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BY FEDERAL EXPRESS

November 14, 2000

Clerk of the Court
United States Court of Appeals
Eleventh Circuit
ATTN: Jenifer Alexander
56 Forsyth Street, N.W.

Re: Greenberg vs. National Geographic Society
Case No. 00-10510-C


Dear Clerk of the Court:

We represent the Appellants in the above-referenced matter. This will respond to a Memorandum from the Court, dated October 26, 2000, which directed the parties to take various actions to assist the Court.

The Memorandum directed the parties to provide the Court with copies of "any agreements between Greenberg and the National Geographic Society in which Greenberg agreed to permit the Society to use his photographs in National Geographic Magazine." Those documents are enclosed as exhibits to an affidavit prepared by Jerry Greenberg.

The Memorandum also directed the parties to file supplemental briefs on two issues specifically set forth in the Memorandum by the Court. The Appellants' brief on those issues is enclosed.

Respectfully submitted,


Norman Davis

Enclosures

copies: Counsel of record

DOCKET NO. 00-10510-C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JERRY GREENBERG and IDAZ GREENBERG,
Plaintiffs/Appellants

vs.

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

Defendants/Appellees.

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

Supplemental Brief of Jerry Greenberg and Idaz Greenberg

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**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

Aronberg, David

Beck, Joseph

Davis, Norman

Greenberg, Jerry

Greenberg, Idaz

Lenard, Joan, U. S. District Judge

Mindscape, Inc.

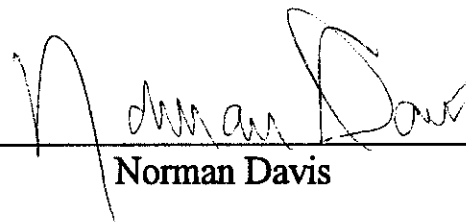
National Geographic Enterprises, Inc.

National Geographic Society

Steel Hector & Davis LLP

Sugarman, Robert

Weil Gotshal & Manges LLP



Norman Davis

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I.

**Congressional Intent as to the
Presumptive Section 201 (c) Privileges**

**A. The House Committee Report is Explicit in Outlining,
with Respect to Individual Contributions to Collective
Works, What Lies Outside the 201 (c) Privileges**

In its October 26, 2000 Memorandum, the Court directed the parties and amici to discuss the following specific language contained in H.R.Rep. No. 94-1476 with respect to the House committee's intent¹ in drafting Section 201 (c) of the Copyright Act

Under the language of this clause . . . **the publisher could not** revise the contribution itself or **include it** [the contribution] **in a new** anthology or entirely different magazine or other **collective work**.

(Emphasis and bracketed material added by the Court). The Court's use of emphasis in that quotation is appropriate: a publisher has only the narrowest of privileges, and only presumptively. The prohibition against including a contribution in a new collective work emerged from a legislative process that in the early stages limited a reproduction privilege solely to the original work containing the author's contribution, and painstakingly evolved into the still-limited presumptive privileges that now appear in

¹ The Senate committee report adopted exactly the same language of intent. See 8 Melvin and David Nimmer, NIMMER ON COPYRIGHT, App. 4A-17.

Section 201 (c). In the 1963 bill prepared by the House committee, the draft of Section 201 (c) limited the presumptive privilege only to “publishing the contribution in that particular collective work.” ASMP Br., Ex. A. at 5.² The bill was altered by the committee in 1964 to read “only the privilege of reproducing and distributing the contribution as part of that particular collective work and any revisions of it.” That language was ambiguous, according to one of the author representatives, Harriet Pilpel, who advocated that revisions should be limited to the particular collective work in which the contribution first appeared. *Id.* at 8, 10.

The language that now appears in Section 201 (c) was stated first in the 1965 revision bill, which added the provision “any revision of that collective work [not to the individual contribution] and any later collective work in the same series.” (Brackets added.) The excerpt quoted above by this Court from the final committee report provides an explication of the final changes. Any revision or “later collective work in the same series” cannot be used in a “new” collective work or an “entirely different” collective work (both terms appear in the report).

² For convenience, citations to the House report are to pages in Appendix A of the brief filed by *Amicus Curiae*, American Society of Media Photographers, Inc. The appendix contains quotations from relevant portions of the House report.

B. The Complete Geographic Product is “New,” “Entirely Different,” a “Collective Work,” and Thus is Outside the Section 201 (c) Privilege Congress Intended

Each of the 1200+ monthly magazines in the Complete Geographic product satisfies the statutory definition of “collective work” in Section 101 of the Act.³ No one disputes that contention. In the language of Section 101, each monthly issue was “selected, coordinated or arranged” (emphasis added) in such a way that each resulting monthly magazine constituted an original work of authorship. Similarly, the Complete Geographic product is a collection of collective works, which also satisfies the statutory definition in Section 101 by the manner in which the collection was selected, coordinated or arranged. See Initial Br. at 30. (Even if regarded as an anthology of collective works, the definitional statute is still satisfied and the committee’s prohibitory language applies to the anthology). Moreover, the Complete Geographic product qualifies as an original work of authorship on other grounds than stated in the definition, as set forth *infra*.

The next inquiry is whether the Complete Geographic product is “new” or “entirely different” as Congress intended in its prohibition and as Section 201 (c) states.

