

CASE NO. 00-10510-C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JERRY GREENBERG and IDAZ GREENBERG,

Plaintiffs/Appellants,

v.

NATIONAL GEOGRAPHIC SOCIETY, a District of
Columbia Corporation, **NATIONAL GEOGRAPHIC
ENTERPRISES, INC.**, a corporation, and
MINDSCAPE, INC., a California Corporation,

Defendants/Appellees.

On Appeal from the United States District Court
for the Southern District of Florida

**PETITION OF AMICI CURIAE, MAGAZINE PUBLISHERS
OF AMERICA, INC., NEWSPAPER ASSOCIATION OF
AMERICA, INC., GANNETT CO., INC., HACHETTE
FILIPACCHI MAGAZINES, INC., THE NEW YORK
TIMES COMPANY, TIME INC., TIMES MIRROR CO.,
AND TRIBUNE COMPANY FOR REHEARING EN BANC**

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**CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT**

In accordance with Federal Rule of Appellate Procedures 26.1 and 35 and Eleventh Circuit Rule 35-6(b), amici hereby identify themselves; their parent corporations; and all publicly held companies owning 10% or more of their stock:

Magazine Publishers of America, Inc. states that it has no parent companies and no publicly held company owns 10% or more of its stock.

Newspaper Association of America, Inc. states that it has no parent companies and no publicly held company owns 10% or more of its stock.

Gannett Co., Inc. states that it has no parent companies and no publicly held company owns 10% or more of its stock.

Hachette Filipacchi Magazines, Inc. states that it is a wholly-owned subsidiary of **Hachette Filipacchi Medias** which is a subsidiary of **Lagardere Group**, a publicly-traded French company.

The New York Times Company states that it has no parent companies and no publicly held company owns 10% or more of its stock.

Time Inc. states that it is a wholly-owned subsidiary of **AOL Time Warner Inc.**, a public company. **Time Inc.** has no publicly held subsidiaries. **AOL Time Warner Inc.** holds interests in the following publicly held companies: **JTS Corporation**; **USA Networks, Inc.**; and **FortuneCity.com**.

Times Mirror Co. states that it has no parent companies and that **Newsday, Inc.** is its subsidiary. Approximately 40% of its stock is owned by **Tribune Company**.

Tribune Company states that it has no parent companies and no publicly held company owns 10% or more of its stock.

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I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

1. Whether publishers who republish their collective works so as to create "original works of authorship" as defined by copyright law are disqualified, as a matter of law, from claiming the privilege that Section 201(c) affords to such reproduction and distribution.

2. Whether the Section 201(c) privilege is an "all or nothing" privilege under which any unprivileged change to the collective work, however slight, exposes the entire collective work to copyright infringement liability.

3. Whether every digital collection of articles, letters, photographs, stories, and other works that previously was published only on paper is subject to copyright infringement liability in the Eleventh Circuit if that collection uses digital technology to make its content accessible to readers.

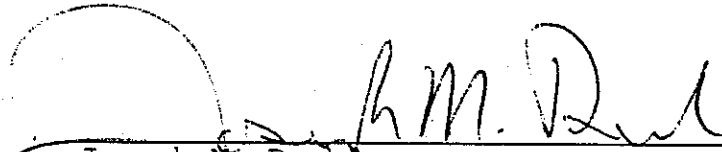

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STATEMENT OF THE ISSUES MERITING EN BANC CONSIDERATION

First, whether a Panel of this Court erred in withholding the Section 201(c) privilege to reproduce and distribute a collective work, "any revision" of it, and "any later collective work in the same series" when a publisher introduces a collection of its past periodical issues in electronic form and incorporates a copyrightable program enabling users to navigate the collection on their computers. Second, whether any change to any of the contributions in that collection destroys the Section 201(c) privilege as to the balance of the collection, even if the balance would otherwise constitute a privileged publication under Section 201(c).

STATEMENT OF THE COURSE OF PROCEEDINGS
AND DISPOSITION OF THE CASE

Appellees Jerry and Idaz Greenberg (collectively, "Greenberg") filed this action against Appellants National Geographic Society, National Geographic Enterprises, Inc., and Mindscape, Inc. (collectively, the "Society"), alleging that *The Complete National Geographic* (on computer disk) infringed copyrights in several photographs that Greenberg had taken for publication in the *National Geographic* (on paper) over the years. The parties moved for summary judgment on the copyright infringement counts that are relevant in this appeal.

