

Strike arguments  
not raised below  
NGS  
APR 18 2000

NGS

DOCKET NO. 00-10510-C

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

JERRY GREENBERG and IDAZ GREENBERG,  
Plaintiffs/Appellants

vs.

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

**APPELLEES' MOTION TO STRIKE  
APPELLANTS' ARGUMENTS NOT RAISED BELOW**

ROBERT G. SUGARMAN, ESQ.  
NAOMI JANE GRAY, ESQ.  
JOANNE MCLAREN (not admitted in  
the Eleventh Circuit)  
WEIL, GOTSHAL & MANGES LLP  
767 Fifth Avenue  
New York, New York 10153  
(212) 310-8000

- and -

Edward Soto, Esq. (265144)  
Valerie Itkoff, Esq. (26514)  
WEIL, GOTSHAL & MANGES LLP  
701 Brickell Avenue  
Suite 2100  
Miami, FL 33131  
(305) 577-3100

Attorneys for the Defendants

Terrence B. Adamson, Esq.  
Senior Vice President  
Law, Business and Government  
Affairs  
National Geographic Society  
1145 17th Street, N.W.  
Washington, D.C. 20036-4688

Of Counsel

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

Appellees National Geographic Society, National Geographic Enterprises, Inc.  
(now named National Geographic Holdings) and Mindscape, Inc. submit this Certificate of  
Interested Persons and Corporate Disclosure Statement.

Educational Insights  
Gray, Naomi Jane  
Itkoff, Valerie  
Lenard, Joan, U.S. District Judge  
Mattel, Inc.  
McLaren, Joanne  
Mindscape, Inc.  
National Geographic Society  
National Geographic Holdings  
Soto, Edward  
Sugarman, Robert  
Weil, Gotshal & Manges LLP

Robert G. Sugarman, Esq.  
Naomi Jane Gray, Esq.  
Joanne M. McLaren (not admitted in  
the Eleventh Circuit)  
WEIL, GOTSHAL & MANGES LLP  
767 Fifth Avenue  
New York, New York 10153  
(212) 310-8000

Edward Soto, Esq. (265144)  
Valerie Itkoff, Esq. (26514)  
WEIL, GOTSHAL & MANGES LLP  
701 Brickell Avenue, Suite 2100  
Miami, Florida 33131  
(305) 577-3100

Attorneys for Appellants

-and-

Terrence B. Adamson, Esq.  
Senior Vice President  
Law, Business and Government Affairs  
National Geographic Society  
1145 17th Street, N.W. 20036-4688

Of Counsel

By:

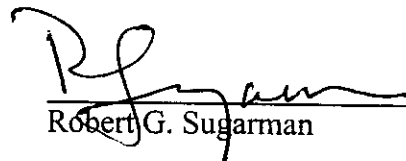
  
Robert G. Sugarman

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**APPELLEES' MOTION TO STRIKE  
APPELLANTS' ARGUMENTS NOT RAISED BELOW**

Appellants National Geographic Society (the "Society"), National Geographic Enterprises, Inc. and Mindscape, Inc. ("Mindscape") submit this Motion to Strike Appellants' Arguments Not Raised Below.

**STATEMENT OF FACTS**

The Parties

Appellant Jerry Greenberg is a photographer. Idaz Greenberg, his wife, is an illustrator. (Affirmation of Robert G. Sugarman in Support of Appellees' Motion to Strike Arguments Not Made Below at ¶ 3 ("Sugarman Aff.")).

The National Geographic Society is the world's largest nonprofit scientific and educational organization, with approximately 10 million members worldwide. (Sugarman Aff. at ¶ 4). National Geographic Magazine (the "Magazine") is the monthly official journal of the Society. (*Id.*). It began publication in 1888, and the Society has continually invested substantial revenues and produced for publication in-depth articles and photographs which explore the cultural, geographical and organic richness of the world around us. (*Id.*)

Mindscape is a computer software publisher and distributor which collaborates with the Society in its efforts to bring its products to the public in the digital environment. (Id. at ¶ 5).

#### CD-ROM 108

In 1997, the Society produced and began to sell “The Complete National Geographic,” a CD-ROM product containing all issues of the Magazine published between 1888 and 1996 (hereinafter “CD-ROM 108”). (Sugarman Aff. at ¶ 6).