³ Section 101 defines a collective work as “a work formed by the collection and assembling of preexisting materials . . . that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term ‘compilation’ includes collective works.”

The Complete Geographic product, which includes the Greenberg photographs, is not “part of *that* particular collective work” as referenced in Section 201 (c), it is not a “revision of *that* collective work,” as contemplated in that section, and it is not a “later collective work in the same series,” the concluding phrase in Section 201 (c). (Emphasis added.) The “same series” could only contemplate some later single issue of the monthly magazine. The new collection or anthology at issue is not in the *same* series, because such a collection or anthology of 1200+ monthly issues never existed before as part of *any* series.⁴ Whether a work is new is largely an empirical question. The Complete Geographic product is “new” or “entirely different” because it never existed before. The label on the product box, placed there by the Society, says so. The Society admitted under oath, in its registration filing with the U.S. Copyright Office, that the product is new. All of the monthly collective works placed in the product had

⁴ The Society’s constant and improper references to microfilm and microfiche (items never placed in the record for comparative analysis) are directly contradictory of the Society’s admissions in its public filing that the Complete Geographic product is new. There is *no evidence* in the record that such archiving materials were used, or were used in a “series,” or could be compared in any way to the Complete Geographic product. The Society placed no such materials in the record, Greenberg never had an opportunity for discovery on the matter, and the district court did not consider such archiving techniques in ruling on the summary judgment motion below. Moreover, as noted in prior briefs, microfilm archiving enjoys express, limited protection in Section 108. In any event, Greenberg contends that such archival reproduction bears no resemblance, legally or factually, to the Complete Geographic product.

been published in the year 1996 or earlier. The registration form said that the new work – the CD-ROM product – never existed before 1997.

**C. “Originality” in the Infringing Work is
Not Required for Infringement to Exist**

At bottom, to prevail in his infringement claim Greenberg does not have to demonstrate that the Society’s⁵ new product embodies sufficient originality to be copyrightable (although he has done so), because the copyrightability of the *infringing* work, or lack of it, is not an element of copyright infringement. “[T]o establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.” Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991). Greenberg’s ownership of valid copyrights in the photographs at issue is unchallenged, and the copying of all elements of his photographs is undisputed. Section 106 of the Copyright Act reserves to Greenberg the exclusive right to produce his work and to distribute it. The Act says that “[a]nyone who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright” 17 U.S.C. § 501 (a). Greenberg’s rights have been violated here.

⁵ As in prior briefs, the term “Society” is intended to encompass all of the Defendants/Appellees.

An infringer does not evade liability for infringement by demonstrating that his infringing work is copyrightable -- or not copyrightable. It is simply not part of the infringement equation. Infringer Brown in, say, Missouri, may copy the Greenberg photographs into Brown's new book and sell it openly on the market with no intention of seeking copyright protection for the new book because he simply doesn't care about such protection. Nonetheless, Brown's act of copying and distributing the Greenberg photographs without consent constitutes infringement. "Pirate" radio stations infringe copyrighted musical selections with regularity, and with total disregard for the copyrightability of what they do. It is the copying and republishing of protected works by the Society that constitutes infringement.

To be sure, the Copyright Act provides various defenses for what would otherwise be an infringing act. The only defense ever asserted by the Society is that it is privileged under Section 201 (c) to republish the photographs. That defense fails because none of the three privileged avenues of reproduction applies here. The Society has never asserted any other defense -- fair use, license, estoppel, innocent intent, substantial similarity -- and the Society has thus waived any right to assert any other defense. (None would apply in any event.)

**D. Even if “Originality” Were Required in
the Complete Geographic Product, It Exists**

If the Court should conclude that the Complete Geographic product must contain sufficient originality for copyrightability in order for infringement to exist, the originality is there. The Appellants discuss these elements at length in their briefs, see Initial Brief at 30; Reply Brief at 8, and to minimize repetition those arguments will be condensed here.

The collection of 1200+ monthly magazines is unprecedented and original. The selection and arrangement components are detailed in Greenberg’s Initial Brief at 31-32. As for creative components, the product includes a moving logo of a globe with thematic music, an Eastman Kodak advertisement with sound, a multi-media sequence of moving covers (the “Moving Covers Sequence” that is the basis for Greenberg’s other claim), and various software programs that serve as a search engine and that provide for interaction with the Society’s Internet site. The Society has conceded that these items are separately copyrightable, and defendant Mindscape separately claimed and registered copyright in incorporated software that it created. All of these creative additions appear to each of the 30 CD-ROM disks in the product, and are visible to a user each time a disk is opened.

When the creative elements are combined with the editing elements, the level of originality in the Complete Geographic product far exceeds the required threshold.

E. Conclusion

The legislative intent expressed in the final report of the House committee, and set forth for the parties by the Court with boldface emphasis, is easily read and understood. The Appellees have infringed Greenberg's photographs by copying them and republishing them in a new collective work, which unquestionably violates Congressional intent as to Section 201 (c).

II.

**The Second Issue Posed by the Court Further Signifies
That the National Geographic Product is a New
Work and Outside the Privileges in Section 201 (c)**

The Court directed the parties and amici to discuss the following issue with respect to the application of Section 201 (c) of the Copyright Act:

Whether a change in the medium (from print to digital) for the collective set of individual issues of the Magazine (each of which constitutes a collective work), integrated together with the Moving Sequence and the Program constitutes a new product, in a new medium, in a new market, that transcends the publisher's privilege in Section 201 (c).

