

Dear Sir:

I would like to suggest that you examine the controversy that surrounds the publication of "108 Years of National Geographic Magazine on CD-ROM." This story deals with the rights of freelance creator to control the electronic publishing of their work. The issue could lead to eventual changes in the copyright laws.

There are several points relative to how this product has been produced and marketed that could make a very informative and interesting business article for the Washington Post.

This 30 disc set, released in September 1997, contains every article and picture ever published in National Geographic Magazine.

The controversy began developing in May 1997 when photographers and writers first learned of National Geographic's plans. In June the Society announced they would pay nothing to freelance writers and photographers for this additional use. At that point many who have been published in the magazine informed the Society that they did not want their pictures used on the disc unless they were compensated in some way.

It is the Society's position that their "collective works" copyright entitles them to reuse this material in this way, regardless of any contractual conditions to the contrary. The Society also feels that a copyright decision in U.S. District Court, Southern District of NY (Tasini et. al vs. New York Times et. al.) announced in August bolsters their position. Photographers believe there are critical factual differences in the two cases. Tasini dealt with situations where no contracts existed and did not deal with contracts in any way.

In December two copyright suits were filed in Federal court against National Geographic. There is at least one other group of about 30 photographers and stock agencies negotiating with National Geographic and considering how and when they may file.

The first suit filed was Douglas Faulkner et.al. vs. National Geographic Society et.al. Case Number 97 CIV 9361. For more information on this action call Stephen Weingrad 212-244-4187. The second case was file in Federal Court in Miami and it is Jerry & Idaz Greenberg vs. National Geographic Society et.al. Case Number 97 CIV 3924. Mr. Greenberg's lawyer Norman Davis can be reached at 305-577-2988.

One key thing to understand is that while National Geographic has a large staff, a huge percentage of the material published in the magazine is produced by freelance photographers. We have determined that in the years 1986 through 1996 alone, over 1,300 non-staff photographers had pictures in the magazine (see attached list). In addition there were published images supplied by 60 stock photo agencies and at least 18 newspapers. There is no question that NGS has the right to republish, without additional compensation, work produced by staff photographers and writer. The controversy revolves around the work produced by non-staffers.

In addition there seems to be a house cleaning of key personnel taking place. The Washington Post has already announced that Reg Murphy, the President of the Society will be retiring. In addition at the end of 1997 Thomas Kennedy, Director of Photography for the

magazine and Suzanne Dupre, Secretary of the Society and Chief Counsel were fired. We understand that Ms. Dupre's chief assistant resigned in protest. In addition, we understand that Robert B. Sims one of three Senior Vice Presidents and a public affairs specialist for the Society was also fired. We assume Mr. Sims was also removed from his board position.

Rumors have it that the firings of Ms. Dupre and Mr. Kennedy are related to the CD-ROM project, but we do not have quotable sources to substantiate these rumors. Since Mr. Sims has been involved in Public Affairs, his firing may also be related.

One source that may be useful in your inquiries is Robert E. Gilka. Mr. Gilka was Director of Photography at National Geographic Magazine until he retired in the late 1980's. He was the person who negotiated the agreements with many of the photographers who are now claiming that they are entitled to additional compensation for this use. Mr. Gilka lives in Arlington and his phone number is 703-524-0060.

We believe Mr. Gilka will testify that in the vast majority of cases he negotiated the photographers and stock agencies were providing National Geographic with one-time usage rights (first rights in the case of assignments) for the fee paid by National Geographic. It was the clear understanding of both parties at the time that the photographers would be paid for additional re-uses of the images, with a few specific and minor exceptions that were spelled out in the contracts.

