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DIGITAL IMMERSIONS

OCCASIONAL INSIGHTS AND OBSERVATIONS FROM MARINE IMAGING SPECIALIST, STEPHEN FRINK,
WWW.STEPHENFRINK.COM

MONDAY, DECEMBER 15, 2008

Jerry Greenberg - Friend and Mentor and Champion of Photographer's Rights



It is a story I like to tell about a man who has become a very close friend over the years. The year was 1980 and I had just begun to get published in dive magazines when I got a call from Jerry Greenberg saying that he and Rick Fehse would like to take me to dinner.

Now, this was a big deal for a kid in Key Largo, for I had been highly inspired by the work Rick had been doing with underwater models in Skin Diver and the original Sport Diver magazines, and Jerry was my go-to guy for books and education on underwater photography. When I was living in Kona, fresh out of graduate school and trying to figure out how to make my first underwater photos work, Jerry's post cards showed me what artful application of artificial light should look like.

I wore through the pages of my first copy of MANFISH WITH A CAMERA with years of perusal, never imagining that I would end up living and diving in the marine wilderness Jerry first brought to national attention with his many publications about Key Largo and John Pennekamp Coral Reef State Park. (Fortunately in 2005 Jerry gave me a fresh copy, this one inscribed "To Steve: With best wishes and thanks for all your help these many years. Jerry Greenberg")

<http://stephenfrink.blogspot.com/2008/12/jerry-greenberg-friend-and-mentor-and.html>

STEVE FRINK
PG. 1

BLOG ARCHIVE

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 - ▼ December (5)
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 - Jerry Greenberg - Friend and Mentor and Champion o...
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 - Scuba Diving Magazine's Annual Photo Contest
 - The Power of RAW ... and Lightroom ... and a Great...
 - November (9)
 - October (10)
 - September (5)
 - August (3)
 - July (13)

ABOUT ME



STEPHEN FRINK

Stephen Frink is among the world's most frequently published underwater photographers with editorial work appearing in SCUBA

DIVING for whom he is Director of Photography and writes a monthly column on underwater photo trends and techniques. Frink has authored a coffee table book entitled *WONDERS OF THE REEF*, and teaches the Stephen Frink School of Underwater Digital Imaging in his home waters of Key Largo, Florida. He is also a Canon Explorer of Light, the only marine imaging specialist within this very elite group of photographers. Clients for assignment photography over the past 3 decades have included Canon, Nikon, Victoria's Secret, Aqua Lung, Oceanic, Scubapro, Mercury Marine,

But, back to that night at dinner with Rick and Jerry. The point was that I was getting published and they thought maybe I had legs in this business, and as such, maybe I should learn some of the rules, for my own protection and for the betterment of the photo industry. They were incredibly generous that night, explaining the principles of copyrighting one's images (slides, in those days), meeting deadlines, and as Jerry put it, always avoiding the peril of "believing in your own press releases". They also told me to never judge another photographer by their work you see published, as that is as much about design and art direction and the politics of advertising as it is about someone's own personal vision. There were a lot of other nuggets of wisdom that night, things I never forgot. Just as I never forgot their unselfish willingness to share with me.

Thinking of Jerry's early and unwavering belief in the power of copyright and his belief in the legal system, I am greatly saddened to see the final outcome of his long (11 year) battle with National Geographic. It all went back to a CD-ROM collection of all of the back issues of National Geographic called *The Complete National Geographic: 108 Years of National Geographic Magazine*. National Geographic used new technologies never imagined when Jerry shot his first photos for them, and they created a product that had terrific sales potential. The one issue was that they didn't necessarily own the rights to all the work contained within those 108 years of published pages, and the copyrights to Jerry's in particular were clearly registered to him.

Jim Pickrell, the author of a highly respected newsletter on subjects of interest to stock photographers said it very well in a post today. In his words, "The grim outcome of Greenberg vs. The National Geographic Society should be of deep concern to every photographer who believes copyright offers legal protection. Rather, this case teaches us two things: the law is not always fair or equitable, and those who have deeper pockets tend to win ..."

"If there was ever a photographer who dotted all the Is and crossed all the Ts in executing a contract for photographic work, it was Jerry Greenberg. His written agreement with the National Geographic Society said that for the fee he was paid he was licensing only the rights to publish his work in a single edition of the printed magazine. If NGS wanted to use his work in any other way, it would be necessary to compensate him for that use."

"Greenberg also had letters from NGS transferring the copyright back to him. It should be noted that these images were used by NGS before the passage of the 1976 Copyright Act. At that time, copyright rested with the organization paying for the work and not the creator, as it does today. Thus, the formal transfer of copyright back to Greenberg was extremely important."

"Greenberg had the images registered with the Copyright Office years before *The Complete National Geographic: 108 Years of National Geographic Magazine* CD-ROM discs were created."

Ultimately that was the issue. Jerry owned the copyright to these images and it was up to him to choose how or if they were to be used, and at what rate of compensation. You'd think.