The issue is whether those factors identified by the Court constitute the Complete Geographic product as a new collective work, which Congress said would not be privileged under Section 201 (c). This brief by the Appellants, in Part I, *supra*,

contends that the product is unquestionably a collective work, and that it is “new.” The Court’s inquiry sets forth additional reasons why the product is “new” and is outside the limited publisher’s privilege stated in Section 201 (c).

**A. The Copyright Act is “Medium Neutral”
Only for Purposes of Copyrightability**

In order for works of authorship to be eligible for copyright under the Copyright Act, they must be “fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” 17 U.S.C. Section 102 (a).

Thus it is not important whether the form, manner, or medium of “fixation” be in words, numbers, pictures, or any other graphic method, so long as it is capable of perception directly or by means of any machine or device, in the words of the Act, “now known or later developed.” No fixation, no copyrightability.

However, medium neutrality is irrelevant to an analysis of the presumptive privileges afforded in Section 201 (c). Under the undisputed facts of this case, the change in medium and market matter a great deal.⁶

For a very long time, courts have held that unauthorized uses of copyrighted material involving new media and technology are controlled by the language of

⁶ The very concept of derivative works under the Copyright Act embodies new and different media.

agreements and the knowledge of the parties at the time of entering into such agreements. In short, a use in a new medium known by the parties at the time of contracting is not infringing; whereas, an unauthorized re-use in a new medium that was inconceivable at the time of contracting is infringing. See, e.g., Rey v. Lafferty, 990 F.2d 1379 (1st Cir. 1993); Murphy v. Warner Brothers Pictures, Inc., 112 F.2d 746 (9th Cir. 1940). Almost always, such issues have arisen in the context of a licensing arrangement between the owner of the copyright and some other party.

Here, no licensing agreement between Greenberg and the Society, with respect to the Greenberg photographs, ever existed, and none of the parties has ever suggested it. Even if such an agreement had existed in the earlier years of the relationship, it was voided by the transfer to Greenberg of all rights in his photographs in the two conveyances executed in 1985 and 1989.

In this case, of course, none of the parties knew about, thought about or even dreamed about CD-ROM technology when Greenberg created and sold his works to the Society. The works were intended to be used only in the magazine issues for which they were created, and no further uses by the Society were anticipated. See Greenberg Affidavit.

**B. The Greenberg Agreements
With the Society Regarding Photographs**

The Court instructed Greenberg to provide, under separate cover, copies of any agreements between Greenberg and the Society “in which Greenberg agreed to permit the Society to use his photographs in National Geographic Magazine.” Various documents in response to the directive have been filed separately with the Court. Those documents are identified with particularity in an affidavit by Jerry Greenberg to which the documents are attached.

Greenberg was engaged on four occasions to take photographs that subsequently were published with particular articles in the Society’s monthly magazine. The “agreements” as to the first three articles are essentially unilateral statements by the Society to which Greenberg acquiesced. The understandings as to the fourth article, contained in a 1989 agreement, are more detailed and elaborate, particularly as to who would own rights to the photographs to be taken for the magazine article. Although Greenberg now and then through the years raised concerns regarding ownership and control of his photographs, it is obvious in the filed documents that he was not sophisticated about such arrangements. Greenberg concedes that the Society initially owned all rights to the photographs at issue in this litigation.

On November 15, 1985, Greenberg wrote to ask the Society to assign to him copyrights in all photographs taken by him that had been published in the magazine (at that time, in three articles). In the letter, Greenberg said that the copyright assignment would have no effect on the Society's re-use of the published photographs, because Greenberg believed that any re-use would involve a re-printing of a particular monthly magazine. See Greenberg Affidavit, ¶ 9. Moreover the original contracts with the Society "did not even remotely consider digital reproduction in a for-profit marketplace." Id. On only two occasions did the Society re-print in the Magazine a Greenberg photograph from one of the four published articles, and on both occasions Greenberg consented and was paid. Id.

On December 18, 1985, the Society effected the transfer. The notarized assignment document was executed by the Corporate Counsel, and it assigned "all right, title and interest, including copyright" to Greenberg. The transfer of rights was unconditional. No right of any kind was reserved by the Society.⁷

In 1989, Greenberg and the Society executed an agreement regarding photographs he would take for an article that eventually was published in the April

⁷ Principles of contract law generally control copyright assignments. NIMMER, supra at § 10.08. "The distinguishing feature of a partial assignment is a manifestation of intention to make an immediate transfer of part but not all of the assignor's right . . ." Restatement, Contracts 2d § 326, Comment b. The Society's 1985 assignment manifested no such intention.

1990 issue of the monthly magazine. In paragraph 5 of the agreement, the parties agreed that the Society initially would own all rights to the photographs. However, in paragraph 5 (a), the agreement provided that, after publication in the monthly magazine, all rights to the published photographs would automatically transfer to Greenberg, subject to certain conditions that were unrelated to the substance of the conveyance. The transfer was unconditional. The agreement document contains no reservation of any right by the Society to re-use any of the photographs. The two conveyance documents were placed in the record of this case at an early stage. R1-24-Ex. B. The Society has never challenged the validity of the documents or the ownership of copyright in the Greenberg photographs. The Society's only position with respect to the photographs is that it was privileged under Section 201 (c) to republish them in the Complete Geographic product.