In nearly all cases there were written contracts with the rights of both parties clearly spelled out. The standard contract varied somewhat from job to job over the years, but in general the key language concerning rights is as follows:

All photographs taken by you under this Agreement will be considered as specially commissioned for use by NGS and upon creation all rights, including the copyright and world publication rights, to these photographs will automatically, by virtue of this Agreement, be deemed transferred exclusively and indefinitely to NGS, subject to the following provisions:

(a) any photographs not selected for publication by NGS will be returned to you along with all rights to said photographs under the following conditions:

(i) none may be made available to anyone for publication until sixty days after NGS has published its selections and none will ever be made available for publication to the three foreign language facsimiles of the Magazine: Revista de Geografia Universal (published in Mexico), Revista Geografica Universal (published in Brazil), and Airone magazine (published in Italy);

(ii) it is understood that any necessary rights clearance or release for non-NGS publication is your independent responsibility;

(iii) NGS may make and retain copies of some of the photographs ("reference selects") for reference purposes only in its Illustrations Library;

(b) if NGS makes further use (promotional, advertising,

exhibition, audiovisual or other editorial use) of the photograph selected for publication, it will make additional appropriate payment to you but no such additional payment will be made if the use is as part of a non-promotional NGS photograph in an exhibit or in a non-promotional audio-visual presentation or lecture given by an NGS employee or under NGS auspices;

The photographers contend that National Geographic Society must abide by the terms of their own contract - specifically item (b). NGS seems to be taking the position that they don't want to comply with item (b) and that photographers will have to take the magazine to court if they want a settlement.

The photographers contend that there is no transfer of copyright unless National Geographic abides by the other terms of its contract.

There are other issues:

1 - Many of the photographers worked for lower than normal rates for the non-profit National Geographic Society. They did this because they wanted to promote geographic and environmental education. Now NGS has transferred the images of the photographers to a "for profit" organization National Geographic Interactive.

(a) This action is in express violation of all agreements National Geographic has made with all stock photo agencies, because the language on all deliveries and invoices from such organization specifies that, "This agreement (the licensing of usage of particular photos) is not assignable or transferable on the part of the recipient." The Picture Agency Council of Americas, the leading trade association in the U.S. for stock photo agencies, has opposed this action by National Geographic Society. For more information on their position you can contact Loni Schroeder at 800-457-7222.

(b) The sole purpose of this transfer was federal tax avoidance. The Society wants to engage in for profit activities and still maintain their non-profit status for a magazine that is a very commercial venture. They want to use assets of the Society that were obtained under non-profit rules, and some assets the Society doesn't even own, to engage in profit making ventures.

(c) This puts NGS in a very unfair competitive position with all major publishers who have to pay federal taxes on their profits.

(d) - The tax status may be worth exploring. On October 20, 1995 NGS received a private letter ruling (PLRR 9542045) from the IRS allowing them to engage in for-profit activities and still maintain their non-profit status for the magazine. This ruling is conditional based on representations that Geographic made at the time about how they conduct their business. We believe the representations they made at the time may no longer be an accurate reflection of how they operate and thus the exemption may no longer apply.

2 - Most freelance photographers and writers who continue to do occasional assignments for the magazine are afraid to speak out for

their rights for fear that the magazine will never give them another assignment. Fortunately, there is a growing number of professional photographers who have no desire to ever work for National Geographic Magazine again. Three who have been significant contributors in the past are: Fred Ward at 301-299-5330, Loren McIntyre at 703-538-4929 and Charles O'Rear in California at 707-963-2663. If you need more names let me know.

3 - One of the complainants in the Faulkner case is Matrix International, Inc, a New York stock agency. Over the years they have licenced rights to National Geographic for the one-time use of several images that were originally shot for other clients. Geographic had no right to re-use these images without paying an additional fee and Matrix would not be carrying out their fiduciary obligations to their photographers if they did not try to collect for these uses.

Someone at National Geographic Magazine (it is unclear who) has been telling photographers that if they are represented in any way by Matrix they will never be allowed to work for National Geographic Magazine again. For more information on this you can contact Barbara Sadick at Matrix in New York at 212-477-9500.

4 - One of the issues in the Greenberg case is that National Geographic not only re-used his pictures as they appeared in the magazine, but they used one of his pictures in a new advertisement for National Geographic that appears on all 30 discs. They have refused to compensate him for this use and made it necessary for him to file suit in Federal Court.