Prior to the release of CD-ROM 108, the Society sent a letter to each individual who had made a contribution to the Magazine. (Sugarman Aff. at ¶ 7). The letter notified the contributors of the pending release of CD-ROM 108 and explained the Society’s belief that its continuing copyrights in the Magazine entitled it to publish CD-ROM 108 without making further payments for the use of individual contributions. (Id.). All contributors thus had the opportunity to come forward and claim any contractual rights to repayment which they may have had. (Id.).

Greenberg has stated that he did not receive this notice, but nonetheless says he contacted the Society in response to it and claimed that the Society had no right to reproduce his photographs in CD-ROM 108 without his consent and stated that he did not consent to such use. (Sugarman Aff. at ¶ 8). Greenberg does not claim to have stated any rationale or basis for this claim, including the assertion now made in this appeal for the first time that the Society could not reproduce the photographs in CD-ROM 108 because all of the rights to the photographs had been reassigned to him by the Society. (Id.).

After publication of CD-ROM 108, Appellants sued. (Sugarman Aff. at ¶ 9). The District Court granted the Society’s motion for summary judgment and this appeal followed. (Id.).

On this appeal, Appellants argue, for the first time, that the Society had no right to

republish Appellants' photographs because the Society reassigned to Jerry Greenberg all rights therein, including copyright. (Sugarman Aff. at ¶ 10).

The Motion

The Society now moves to strike this argument because it was never raised below, the Society did not have the opportunity to develop facts relevant to the argument and the District Court did not address it. (Sugarman Aff. at ¶ 11). In particular, the Society did not have the opportunity to introduce the letter from Mr. Greenberg which led to the reassignment, upon which Appellants now rely, which states:

This reassignment would have no effect on the Society's reuse of this material as this provision was covered in the original contracts for each assignment.

(Sugarman Aff. Exh. B).

Moreover, had the Society had the opportunity below, it could have established that: the Society assigned Mr. Greenberg, a free-lance photographer, to produce photographs for possible publication in connection with articles for the Magazine; the contracts that Greenberg signed in undertaking these assignments provided that the Society would make payments to Greenberg of a day rate for each day on the assignment, and would pay for all costs and expenses associated with the assignments; the Society owned all rights and copyright to the photographs and provided for their publication in the Magazine; the contracts did not state that the Magazine may only be published on paper; at a period of time after first publication, the Society would assign to Greenberg copyright to the photographs, subject to the Society's right to publish in the Magazine and that further editorial use would be subject to additional payments. (Sugarman Aff. at ¶ 12). The Society could also have demonstrated that Greenberg knew that the reassignment was limited to rights in the individual photographs, and would not affect the Society's right to



use the photographs in CD-ROM 108. (Id.).

Counsel for the Society contacted counsel for Appellants and requested that they withdraw their argument based on the purported reassignment. (Sugarman Aff. at ¶ 13).

Appellants declined to do so. (Id.).

## ARGUMENT

### **I. APPELLANTS' CONTRACT ARGUMENT RAISED FOR THE FIRST TIME ON APPEAL IS LEGALLY IMPERMISSIBLE, FACTUALLY INSUPPORTABLE AND UNDULY PREJUDICIAL TO THE SOCIETY.**

#### **A. Appellants' new contract theory was not raised below and cannot be considered on appeal**

It is settled beyond dispute that arguments not raised below are deemed waived, and may not be raised on appeal absent plain error. Estate of Martin Luther, King, Jr., Inc. v. CBS, Inc. 194 F.3d 1211, 1220 (11th Cir. 1999) (“It would be inappropriate for us to address CBS’s other arguments, e.g., fair use and the First Amendment, because the district court did not address them, and because the relevant facts may not yet be fully developed.” Estate of Martin Luther, King, Jr., Inc. v. CBS, Inc. 194 F. 3d 1211, 1220 (11th Cir. 1999), see also Irving v. Mazda Motor Corp., 136 F.3d 764, 769 (11th Cir. 1998) (“we cannot allow Plaintiff to argue a different case from the case she presented to the district court”). Appellants have elected to disregard this unequivocal rule, raising for the first time on appeal a strained interpretation of a December 18, 1985 letter from the Society to Greenberg, whereby the Society reassigned copyright in Greenberg’s individual photographs to Greenberg. (Sugarman Aff. Exh. A). From this reassignment agreement, Appellants argue that the Society “had no rights whatsoever to republish and distribute the photographs,” (App. Br. at 16).