Thus, whatever initial understandings may have existed as to the Society's use of the Greenberg photographs were negated by the 1985 and 1989 transfers to Greenberg.

C. Because The Complete Geographic Product is a New Product, in a New Medium, in a New Market, It is a New Collective Work and the Inclusion of Greenberg's Photographs is Not Privileged

That the Society is exploiting a new market is clear. There is no question that the Complete Geographic product is in a new medium. It is digitalized, interactive, with moving-fading-morphing elements, music, and searching capability that never existed in any of the monthly Magazines. There is no question that it was intended for a new market: the public (distinguished from a members-only tradition) and the for-profit market.

The Society that Greenberg dealt with, from 1960 to 1990, regarding his photographs that were used in the magazine, was a different institution. Staunchly not-for-profit, the Society in those days was in effect subsidized in its efforts by American taxpayers.

Today, Greenberg's photographs are swept away in unknown (to Greenberg) licensing arrangements, in a digital medium that no one can seriously believe was in his remotest contemplation when he signed-on to shoot photographs for the Society's magazine, and in a retailing and Internet-oriented marketplace that marks a truly

revolutionary departure from what the Society could have dreamed of two or three or four decades ago.⁸

D. Conclusion

As discussed in this brief and earlier ones, Greenberg contends that the Complete Geographic product, for a host of reasons, is a “new” collective work exactly as comprehended by Congress when its legislative intent was explained. The changed medium and marketplace reflected in the Court’s directive to the parties amplifies the “new” and “entirely different” character of the product. Apart from the fact that the Society has no rights at all to the photographs, all of the factors manifesting a “new” collective work transcend the Society’s privilege under Section 201 (c).

STEEL HECTOR & DAVIS LLP
Attorneys for Appellants

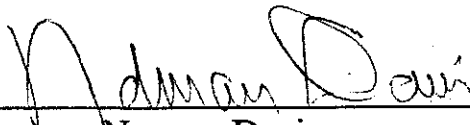


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⁸ The First Circuit’s discussion of “new uses” in Rey v. Lafferty, supra at 1387-89, is useful for this analysis.

Certificate of Service

I hereby certify that a copy of the foregoing Supplemental Brief was served by Federal Express on Robert G. Sugarman, Esq., Weil Gotshal & Manges LLP, 767 Fifth Avenue, New York, NY 10153; Joseph M. Beck, Esq., Kilpatrick & Cody LLP, 1100 Peachtree Street, Suite 2800, Atlanta, GA 30309; and by mail on Patricia A. Felch, Esq., Banner & Witcoff, Ltd., Ten South Wacker Drive, Suite 3000, Chicago, IL 60606 this 14th day of November, 2000.



Norman Davis

DOCKET NO. 00-10510-C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JERRY GREENBERG and IDAZ GREENBERG,

Plaintiffs/Appellants

vs.

NATIONAL GEOGRAPHIC SOCIETY, et al.,

Defendants/Appellees.

AFFIDAVIT OF JERRY GREENBERG

1. My name is Jerry Greenberg. I live at 6840 S. W. 92nd Street, Miami, Florida 33156. The statements in this affidavit are based on my personal knowledge.

2. Over a period of three decades, I handled various photographic assignments for the National Geographic Society ("the Society"). Photographs I took for those jobs were published on four separate occasions in articles in the Society's monthly magazine ("the Magazine").

3. Those articles were "Key Largo Reef: America's First Undersea Park" and "Florida's Coral City Beneath the Sea," January 1962 issue (two articles within one month's issue); "Sharks: Wolves of the Sea," February 1968 issue; "Buck Island -- Underwater Jewel," May 1971 issue; and "The Coral Reefs of Florida are Imperiled," April 1990 issue.

4. I have been directed to provide to the Court copies of any agreements in which I agreed to permit the Society to use my photographs in the monthly Magazine. To the best of my knowledge, the documents attached to this affidavit are responsive to that request.

5. Two documents memorialized my agreement with the Society regarding the "Key Largo Reef" article published in January 1962. Those documents are attached to and incorporated in this Affidavit as Exhibit A. On June 6, 1960, I wrote to Bill Garrett, then the Assistant Illustrations Editor of the Magazine, and enclosed an expense estimate for the job. In that letter I also raised issues about the re-use of any published materials, expressing my intent to retain some control over re-use. Garrett responded soon thereafter in an undated letter in which he did not respond to my concern but unilaterally asserted rights on photographs that would be used in the upcoming article. I did not object at the time, but all rights to the photographs were later conveyed to me, as discussed below.

6. When I began a relationship with the Society as a contributor to the Magazine around 1960, and for many years thereafter, the Magazine was distributed only to Society members and the Society was purely a nonprofit institution. No other "market" for the photographs provided by me for the four articles published in the monthly Magazine was ever contemplated. Had I had any intimation that the Society would in later years expand its horizons for the Magazine into for-profit enterprises and digital products, I would have approached the jobs they offered me with a different set of expectations. The agreements for photographs for articles were relatively informal and were based on trust and fair play. In my mind, the Society owned my photographs that were published in articles in the Magazine until such time as all rights in those photographs were conveyed to me, as explained below.