The district court, relying on the district court opinion in Tasini v. New York Times Co., 972 F. Supp. 804 (S.D.N.Y. 1997), rev'd, 206 F.3d 161 (2d Cir. 2000), cert. granted, 121 S. Ct. 425 (2000), held that *The Complete National Geographic* constituted a "revision" of the paper copies of *National Geographic* that was within the privilege the Society enjoyed under 17 U.S.C. § 201(c). Accordingly, the district court granted summary judgment to the Society and dismissed the copyright counts against it. The Greenbergs appealed.

While the case was on appeal, the Second Circuit reversed the district court decision in Tasini v. New York Times Co. and ruled that the New York Times Company committed copyright infringement by licensing issues of the *New York Times* to electronic services such as Nexis®. Greenberg and his *amicus curiae*, the American Society of Media Photographers, urged the Court to follow the Second Circuit decision. The Society and its

amici curiae - publishing firms which together publish hundreds of magazines, newspapers and newsletters on a wide variety of subjects - urged the opposite, arguing that the Second Circuit decision contained legal error.

On October 3, 2000, a Panel of this Court heard oral argument in the case, and on March 22, 2001, that Panel issued its opinion reversing the decision of the district court. This Petition for Rehearing *En Banc* followed.

ARGUMENT

On March 22, a Panel of this Court was asked to decide an issue of first impression in this Circuit: whether the privilege of 17 U.S.C. § 201(c)¹ applied to *The Complete National Geographic*, a set of 30 CD-ROMs presenting more than 100 years of the magazine in digital format. The Panel began by dissecting *The Complete National Geographic* into three elements: (1) the "Sequence," a slide show of ten *National Geographic* covers used to introduce each disk; (2) the "Replica," the issues themselves, scanned as they originally appeared on paper; and (3) the "Program," the digital code used to help readers page through the issues on screen. After analyzing those elements, the Panel then held that as a whole, *The Complete National Geographic* fell outside the Section 201(c) privilege because it was "a new product ('an original work of authorship'), in a new medium, for a new market...." Greenberg v. National Geographic Society, No. 00-10510, 2001 U.S. App. LEXIS 4270, at *16 (11th Cir. Mar. 22, 2001).

¹ That section provides, in pertinent part,

Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.

17 U.S.C. § 201(c) (1994).

The Panel decision made two fundamental legal assumptions: first, that if a publisher creates "an original work of authorship" within the meaning of 17 U.S.C. § 102(a), the privilege cannot apply; and second, that the privilege is an "all or nothing" proposition - that is, unless every part of the collective work falls within the privilege, the entire collective work is infringing. As shown below, both assumptions are contrary to copyright law.

I. WHETHER A COLLECTIVE WORK CONSTITUTES A SEPARATELY COPYRIGHTABLE "ORIGINAL WORK OF AUTHORSHIP" IS IRRELEVANT TO THE QUESTION WHETHER THAT WORK FALLS WITHIN THE PRIVILEGE OF SECTION 201(c).

The Panel conditioned recourse to the Section 201(c) privilege on the ability of a publisher to show that its "new" collective work adds nothing copyrightable to its "old" collective work. Thus, under the Panel opinion - now law in the Eleventh Circuit - if a publisher adds **anything** that satisfies the modest copyright definition of "originality,"² that publisher sacrifices its statutory privilege of reproducing and distributing all of the articles, letters, photographs, or stories it previously collected and published "as part of that particular collective work, any revision of that collective work, and any later collective work in the same series." 17 U.S.C. § 201(c).

² See Original Appalachian Artworks, Inc. v. Toy Loft, Inc., 684 F.2d 821, 824 (11th Cir. 1982) ("The test of originality variously has been characterized as 'modest,' 'minimal,' and 'a low threshold.'" (citation omitted)).

This interpretation of 17 U.S.C. § 201(c) runs directly contrary to the very sources on which the Panel relied: the legislative history and, of course, the statute itself.

Section 201(c) is a perfect example of Congress balancing the interests of publishers and authors in accordance with the Constitution. An early draft of Section 201(c) gave publishers the right to publish freelance contributions in the original periodicals or "a composite work like that of the publisher...." Discussion and Comments on Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 88th Cong., 1st Sess., Copyright Law Revision, Part 2 (H. Judiciary Comm. Print 1963), at 385 (Appendix to Brief of Amici Curiae Supporting Defendants/ Appellees and Affirmance of the Decision Below ("App.") at 5). This language led Harriet Pilpel, an experienced literary property attorney who represented freelance authors, to worry that the section, as drafted, was "less favorable than the present law," presumably because it could allow *Newsday*, for example, to sell one of its articles for later publication in *The New York Times*, arguably a "like" composite work. See id. at 151-152 (App. at 2-3). Responding to this concern, the Register of Copyrights agreed to clarify the language to refer to "that particular composite work" and no other. Id. at 153 (App. at 4).

In response to this new language, however, publishers observed that this draft of Section 201(c) might not allow them to republish revisions of their collective works, selecting and discarding freelance contributions as they chose. Id. at 261 (App. at 10). The Register of Copyrights agreed that the

"particular collective work" language was too restrictive, and that the core privilege to which publishers were entitled should include the privilege of distributing freelance contributions of "that collective work and any revisions of it." Copyright Law Revision, Part 5, at 9 (App. at 12). After Pilpel pointed out that under that language, a publisher could revise individual contributions (as opposed to the collective work), *id.* at 152 (App. at 13), the Register of Copyrights refashioned Section 201(c) to make clear that the "any revision" language authorized any changes to the "particular collective work" as a whole, but not to the individual contributions. Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law; 1965 Revision Bill, 89th Cong., 1st Sess., Copyright Law Revision, Part 6 (H. Judiciary Comm. Print 1965), at 69 (App. at 15). This final compromise yielded the present language of Section 201(c).

To clarify the compromise further, Congress provided the following examples of what publishers can and cannot do under Section 201(c):

Under the language of this clause a publishing company could reprint a contribution from one issue in a later issue of its magazine, and could reprint an article from a 1980 edition of an encyclopedia in a 1990 revision of it; the publisher could not revise the contribution itself or include it in a new anthology or an entirely different magazine or other collective work.

H.R. Rep. 94-1476, at 122-123 (1976), reprinted in 1976

U.S.C.C.A.N. 5659, 5737 (App. at 20-21).

In other words, Congress meant to give publishers the privilege to use freelance contributions in the recognizably

"same" publication (e.g., *The National Geographic* and *The Complete National Geographic*), even if that publication had undergone a "revision" to keep up with (or reflect) the passage of time - and even though such a "revision" almost inevitably would satisfy the modest copyright definition of "originality."

By withholding the statutory presumption in 17 U.S.C. § 201(c) where, as here, the publisher has made revisions sufficient to make the "new" collective work "original" (but nonetheless recognizably the "same"), the Panel rewrote Section 201(c) in disregard of the clearly expressed intentions of Congress. As a result, in the Eleventh Circuit, virtually every conceivable collective work is at risk of falling outside the Section 201(c) privilege merely because it is kept up to date.

If, for example, the Oxford English Dictionary wished to save printing costs by updating its dictionary only digitally and distributing those (digital) updates on the World Wide Web for a fee, it would create an original work with each update - thus destroying its chances of claiming the Section 201(c) privilege in this Circuit. The same would be true even in the absence of any digital aspect at all: if, say, a publisher sought to republish "an article from a 1980 edition of an encyclopedia in a 1990 revision of it" - **the very act authorized by Congress** - that republication would fall outside 17 U.S.C. § 201(c) (according to the Panel) because the 1990 edition would constitute an "original" work. In other words, the new losers in this Circuit even include the examples of "privileged" publishers discussed in

House Report 94-1476. See H.R. Rep. 94-1476, at 122-123 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5737 (App. at 20-21).

One factor contributing to this error is the way in which the Panel analyzed the effect of technology. As the Panel wrote (without citing a single case), "common-sense copyright analysis compels the conclusion that the Society, in collaboration with Mindscape, has created a new product ('an original work of authorship'), in a new medium, for a new market that far transcends any privilege of revision or other mere reproduction envisioned in § 201(c)." Greenberg, 2001 U.S. App. LEXIS 4270, at *16. As much as the Panel may have viewed digital technology as somehow "different," however, the Copyright Act views technological innovations (like digitalization) as simply "more of the same." The Copyright Act was designed to be adapted to changing technology.³ Thus, the "new medium" test has no more basis in the Copyright Act than the "new product" test, with its injection of an originality hurdle into Section 201(c)).