5 - The quality of printout that is possible from these discs is excellent. Thus, photographers have a legitimate concern about the possible stealing and mis-use of their work by individuals who purchase these disc sets.

6 - The photographers and writers believe that the product is a valuable and useful tool, and are not in any way trying to prevent National Geographic from publishing this type of product. They simply believe that their words and pictures are a critical element, if not the whole element, in what is being sold and they believe they are entitled to a portion of the revenues from these sales.

7 - I have attached a list of potential claims we believe photographers and writers have against National Geographic.

If you have any questions, please call.

# TOTAL CLEARANCE

Entertainment Clearances

Phone: (415) 389-1531

Fax: (415) 380-9542

Attention: [REDACTED]

Date: 5/13/97

Company: [REDACTED]

From: Jill Alofs

Re: agency request

(11 photos)

Dear [REDACTED]

As you may know, my client, National Geographic Society is developing a digital archive of NATIONAL GEOGRAPHIC MAGAZINE from 1888 through 1996, entitled *The Complete National Geographic on CD-ROM*. It is intended to contain a digital image of every page of the magazine, including advertisement, without any changes or modifications. The CD-ROM will contain a search engine based on National Geographic Society proprietary indexing scheme; the product does not allow users to cut and paste photographs or text, and while photographs or text can be printed, the quality is inferior to a photocopy of the magazine itself.

This product has been designed as a low-cost reference tool for educators, librarians, students and families. Producing a CD-ROM of this size is an expensive proposition; however, the 30 volume set has been priced at \$199 to make it more affordable for educational institutions and families. The Society does not expect to do more than break even on this product.

Certain images for which restricted publication rights were obtained from [REDACTED] have appeared in NATIONAL GEOGRAPHIC MAGAZINE, and I have been commissioned to offer you a fee of \$20.00 per photo, regardless of the size, for the licensing rights to include these images in this CD-ROM archive, as well as on versions in CD-I, DVD, and other versions, editions, adaptations, or sequels to the original title. The term and territories sought for this product is twenty years worldwide, in all languages. All photos will be used as they originally appear in the magazine, without alterations. Promotional rights for these images are not included.

I will contact you shortly to discuss this further.

Best regards,

Jill Alofs  
President

P.O. Box 836 Mill Valley California 94042 Phone (415)389-1531 Fax (415)380-9542

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Jill Alofs  
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esday, May 20, 1997 9:49 AM

The following was published in the Los Angeles Times 5/19/97. The column by Greg Miller was distributed on the Internet by American Society of Journalists and Authors contracts watch. This is not the full text of the article (space between the 1st and 2nd graphs). The full text may have other useful information.

Natl Geographic Society has undertaken some of the most daunting journalistic missions imaginable, sending writers and photographers to retrieve captivating images and stories from the most remote corners of the globe. Now the society's multimedia division is in the midst of a breathtaking mission of its own: cramming 108 years' worth of magazines into a boxed collection of CD-ROMs....

.....Larry Lux, managing director of National Geographic Interactive...says the magazine still isn't sure how it will accomplish the task. "What we're doing is poring over" old contracts, he said, "and until we're done it's hard to say how it's going to shake out."

For starters, National Geographic has enlisted the help of a Mill Valley company, Total Clearance, that specializes in negotiating and clearing electronic publication rights. Jill Alofs, founder of the company, said Total Clearance has spent the last six years assembling a huge database of addresses and phone numbers for writers and photographers, as well as actors, announcers and any other professionals whose material might be of digital use. Still, she said, a project like National Geographic's will take months to complete, and even then will involve compromise.

"You're obligated to do your best to clear the rights," she said. "If we try to locate an individual and can't find him, but have a huge paper trail, we can say we've done due diligence. But you're still assuming a risk."

The risks, she said, include being sued and having the product pulled from store shelves.

The whole process is being monitored by trade associations, such as the American Society of Journalists and Authors, and other groups whose members have something at stake in the project.

