

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division
CASE NO. 97-3924-CIV-LENARD-SIMONTON

JERRY GREENBERG, individually,
and IDAZ GREENBERG, individually,

Plaintiffs,

vs.

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

Defendants.

**PLAINTIFFS' SUPPLEMENTAL MEMORANDUM IN
SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT, AND
IN OPPOSITION TO CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT**

Plaintiffs, JERRY GREENBERG and IDAZ GREENBERG (collectively "Greenberg"), submit this supplemental memorandum in support of their pending Motion for Partial Summary Judgment, and in opposition to the Defendants' Cross-Motion for Partial Summary Judgment.

This supplemental filing was authorized in an Order entered by the Court on September 6, 2002. Greenberg's motion for partial summary judgment seeks a judicial determination, for use at trial, of the number of works infringed. This memorandum speaks briefly to the issue of whether the 64 Greenberg photographs at issue can "live their own copyright life," as the

Eleventh Circuit has put it, and whether the photographs have independent economic value.

MCA Television Ltd. v. Feltner, 89 F.3d 766, 769 (11th Cir. 1996).

Defendants argue that the 64 photographs at issue can have economic value only if they have generated revenue. That is meritless. Wonderful photographs, like other works of art, have exceptional value even though they have never produced a dime in revenues. As an example, the leading museums in our country contain the works of thousands of exceptional artists that have never brought money to the creators; no one can say with a straight face that such works have no economic value. So too here, the monthly magazines published by the Society contain one-of-a-kind museum-quality photographs. The defendants can challenge that reality only by demeaning their own product. The 64 Greenberg photographs share that quality; otherwise the Society never would have published them.

Further, the defendants realize the unprecedented value the contents of the magazine command. They continue to reap that value in their highly successful global marketing of the Complete National Geographic CD-ROM product. The defendants cannot have it both ways: they cannot exploit the significant economic value from the product, and then contend that its components have no economic value. The product is the sum of its components.¹ Moreover, the marketing of the product is not some historical event; it is ongoing.

Greenberg listed in his reply memorandum, at page 9, numerous factors that are evidence of the actual and potential economic value of his 64 photographs. The defendants scoffed, implying that Greenberg was engaging in puffery. Economic value is inherent, among other things, in a photographer's reputation as a creative artist because reputation leads to revenue. It is meaningful that ranking editors and publishers of the National Geographic Society have

¹ The convenient packaging of the issues of the magazine clearly is part of the appeal in the market, but the ultimate appeal is the quality of the content.

heaped plaudits on Jerry Greenberg through many years for the consummate and unique quality of Greenberg's work. Attached hereto as Exhibit A is an affidavit by Greenberg, with letters as attachments that praise works by Greenberg appearing in his own publications as well as Society publications:

"the best series of underwater color photographs so far taken"

"I am amazed that you and Idaz were able to put together such a beautiful pictorial representation of fish and coral through artwork"

"one of the most beautiful collections of underwater photographs ever made"

"your reef pictures continue to be a landmark in underwater photography"

"as always, the pictures are superb"

"your story on the under sea park was one of the most popular articles we have published in the Magazine"

See Greenberg Affidavit and exhibits. Such statements made by shapers of the National Geographic Society's history -- Melville Bell Grosvenor, Gilbert M. Grosvenor, Melvin Payne, and others -- cannot be diminished by the lawyers who now represent that institution. The letters are testament to a unique creative ability, and a reputation,² that have allowed Jerry Greenberg to prosper modestly throughout his professional life. As noted previously, many factors attest to the ability of the photographs to "live their own copyright life," and the statements in the attached letters, made long before the infringements occurred, also speak unassailably to the economic value of the 64 photographs at issue.

² The 64 photographs appearing in the Society's magazines have economic value if only because they contributed mightily to Greenberg's professional reputation.

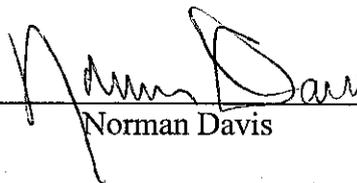
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Certificate of Service

I hereby certify that a copy of the foregoing supplemental memorandum was served by mail on Edward Soto, Esq., Weil, Gotshal & Manges LLP, 701 Brickell Avenue, Suite 2100, Miami, FL 33131 and on Robert G. Sugarman, Esq., Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York NY 10153 this 13th day of September, 2002.



Norman Davis

EXHIBIT A

UNITED STATES DISTRICT COURT
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California corporation,

Defendants.

AFFIDAVIT OF JERRY GREENBERG

1. My name is Jerry Greenberg. I am a plaintiff in the above-captioned action. The statements in this affidavit are based on my personal knowledge.
2. Attached to this affidavit as exhibits are letters received by me through the years from individuals at the National Geographic Society.
3. Exhibit A is a letter from Melville Bell Grosvenor.
4. Exhibit B is a letter from Thomas R. Smith.
5. Exhibit C is a letter from Gilbert M. Grosvenor.
6. Exhibit D is a letter from Luis Marden.
7. Exhibit E is a letter from Melvin M. Payne.
8. Exhibit F is a letter from Leonard J. Grant.

9. Exhibit G is a letter from Robert E. Gilka.

AFFIANT SAYS NOTHING FURTHER.

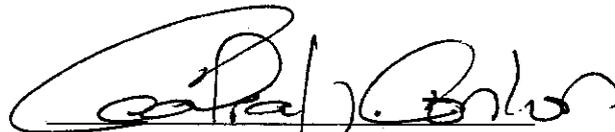

Jerry Greenberg

STATE OF FLORIDA)
)
COUNTY OF MIAMI-DADE)

This acknowledges that Jerry Greenberg appeared personally before me and stated under oath that the facts contained in the affidavit above are true and correct. Mr. Greenberg is

personally known to me _____, or
provided FL. DRIVERS LICENSE as identification.

Executed by me this 14th day of September, 2002.


Notary Public signature

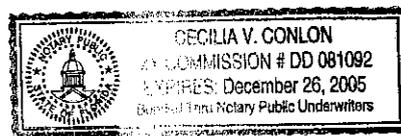


EXHIBIT A

National Geographic Society

WASHINGTON, D.C. 20036

MELVILLE BELL GROSVENOR

EDITOR-IN-CHIEF

CHAIRMAN OF THE BOARD

January 10, 1973

Dear Jerry:

Many thanks for the copies of "The Living Reef" you sent me. As always the pictures are superb! When I go down to Florida next month, your book will go with me and I'll have a chance to read the text and study your beautiful photos at leisure.

With warm personal regards.

I hope to see you again then

Sincerely,



MBG:jd

Mr. Jerry Greenberg
6840 S. W. 92nd Street
Miami, Florida

EXHIBIT B

National Geographic Magazine

WASHINGTON, D. C. 20036

January 8, 1973

THOMAS R. SMITH
ASSOCIATE ILLUSTRATIONS EDITOR

Mr. Jerry Greenberg
6840 S. W. 92nd Street
Miami, Florida

Dear Jerry:

Thanks for the copy of The Living Reef. Congratulations to both you and Idaz. Your reef pictures continue to be a landmark in underwater photography, Jerry. And the layout and printing of the book are first-rate.

Happy New Year.

Best regards,

A handwritten signature in dark ink, appearing to read 'Tom', with a large, sweeping flourish above it that extends to the left and then curves back down to the right.

TRS:erc

EXHIBIT C

National Geographic Magazine

WASHINGTON, D. C. 20036

GILBERT M. GROSVENOR
EDITOR

March 18, 1977

Dear Jerry:

My congratulations to you on THE CORAL REEF and, in particular, the coral and fish identification book which I am returning as you requested. I am amazed that you and Idaz were able to put together such a beautiful pictorial representation of fish and coral through artwork. I must confess I was somewhat skeptical about the quality when we talked over the phone but I assure you I'm not now! As you know, the Geographic has always leaned heavily toward the photograph when possible but you have certainly made artwork in the identification area extremely attractive. I look forward to purchasing several of these books when they are published and I am confident that thousands of other people will feel the same way.

Your Coral Reef Park poster is excellent and I am particularly impressed with the texoprint material. I wish we could use the same material for our Close-Up: USA maps. In fact right now the production people are determining what the increased cost would be for our overall package of 15 maps.

Again, my thanks and appreciation for your interest in my publishing problems. I hope to find an excuse to fly to Miami soon. If so, I will come without my 7-year-old so that my time will be more flexible. I want very much to visit with both you and Idaz. You are a fortunate couple in that both of you possess great talent in similar fields and that you can work together so harmoniously.

Your many friends up here join in sending best regards.

Sincerely,



jam

Mr. Jerry Greenberg
6840 S.W. 92nd Street
Miami, Florida 33156

EXHIBIT D

LUIS MARDEN
FOREIGN EDITORIAL STAFF

National Geographic Society

WASHINGTON 6, D. C.

U. S. A.

August 18, 1961

Dear Mr. Greenberg,

Although we have never met, I take the liberty of writing to you because I have just seen a dummy makeup of the series of pictures you made for us off Key Largo. I had long thought that the wide-angle picture you made several years ago of a school of porkfish moving from right to left was the finest black-and-white underwater photograph I had ever seen. Now you have made, in my opinion, the best series of underwater color photographs so far taken, and I want to congratulate you most sincerely. They are magnificent pictures.

I hope to have the pleasure of meeting you some day.

Sincerely,

Luis Marden

Mr. Jerry Greenberg

EXHIBIT E

National Geographic Society

WASHINGTON, D. C. 20036

MELVIN M. PAYNE
PRESIDENT

January 10, 1973

Mr. Jerry Greenberg,
6840 S.W. 92nd Street,
Miami, Florida.

Dear Jerry:

Mike Garrett dutifully delivered a copy of your new book, *THE LIVING REEF*, and I have thoroughly enjoyed it. It is undoubtedly one of the most beautiful collections of underwater photographs ever made and I congratulate you and Idaz on a remarkably fine job.

Everyone who has seen it has exclaimed at the beauty, clarity, and sharpness of the illustrations—which is also a compliment to your printers.

Thanks ever so much for thinking of me, and every good wish for '73!

Sincerely yours,



Melvin M. Payne

President.

MMP:ec

EXHIBIT F

National Geographic Society

WASHINGTON, D. C. 20036

LEONARD J. GRANT
ASSISTANT TO THE
PRESIDENT AND EDITOR

March 3, 1965

Dear Mr. Greenberg:

The first shipment of our new book "Wondrous World of Fishes" has just arrived from the bindery and I take great pleasure in sending you four advance copies.

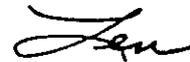
I don't know what we would have done without all of your wonderful pictures. My only disappointment is that we did not have more room for tropical fish. I am hoping we can expand the fish biographies and use more of the pictures in a later edition.

Your story on the under sea park was one of the most popular articles we have published in the Magazine and all of us feel it adds greatly to the interest and value of our book, too. Even before opening the book your work is apparent on the jacket. We hope you will be as pleased as we are with the way it turned out.

Just as soon as I get the transparencies back from our engraving-printing department, I'll be returning the originals to you, as requested.

Warm personal regards.

Sincerely,



Mr. Jerry Greenberg
6840 S. W., 92nd Street
Miami 56, Florida

lfr

Enclosures (4)

EXHIBIT G

National Geographic Magazine

WASHINGTON, D. C. 20036

ROBERT E. GILKA
DIRECTOR OF PHOTOGRAPHY

December 15, 1972

Mr. and Mrs. Jerry Greenberg
6840 S.W. 92nd Street
Miami, Florida

Dear Idaz and Jerry:

Thank you ever so much for "The Living Reef."

I am as impressed by the text as by the photographs, Jerry. Better look to your laurels! When Idaz describes hard corals as "masons of stone castles" and the parrotfish as an "efficient recycling machine" she is giving your beautiful images real competition.

The reproduction is excellent. You must have stood over the pressmen with a belaying pin!

All the best,



REG/eih