II. THE SECTION 201(c) PRIVILEGE IS NOT AN "ALL OR NOTHING" PROPOSITION UNDER WHICH AN ENTIRE COLLECTIVE WORK IS EITHER PRIVILEGED OR INFRINGING.

The Panel found *The Complete National Geographic* to be infringing because it was "unable to stretch the phrase 'that

³ For example, a work may be original if it is "fixed in any tangible medium of expression, now known or later developed." See 17 U.S.C. § 102(a) (1994); Matthew Bender & Co. v. West Publ'g Co., 158 F.3d 683, 702-703 (2d Cir. 1998) (noting that copyright protection does not "'depend upon the form or medium in which the work is fixed") (quoting H.R. Rep. No. 94-1476, at 52 (1976). *Amici* hereby adopt by reference the discussion of the media neutrality built into the Copyright Act found in the Petition to be filed this date by Defendants/Appellees.

particular collective work' to encompass the Sequence and Program elements," nor did it believe those elements to constitute a "revision." Greenberg, 2001 U.S. App. LEXIS 4270, at *14. Its insistence on equating the "copyrightable Mindscape Program" with forfeiture of the Section 201(c) privilege was, as shown, contrary to the Copyright Act. Yet just as erroneous was its unstated belief that the privilege is an "all or nothing" proposition: that if the Sequence is infringing as a revision of "the contribution itself,"⁴ the entirety of *The Complete National Geographic* forfeits the privilege.

No hint of any such "all or nothing" gloss on the privilege in Section 201(c) can be found in the legislative history or Section 201(c) itself. That section provides simply that in the absence of a contract to the contrary, "the owner of copyright in the collective work is presumed to have acquired **only the privilege** of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series." 17 U.S.C. § 201(c). As Congress stated, "[u]nder the language of this clause" a publisher either "could" ("reprint an article from a 1980 edition of an encyclopedia in a 1990 revision of it") or "could not" ("revise the contribution itself or include it in a new anthology or an entirely different magazine or other collective work"). See H.R. Rep. 94-1476, at 122-123 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5737 (App. at 20-

⁴ See H.R. Rep. 94-1476, at 122-123 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5737 (App. at 20-21).

21). Congress never stated that a venture into "could not" territory would nullify the "could."

The statute and its legislative history are absolutely consistent with our body of copyright law. If they accomplished anything, the Copyright Act of 1976⁵ and particularly the Berne Convention Implementation Act of 1988⁶ banished the concept of "all or nothing" from the Copyright Act. For example, copyright holders no longer risk forfeiting the copyrights to their works if they fail to include a proper copyright notice on the work at its first publication. See 17 U.S.C. §§ 401(a), 405(a) (1994 & Supp. III 1997); Norma Ribbon & Trimming Inc. v. Little, 51 F.3d 45, 48 (5th Cir. 1995). Nor are copyright holders held to the "all or nothing" sword in conveying their copyrights; instead, they now have the option of transferring only the distribution right, the performance right, the right to create derivative works, etc., without transferring their other rights under 17 U.S.C. § 106. See 17 U.S.C. § 201(d)(2) (1994); 3 NIMMER §§ 10.01, 10.02. Thus, while the "all or nothing" concept may be in keeping with the Copyright Act of 1909 and the "old law" cases decided under it, that concept is out of place in current copyright jurisprudence.

Finally, this kind of "all or nothing" interpretation of the privilege not only is contrary to Section 201(c), its legislative history, and the spirit of the Copyright Act of 1976 itself; it

⁵ Pub. L. No. 94-553, 90 Stat. 2541 (1976).

⁶ Pub. L. No. 100-568, 100 Stat. 2853 (1988).

also upsets the Constitutional balance, sacrificing the "cause of promoting broad public availability of literature, music, and the other arts" to private reward. See Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (citations omitted). By transforming Section 201(c) from a "presumed ... privilege" into a gamble for publishers - and one with prohibitively high odds - the Panel opinion will have the effect of diminishing the availability of creative works to the public.