The payments for electronic rights vary widely depending on the work and the way it will be used. Steinmetz [a photographer] said that these days, publications will sometimes pay as much as \$100 extra per day to acquire upfront the digital rights to pictures from an assignment.

But in the case of National Geographic's CD-ROM project, he said, a fair payment might be a royalty of a few pennies for every 100 boxes sold....

Meanwhile, Lux and his staff are still shooting for a fall release of the boxed set, which will include about 30 CD-ROMs and cost about \$199.

Lux said the collection is designed primarily for use by schools and longtime subscribers who until now have kept copies of the yellow-bordered magazine in growing piles.

This is not budgeted to be a profit generator," Lux said.

Subject: National Geographic  
Date: Mon, 14 Apr 1997 23:22:30 +0800 (WST)  
From: Jim Pickerell <jim@chd.com>  
Reply-To: jim@chd.com  
To: Multiple recipients of list <stockphoto@info.curtin.edu.au>

#### GEOGRAPHIC ON DISC

National Geographic will be releasing this fall a series of discs of every issue of National Geographic covering over 100 years from 1888 to the present.

According to Bob Madden, head of National Geographic Interactive, there will be 30 discs in the series with approximately three and a half years of issues on each disc. The entire National Geographic index will also be included on all discs. Thus, by placing any disc into a computer the user will be able to look up a particular subject and determine which disc contains that story.

Each page in the magazine is being individually scanned and will appear exactly as it did in the magazine. The images will not be scanned separately. The file size for each page will be approximately 80K. While the pages are scanned individually they will normally appear as spreads on the screen.

Madden says, "If you like pixels you love these images because you can see a lot of pixels in them." These will be straight JPEG files. User will be able to print out the pages, but a copyright notice will appear on the bottom of each page when it is printed. There is no plan to use Digimark technology on the images so they might be tracked if they were transferred into another on-line program.

It is not clear whether school children will be allowed to copy images from the disk and uses them in their own projects. However, it is becoming a common practice of many publishers to authorize this educational use.

Angelo Grima who is in charge of working out the arrangements for rights to these images said "No comment," when asked what type of arrangements would be made to compensate photographers for their work.

Clearing copyright on this project may well be a nightmare. Copyright will have expired on some of the older material. But, everything since 1976 will be a different ball game. Geographic clearly owns the staff produced material, but in the last couple decades an increasing amount of the work for the magazine has been done by freelancers. A couple years ago they were down to two staff photographers. Now they have six.

When it comes to the freelance work there were several different deals. Each contract was different. There were individuals who did one or more stories on a straight contract basis and owned all secondary rights. Then there were varying agreements with the photographers who had contracts guaranteeing them a certain number of days work per year. In some, but certainly not all, of these cases may have granted some secondary uses.

Many of the photographers also wrote for the magazine and received compensation as writers. Each writer may have a different agreement as well as the photographers. We know of one photographer/writer who has a specific written agreement transferring the copyright back to him.

The nearest precedent for this was "The Face of LIFE" disc that was published in late 1994. This disc contained 1800 Life covers from the years 1936 through 1972. It also contained more than 2200 other selected images, but nearly all of these were produced by staff photographers.

In their letter to photographers Life said, "While as a legal matter we are not obligated to make any additional payments to reproduce our covers, in the spirit of this project we decided to make a payment to all non-staffers

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~~mailto:REDETECT@com.com#number#27~~

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**Subject:** Re: National Geographic  
**Date:** Tue, 15 Apr 1997 22:20:25 +0800 (WST)  
**From:** Iglooking@aol.com  
**To:** Multiple recipients of list <stockphoto@info.curtin.edu.au>

I have information from a source I will not name, but who is one of the most honest and reputable people I know. He is also "well placed" within the NGS arena. When we last spoke, 2 months ago, it was his understanding that NGS will NOT be offering any additional payment to any of the photographers whose work will appear in this massive digital "xerox" of every copy of the magazine ever published.

Would NGS's own stock agency, the NGS Image Collection and Image Sales Division, ever allow this kind of free usage for one of their clients?

Me thinks this one will visit the courts.