7. The agreement as to the "Sharks" article published in February 1968 was covered in a letter to me from Robert Gilka dated June 20, 1963. The letter is attached to and incorporated in this Affidavit as Exhibit B. The agreement vested ownership of my photographs in the Society until such time as all rights in the photographs were conveyed to me, as explained below.

8. The agreement as to the "Buck Island" article published in May 1971 was covered in a letter to me from Gilbert Grosvenor dated August 8, 1969. The letter is attached to and incorporated in this Affidavit as Exhibit C. The agreement vested ownership of my photographs in the Society until such time as all rights in the photographs were conveyed to me, as explained below.

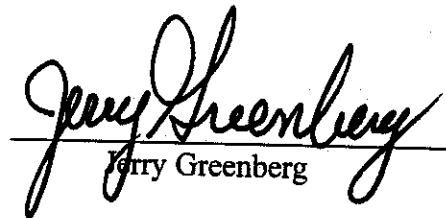
9. On November 15, 1985, I wrote to Bill Garrett, Editor of the Magazine, and asked for a conveyance from the Society to me of copyright with respect to photographs of mine that were published in the three articles described above. The letter is attached to and incorporated in this Affidavit as Exhibit D. The letter identified the affected photographs in detail. In the letter I stated that the copyright assignment would have no effect on the Society's re-use of the published photographs because "this provision was covered in the original contracts for each assignment." The original contracts did not even remotely consider digital reproduction in a for-profit marketplace. As a photographer unschooled in copyright law I believed that the Society might re-use the photographs by re-publishing the particular magazine containing the photographs. As far back as 1960 (see my letter in Exhibit A) I had expressed concern about controlling the re-use of my photographs, certainly with little or no knowledge of how such things worked. On two occasions in my entire relationship with the Society, the Society reprinted in the Magazine

photographs of mine that had appeared in previous articles in the Magazine, and on both occasions I consented and I was paid for the uses.

10. In response to that letter, on December 18, 1985 the Society assigned to me "all right, title and interest, including copyright" in the photographs I had identified in my November 15, 1985 letter. The December 18, 1985 assignment is attached to and incorporated in this Affidavit as Exhibit E. The assignment was executed under oath by Suzanne Dupre, Corporate Counsel for the National Geographic Society. I subsequently registered the assignment with the U.S. Copyright Office and timely renewed copyrights in the photographs. No one at the Society discussed the assignment with me prior to its execution.

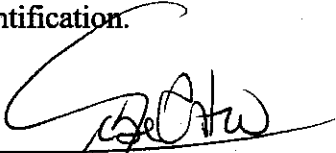
11. The agreement as to the "Pennekamp Reef Park" article published in April 1990 was covered in a letter to me from Kent Kobersteen dated June 14, 1989. The letter is attached to and incorporated in this Affidavit as Exhibit F. The language in paragraph 5, upon creation of the photographs for the article, placed all rights, including copyright, in the Society, subject to provisions in the letter that followed. In paragraph 5 (a), the agreement provided that "all photographs will be returned to you along with all rights to said photographs" under conditions listed in the letter. After the return of "all rights" to me, the Society was permitted to retain copies of some of unpublished photographs taken for the photo-shoot "for reference purposes only" in the Society's library.

AFFIANT SAYS NOTHING FURTHER.


Jerry Greenberg

STATE OF FLORIDA)
) ss
COUNTY OF MIAMI-DADE)

The foregoing instrument was acknowledged before me this 13 day of November, 2000, by Jerry Greenberg, who was sworn and who said that the information set forth above is true and correct. Jerry Greenberg is personally known to me, or produced DL 5651-432-21-3A as identification.



Notary Public

My commission expires:



Felipe E. Castro
MY COMMISSION # CC919304 EXPIRES
March 16, 2004
BONDED THRU TROY FAIN INSURANCE, INC.



RECYCLED PAPER



June 6, 1960

DISTRICT 7-3330

Mr. Bill Garrett
National Geographic Society
Washington 6, D.C.

Dear Bill:

Thanks for your phone call of Friday regarding the Reef Diving Essay. I appreciate your faith in me and will do everything in my power to give the magazine the finest underwater illustrations it is humanly possible to produce.

I have enclosed an expense schedule which will give you an idea of what is involved in a day's work. I figure that it would cost about \$110.00-125.00 a day for diving or active stand by. This would apply only to days actively involved on the story. Naturally, the days when we don't dive due to bad weather, there are no charges involved. I figure we could dive about 3-4 days in a row. The price of \$110.00-\$125.00 a day also pays for one model, the price of diving air or a rented compressor is not included in this price. I have listed a complete schedule of expenses so you can see how the final figure is broken down.

At this point I would like to go over two items for you. 1) If a magazine, say in the next month or so, wants to use some illustrations from my own photo library for an underwater article, what are my obligations to National Geographic? Would there be any conflict? 2) As you mentioned on the phone, the magazine would retain possession of all of the originals which were used in the story. I also understand that any material not used would be returned to me for my own use. This is agreeable with me. I would like to work out an understanding with you in regards as to the re-use of the published material is concerned. I would work out an arrangement where by all requests for this material would be channeled through me. This way I would have some control as to its use in textbooks, encyclopedias, etc. What I want to avoid is a situation where I would be competing against myself. I'm sure, as a working photographer, you can understand my problem and pass on this slight advantage to me. In appreciation of the above consideration I would like to put in your hands my entire photo library for use in the final layout of the forthcoming story. This consists of about 135-35mm. and 37-Rollei contact pages as well as about 200 prime color slides. This is the output of about eight years of photo-diving.

