

WEIL, GOTSHAL & MANGES LLP

A LIMITED LIABILITY PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

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PRAGUE
WARSAWROBERT G. SUGARMAN
DIRECT LINE (212) 310-6184

January 28, 1998

**FOR SETTLEMENT
PURPOSES ONLY****VIA FACSIMILE**Norman Davis, Esq.
Steel, Hector & Davis LLP
200 South Biscayne Boulevard
Miami, FL 33131-2398Re: Greenberg et al. v. National Geographic Society et al.

Dear Norman:

You indicated by letter dated January 19, 1998 that Mr. and Mrs. Greenberg are willing to discuss settlement of Counts I and II of the Amended Complaint. National Geographic Society (the "Society") believes that settlement of these claims is in the parties' best interests. The Society is therefore willing to settle these claims as outlined below.

The Society will pay to the Greenbergs the sum of \$17,800, \$2,800 of which represents payment for use of the images and \$15,000 of which represents reimbursement for the Greenbergs' legal expenses.

The \$2,800 figure is based upon current market rates for the use of images in materials like the "GeoPack" product and the "Jason" brochure. In rare cases, the most that the Society would pay for the use of a photograph as reference material for an illustration like the "GeoPack" product is \$100. The Society would typically pay \$200 to display a photograph in a promotional brochure like "Jason." In recognition of its long-standing relationship with the Greenbergs, the Society is willing to quadruple these market rates. Thus, four times the market rate of \$100 for the five "GeoPack" images and four times the

WEIL, GOTSHAL & MANGES LLP

Norman Davis, Esq.
January 28, 1998
Page 2

market rate of \$200 for the "Jason" image yields a total payment to the Greenbergs of \$2,800 for the use of their images.

The Society feels that this settlement amount generously compensates the Greenbergs for the use of their photographs and for the expenses they have incurred, particularly given that five of the six disputed images were used as reference material for illustrations. The Greenbergs have suffered no loss in the value of their copyrights as a result of these uses. Moreover, the Society has made every effort to cooperate with the Greenbergs in this matter. When the Society became aware of the inadvertent inclusion of the sea fan photograph in the Jason brochure, it immediately notified the Greenbergs and offered to compensate them. The use of the other disputed images as reference material for the "GeoPack" product was equally innocent. Indeed, the Society did not even make the Greenbergs' photographs available to the "GeoPack" artist; rather, the artist discovered the photographs on his own and made an independent decision to use them as reference material.

The Society will use its best efforts to provide Mr. Greenberg with a visual inventory of photographs created originally by him and held by the Society. The Society will agree to refrain from publishing or using any such images in which the Greenbergs can demonstrate copyright ownership without their prior written consent.

Finally, the Society will assign all of its copyrights in the disputed images in the GeoPack product to the Greenbergs. This assignment will not affect any other images in the GeoPack.

Please convey this settlement offer to your clients and advise us of their response as soon as possible. The Society is eager to resolve these issues amicably and fairly for all parties concerned.

Sincerely,



Robert G. Sugarman

**NATIONAL
GEOGRAPHIC
SOCIETY**

SUZANNE ROSS McDOWELL
Assistant Vice President
LEGAL AFFAIRS, PUBLICATIONS

April 18, 1997

BY FAX AND FEDEX

Norman Davis, Esquire
Steel Hector & Davis LLP
200 South Biscayne Boulevard
Miami, FL 33131-2398

Dear Mr. Davis:

I am writing in response to your letter of March 13, 1997 concerning Jerry Greenberg's claims of copyright infringement. This letter is in the nature of settlement negotiations and the contents hereof shall neither be (a) deemed as an admission against interest, or (b) admissible in any adversary or other proceeding brought against the Society concerning the matters discussed in this letter. For purposes of this letter, we assume that Mr. Greenberg holds valid copyrights.

Part I

In Part I of your letter, you discuss issues concerning *Fish of the Coral Reef* and *Creatures of the Open Ocean*, cards sold by Educational Insights for use with its game GeoSafari.

1. *Fish of the Coral Reef*. You allege that five objects pictured in the artwork for *Fish of the Coral Reef* infringe Mr. Greenberg's copyrights in photographs identified in your letter. We do not believe the facts or the law support Mr. Greenberg's claim. In addition to the facts we have raised in prior correspondence the following are important and relevant:

a. The artist of the coral reef scene used several sources as research material for the five objects at issue to ensure that his work was factually accurate, and his research from these sources is incorporated in the five objects that Mr. Greenberg claims infringe his copyrighted photographs.

