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GEOGRAPHIC GUILTY OF COPYRIGHT INFRINGEMENT

June 16, 1999

Judge Joan A. Lenard has found that National Geographic Society infringed the copyright of underwater photographers Jerry and Idaz Greenberg when they used the Greenberg's copyrighted images as reference materials for two projects without permission or compensation. The case was heard in Federal Court in the Southern District of Florida in Miami.

The case has been referred to Magistrate Judge William C. Turnoff for the purposes of holding a settlement conference to determine the amount National Geographic will be required to pay to the Greenbergs.

This is the first time National Geographic has been found guilty of copyright infringement of a photographer's work. The case may open the door for legal action by other photographers against the Society.

In a review of the facts of the case it was shown that Walter Cutler, the work-for-hire illustrator hired by the Society to produce illustrations for an educational GeoPack project, improperly used books produced by the Greenbergs as reference for his illustrations.

On his working drawings Cutler noted the page references referring to the photographs he had copied so the Society editors could verify that the illustrations were accurate. This clearly laid the responsibility on the Society editors because they were fully aware of what had been done and were responsible to obtain proper permissions and deal with compensation issues.

Cutler's illustrations also met the test of "substantial similarity" according to Judge Lenard. The Greenbergs had produced overlays from their books that clearly showed the illustrations were almost exact matches of the Greenberg's photos.

In challenging the Greenbergs' motion for Summary Judgement on Liability, lawyers for National Geographic Society argued that the newly created illustration did not violate the Greenbergs' copyright, and "that even if these images reflect copyrighted material, this use constitutes "fair use".

Judge Lenard found that the illustrations "improperly infringed the photographs at issue, and that the doctrine of fair use is not applicable to these facts."

The court took into consideration the four nonexclusive factors to be considered when determining whether the fair use doctrine applies and concluded, "that neither the GeoPack product nor the Jason Project poster qualify as fair use."

The four factors are:

- 1 - the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- 2 - the nature of the copyrighted work;
- 3 - the amount and substantiality of the portion used in relation to the copyrighted work as a

whole; and

4 - the effect of the use upon the potential market for or value of the copyrighted work.

The courts detailed presentation of the facts related to each of these points should be useful to others faced with a "fair use" claim by any organization, and particularly National Geographic.

Counts three and four in the Greenberg's case are not a part of this decision and dealt with the use of the Greenbergs copyrighted images in the "108 Years of National Geographic on CD-ROM". Earlier in the proceedings lawyers for National Geographic argued that these two counts should be considered based on the "Tasini" decision.

On this point the judge agreed with National Geographic and the arguments for the use of the Greenberg's images in that project were not heard. The Greenbergs have the option to appeal that decision of the judge.

Oral arguments for the appeal of the "Tasini" decision have been heard in the New York Appeals court and all parties are presently waiting for the judge's ruling in that case. The results of that case could affect the Greenbergs ultimate decision.

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