I am now working on a housing for the Veriwide and should have it ready in about 7-10 days. As you know this camera takes in an angle of view of 100° (about 80° web). With it I can do the following: 1) Use it for one shot, 2) Put it on a tripod for a two exposure panorama view which will yield about 160°, 3) Take the first color photographs of a large section of coral reef at night using flash bulbs. The last two ideas would make beautiful goldouts. Later on this week I am going to send you several 8 x 10 Type C prints to give you an idea of the many variations possible in color balance.

Sincerely,

Jerry Greenberg
6840 S.W. 92nd St.
Miami 56, Fla.

National Geographic Magazine

WASHINGTON 6, D. C.

W. E. GARRETT
ASSISTANT ILLUSTRATIONS EDITOR

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

Jerry,

By now you know the good news that the Editor has approved the assignment on Key Largo for you. I have received your list of expenses and gone over them. In view of the unusual problems of working underwater I feel this is reasonable even though it adds up to over a hundred dollars a day.

We will pay a premium of double the normal page rate because of the difficulty of the job. This would amount to \$200.00 a page or \$100.00 minimum per picture used in color. Considering a minimum size of 8 color pages we would guarantee you \$1,600.00 for the job. I would estimate that a successful job would occupy no less than 16 color pages, and as high as 24.

All pictures used in the story plus a few for file selects would become the property of the National Geographic Magazine. After publication in the Magazine all rights on those pictures not held by us would be yours to sell.

Insofar as The Society is concerned, you will undertake this assignment as a free lance agent and independent contractor, and not in any sense of the word as a person employed by the Society, directly or indirectly. Further, acceptance of financial and other considerations outlined in this letter shall constitute an absolute release to the National Geographic Society of all responsibility for personal injury, and/or death, which may arise out of or result from this assignment.

Enclosed is a check for \$1,500.00 as an advance towards expenses on the assignment. Please keep records for our Auditing Division. The enclosed daily expense slips are used by the staff, and do have the advantage of providing a system. Use them if you like. As this money is used notify us and we will try to guess how much more, if any, will be needed within reason to produce a top story. If you have any questions on large expenses that you are in doubt about call me and I will advise you.

Your sketches on the potential pictures for the story make very good sense. As you know from our conversations the key picture will be a superwide shot. This may be two VeriWide shots side-by-side or even three or four. I would like to be there to work with you on it, but I'm not counting on it.

The night shot with the lanterns lends itself to a dramatic picture, but it has to be more than just the lantern and man. In other words, it must be obvious that it is part of a reef story and not in a pool.

The brain coral looks promising.

The sled picture is excellent. It indicates possibilities for recreational use of the area. In this same category would be the picture of the diver using your Rollei housing with the ring light on the front.

For a model be on the lookout for a full-breasted mermaid.

Let's plan to do a spread with 8 to 12 different types of coral that are most common or most interesting. If you do not know which to select let me know and I will talk to a coral expert and make suggestions. This would be in the nature of a catalogue of coral. Those represented in other large pictures in the series should be left from this collection.

Try getting on top of one of the lighthouses and shooting down into the water. This is just a wild idea, but you might try a Panon or wide angle that would cover from the horizon (with a freighter moving across a sunset or sunrise) to the base of the light scaffold looking straight down onto a shallow reef. If you look down into the water (calm night) from this perch would you be able to see a model lighted by a flash or torch underwater? If so, this would make quite a shot. Perhaps having a small boat in the middleground and a diver on the bottom lighted with flash would be successful. This may all be impossible. Even if the diver were only 5 feet below the effect would be there.

If there is anything to be shown do not hesitate to rent a plane for an aerial of the reef.

I'm going to see a park service man here who is well-informed about this park, and will pass on any ideas that come from him.

I'll try to answer your questions. We cannot restrict use of your files, but would expect that you not produce a story on the reefs for another magazine. *(right down)*
SOON

The proposed author for the article is Mr. Charles Brookfield. We will see that you two get together as soon as his assignment is firm.

Mr. Jerry Greenberg

--3--

Mr. Brookfield knows of a wreck or two in this area that might spice up the photographic coverage a bit. If there are any known wrecks in the area be sure to get coverage.

I agree it would be best to rent a compressor.

Regarding a model wouldn't it be easier, cheaper and safer to hire an assistant than to pay a daily rate for a model. This would give you an assistant and diving buddy as well as a model. You might look into the possibility.

If this letter raises any questions or leaves any of yours unanswered don't hesitate to ask me.

Please let me see your film as you go, rather than hold it all until the end. Let me know what film or equipment you might need that we can provide. As soon as the 120 size High-speed Ektachrome is available we will try to get it to you.

Best of Luck

*Bill
C.*

WEG:CLM
Enclosures
Air Mail



National Geographic Magazine

WASHINGTON 6, D. C.