Norman Davis
April 18, 1997
Page 2

b. The fact that scientific or factual works are at issue here is of great importance in evaluating this case. Mr. Greenberg's claim of infringement raises questions as to what elements of his photographs are original and therefore protectible expression. This question is particularly important for photographs which are representations of natural objects as they appear in nature. Mr. Greenberg can claim no protection in the appearance of natural objects but only in the literal expression of those objects in his photographs. The scope of protection is thus very narrow and infringement exists only where there is a very close similarity, verging on the identical.

c. Even assuming *arguendo* that protected expression has been copied, other factors would support a finding that any alleged use by the artist of Mr. Greenberg's work constituted fair use and thus that no infringement has occurred. The artist's original artwork is used in an educational product where accuracy is critical to the educational value of the product. The product has a different purpose, character, functional use and audience than does Mr. Greenberg's work. Mr. Greenberg's work is for the most part a representation of natural objects as found in nature. Other sources were used as research and anything allegedly used from Mr. Greenberg's photographs is probably not protectible expression. Finally, and most importantly, any use by the artist of Mr. Greenberg's work would not have a substantially adverse impact on the market for Mr. Greenberg's work.

For these reasons we do not think that the facts and law support your assertion that your client's copyrights have been infringed.

2. *Creatures of the Open Ocean*. You also raise issues concerning *Creatures of the Open Ocean*. The artwork used in this product was published almost thirty years ago in the February 1968 issue of NATIONAL GEOGRAPHIC. The three year statute of limitations has long since tolled.

PART II

In Part II of your letter you raise a number of concerns that Mr. Greenberg has had over a period of more than 30 years. I will address each one.

a. Your letter states that an alleged infringement occurred in 1975 in a promotional piece distributed by the Society, which used a picture originally published in the Society's book *World Beneath the Sea* in 1967. The photograph at issue was used in the promotional piece, which was mailed as a test to 100,000 members on November 6, 1975. The promotional piece was never used again.

The statute of limitations under the copyright law is three years. Thus, any claim for this possible infringement is time-barred by more than 28 years.

Norman Davis
April 18, 1997
Page 3

b. Your discussion of the photograph of the diver "swimming through a coral jungle" concludes that the Society paid Mr. Greenberg for the use. Presumably therefore no claim is being made regarding this photograph.

c. You raise the question of the use by the Society, in a brochure prepared for use by the Jason Project in 1996, of a photograph taken by Mr. Greenberg of a sea fan. Mr. Rock Wheeler confirms that he had communications with Mr. Greenberg about the use of the photograph. In fact, when the Society discovered it had inadvertently used Mr. Greenberg's photograph without obtaining prior permission, it informed Mr. Greenberg of the situation and offered to pay him \$500. Mr. Greenberg declined the payment.

* * *

We share Mr. Greenberg's interest in promptly resolving all matters set forth in your letter. However, as noted above our view of the facts and law would not justify payment of amounts anywhere in the vicinity of those you propose. We make the following offer:

(1) We reiterate our offer to pay Mr. Greenberg \$500 for the use of his photograph of a sea fan in the 1996 Jason Project brochure.

(2) We agree that it is important to take actions to ensure protection of Mr. Greenberg's rights in photographs held by the Society pursuant to earlier agreements. To that end, we will take the following action.

(a) Every transparency held by the Image Collection will be entered in the database with the appropriate rights code indicating that permission must be sought from Mr. Greenberg before any images can be used in a Society product and that the licensing fee for each image must be negotiated with Mr. Greenberg. In addition, the rights code will indicate that the Society does not have the right to release the transparencies to any third party.

(b) The mount or identifying label of each transparency by Mr. Greenberg held in the Image Collection will be stamped: Permission and Payment Required for Each Use.

(3) With respect to Mr. Greenberg's claim concerning the Educational Insights cards, as stated above, we believe no infringement has occurred and that no payment is justified.

We believe this offer is responsive to legitimate issues raised by Mr. Greenberg.

Sincerely,



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WARSAW

ROBERT G. SUGARMAN
DIRECT LINE (212) 310-6184

January 28, 1998

**FOR SETTLEMENT
PURPOSES ONLY**

VIA FACSIMILE

Norman Davis, Esq.
Steel, Hector & Davis LLP
200 South Biscayne Boulevard
Miami, FL 33131-2398

Re: Greenberg et al. v. National Geographic Society et al.

Dear Norman:

You indicated by letter dated January 19, 1998 that Mr. and Mrs. Greenberg are willing to discuss settlement of Counts I and II of the Amended Complaint. National Geographic Society (the "Society") believes that settlement of these claims is in the parties' best interests. The Society is therefore willing to settle these claims as outlined below.

