

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JERRY GREENBERG, individually,
and IDAZ GREENBERG, individually,

Plaintiffs,

CASE NO. 97-3924
CIV-LENARD
Magistrate Judge Turnoff

vs.

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

Defendants.

**AFFIDAVIT BY NORMAN DAVIS
IN SUPPORT OF PLAINTIFFS'
REQUEST PURSUANT TO
RULE 56 (f)**

1. My name is Norman Davis. The statements in this affidavit are based on my personal knowledge.
2. I am a partner in the law firm of Steel Hector & Davis LLP, which has represented the plaintiffs in the above-styled matter since its inception. I have been the lead counsel in the litigation.
3. The plaintiffs filed their Complaint on December 5, 1997, and filed an Amended Complaint on December 23, 1997. Count V of the Amended Complaint alleges a cause of action for copyright infringement with reference to a Moving Cover Sequence that is described more fully in paragraphs 22 through 39 of the Amended Complaint .
4. On January 30, 1998, the defendants filed a motion that, in part, seeks summary

judgment as to Count V. In Part IV of the memorandum supporting the motion, the defendants seek summary judgment as to that count by invoking the "fair use" doctrine.

5. No discovery in this case has taken place by either party, and the defendants have not answered Count V.

6. The plaintiffs cannot adequately respond to Part IV of the defendants' motion until reasonable discovery has occurred. This is because the "fair use" issue argued in Part IV is intensively fact-based, and significant facts relevant to that issue are uniquely in the hands of the defendants.

7. Reasonable discovery could disclose genuine issues of material fact in this case, or could otherwise support the plaintiffs' opposition to Part IV of the defendants' memorandum.

8. For example, in Part IV, the defendants claim that the "Complete Geographic" CD-Rom product is educational and does not seek to exploit the Moving Covers Sequence for commercial gain. To respond to the "commercial gain" argument, the plaintiffs are entitled to discover facts such as the following:

a. The nature of for-profit corporate affiliates created by the National Geographic Society to produce, market and distribute the "Complete Geographic" product, and the financial goals and expectations of the affiliates.

b. The financial goals and expectations of the nonprofit Society itself with respect to the Complete Geographic product, including but not limited to profits, royalties, rent, fees, interest or tax benefits.

c. The financial goals and expectations of the for-profit defendant Mindscape with respect to its role as a licensee for the Complete Geographic product, and an inquiry as to whether Mindscape's goals with respect to commercial gain on that product are the same as those the other defendants purport to have.

d. The roles of the respective defendants in manufacturing, distributing, marketing and selling the Complete Geographic product.

9. The defendants also have asserted a "good faith" basis for application of the fair use doctrine, in part because of a notification purportedly sent to "all contributors to the magazine." The plaintiffs are entitled to know what contacts were made by any of the defendants with individual holders of proprietary interest in contributions to the Society's magazine, what compensation, if any, was offered to such holders, and the outcome of such contacts. Additionally, such discovery would include whether any effort was made to contact plaintiff Jerry Greenberg, and if so, what compensation, if any, was proposed to him.

AFFIANT SAID NOTHING FURTHER.

Norman Davis

STATE OF FLORIDA)
) ss
COUNTY OF DADE)

The foregoing instrument was acknowledged before me this _____ day of February, 1998, by Norman Davis, who was sworn and who said that the information set forth above is true and correct to the best of his knowledge and belief. Mr. Davis is personally known to me.

Notary Public

My Commission Expires: