

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JERRY GREENBERG, individually,
and IDAZ GREENBERG, individually,

CASE NO. 97-3924
CIV-LENARD
Magistrate Judge Turnoff

Plaintiffs,

vs.

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

Defendants.

**MEMORANDUM IN SUPPORT OF PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT ON LIABILITY
FOR COUNT I AND COUNT II OF AMENDED COMPLAINT**

Plaintiffs, JERRY GREENBERG and IDAZ GREENBERG ("the Greenbergs"), submit this memorandum in support of their Motion for Summary Judgment on Liability as to Counts I and II of the Amended Complaint.

THE PLAINTIFFS' CLAIMS IN COUNTS I AND II

In Count I, the plaintiffs allege that five photographs, created and copyrighted by Jerry Greenberg, were used without his permission in a product created by Defendant, NATIONAL GEOGRAPHIC SOCIETY ("the Society"), and licensed by the Society to Educational Insights, Inc., a for-profit California corporation. The Educational Insights product bears various titles, and is referred to in this memorandum as "the GeoPack." The product displays the notice "© 1995 National Geographic Society."

In Count II, the plaintiffs allege that a photograph of a sea fan, for which Jerry Greenberg possesses copyright, was used by the Society without his permission in a color brochure promoting the Society's 1996 Jason Project.

STATEMENT OF MATERIAL FACTS

The Greenbergs as Creative Artists

For more than 50 years, plaintiff Jerry Greenberg ("Greenberg") has been a professional photographer, with a distinguished career based on underwater photography of fishes and other undersea life. During the years 1960 to 1990, he had nine assignments from the National Geographic Society ("the Society"), four of which developed into photo essays in the Society's monthly magazine. He also did photographic work for the Society's Traveler magazine and for its book division. Greenberg's photographs have appeared in Life, Sports Illustrated, Reader's

Digest books, Stern, Leica Magazine, Paris Match, and elsewhere. Exhibit A (J. Greenberg Affidavit).

Plaintiff Idaz Greenberg has been a noted illustrator of undersea life for more than 30 years. In their 43 years of marriage, the Greenbergs, through a business known as Seahawk Press, have produced a dozen books, numerous submersible "field guides," posters, and other products that are distributed and sold widely in the United States and in various parts of the world. All photographs and illustrations in the Greenbergs' products were created by them. All of the Greenbergs' works bear copyright notice, and each has been registered with the U. S. Copyright Office. The Greenbergs and their children hold over 100 U.S. copyrights on their publications. Id.

One of the Greenbergs' books is "The Living Reef," published originally in 1972, followed by a revised edition published in 1979. A copy of the 1979 edition, which is relevant to Count I, is attached to Exhibit A as Attachment 1. The book features photographs by Jerry Greenberg and illustrations by Idaz Greenberg. Copyright registration forms for both editions of "The Living Reef" are attached to Exhibit F as Attachment 1.

In 1962, Mr. Greenberg began an affiliation with the National Geographic Society ("the Society") which resulted in the use of scores of photographs taken by Mr. Greenberg in various issues of the Society's monthly magazine and other publications. Exhibit A. One such photograph, showing a scuba-diver under water, was originally published in the Society's monthly magazine in January 1962. Exhibit A, ¶ 17. The Society, on December 18, 1985, assigned copyright as to that photograph to Mr. Greenberg. Exhibit A, Attachment 2. Mr. Greenberg renewed the copyright in 1989. Exhibit A, Attachment 3. After the assignment in

1985, Mr. Greenberg never authorized the Society to use the photograph in any manner. Exhibit A, ¶ 23.

The GeoPack Project

In 1994, the Society entered into a licensing arrangement with Educational Insights, Inc., a for-profit California-based company. Exhibit B. The agreement, among other things, called for the creation of a product entitled World Oceans and Seas, otherwise referred to herein as “the GeoPack.” A sample of the GeoPack is shown as Exhibit C. The agreement provided that the Society would have primary responsibility for the editorial and art content. Exhibit B, ¶ 1. The Society retained all rights to materials it provided to Educational Insights, including copyright. Exhibit B, ¶ 3. The Society granted Educational Insights an exclusive, perpetual license to distribute, display, reproduce and sell copies of products prepared by the Society. *Id.* The agreement provided that each card developed by the Society would bear the following notice: “Copyright © 1995 National Geographic Society.” Exhibit B, ¶ 5.

The Disputed Illustrations

The relevant portion of the Educational Insights product is a four-layered “3-D” package, titled “Fish of the Coral Reef.” Exhibit C, Attachment 1. The package consists of three plastic sheets superimposed on an opaque background and secured at the top by a spiral binder. The package depicts a number of fishes cruising or feeding on a sea bottom covered with corals and other growth. Also apparent in the scene is a pair of scuba-divers. With one exception, each of the fishes is identified on the plastic sheets by name and an identifying number. Different aspects of the sea bottom are revealed as each sheet is lifted.

Two illustrations that are the basis for the plaintiffs' claim as to Count I are those identified on the GeoPack product as "Parrot Fish" and "Moray Eel." The other infringing images are the two scuba-divers, and a brightly-colored fish, unlabeled, that appears in the top-center of the artwork. Id.

Comparative exhibits, prepared from the Greenberg photographs and from the disputed images in the GeoPack product, are attached as Exhibit D. The disputed images are shown side-by-side, and also are shown with comparative plastic overlays.

Warren Cutler Prepared Artwork for the GeoPack

The artwork comprising Exhibit C, Attachment 1 was prepared by Warren Cutler, a freelance artist who executed an agreement with the Society regarding the project on or about August 3, 1994. Cutler, 17¹; Exhibit H. The contract reserved all rights, copyright and otherwise, to the Society. Cutler's work was thus a work for hire. Since the 1980s, Cutler has worked with the Society on roughly a dozen projects on a work-for-hire basis. Cutler, 14. On each project, an art director at the Society "tells you what to do." Cutler, 16. On the GeoPack project, the only art director with whom Cutler worked was Lyle Rosbotham, and Rosbotham was the only person at the Society from whom Cutler received instruction. Cutler, 16, 23.

Cutler possessed in his home library a copy of the Greenbergs' book, "The Living Reef," when he was doing artwork for the GeoPack project. Cutler, 24, 27, 28.

¹ References to "Cutler, ___" are to pages in the transcript of Cutler's deposition, the original of which has been filed with the Court.

Cutler's Preliminary Sketches

Cutler submitted preliminary drawings, or sketches, to the Society, including the two documents attached as Exhibit G. Cutler, 39-42. Cutler included in the GeoPack artwork illustrations of fishes that had been specified by the Society. Cutler, 44. The normal way he would comply with the instructions was to research every aspect of fishes and other specified items and then "go through every book looking for it." Cutler, 45.

On the sketches comprising Exhibit G, Cutler penciled in the name of each reference work and its page number on which a particular fish illustration could be found. Cutler, 48-53. The Greenbergs' book, "The Living Reef," with page references, is referenced in Cutler's writing at six places on the sketches that comprise Exhibit G.

The Nature of Underwater Photography

In Jerry Greenberg's fifty-year experience, each photographic image he has taken represents a definitive moment in time, consisting of innumerable variables, when the camera's shutter is tripped. Exhibit A, ¶¶ 9-12. Greenberg operates professionally in an alien and fluid environment, where neither the photographer nor the fish is tethered. In order to track a moving fish in the frame of the camera, Greenberg constantly follows it, so that the snap of the shutter captures a specific and unique perspective of a fish. Id. In his long experience, Greenberg has found it impossible to duplicate a photograph when the fish and the photographer are moving, even when the shutter of the camera is firing at the fastest possible rate. Id.

A photograph of a fish is defined and determined by such things as locating the fish, having a particular lens and film available, the position of the photographer vis-a-vis the fish, the movement of the fish as the picture is framed, and the light available, natural or flashed. Id.

Additionally, because a fish tends to be constantly in motion, particularly when a photographer is present, a fish's posture, attitude, turns, and activity contribute to the originality of a photograph. A fish's body compresses or distends as it moves to feed, mate, or to protect territory. Almost all fishes are capable of natural camouflage, flushing dark or light patterns. Id.

A photograph of a particular fish also can be unique because of the lens chosen: for close-up, for distance, or for a distorted effect as produced by a 'fish-eye' or curved wide-angle lens. A particular fish also is rendered unique by its posture, motion, activity, color, sex, and age. Many species are so different throughout their development from immature to juvenile to adult that they were once thought to be separate species. Id.

The Society Regarded Its Own Photographs as Unique and Original

Robert Gilka was Director of Photography for the National Geographic Society from 1964 until he retired in 1985. Exhibit E (Gilka Affidavit). The Society published many hundreds of photographs of fishes and other undersea creatures, and regarded every photograph it used as creative, original and worthy of protection. Id. In more than two decades of reviewing and assessing photographs for the Society, Gilka never saw any underwater photograph of a fish that was identical to any other underwater photograph of a fish, because of the numerous variables involved. Id.

Greenberg's Redband Parrotfish Photograph

A photograph of a Redband Parrotfish appears on the cover of "The Living Reef" and the same photograph appears at page 49 of that book. Exhibit A, Attachment 1. The photograph shows a "supermale" Redband Parrotfish, a sex-reversed fish that has superior size and unique

color, pattern and body shape. Exhibit A, ¶ 14. The fish is distorted in Greenberg's photograph because of the special lens he used. Id.

Cutler's rendition of a Redband Parrotfish, with no number or name, appears in the top-center of the GeoPack product. Exhibit C, Attachment 1. Cutler possessed a copy of "The Living Reef." Asked if the Greenberg photograph on the cover of the book had anything to do with his selection of a Redband Parrotfish for his artwork, Cutler replied "I'm sure it did." Cutler, 61.

Greenberg's Stoplight Parrotfish Photograph

Two photographs of a Stoplight Parrotfish appear side-by-side on page 50 of "The Living Reef." Exhibit A, Attachment 1. The fish on the right can be a male or a female. The parrotfish on the left is that of a terminal-phase male parrotfish, and is the parrotfish photograph in dispute here. The parrotfish on the left is strikingly different in color, has a much larger head, and the eyes are set back considerably. Exhibit A, ¶ 15.

Cutler's rendition of Greenberg's Stoplight Parrotfish appears in the GeoPack product, Exhibit C, Attachment 1, where it bears the number "8" and the words "parrot" and "fish." His rendition also appears in his sketch, Exhibit G, where it is identified by the annotation "Page 5, L. Reef."² Cutler possessed a copy of "The Living Reef."

Greenberg's Photograph of a Green Moray

A photograph of a Green Moray appears on pages 83-84 of "The Living Reef" under the heading "Moray Eels." Exhibit A, Attachment 1. On page 83 also appears a photograph of a

² Cutler stated at his deposition that the correct page number was not "5" but "50." Cutler, 51.

Goldentail Moray, which is marked with speckles on its dark skin. Cutler's rendition of a Moray Eel appears in the GeoPack product, Exhibit C, Attachment 1, where it bears the number "6." His rendition also appears in his pencil sketch, Exhibit G, where it is identified by the annotation "Page 84, The Living Reef."

Greenberg's Scuba-Diver Photographs

"The Living Reef" contains numerous photographs of divers, but the two photographs relevant to this dispute are displayed on page 17 and 74 of the book. Cutler's rendition of two divers appears in the GeoPack product, Exhibit C, Attachment 1, on the final page of the four-page "3-D" model. (The Society did not produce a copy of Cutler's sketch for that page.)

Greenberg's Sea Fan Photograph

Jerry Greenberg photographed a sea fan that was included in an article in the Society's July 1990 issue of the monthly magazine, on page 130. Exhibit A, ¶ 19. A copy of that page is shown in Exhibit D. By operation of a 1989 agreement between Greenberg and the Society with reference to that photograph and others, the Society assigned its copyright interest in the photograph to Greenberg after publication in the Society's 1990 issue. Exhibit A, Attachment 4. Greenberg registered the assignment of copyright in the 1989 agreement. Exhibit A, Attachment 5. In 1995, Greenberg learned that the Society had re-published a copy of the photograph of the sea fan in promotional literature for the Society's Jason Project. Exhibit A, ¶ 22. A copy of the promotional piece is shown at Exhibit A, Attachment 7. Greenberg at no point gave permission for use of the photograph by the Society in any manner. Exhibit A, ¶ 23. In the Jason Project literature, the Society altered the Greenberg photograph, also without consent, by "flopping" the photograph and by "cropping" it. *Id.*

Cutler's Version of a Sea Urchin

Cutler could not remember that anyone at the Society had admonished him against copying. Cutler, 58. Cutler said that he was hired to do "original" work, which he described as never-before-seen. Cutler, 54. He explained that "original" to him means "something that -- that I have not seen in the context before." Cutler, 55. A particularly apt illustration of his "originality" is a drawing of a slate pencil urchin that appears on the first page of Exhibit G in the lower left-hand corner. Although not at issue here, it illustrates Cutler's willingness to copy, even to trace. Alongside the drawing are the words "Audubon Plate 194." A composite exhibit has been prepared by Greenberg, utilizing the slate pencil urchin by Cutler that appears in the GeoPack artwork and a transparent overlay of a slate pencil urchin made from plate 194 in a book called Audubon Nature Guide, Atlantic and Gulf Coasts. Exhibit F, Attachment 2. Given that sea urchins have numerous spines that are constantly in motion, the Cutler sketch is exactly the same size and is astonishingly similar to the illustration in the Audubon book.

ARGUMENT

Summary Judgment in a Copyright Action

Summary judgment is often appropriate in a copyright infringement action, see Warner Bros. v. American Broadcasting Companies, 720 F.2d 231 (2d Cir. 1983), and particularly where, as here, the Court is the trier of fact.

The Copyright Infringement Standard

The 1976 Copyright Act reserves to the owner of copyright in a work the exclusive right to reproduce, distribute and sell that work. 17 U.S.C. § 106. Anyone who violates any of the exclusive rights is an infringer of the copyright. 17 U.S.C. § 501. The owner of an exclusive right under a copyright is entitled to an action for any infringement of that right. Id.

“Photographs clearly fall within the Section 102 (a) (5) classification [in the Copyright Act] of ‘pictorial, graphic and sculptural works.’” 1 NIMMER ON COPYRIGHT § 2.08 [E].

Although copyright protection extends only to those components of the work that are original to the creator, “the quantity of originality that need be shown is modest -- only a dash will do.”

Rogers v. Koons, 960 F.2d 301, 307 (2d Cir. 1992). “Elements of originality in a photograph may include posing the subjects, lighting, angle, selection of film and camera, evoking the desired expression, and almost any other variant involved.” Id. Moreover, copyright protects against unauthorized copying, not only in the original medium but also in any other medium as well. Rogers v. Koons, 751 F.Supp. 474, 478 (S.D.N.Y. 1990), aff’d, 960 F.2d 301 (2d Cir. 1992).

A plaintiff must prove only two elements in an infringement action: (1) ownership of the copyright and (2) copying by the defendant of constituent elements of the work that are original. Feist Publications, Inc. v. Rural Tel. Service Co., 499 U. S. 340, 361 (1991). In turn, ownership must be demonstrated by originality in the author and compliance with the appropriate statutory formalities, such as registration. And in the case of one photograph, of a diver, Greenberg must demonstrate that copyright was assigned to him.

The copying element comprises two issues. First, the factual question whether the defendant, in creating its work, had access to the plaintiff's materials or used the material "as a model, template, or even inspiration." 4 NIMMER ON COPYRIGHT § 13.01[B]. Not only is access clearly established here, but reliance on the protected photographs by artist Warren Cutler is also established. Second, copying as a legal matter must be demonstrated by a showing of substantial similarity of the copy to the original. Id.

COUNT I

The Educational Insights product ("the GeoPack") infringes Jerry Greenberg's copyright by unlawfully utilizing copies of five original photographs by Greenberg. The infringing artwork was provided to Educational Insights, Inc. by the National Geographic Society ("the Society") pursuant to a licensing agreement.

A. Greenberg Owns the Relevant Copyrights

All five infringing copies are of photographs that appear in "The Living Reef," published by Jerry and Idaz Greenberg, the plaintiffs, in 1972 and 1979 editions. Copyright registrations for both editions are in the record. Greenberg's registration certificates establish a prima facie case that the copyrights are valid. Original Appalachian Artworks, Inc. v. Toy Loft, Inc., 684 F.2d 821, 826 (11th Cir. 1982). Nothing in the record diminishes the validity of the copyrights.

B. Cutler Had Access to, and Used, the Greenberg Photographs

A presumption of copying is raised with Greenberg's showing that the Society, through its agent, Warren Cutler, had access to Greenberg's work. Id. at 829. Many courts, moreover, have concluded that "access" involves merely an opportunity to copy, and that actual viewing of the protected works by the purported infringer is adequate, without more, to establish access. See

4 NIMMER ON COPYRIGHT § 13.02[A] and numerous cases cited there. Artist Cutler plainly had physical access to the Greenberg photographs through his copy of "The Living Reef." That he directly referenced those photographs when preparing his artwork is clearly established. Cutler's pencil sketches that he provided to the Society contained annotations that particular fish included in the GeoPack product appeared on specified pages in "The Living Reef." The annotations were included so that Cutler's editor or others at the Society could "look it up and verify that [my artwork] was accurately done." Cutler, 53. When asked whether anyone at the Society had cautioned him against copying materials for the project, he replied "not that I can remember." Cutler, 58.

A Redband Parrotfish that does not appear in the pencil sketches was subsequently added by Cutler to the GeoPack. Asked if the Greenberg photograph of the Redband Parrotfish had anything to do with selection of a Redband Parrotfish for inclusion in his artwork, Cutler said "I'm sure it did."

C. As a Matter of Law, Cutler Infringed the Greenberg Photographs

Substantial similarity that demonstrates infringement, according to Professor Nimmer, falls "[s]omewhere between the one extreme of no similarity and the other of complete and literal similarity." 4 NIMMER ON COPYRIGHT § 13.03 [A]. The Eleventh Circuit has applied a widely used definition in holding that "substantial similarity exists where 'an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work.'" Original Appalachian Artworks, Inc., 684 F.2d at 829 (quoting Novelty Textile Mills, Inc. v. Joan Fabrics Corp., 558 F.2d 1090, 1092-93 (2d Cir. 1977)). Judge Learned Hand stated the same test as whether "the ordinary observer, unless he set out to detect the disparities, would be

disposed to overlook them, and regard their aesthetic appeal [of the original and the copy] as the same.” Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960).³ The copying need not be of every detail. Comptone Co. v. Rayex Corp., 251 F.2d 487, 488 (2d Cir. 1958). “The key to the ‘ordinary observer’ test is . . . the similarities rather than the differences.” Novelty Textile Mills v. Joan Fabrics Corp., 558 F.2d 1090, 1093 n.5 (2d Cir. 1977).

The law provides that substantial similarity, and thus infringement, exists only if Cutler’s work copies not merely the idea of a fish, or a diver, but the expression by Greenberg of the idea of a particular fish or a particular diver. See 17 U.S.C. § 102 (b).

In determining the existence of substantial similarity, the Court should refer basically, of course, to the Greenberg photographs in “The Living Reef” and the Cutler artwork that appears in the GeoPack product. To assist the Court, the plaintiffs have prepared a composite exhibit showing side-by-side comparisons, Ex. D, including an exhibit with overlays so that prominent features of the original and copy can be compared more closely. A number of courts have supported the use of overlay comparisons. See, e.g., Novelty Textile Mills v. Joan Fabrics Corp., 558 F.2d 1090, 1093 n. 5 (2d Cir. 1977); Mastercraft Fabrics v. Dickson Elberton Mills, 821 F.Supp. 1503, 1512 n.9 (M.D.Ga. 1993).

D. The Greenberg Photographs are Original

The Society’s contribution to the GeoPack product states, on the cover page of Exhibit C, Attachment 1, with reference to fishes, that “no two [are] exactly alike.” The Jerry Greenberg and Robert Gilka affidavits confirm that truism. Greenberg’s photographs of fishes are unique

³ “[T]he decision-maker, whether it be a judge or jury, need not have any special skills other than to be a reasonable and average lay person.” Rogers v. Koons, 960 F.2d at 308.

and original because no two fishes are exactly alike, particularly at a given moment in time, place, orientation, age, maturity, activity, color, and other characteristics. As Greenberg's affidavit notes, an underwater photographer and a fish are both constantly moving in a fluid environment.

The Society's Director of Photography for some twenty years, Robert Gilka, says that the Society considered every photograph of fishes and undersea creatures that it used was creative and original.

The Society may contend that Cutler's illustrations of the disputed fishes are not copied but are "original." Any reasonable observer, however, applying the legal standard set forth above, could only conclude that the Greenberg originals were plagiarized.

E. Cutler Copied the Greenberg Photographs of Fishes

Greenberg's Redband Parrotfish is shown through a special camera lens that distorts its natural profile. The fish is in a particular posture and is caught by Greenberg's artificial light that enhances its color. Cutler said "I'm sure it did" when asked if the Greenberg photograph had anything to do with his inclusion of a Redband Parrotfish in the GeoPack product. The comparative exhibits leave no doubt that Cutler's copy is substantially similar to the Greenberg photograph. See Exhibit D.

Greenberg's Stoplight Parrotfish is shown in a particular light, in a particular posture, in a particular act, and at a uniquely particular stage of development -- that of a "supermale." The

comparative exhibits show unmistakably that the Stoplight Parrotfish photograph was traced, and that the Cutler illustration is substantially similar.⁴ See Exhibit D.

The Greenberg photograph of a Green Moray captures a reclusive, snake-like creature (the moray is a fish) in a completely unique profile as it extends from its lair. The mouth, the angle of the head, the extension and bends of the body, the articulation of the dorsal fin -- all represent a specific and original moment in time and place. The comparative exhibits show plainly that Cutler's copy is substantially similar to the Greenberg photograph.⁵ See Exhibit D.

F. Cutler Copied Divers in the Greenberg Photographs

Any reasonable observer must conclude that Cutler copied the divers shown in two Greenberg photographs. The comparative exhibits allow no doubt on the question. Exhibit D.

Cutler testified that, in drawing the diver shown on the left in the GeoPack product, he thinned the arms and legs. Such a disparity is trivial. Everything else about the diver in Cutler's illustration is an obvious tracing of Greenberg's diver: arm and hand positions, angle of the head, leg positions, fin positions, the arrangement and position of the tanks, and more. The

⁴ At page 50 of "The Living Reef," two Stoplight Parrotfishes are depicted in wholly different environments and presentations, and at wholly different stages of maturation. Cutler had a choice, and he chose to copy the less common "supermale" on the left. Ex. A, Attachment 1.

⁵ Cutler's artwork in the GeoPack product is identified only as "Moray Eel." The Court is urged to see page 83 of "The Living Reef" on which Greenberg's photograph of a Yellowtail Moray is immediately adjacent to a Green Moray. Cutler not only copied the essence of the Green Moray; he gave it a speckled skin exactly as shown in the adjoining photograph. The addition of speckles on the skin does not diminish the substantial similarity of the Cutler illustration to the Green Moray photograph. Indeed, the plagiarism is all the more cavalier and deliberate. "[A]n infringement ... includes also the various modes in which the matter of any work may be adopted, imitated, transferred, or reproduced, with more or less colorable alterations to disguise the piracy." Universal Pictures Co., Inc. v. Harold Lloyd Corp., 162 F.2d 354, 360 (9th Cir. 1947).

Cutler copy of the diver on the right is so similar that it could only have been literally traced from the original. Exhibit D.

