

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

**MOTION 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 LEAVE TO FILE
PETITION FOR REHEARING EN BANC**

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Magazine Publishers of
America, Inc.

MOTION

In accordance with Federal Rule of Appellate Procedure 29(b), *amici* hereby move for leave to file a Petition for Rehearing *En Banc*, which was delivered to the Clerk of Court on Thursday, April 12, 2001. On April 12, the Clerk of Court asked counsel for *amici* by telephone to file this motion and granted *amici* until this date to do so.¹

Amicus Magazine Publishers of America, Inc. is a nonprofit corporation and is the principal trade association for the consumer magazine industry in the United States, representing approximately 200 publishers and more than 1,200 magazines. *Amicus Newspaper Association of America, Inc.* is a nonprofit corporation and is the principal trade association for newspaper publishers, representing more than 1,500 newspapers across the United States. All of the other *amici* are publishing firms which together publish hundreds of magazines, newspapers and newsletters on a wide variety of subjects covering general and special interests of all kinds.

The Petition for Rehearing *En Banc* filed by *amici* in this case is both desirable and relevant to its disposition. As detailed in the Petition, the opinion issued on March 22 by a Panel of this Court contains 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

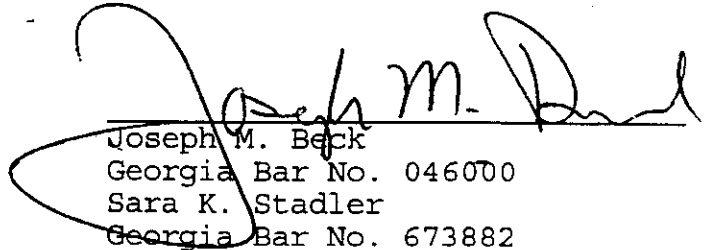
¹ Counsel for *amici* previously had been told by the Clerk of Court that no such motion was necessary, or counsel would have filed its motion on or before April 12.

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. Both assumptions are contrary to Section 201(c), by which 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." Indeed, the legislative history is crystal clear on this point.

If, in the Eleventh Circuit, digital storage and retrieval now is punishable as copyright infringement - and all because the disks contain a separately copyrightable computer 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.

Dated: April 12, 2001.

Respectfully submitted,



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CERTIFICATE OF FILING AND SERVICE

This is to certify that I have this day filed one- (1) original and fourteen (14) true and correct copies of the foregoing MOTION 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 LEAVE TO FILE PETITION 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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This 13th day of April, 2001.


Joseph M. Beck