

Subj: **Judge Kaplan's opinion in Fred Ward's case against National Geographic Society**

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Judge Kaplan s opinion in Ward v. National Geographic et al. (99 Civ. 12385)
From: Fred Ward

As many of you know, I and a number of other photographers, including Jerry Greenberg, have been locked in litigation with the National Geographic Society (NGS) for years over the Complete National Geographic CD-ROM product (the CNG). It is reportedly one of the top-selling CD-ROM sets in history with millions of units having been sold over the past 6 years around the world.

It bundles the past 108+ years of the National Geographic Magazine (Magazine) with a number of interactive multi-media features, including an opening cover sequence of metamorphosing magazine covers complete with sound and music, a spinning globe of the world, some Kodak ads (in the earlier editions) an online tutorial (in later additions) and a host of other attractive features. Under section 201 (c) (3) of the Copyright Law, a publisher like NGS has the right to revise a collective work (defined as a magazine or encyclopedia containing separately copyrightable contributions) without permission from the contributors to the collective work. But a publisher cannot make that collective work into a brand new product without permission from the contributors.

Jerry Greenberg began his copyright case against NGS after the CNG was released in 1997. The district court in Miami dismissed the case; but the 11th Circuit Court of Appeals in Atlanta reversed in 2001 and found that the CNG infringed Jerry s copyrighted works he had created for the Magazine. The Atlanta Court cited numerous features in the CNG that made it a new product The Court reasoned that common-sense copyright analysis compels the conclusion that the [National Geographic] Society & has created a new product (an original work of authorship), in a new medium, for a new market.

That court sent Jerry's case back to the District Court for a trial on damages. NGS, aided by a brief written by former Watergate prosecutor Kenneth Star, among others, asked the Supreme Court to review the 11th Circuit opinion but the High Court without comments, refused.

After Jerry's case was remanded to the district court in Miami, a jury there earlier this year found that NGS had willfully infringed Jerry's copyright in the four works at issue and gave him the maximum award of damages allowed, \$400,000 or \$100,000 for each of the four works involved. NGS has now requested the trial judge to set aside the jury's determination and that judge has yet to rule on that request.

My case and a few other related cases against National Geographic went forward before Judge Louis Kaplan in the United States District Court for the Southern District of New York. Last week on December 11, 2003, Judge Kaplan ruled that that NGS's section 201 (c) (3) privilege allowed it to create the CNG thus contradicting the 11th Circuit opinion in Jerry Greenberg's case.

The district court in New York found that the new features contained in the CNG did not make it into a new work. In reaching that conclusion, Judge Kaplan focused instead on the fact that NGS made no changes in the content, format or appearance of the articles in the Magazine that were reproduced in the CNG.

The implication of Judge Kaplan's decision are chilling. The court stated that so long as the publisher digitally reproduces the contents of the original print work in the same context in which they originally appeared, the publisher is free to add a number of multimedia elements and software tools that enhance the marketability and salability of the product. Thus, unless Judge Kaplan's decision is overturned, we may find that publishers have taken our works and without our permission displayed them in the same context in which they first appeared in a host of new products that none of us ever imagined when we originally created them.

Now the battle escalates dramatically. This is no longer a series of lawsuits brought by photographers and writers against National Geographic for the CD sets. This is a major conflict between the

creators of intellectual property and those who would exploit their works. We will be asking organizations and individuals who care about protecting the copyright of artists, writers, photographers, musicians, painters, television and movie producers, to file briefs on our behalf before the 2nd Circuit Court of Appeals as we go forward in our appeal. Publishers have significant resources but with all your help I am confident that reason and good sense will prevail.

Fred Ward

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