The Society will pay to the Greenbergs the sum of \$17,800, \$2,800 of which represents payment for use of the images and \$15,000 of which represents reimbursement for the Greenbergs' legal expenses.

The \$2,800 figure is based upon current market rates for the use of images in materials like the "GeoPack" product and the "Jason" brochure. In rare cases, the most that the Society would pay for the use of a photograph as reference material for an illustration like the "GeoPack" product is \$100. The Society would typically pay \$200 to display a photograph in a promotional brochure like "Jason." In recognition of its long-standing relationship with the Greenbergs, the Society is willing to quadruple these market rates. Thus, four times the market rate of \$100 for the five "GeoPack" images and four times the

WEIL, GOTSHAL & MANGES LLP

Norman Davis, Esq.
January 28, 1998
Page 2

market rate of \$200 for the "Jason" image yields a total payment to the Greenbergs of \$2,800 for the use of their images.

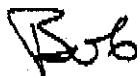
The Society feels that this settlement amount generously compensates the Greenbergs for the use of their photographs and for the expenses they have incurred, particularly given that five of the six disputed images were used as reference material for illustrations. The Greenbergs have suffered no loss in the value of their copyrights as a result of these uses. Moreover, the Society has made every effort to cooperate with the Greenbergs in this matter. When the Society became aware of the inadvertent inclusion of the sea fan photograph in the Jason brochure, it immediately notified the Greenbergs and offered to compensate them. The use of the other disputed images as reference material for the "GeoPack" product was equally innocent. Indeed, the Society did not even make the Greenbergs' photographs available to the "GeoPack" artist; rather, the artist discovered the photographs on his own and made an independent decision to use them as reference material.

The Society will use its best efforts to provide Mr. Greenberg with a visual inventory of photographs created originally by him and held by the Society. The Society will agree to refrain from publishing or using any such images in which the Greenbergs can demonstrate copyright ownership without their prior written consent.

Finally, the Society will assign all of its copyrights in the disputed images in the GeoPack product to the Greenbergs. This assignment will not affect any other images in the GeoPack.

Please convey this settlement offer to your clients and advise us of their response as soon as possible. The Society is eager to resolve these issues amicably and fairly for all parties concerned.

Sincerely,



Robert G. Sugarman

DRAFT**BY TELECOPY & MAIL**

January 16, 1998

Robert G. Sugarman, Esq.
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153

Re: Jerry Greenberg, et al. v. National Geographic Society, et al.

Dear Mr. Sugarman:

You and I have had telephone discussions this week regarding the prospect for settling Count I and Count II of the Amended Complaint. The Greenbergs have no enthusiasm for a partial settlement of their case, but are willing to resolve those two counts with the National Geographic Society ("the Society") on the basis described below. This proposal is tendered solely as a compromise for the purpose of settlement with the expectation that it will be used for no other purpose.

(1) The Society will pay to the Greenbergs the sum of \$40,000.00. That sum is inclusive of all legal expense to date that is related to the claims in Counts I and II.

(2) Additionally, the Society will pay to the Greenbergs each year the sum of \$2,000.00 as a license fee for the continued use by Educational Insights, Inc. of the disputed images in its product. The fee for 1998 will be paid with the amount stated in (1) above. Fees for any subsequent years will be paid by January 1 of each year of license. The license will expire and no further fees will be required upon receipt by the Greenbergs of a sworn statement by an officer of Educational Insights, Inc. or the Society that all manufacture, distribution and sale of the product containing the disputed images has ended.

(3) In order to safeguard against any future problems, the Society (and its affiliates, if applicable) will promptly provide to Mr. Greenberg a visual inventory of all photographs, copies or derivatives, created originally by him, that the Society is holding in its files, archives, libraries, databases or elsewhere. Mr. Greenberg will thereupon identify on the inventory all such items for which he holds copyright and for which he can demonstrate such copyright, and provide such identification to the Society. The Society will provide written assurance that no photographs or items so identified will ever be published, distributed, licensed, sold or otherwise

Robert G. Sugarman, Esq.
January 16, 1998
page two

utilized by the Society, or by others with its consent or participation, without a prior written agreement with Mr. Greenberg.

(4) Copyright in the disputed images in the Educational Insights product will be assigned to Mr. Greenberg by the Society. Such assignment will not be effective as to any other images contained in that product.

The proposal set forth above represents significant compromise in terms of any previous proposal. The money amount incorporates legal expense incurred in preparation of the complaint, and it incorporates as well the infringement (admitted by the Society) embodied in Count II. The license fee has been reduced from a former demand. The Greenbergs have instructed me that some flexibility remains as to some details in the proposal, but not as to its substance. They are otherwise willing to see the claims through to the end. The proposal is offered in good faith, and in the expectation that it will be resolved, one way or another, with the least delay.

Sincerely,

Norman Davis

DRAFT

BY TELECOPY & MAIL

April 21, 1998

Robert G. Sugarman, Esq.
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153

Re: Jerry Greenberg, et al. v. National Geographic Society, et al.

Dear Bob:

The contents of this letter are intended solely for the purpose of exploring a settlement of the dispute as to Counts I and II of the Amended Complaint and with the expectation that the contents will be used for no other purpose. Our clients, as you are aware, are engaged in a time-consuming and costly phase in preparing responses to discovery requests pertaining to Counts I and II. The Greenbergs already have incurred more than \$15,000 in attorney's fees and some \$2,000 in costs with respect to those counts, and those numbers are escalating. Encompassed in those amounts are unsuccessful attempts by their counsel, before proceeding to litigation, to resolve issues as to those counts with Educational Insights, Inc. and with the National Geographic Society. Thus, in an attempt to halt the growing expense, the Greenbergs are prepared to make one last proposal to resolve Counts I and II by settlement. If this attempt is unsuccessful, they are resolved to allow the court to determine whether infringements have occurred, and if so, to award damages.

The only leverage the Greenbergs have in a settlement discussion is their conviction that their works have been infringed and that they are entitled to fair redress. They are prepared to continue their investment in the litigation if necessary. Their adversaries are bountifully endowed, while the Greenbergs are not. On the other hand, they are not hand-to-mouth artists who must struggle to pursue their creative efforts. The Greenbergs have operated a modestly successful business, attributable only to the quality of their works, that has produced revenues in excess of \$2,500,000, and significant license fee arrangements with various entities, in the last five years. The enclosed promotional fliers illustrate some of their current products.

Nor are the Greenbergs litigious. In the last decade they have resolved scores of disputes over infringements of their works without litigation, and have filed complaints in only a handful of circumstances. In other reasonably comparable disputes the Greenbergs obtained amounts of

Robert G. Sugarman, Esq.
April 24, 1998
page two

\$35,000, \$58,000, \$49,000, and \$195,000 in the course of settling the controversies. A number of settlements included licensing arrangements for the continued use of various images.

Your January 28, 1998 letter set forth standards for compensation that the Greenbergs believe are not appropriate here. What the Society has typically paid, or rates that may exist in the current market, are not relevant because the Greenbergs would not have been amenable to such rates, and they were deprived of any chance to decline such rates. No one approached them to determine whether four times the "market rate" was acceptable. Mr. Greenberg agreed to specific compensation by the Society over the years because his work was for a nonprofit entity with nonprofit purposes. That is no longer the situation. In comparison, Mr. Greenberg was paid \$9,800 by J. Walter Thompson for one photograph used in an advertisement. That photograph, for which Mr. Greenberg owns copyright, appeared first in the July 1990 National Geographic magazine.

The statement in your letter that the Greenbergs "have suffered no loss" in the value of their copyrights is not sustainable. Some of the Greenbergs' products are directed to children, and they have the dismaying experience of competing in that market with infringements of their own images in an Educational Insights product. Your letter notes that the Society was solicitous regarding the sea fan infringement. Not yet acknowledged is that the sea fan episode was the third time that the Society had used Mr. Greenberg's copyrighted photographs without consulting him. The amount offered him by the Society as compensation was not acceptable.

The proposal that is enclosed contains a higher number than previously because the Greenbergs' legal expense has escalated. You should note, as well, that the proposed license fee has been substantially reduced. If the offer is not accepted by the close of business on May 1, 1998, the offer will be automatically withdrawn. The Greenbergs are people of conscience and goodwill, and their offer is made in that context.

Sincerely,

Norman Davis

Enclosure

Settlement Proposal - Counts I and II

(1) The Society will pay to the Greenbergs the sum of \$42,000.00. That sum is inclusive of all legal expense to date that is related to the claims in Counts I and II.

(2) Additionally, the Society will pay to the Greenbergs each year the sum of \$1,000.00 as a license fee for the continued use by Educational Insights, Inc. of the disputed images in its product. The fee for 1998 will be paid with the amount stated in (1) above. Fees for any subsequent years will be paid by January 1 of each year of license. The license will expire at the end of each year and no further fees will be required upon receipt by the Greenbergs of a sworn statement by an officer of Educational Insights, Inc. or the Society that all manufacture, distribution and sale of the product containing the disputed images has ended.