ROBERT E. GILKA
DIRECTOR OF PHOTOGRAPHY

June 20, 1963

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

Dear Jerry:

Thank you for your letter about the shark project. I am turning over the transparencies and the art work to the Illustrations Division for evaluation.

I would like to have you plan to do the shark photography. Your outline seems to cover the project adequately but the illustrations people may ask for more emphasis in one place or another and may ask for photographs of new subjects.

We are prepared to offer you a minimum guarantee of \$3,200 for 16 pages of publishable photographs for the shark story.

We are also prepared to pay your expenses -- within reasonable limits -- in connection with your obtaining these photographs. We will forward a \$1,000 expense advance and we ask that you keep a detailed account of how this money is spent using the Geographic expense booklets which we will provide.

(Unused or unpublished photographs will be returned to you. After the publication of our Magazine story all rights on those pictures not held by us will become yours.)

The assignment will be termed complete when all photographs are in hand accompanied by satisfactory caption information.

You will undertake the assignment as a free agent and independent contractor. Acceptance of financial and other considerations outlined in this letter shall constitute an absolute release to the National Geographic Society of all responsibility for personal injury, and/or death, which may arise out of or result from this assignment.

Sincerely,



REG:cw



National Geographic Magazine

WASHINGTON, D. C. 20036

GILBERT M. GROSVENOR
VICE PRESIDENT AND
ASSOCIATE EDITOR

August 8, 1969

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



This is to confirm your assignment to do a story on the Buck Island Reef National Monument for publication in the National Geographic magazine.

As Mr. Garrett outlined in his letter of June 30, we want a 12-16 page picture essay with text blocks to accompany the photographs. We will pay you \$3,500 for publishable pictures and text information. If for any reason the story is unacceptable we will guarantee payment in the amount of \$1,500 for this work. In addition, we will pay expenses involved with this assignment including transportation to and from St. Croix and your home. Enclosed is an expense advance in the amount of \$1,000 which you and Mrs. Greenberg may use for your planned trip to the park at the end of this month to make contacts and do preliminary photography and research. You will be expected to account for these funds in the enclosed expense account booklets. If needed, additional expense money will be made available for the major part of the assignment which you will undertake next summer.

As agreed, the National Geographic Society will retain those photographs from this assignment that are published in the magazine for all other publications and purposes related to the Society's objectives. No additional payment for reuse of these pictures will be made. Also, we will retain one-time publication rights to those pictures published in the article which were picked from your files and not produced while on this assignment for the Society.

We will send you film and process it here. Please advise Mr. Gilka the types and quantity of film needed. Shipping cartons and caption booklets will be sent with the film. Should you need to borrow any equipment for use on this assignment I'm sure this can be worked out with Mr. Gilka.

Mr. Jerry Greenberg

Page 2

For the record, it should be understood that the Society cannot be responsible for your safety or for the safety of anyone working with you on this assignment. Please sign the copy of this letter that we enclose and return it to me.

As soon as we receive any material from the Department of the Interior for your use on this assignment we will forward it to you.

We offer our very best wishes for a successful assignment and look forward to the publication of your story in the National Geographic magazine.

Best regards,



Gilbert M. Grosvenor
Vice President and Associate Editor

jam

Enclosures



November 15, 1985

WE Garrett / Editor
NATIONAL GEOGRAPHIC MAGAZINE
Washington, D.C. 20036

Dear Bill:

Last July I was down in the Keys, finishing up Florida's Marine Wilderness for TRAVELER and I missed seeing you. Perhaps on your next trip into Miami for kudos or Mayans we will get together.

Because of your faith in me I produced three major assignments for the National Geographic Society. They were PENNEKAMP PARK (Jan.1962), SHARKS (Feb.1968 and BUCK ISLAND (May,1971). With this material available to us along with Idaz's art work, we have become successful mini-publishers.

I am concerned that photographs published in 1962, 1968 and 1971 will fall into public domain in 1990, 1996 and 1999. In order to protect my material used in our publications, I need to receive a re-assignment of copyright from the Society. With this document, I or my heirs will be able to re-copyright this photography (using the RE form) for an additional 28 years.

This re-assignment would have no effect on the Society's reuse of this material as this provision was covered in the original contracts for each assignment.

The material involved is:

January, 1962
Vol.121, No.1

photos on cover and
pages 58 thru 89

February, 1968
Vol.133, No.2

photos on cover and
pages 222-223, 225,
226-227, 238, 240-
241 and 251

May, 1971
Vol.137, No.5

photos on pages
674-675-676, 677,
678, 679, 680,
681, 682 and 683

Re-assignment of copyright should reflect the above material with appropriate date of copyright and registration number.

Thanks for any help in this matter.

Warmest personal regards,

Jerry Greenberg
SEAHAWK PRESS
6840 SW 92nd Street
Miami, Florida 33156

JERRY G.