Allowing the Section 201(c) privilege to cover privileged conduct "wherever it may be found" (here, at least in the Replica and the Program) would not deprive freelance writers of their remedies under the Copyright Act. If the Sequence portion of *The Complete National Geographic* were found to be an infringing work (as opposed to a "transformative" work under the fair use doctrine),⁷ then the district court could grant Greenberg appropriate relief consistent with the Section 201(c) privilege -

⁷ The Panel also erred in finding that the Sequence failed to constitute "fair use" under 17 U.S.C. § 107 on the ground that "[t]he use to which the diver photograph was put was clearly a transformative use." Greenberg, 2001 U.S. App. LEXIS 4270, at *19. Transformative uses weigh strongly in favor of a finding of fair use. As the Supreme Court stated in Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) (the "Pretty Woman" case):

Although such transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright, and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.

Id. at 579.

i.e., relief of the harm he suffered in connection with the (in this hypothetical, unprivileged) use of his diver photograph in the Sequence.

III. CONCLUSION

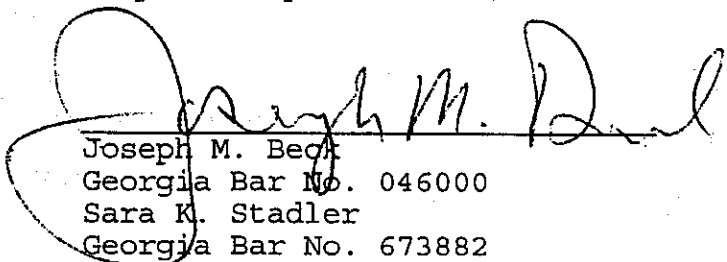
In sum, the opinion issued on March 22 by a Panel of this Court threatens to derail the application of copyright law to the digital age. The United States Supreme Court has been wrestling with the consequences of curtailing the Section 201(c) privilege, but those consequences bear repeating: As author Nicholson Baker points out, books in our public libraries have been "'chopped and chucked in the cause of [micro]filming'"; "microfilm has become increasingly obsolete"; and microfilmed works "will have to be converted to optical disk for digital storage and retrieval" in order to preserve our historical record. See Michiko Kakutani, "'Double Fold': Microfilm Gets a Black Eye From a Friend of Paper," The New York Times (Apr. 10, 2001).

If, in the Eleventh Circuit, digital storage and retrieval is punishable as copyright infringement - and all because the disks contain a separately copyrightable "Program" to make them readable - then publishers will be forced to delete freelance contributions from their collective works or face the kind of class action lawsuits that already have proliferated after the Second Circuit issued Tasini v. The New York Times Company, 206 F.3d 161 (2d Cir. 1999). Undoubtedly, the Panel did not intend such a result; and just as surely, Congress did not have such an intention in enacting Section 201(c), as it made crystal clear in the legislative history of that section.

Dated: April 12, 2001.

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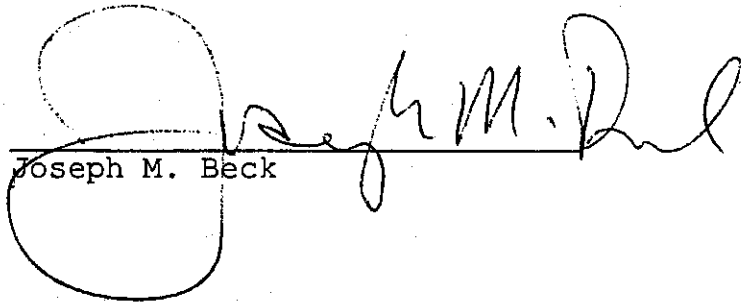
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7). The brief utilizes proportional spacing and consists of approximately 3,089 words.


Joseph M. Beck

CERTIFICATE OF FILING AND SERVICE

This is to certify that I have this day filed one (1) original and fifteen (15) true and correct copies of the foregoing PETITION OF AMICI CURIAE, MAGAZINE PUBLISHERS OF AMERICA, INC., NEWSPAPER ASSOCIATION OF AMERICA, INC., GANNETT CO., INC., HACHETTE FILIPACCHI MAGAZINES, INC., THE NEW YORK TIMES COMPANY, TIME INC., TIMES MIRROR CO., AND TRIBUNE COMPANY FOR REHEARING WITH A SUGGESTION FOR REHEARING EN BANC by delivering the same by hand to the Clerk of Court, United States Court of Appeals for the Eleventh Circuit, 56 Forsyth Street, N.W., Atlanta, Georgia 30303.

This is further to certify that I have this day served two (2) true and correct copies of the foregoing document via Federal Express overnight delivery addressed to:

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