Jerry stops into my studio frequently, an honored guest I am always eager to see. He updates me often about his new photographic missions, now exploring digital imaging in collaboration with his brilliant son Michael. He shows me the beautiful artwork his talented wife Idaz creates for their series of books and waterproof marine ID cards. He also has kept me updated about the National Geographic saga all these years.

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STEVE FRINK
PAGE 2

Jantzen, Alcan Aluminum, R.J. Reynolds, Seacrest, Henderson Aquatics, Club Med, major ad agencies, and scores of resorts and live-aboard dive boats throughout the world. Role Watch Company has also engaged Frink for product endorsement. Other Frink enterprises include a dive travel company, Waterlouse Tours and Reservations and a stock photo agency, Stephen Frink Collection. Frink is also the North American, South American, and Caribbean distributor for the Austrian camera housing manufacturer Seacam.

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joyce
PHOTOGRAPHY

Dear Jerry,

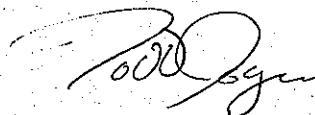
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Please let me know if there is anything I can do to help.

Thank you for fighting the good fight.

Sincerely,



Todd Joyce
ASMP President
513-899-2727

2174 S. Waynesville Rd., Lebanon, OH 45036 Phn. 513-899-2727 www.joycephotography.com

**TODD JOYCE
ASMP PRESIDENT**

Davis, Norman

From: Robin McDonald [Robin.McDonald@incisivemedia.com]
Sent: Wednesday, December 10, 2008 2:32 PM
To: Davis, Norman
Subject: Here's the story

Thanks again for always being willing to talk to me about this case.

Robin,

Supreme Court Closes Book on Photographer's Case

R. Robin McDonald
12-10-2008

The U.S. Supreme Court has closed the book on an 11-year-old copyright case that, in its final form, granted The National Geographic Society -- and by extension, other publishers -- the right to reproduce its magazine archive in digital format without paying additional royalties to freelance contributors.

The high court on Monday denied a petition for a writ of certiorari from Florida undersea photographer and former *National Geographic* magazine contributor Jerry Greenberg. In July, the full 11th U.S. Circuit Court of Appeals voted 7-5 in favor of *National Geographic*.

Greenberg petitioned the high court for a hearing, claiming that the 11th Circuit, and the 2nd Circuit in a nearly identical case, had misinterpreted the Supreme Court's 2001 landmark copyright ruling, *Tasini v. New York Times*.

But the high court, without comment, let stand rulings that *Tasini* -- which bars publishers from selling published articles to Internet databases without securing new copyright permissions from freelance contributors -- did not prohibit publishers from selling their digital archives on CD-ROMs without securing new copyright contracts.

In 1997, Greenberg challenged *National Geographic*'s use without permission of more than 60 of the photographer's photos, which had appeared in the magazine, in a 30-disk CD-ROM compilation of the society's entire magazine archive.

Greenberg's suit caused *National Geographic* to pull the archive off the market in 2003, after Greenberg, with the approval of the 11th Circuit, was awarded damages by a Florida district court. But the 11th Circuit's final of three rulings favored the magazine.

Terry Adamson, executive vice president of the National Geographic Society, said Tuesday that the magazine is considering issuing a new version of the CD archive.

Greenberg's attorney, Squire, Sanders & Dempsey senior counsel Norman Davis, said that his client, "did this not only for himself but to try to look after the interest of others who were also creative people. In pursuing this cause, he has exhausted virtually all of his means."

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**ROBIN MCDONALD
ATLANTA, GEORGIA
NEWSPAPER REPORTER**

Subj: Jerry Greenberg v. National Geographic Society
Date: 12/10/08 9:02:16 PM Eastern Standard Time
From: asmpmemberannouncement@asmp.org
To: sueray624@aol.com

Dear Members:

As we had anticipated, but not as we had hoped, the U.S. Supreme Court this week denied the appeal in Jerry Greenberg's infringement suit against National Geographic. As you may recall, the suit was based on Geographic's issuance of its 100-year compilation CD and similar CD's that reproduced massive numbers of issues of the print magazine in electronic form without permission from the photographers and others who created the material that appeared in those magazines. Long time ASMP member Jerry Greenberg filed a copyright infringement suit, and it has been going through the various stages of trial and appeals over the past 10 years or so. Despite earlier victories by Jerry, the case is finally over, and National Geographic has won.

This appears to mean that, unless your contracts say otherwise, publishers are generally free to produce electronic compilations of their print materials, even without permission from, or additional compensation to, the photographers and other contributors who created the materials being digitally reproduced. The key words here are "unless your contracts say otherwise." Your only hope to receive a piece of the electronic pie that publishers are now able to consume is to do so by contract. If your paperwork with a publisher specifically says that no electronic uses can be made without your permission, the decision in Greenberg and the other suits against National Geographic should not grant the publisher these expanded rights.

