

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

Jerry Greenberg and Idaz Greenberg)	
)	
<i>Plaintiffs-Appellants,</i>)	
)	
v.)	No. 00-10510
)	
National Geographic Society,)	
National Geographic Enterprises, Inc.)	
and Mindscape, Inc.)	
)	
<i>Defendants-Appellees.</i>)	

MOTION TO RECONSIDER ORDER GRANTING MOTION TO STRIKE

Pursuant to Fed. R. App. P. 27(a)(3), appellees hereby move this Court to reconsider the May 16, 2001 order granting appellants' motion to strike appellees' amendment to their petition for rehearing. Such reconsideration is warranted because Judge Birch issued that order *prior* to the expiration of the time for appellees to respond to the motion to strike, and appellees had not yet responded.

Under Fed. R. App. P. 27(a)(3), a party has ten days (plus three days for service, *see* Fed. R. App. P. 26(c)) to respond to a motion. The undersigned counsel, Kenneth W. Starr, confirmed the applicability of these rules in a telephone conversation on May 14 with the Clerk of this Court, Thomas K. Kahn. Because appellants sent out their motion on May 7, the response was due on May 21. (May 20 is a Sunday). Judge Birch, however, granted the motion to strike on May 16.

Turning to the merits, this Court should deny appellants' motion to strike for the following reasons:

1. Appellants argue primarily that “[n]othing in the Federal Rules of Appellate Procedure, or the Eleventh Circuit Rules, *authorizes* the filing of . . . an ‘amendment’” to a petition for rehearing. Mot. 2 (emphasis added). While that is true, it is equally true that nothing in those rules *prohibits* such an amendment. The amendment here is warranted, as the May 2 letter explains, because the panel substantively amended its opinion *after* the petition for rehearing was filed *without* disposing of the petition. That amendment materially affected the pending petition; indeed, it granted the relief requested in the third of the three questions presented. Because the panel amended its opinion, it was entirely appropriate for appellees to amend their pending petition accordingly.

2. Appellants also note that “Appellees’ letter expresses concern over the contents of footnote 13 in the Court’s opinion,” but characterize that footnote as “dicta” that “has nothing to do with the merits of the Court’s opinion” and “has nothing to do with whether or not the Court should rehear its opinion.” Mot. 2. That is incorrect. The challenged footnote accuses appellees of having perpetrated a “fraud” on the United States Copyright Office -- an argument that was never raised by appellants or the Court prior to its decision, and hence never addressed by

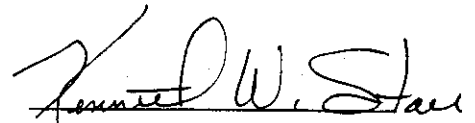
appellees. That is an accusation of the utmost gravity, and forms the basis for the second of the three questions presented in the petition for rehearing. Indeed, appellants' assertion that the footnote is "dicta" only underscores appellees' point that the footnote is gratuitous (as well as incorrect) and should be deleted.

3. Appellants also object to the submission of a letter from the General Counsel (whom appellants inaccurately describe as a "staff counsel") of the United States Copyright Office challenging the Court's accusation of fraud. Although appellants assert that the letter "go[es] far beyond the 'accusation of fraud' footnote in the opinion about which Appellees' letter expresses concern," Mot. 3, the letter expressly limits itself to that issue. *See* Copyright Office Ltr. (5/2/01) at 2. Appellants' suggestion that the Copyright Office is not entitled to furnish its views on this issue to the Court, *see* Mot. 3 (citing 37 C.F.R. § 202.2(a)(3)), is frivolous. That regulation provides only that the Copyright Office "does not give specific legal advice on the rights of persons." Surely the Copyright Office is entitled to describe its own practices and procedures to this Court (a description that is not "specific legal advice") to correct a misunderstanding. Indeed, as the General Counsel explains, "[i]n the rare cases in which appellate courts discuss our registration practices in a way that is likely to confuse the public, we will speak out in the interests of justice, public education and the orderly administration of the copyright laws." Copyright Office Ltr. 1 (citing

Raquel v. Education Mgmt. Corp., 121 S. Ct. 376 (2000)). Needless to say, the Copyright Office's views of its own regulations, practices, and procedures is entitled to great deference. *See, e.g., Martin v. OSHRC*, 499 U.S. 144, 150-51 (1991).

4. Finally, appellants request an opportunity to respond to the petition for rehearing. *See* Mot. 3-4. Appellees have no objection to that request.