Appellants were aware of the “reassignment” letter during the proceedings below, and indeed introduced it for other purposes. (Sugarman Aff. at ¶ 10). Nevertheless, Appellants never advanced the “reassignment” argument they now urge this Court to accept. Appellants had

their opportunity to present their case to the District Court and may not retry it, hoping for a more favorable result on a different theory, before this court.

Because Appellants advance on appeal an argument which the District Court was not asked to consider and which the Society was not called upon to rebut, this newly discovered contract argument is not a permissible subject for this Court's consideration. Accordingly, those sections of Appellants' brief pertaining to this untimely argument should be stricken. See United States v. Harvey, 78 F.3d 501, 502 (11th Cir. 1996) (striking portions of brief addressing issues outside permissible scope of brief); Tallahassee Mem'l Reg'l Med. Ctr. v. Bowen, 815 F.2d 1435, 1446 (11th Cir. 1987) (striking portions of appellate reply brief addressing issues waived because not addressed in initial brief).

**B. Allowing Appellants to raise the "reassignment" argument is unduly prejudicial to the Society because the Society was not given the opportunity to present its meritorious response.**

Appellants ask this Court to base its decision on only one side of an argument they know to be factually incomplete. Because the "reassignment" argument was never raised below, the Society had no opportunity to rebut the argument by introducing the contracts between the parties and the particular factual context in which the Society's letter was written. In particular, the Society had no opportunity to introduce the letter from Jerry Greenberg to the Society requesting such reassignment (Sugarman Aff. Exh. B), which explicitly states:

This reassignment would have no effect on the Society's reuse of this material as this provision was covered in the original contracts for each assignment.

Because Appellants did not raise their reassignment argument below, the Society had no opportunity to introduce into evidence Greenberg's letter, which establishes that the Society's right to reuse Greenberg's photographs was not affected by the reassignment. It would, therefore, be highly prejudicial now to allow Appellants to change the nature of the case on appeal, and thereby profit from the fact that the evidence rebutting their new assertions is not

in the record. It is obvious that the "relevant facts [were] not. . . fully developed." Estate of Martin Luther King, 194 F.3d at 1220.

### CONCLUSION

For all the foregoing reasons, the Society respectfully requests that all references to Appellants' newly-asserted argument in their appellate brief be stricken.

Dated: April 18, 2000

ROBERT G. SUGARMAN, ESQ.  
NAOMI JANE GRAY, ESQ.  
JOANNE MCLAREN (not admitted in  
the Eleventh Circuit)  
WEIL, GOTSHAL & MANGES LLP  
767 Fifth Avenue  
New York, New York 10153  
(212) 310-8000

- and -

Edward Soto, Esq. (265144)  
Valerie Itkoff, Esq. (26514)  
WEIL, GOTSHAL & MANGES LLP  
701 Brickell Avenue  
Suite 2100  
Miami, FL 33131  
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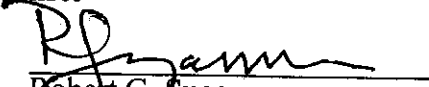
Attorneys for the Defendants

- and -

Terrence B. Adamson, Esq.  
Senior Vice President  
Law, Business and Government Affairs  
National Geographic Society  
1145 17th Street, N.W.  
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Of Counsel

By:

  
Robert G. Sugarman



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Defendants/Appellees.