Cutler's propensity to copy is underscored vividly by his depiction of a slate pencil urchin, in the lower-left-hand corner of his pencil sketch. Exhibit G. That illustration is not at issue here; the Cutler sketch was taken from a book published by the Audubon Society. The Greenbergs prepared an overlay that matches the original Audubon illustration with Cutler's. Exhibit F, Attachment 1. The copying, involving a creature whose numerous spines are in constant motion, is the same size and almost exact, and can only be seen as a deliberate tracing. The slate pencil urchin comparison demonstrates still more that any claim by Cutler to originality in the disputed illustrations is hollow.

G. The Legal Test for Substantial Similarity is Satisfied

In applying the legal test for substantial similarity, the Court should be guided in particular by the standard enunciated by Judge Hand, that "the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal [of the original and the copy] as the same." Peter Pan Fabrics, Inc., 274 F.2d at 489. That is surely the case here. The test articulated by the Eleventh Circuit is satisfied as well, because an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work. Original Appalachian Artworks, Inc., 684 F.2d at 829.

Moreover, the copying by Cutler encompassed the original, expressive qualities of the Greenberg photographs, as those qualities are set forth in detail in this memorandum.

H. The Society's Affirmative Defense of Fair Use is Invalid as a Defense

In its answer to Count I of the amended complaint, the Society asserted an affirmative defense of fair use, with no specificity of any kind in fact or law. "If an affirmative defense is insufficient on its face, or comprises no more than bare bones conclusory allegations, it must be stricken." Flasza v. TVT Holland Motor Express, 155 F.R.D. 612 (N.D.Ill. 1994). Rule 12 (h) (2) provides that an objection for failure to state a legal defense to a claim may be made at the trial on the merits, and this dispositive motion so qualifies. Additionally, the Court may order any insufficient defense stricken on its own initiative at any time. Rule 12 (f).

Fair use is a mixed question of law and fact. Harper and Row Publishers, Inc. v. Nation Enterprises, 105 S.Ct. 2218, 2230 (1985). The Copyright Act identifies four factors that may serve as a defense to infringement, and those factors are not exclusive. See 17 U.S.C. § 107. The Society's conclusory assertion of fair use fails to identify any factor enumerated in the statute, or any other factor, or any factual or legal basis for such a defense, and the defense should be stricken.

(In any event, a party asserting fair use as a defense carries the burden of proof as to all issues related to the defense. American Geophysical Union v. Texaco, Inc., 60 F.3d 913, 918 (2d Cir. 1995)).

COUNT II

In 1990, the Society published in its monthly magazine, as part of an article on coral reefs in the Florida Keys, a spectacular stand-alone photograph by Greenberg of a sea fan. The Society transferred copyright to that photograph to Greenberg. In 1995 the same photograph appeared

(not merely a copy, but the same photograph), completely without Greenberg's knowledge or consent, in a promotional sheet for the Society's Jason Project. The Greenbergs' comparative presentation in Exhibit D speaks for itself. The infringing use of the photograph in 1995 is more egregious because the Society cavalierly "flipped" the photograph and "cropped" the photograph to achieve a particular effect.

The Society's wholly conclusory assertion of de minimis and fair use as defenses to infringement with respect to Count II should be dismissed as legally insufficient defenses for the same reasons set forth above with respect to Count I. Alternatively, it is the Society's burden to establish such defenses.

CONCLUSION

It is unfortunate, to say the least, that a single photographer who operates his business out of his home, and who has rendered distinguished service to the National Geographic Society over four decades, is forced to challenge infringements of his copyrights by the Society.

But the record is clear. There is no genuine issue as to any material fact, and the plaintiffs are entitled to judgment as a matter of law on liability as to Count I and Count II of the Amended Complaint.

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Certificate of Service

I hereby certify that a copy of the foregoing memorandum in support of plaintiffs' motion for partial summary judgment was served by hand on Valerie Itkoff, Esq., Weil, Gotshal & Manges LLP, 701 Brickell Avenue, Suite 2100, Miami, FL 33131; and by Federal Express on Robert G. Sugarman, Esq., Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York NY 10153 this 30th day of September, 1998.



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