Respectfully submitted,



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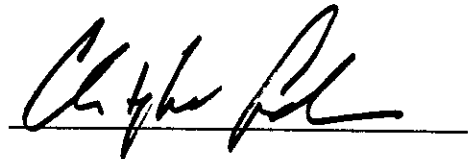
Kenneth W. Starr
Christopher Landau
Kirkland & Ellis
655 15th Street, N.W.
Washington, DC 20005
(202) 879-5000

May 18, 2001

CERTIFICATE OF SERVICE

I, Christopher Landau, hereby certify that a copy of the foregoing Motion to Reconsider Order Granting Motion to Strike was served by Federal Express on the following counsel on May 18, 2001:

Norman Davis, Esq.
Steel, Hector & Davis LLP
200 South Biscayne Boulevard
Suite 4000
Miami, FL 33131-2398

A handwritten signature in black ink, appearing to read "Chris Landau", is written over a horizontal line.

KIRKLAND & ELLIS

PARTNERSHIPS INCLUDING PROFESSIONAL CORPORATIONS

655 Fifteenth Street, N.W.
Washington, D.C. 20005

202 879-5000

Facsimile:
202 879-5200

Christopher Landau
To Call Writer Directly:
(202) 879-5087
christopher_landau@dc.kirkland.com

May 18, 2001

VIA FEDERAL EXPRESS

Thomas K. Kahn
Clerk
United States Court of Appeals
for the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

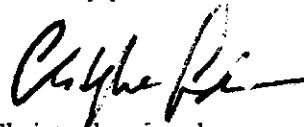
Re: *Greenberg et ux. v. National Geographic Society, et al.*, No. 00-10510

Dear Mr. Kahn:

Enclosed for filing please find an original and four copies of Defendants-Appellees' Motion to Reconsider Order Granting Motion to Strike in the above-captioned case.

Kindly return one file-stamped copy to me in the enclosed self-addressed, stamped envelope. Please do not hesitate to contact me at the number listed above if you have any questions or concerns.

Sincerely yours,



Christopher Landau

Enclosure
CL:rf

Norman Davis
Steel Hector & Davis
Suite 4000 - 200 South Biscayne Blvd.
Miami FL 33131

May 16, 2001

RE: 00-10510-CC Jerry Greenberg v. National Geographic Society
DC DKT NO.: 97-03924 CV-JAL

CC: Norman Davis
CC: Terrence B. Adamson
CC: Robert G. Sugarman
CC: Naomi Jane Gray
CC: Edward Soto
CC: Valerie B. Itkoff
CC: Joseph M. Beck
CC: Kenneth W Starr
CC: Administrative File

United States Court of Appeals

Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

In Replying Give Number
Of Case And Names of Parties

May 16, 2001

MEMORANDUM TO COUNSEL OR PARTIES

RE: 00-10510-CC Jerry Greenberg v. National Geographic Society
DC DKT NO.: 97-03924 CV-JAL

The following action has been taken in the referenced case:

The enclosed order has been ENTERED.

Sincerely,

THOMAS K. KAHN, Clerk

Reply To: Jenifer Alexander (404) 335-6172

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

00-10510-CC

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

MAY 16 2001

THOMAS R. KAHN
CLERK

JERRY GREENBERG,
IDAZ GREENBERG,

Plaintiffs-Appellants,

versus

NATIONAL GEOGRAPHIC SOCIETY,
a District of Columbia corporation,
NATIONAL GEOGRAPHIC ENTERPRISES, INC.,
a corporation,
ET AL.,

Defendants-Appellees.

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

O R D E R:

Appellant's motion to strike the "Amendment to Petition for Rehearing" filed on May 3, 2001, by Appellee National Geographic Society, is *GRANTED*.

Appellant's motion for permission to respond to Appellees' rehearing petition, as amended, is *DENIED, as moot*.



UNITED STATES CIRCUIT JUDGE

**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.

Adamson, Terrence B.

Davis, Pierre M.

Educational Insights

Gray, Naomi Jane

Grima, Angelo M.

Itkoff, Valerie

Kirkland & Ellis

Landau, Christopher

Lenard, The Hon. Joan

Mattel, Inc.

McLaren, Joanne M.

Mindscape, Inc.

National Geographic Society

National Geographic Holdings

Greenberg v. National Geographic Soc'y, No. 00-10510

Schwartz, Karen K.

Shanmugam, Kannon

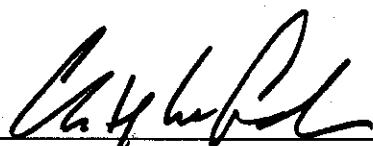
Soto, Edward

Starr, Kenneth W.

Sugarman, Robert G.

Weil, Gotshal & Manges LLP

Wild, Matthew



Christopher Landau