**AFFIRMATION OF ROBERT G. SUGARMAN IN SUPPORT OF  
APPELLEES' MOTION TO STRIKE ARGUMENTS NOT RAISED BELOW**

Robert G. Sugarman affirms as follows, under penalty of perjury:

1. I am a member of the bar of this Court and of the law firm of Weil, Gotshal & Manges LLP, attorneys for Appellees in the above-referenced action. I make this affirmation based upon my knowledge of the facts and circumstances of this case.
2. I submit this affirmation in support of Appellees' Motion to Strike Appellants' Arguments Not Raised Below, and to put before the Court the attached documents, which I certify to be true and correct copies of the originals.
3. Appellant Jerry Greenberg is a photographer. Idaz Greenberg, his wife, is an illustrator.
4. The National Geographic Society (the "Society") is the world's largest nonprofit scientific and educational organization, with approximately 10 million members worldwide. National Geographic Magazine (the "Magazine") is the monthly official journal of the Society. It began publication in 1888, and the Society has continually invested substantial

revenues and produced for publication in-depth articles and photographs which explore the cultural, geographical and organic richness of the world around us.

5. Mindscape is a computer software publisher and distributor which collaborates with the Society in its efforts to bring its products to the public in the digital environment.

6. In 1997, the Society produced and began to sell "The Complete National Geographic," a CD-ROM product containing all issues of the Magazine published between 1888 and 1996 (hereinafter "CD-ROM 108").

7. Prior to the release of CD-ROM 108, the Society sent a letter to each individual who had made a contribution to the Magazine. The letter notified the contributors of the pending release of CD-ROM 108 and explained the Society's belief that its continuing copyrights in the Magazine entitled it to publish CD-ROM 108 without making further payments for the use of individual contributions. All contributors thus had the opportunity to come forward and claim any contractual rights to repayment which they may have had.

8. Greenberg has stated that he did not receive this notice, but nonetheless says he contacted the Society in response to it and claimed that the Society had no right to reproduce his photographs in CD-ROM 108 without his consent and stated that he did not consent to such use. Greenberg does not claim to have stated any rationale or basis for this claim, including the assertion now made in this appeal for the first time that the Society could not reproduce the photographs in CD-ROM 108 because all of the rights to the photographs had been reassigned to him by the Society.

9. After publication of CD-ROM 108, Appellants sued. The District Court granted Appellees' motion for summary judgment and this appeal followed.

10. On this appeal, Appellants argue, for the first time, that Appellees had no right to republish Appellants photographs because the Society reassigned to Jerry Greenberg all rights therein, including copyright. They rely upon a December 18, 1995 letter from the Society to Jerry Greenberg which reassigns copyright in the individual photographs at issue to Greenberg. (Exhibit A). Appellants introduced this letter during the proceedings below, but relied on it for other purposes.

11. The Society now moves to strike this argument because it was never raised below, the District Court did not, therefore, address the argument, and the Society did not have the opportunity to develop relevant facts. In particular, the Society did not have the opportunity to introduce the letter from Mr. Greenberg which led to the reassignment (Exhibit B), upon which Appellants now rely, which states:

This reassignment would have no effect on the Society's reuse of this material as this provision was covered in the original contracts for each assignment.

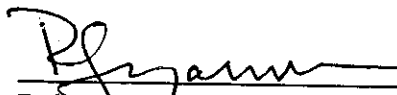
12. Moreover, had the Society had the opportunity below, it could have established that: the Society assigned Mr. Greenberg, a free-lance photographer, to produce photographs for possible publication in connection with articles for the Magazine; the contracts that Greenberg signed in undertaking these assignments provided that the Society would make payments to Greenberg of a day rate for each day on the assignment, and would pay for all costs and expenses associated with the assignments; the Society owned all rights and copyright to the photographs and provided for their publication in the Magazine; the contracts did not state that the Magazine may only be published on paper; at a period of time after first publication, the Society would assign to Greenberg copyright to the photographs, subject to the Society's right to publish in the Magazine and that further editorial use would be subject to additional payments. The Society could also have demonstrated that Greenberg knew that the reassignment was

limited to rights in the individual photographs, and would not affect the Society's right to use the photographs in CD-ROM 108.

13. On April 14, 2000, I contacted Norman Davis, counsel for Appellants, and requested that Appellants withdraw their argument based on the purported reassignment. Appellants have declined to do so.