Jerry is to be thanked by all photographers for his gallant and all-consuming efforts on everyone's behalf. ASMP provided assistance and support to him at every step of the process, but ultimately it was Jerry who made the great sacrifices in this exhausting and exhaustive effort. ASMP sincerely believes that the courts have seriously misinterpreted the Copyright Act and the U.S. Supreme Court's decision in *Tasini v. NY Times*, which is why we supported Jerry and his attorneys over the past decade. Sadly, the Supreme Court takes only a tiny percentage of the cases that are sent before it, and that statistic took its toll here.

Although the Supreme Court has let the decision of the 11th Circuit stand, we are not going to abandon this issue, and we are considering all of the options that are available. In the meantime, thank you all for your support, and especially, thank you, Jerry Greenberg.

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In this case Jerry carried it all the way to the steps of the US Supreme Court. He won a few rounds in court. National Geographic won a few more. But, these are huge issues of law to every visual artist that were being debated in this particular case, and Jerry felt it had merit to be heard by the highest court in the land. Most in the photographic community shared his belief. I definitely did. But, in the end only about 5% of the cases set before the Supreme Court are actually heard, and Jerry's was not. That was the final shot. Now it is over for Greenberg vs. National Geographic.

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Pickerell closes with these chilling words: "Photographers owe Greenberg a tremendous debt of thanks. Hopefully, they will take the lessons of this case to heart. If the infringer is a small organization without a lot of resources to pursue legal action, and the photographer has the copyright registered, he may get an out-of-court settlement, or at least keep legal costs to a minimum. Infringers with deep pockets will eventually get their way, even if it takes 11 years, regardless of what might be fair or equitable." I'd like to be less pessimistic. But, no one does copyright registration and contracts better than Jerry Greenberg. Clearly, being right does not always guarantee victory.

POSTED BY STEPHEN FRINK AT 6:13 PM 

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Subject: Here's the story

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joyce

PHOTOGRAPHY

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There are still avenues to pursue, so we are not finished. I just wanted to drop you a note to say thank you for all you have done. We are happy to support you in your efforts.

Please let me know if there is anything I can do to help.

Thank you for fighting the good fight.

Sincerely,



Todd Joyce
ASMP President
513-899-2727

joyce
PHOTOGRAPHY

Dear Jerry,

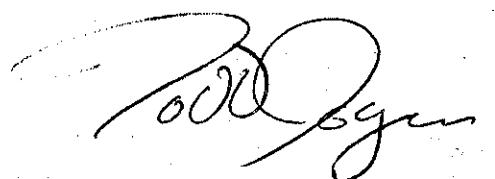
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Jerry

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114b 11:45 AM

Wolf Sams

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A handwritten signature in black ink, appearing to read "Todd Joyce".

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513-899-2727

Davis, Norman

From: Robin McDonald [Robin.McDonald@incisivemedia.com]
Sent: Wednesday, December 10, 2008 2:32 PM
To: Davis, Norman
Subject: Here's the story

Thanks again for always being willing to talk to me about this case.

Robin .

Supreme Court Closes Book on Photographer's Case

R. Robin McDonald
12-10-2008

The U.S. Supreme Court has closed the book on an 11-year-old copyright case that, in its final form, granted The National Geographic Society -- and by extension, other publishers -- the right to reproduce its magazine archive in digital format without paying additional royalties to freelance contributors.

The high court on Monday denied a petition for a writ of certiorari from Florida undersea photographer and former *National Geographic* magazine contributor Jerry Greenberg. In July, the full 11th U.S. Circuit Court of Appeals voted 7-5 in favor of *National Geographic*.

Greenberg petitioned the high court for a hearing, claiming that the 11th Circuit, and the 2nd Circuit in a nearly identical case, had misinterpreted the Supreme Court's 2001 landmark copyright ruling, *Tasini v. New York Times*.

But the high court, without comment, let stand rulings that *Tasini* -- which bars publishers from selling published articles to Internet databases without securing new copyright permissions from freelance contributors -- did not prohibit publishers from selling their digital archives on CD-ROMs without securing new copyright contracts.

In 1997, Greenberg challenged *National Geographic*'s use without permission of more than 60 of the photographer's photos, which had appeared in the magazine, in a 30-disk CD-ROM compilation of the society's entire magazine archive.

Greenberg's suit caused *National Geographic* to pull the archive off the market in 2003, after Greenberg, with the approval of the 11th Circuit, was awarded damages by a Florida district court. But the 11th Circuit's final of three rulings favored the magazine.

Terry Adamson, executive vice president of the National Geographic Society, said Tuesday that the magazine is considering issuing a new version of the CD archive.

Greenberg's attorney, Squire, Sanders & Dempsey senior counsel Norman Davis, said that his client, "did this not only for himself but to try to look after the interest of others who were also creative people. In pursuing this cause, he has exhausted virtually all of his means."

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