RECYCLED PAPER

National Geographic Society

WASHINGTON, D. C. 20036

SUZANNE DUPRÉ
CORPORATE COUNSEL

December 18, 1985

Mr. Jerry Greenberg
SEAHAWK PRESS
6840 SW 92nd Street
Miami, Florida 33156

Dear Mr. Greenberg:

In reply to your letter of November 15th to Mr. Garrett, the National Geographic Society hereby assigns to you all right, title and interest, including copyright, in your photographs appearing in National Geographic Magazine, as follows:

-- January, 1962
Vol. 121, No. 1

Photos on cover and
pages 58 through 89

Registration No. B-960824
Date: March 22, 1962

-- February, 1968
Vol. 133, No. 2

Photos on cover and pages 222-223, 225,
226-227, 238, 240-241 and 251

Registration No. B-402772
Date: January 31, 1968

-- May, 1971
Vol. 139, No. 5

Photos on pages 674 through 683

Registration No. B-701984
Date: July 15, 1971

District of Columbia

Subscribed and sworn to before

me this 18TH day of

DECEMBER 1985

Jessie M. R. Bannan

Notary Public
WASHINGTON, D. C.

My Commission Expires January 31, 1988

Sincerely yours,

Suzanne Dupré

cc: W. E. Garrett, Editor



RECYCLED PAPER



National Geographic Magazine

WASHINGTON, D. C. 20036

June 14, 1989

KENT J. KOBERSTEEN
Assistant Director of Photography

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

Dear Jerry:

This letter, when signed by both parties, will constitute your agreement as a freelance photographer with the National Geographic Society ("NGS") to photograph Pennakamp Reef Park (#05738) for National Geographic Magazine.

1) This assignment will extend for 20 days. Your compensation will be at the rate of:

(a) \$350 per day for days spent shooting or in field research (i.e., research directly germane to producing the coverage); and

(b) one half of the above rate per day for days spent in travel (including arranging or waiting for travel); on standby, in the field or elsewhere; or in consulting with NGS editors ("editorial days").

2) Your compensation is subject to the following provisions:

(a) Work beyond the anticipated assignment days mentioned above will be compensated at the same daily rates as above. Should it become necessary to extend this assignment for additional days, you must get authorization to do so from the Director of Photography, the Assistant Director of Photography or the Illustrations Editor assigned to the project.

(b) The total compensation paid to you for this assignment will be applied against the page rate of \$300 a page for the National Geographic Magazine, or a minimum of \$100 a transparency, whichever is greater.

3) When working for NGS, you will carefully avoid doing similar work for publications which NGS would consider to be editorially competitive with it. You will advise NGS promptly of any possible conflict of interest that may develop. You also will take care not to grant any prepublication interviews or assist in any way in the preparation of any prepublication articles or other press coverage in any medium which would reveal the subject matter, editorial content or the scheduling of an assignment, article or story for the National Geographic Society.

Mr. Jerry Greenberg
(Pennekamp Reef Park/#05738)

-2-

June 14, 1989

4) By this Agreement you warrant to NGS that publication of any photographs taken by you on this assignment will not infringe upon any right of privacy, copyright or any other proprietary right of a third party.

5) 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) all photographs 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; (ii) it is understood that any necessary rights clearance or release for non-NGS publication is your independent responsibility; and (iii) NGS may make and retain copies of some of the photographs ("reference selects") for reference purposes only in its Illustrations Library;

(b) you grant to NGS without additional charge the right to use your name, likeness and biographical material in connection with the publication of any photographs retained by NGS under this Agreement;

(c) NGS may crop your photographs.

6) You undertake all work under this Agreement as an independent contractor. NGS assumes no responsibility for your health, safety or property or that of any person accompanying or assisting you. While on assignment in the field you will be covered by NGS's accident insurance policy, which provides a payment of \$200,000 to you in the event of total disability or to your beneficiary, specified below, in the event of death, and lesser coverage for other injuries. The policy also provides up to \$10,000 for excess medical coverage, i.e. for costs beyond those covered by your own personal accident and health coverages. The above coverage is restricted to you alone.

7) While you are on NGS assignment, NGS will pay or reimburse you for all reasonable expenses and will supply you with film and processing. At the close of this assignment you will provide NGS with a diary of your activities while on assignment, including an accurate and complete record of the people and places represented in your photographs. A final accounting of expenses, supplies, etc. for an assignment will be due to NGS no later than two weeks after the work on that assignment is finished. Failure to reconcile expense/supply accounts with NGS in a timely manner may impede payment of fees.

8) Your work on this assignment will not be considered complete until so indicated by the Illustrations Editor. At the end of the assignment you will deliver to NGS all photographs you have taken on this assignment as well as complete captions for your photographs. You will be available for a projection session with the editor to explain your work. If you are

Mr. Jerry Greenberg
(Pennekamp Reef Park/#05738)

June 14, 1989

called back for editorial consultation, you will be paid a fee of \$175 per day plus expenses.

9) This agreement cannot be modified except by written instrument signed by both of us.

If the foregoing is acceptable, please sign and return the enclosed copy of the Agreement to me.

Sincerely yours,
NATIONAL GEOGRAPHIC SOCIETY

By

Kent J. Kobersteen
Kent J. Kobersteen

Agreed to and Accepted:

Jerry Greenberg
Name
JUNE 14th 89
Date
431-523-822

Social Security/
Federal ID#
JERRY GREENBERG

Check to be Written
to the Order of

© JERRY GREENBERG
Credit Line to read
ALL RIGHTS RESERVED

IDA Z GREENBERG

Insurance Beneficiary
WIFE

Relationship to you
6840 SW 92 ST

MIAMI, FL. 33156
Address

(For NGS records):
Executed copy received:

Date

KJK/mac