14. There has been no prior application for the relief requested herein.

Dated: April 19, 2000

  
Robert G. Sugarman





RECYCLED PAPER



# National Geographic Society

WASHINGTON, D. C. 20036

SUZANNE DUPRE  
CORPORATE COUNSEL

December 18, 1985

Mr. Jerry Greenberg  
SEAHAWK PRESS  
6840 SW 92nd Street  
Miami, Florida 33156

Dear Mr. Greenberg:

In reply to your letter of November 15th to Mr. Garrett, the National Geographic Society hereby assigns to you all right, title and interest, including copyright, in your photographs appearing in National Geographic Magazine, as follows:

-- January, 1962  
Vol. 121, No. 1

Photos on cover and  
pages 58 through 89

Registration No. B-960824  
Date: March 22, 1962

-- February, 1968  
Vol. 133, No. 2

Photos on cover and pages 222-223, 225,  
226-227, 238, 240-241 and 251

Registration No. B-402772  
Date: January 31, 1968

-- May, 1971  
Vol. 139, No. 5

Photos on pages 674 through 683

Registration No. B-701984  
Date: July 15, 1971

District of Columbia

Subscribed and sworn to before

me this 18TH day of

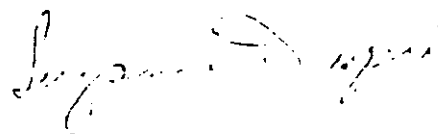
DECEMBER 1985

Jessie R. Bennett  
Notary Public

WASHINGTON, D. C.

Notary Public, Commission Expires January 9, 1986

Sincerely yours,



cc: W. E. Garrett, Editor



RECYCLED PAPER



November 15, 1985

WE Garrett / Editor  
NATIONAL GEOGRAPHIC MAGAZINE  
Washington, D.C. 20036

Dear Bill:

Last July I was down in the Keys, finishing up Florida's Marine Wilderness for TRAVELER and I missed seeing you. Perhaps on your next trip into Miami for kudos or Mayans we will get together.

Because of your faith in me I produced three major assignments the the National Geographic Society. They were PENNEKAMP PARK (Jan.1962), SHARKS (Feb.1968 and BUCK ISLAND (May,1971). With this material available to us along with Idaz's art work, we have become sucessful mini-publishers.

I am concerned that photographs published in 1962, 1968 and 1971 will fall into public domain in 1990, 1996 and 1999. In order to protect my material used in our publications, I need to receive a re-assignment of copyright from the Society. With this document, I or my heirs will be able to re-copyright this photography (using the RE form) for an additional 28 years.

This re-assignment would have no effect on the Society's reuse of this material as this provision was covered in the original contracts for each assignment.

The material involved is:

January, 1962 Vol.121, No.1	February, 1968 Vol.133, No.2	May, 1971 Vol.137, No.5
photos on cover and pages 58 thru 89	photos on cover and pages 222-223, 225, 226-227, 238, 240- 241 and 251	photos on pages 674-675-676, 677, 678, 679, 680, 681, 682 and 683

Re-assignment of copyright should reflect the above material with appropriate date of copyright and registration number.

Thanks for any help in this matter.

Warmest personal regards,

Jerry Greenberg  
SEAHAWK PRESS  
6840 SW 92nd Street  
Miami, Florida 33156

*JERRY G.*

*BILL: THE OCTOBER ISSUE WITH PANDORA, SOMOA AND THE ABERCROMBIE WAS A GREAT ISSUE. I JUST GOT THRU READING IT WHEN YOUR STUNNING EARLY MAN ISSUE CAME IN. WITHOUT DOUBT, ITS ONE OF THE HIGH MARKS IN THE MAGAZINE'S HISTORY. KEEP IT UP! JERRY G.*

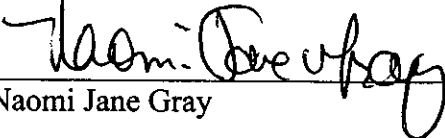
CERTIFICATE OF SERVICE BY WORLD COURIER

I hereby certify that on the 18th day of April, 2000, I caused to be served the annexed Appellees' Motion to Strike Appellants' Arguments Not Raised Below

upon:

Norman Davis, Esq.  
Steel, Hector & Davis LLP  
200 South Biscayne Blvd.  
Miami, FL 33131-2398

by depositing a true copy of the same in a properly addressed World Courier wrapper into the custody of World Courier, an overnight delivery service for overnight delivery, prior to the latest time designated by World Courier.

  
\_\_\_\_\_  
Naomi Jane Gray