(3) In order to safeguard against any future problems, the Society (and its affiliates, if applicable) will promptly provide to Mr. Greenberg a visual inventory of all photographs created originally by him, or any copies or derivatives that the Society is holding in its files, archives, libraries, databases or elsewhere. Mr. Greenberg will thereupon, utilizing the inventory, identify all such items for which he holds copyright and for which he can demonstrate such copyright or other proprietary right, and provide such identification to the Society. The Society will provide written assurance that no photographs or items so identified will ever be published, distributed, licensed, sold or otherwise utilized by the Society, or by others with its consent or participation, without a prior written agreement with Mr. Greenberg.

(4) Copyright in the disputed images in the Educational Insights product will be assigned to Mr. Greenberg by the Society. Such assignment will not be effective as to any other images contained in that product.

(5) Upon satisfaction of the items listed above, the Greenbergs are willing to execute a limited release applicable to the matters addressed in Counts I and II.

MAY 1 1998 4:22PM

SH&D LLP

212NO. 8052516 P. 202

WEIL, GOTSHAL & MANGES LLP

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ROBERT G. SUGARMAN
DIRECT LINE (212) 310-8184

May 1, 1998

VIA FACSIMILE

Norman Davis, Esq.
Steel, Hector & Davis LLP
200 South Biscayne Blvd.
Miami, FL 33131-2398

Re: Greenberg v. National Geographic Society et al.

Dear Norman:

The National Geographic Society is both distressed and dismayed by your letter dated April 24, 1998, which purports to seek a settlement of Counts I and II of the Amended Complaint, but which adopts a far from conciliatory tone. The Greenbergs are happy to impose a one-week deadline for the Society to respond to its settlement proposal, but took three months to respond to the Society's generous settlement offer (which greatly exceeded the reasonable market value of the Greenbergs' photographs by any standard, as explained in detail, and which provided for payment of reasonably attorneys' fees incurred up to that time). And, the Greenbergs now expect the Society to reimburse them for legal expenses which they have incurred solely due to their own procrastination. Had the Greenbergs addressed my January 28 letter promptly -- instead of ignoring it and serving the Society with document requests and interrogatories -- then they would not have generated the legal fees that they now assert that the Society should pay.

In every settlement negotiation in which I have been involved, the settling parties' responses seek to narrow the gap between their respective demands. The Greenbergs have done the opposite -- demanding more money now than they did in their last demand. Accordingly, the Society believes that further negotiations would serve no purpose and that the parties should proceed immediately to court-sponsored mediation as provided by the

MAY 1 1998 4:23PM

SH&D LLP

WEIL GOTSHAL

2NO. 8052851P. 3P.03

WEIL, GOTSHAL & MANGES LLP
Norman Davis, Esq.
May 1, 1998
Page 2

Local Rules, and asks that the Greenbergs join in a request to that effect. If the Greenbergs truly wish to attain a just and speedy resolution without resorting to a costly trial, then they should readily agree to this request. In keeping with the Greenbergs' view of the amount of time which should be given to respond to settlement communications, the Society demands an answer as to whether the Greenbergs will join in a request for mediation by May 8, 1998. If we do not hear from you by that date, we will unilaterally file such a motion and indicate that the Greenbergs refuse to join in the request.

Sincerely,



Robert G. Sugarman

cc: Terrence B. Adamson, Esq.
Angelo M. Grima, Esq.

NATIONAL
GEOGRAPHIC
SOCIETY

SUZANNE ROSS McDOWELL
Assistant Vice President
LEGAL AFFAIRS, PUBLICATIONS

June 9, 1997

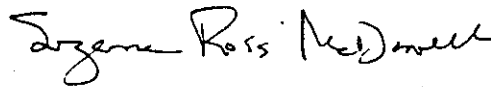
Norman Davis, Esq.
Steel Hector & Davis LLP
200 South Biscayne Boulevard
Miami, FL 33131-2398

Re: Jerry Greenberg

Dear Mr. Davis:

As requested, I enclose the exhibits that you sent on March 13, 1997. I apologize for the delay.

Sincerely,



s:\wpwin\dav2retn.ltr

BY TELECOPY & MAIL

June 8, 1998

DRAFT

Naomi Gray, Esq.
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153

Re: Greenbergs v. National Geographic Society, et al.

Dear Naomi:

I have some additional information regarding the depositions in Washington on June 18. The people at Kirkland and Ellis advise using the entrance at 1450 G Street, N.W., and proceeding to the 12th floor. The conference room to be used is 11-Southwest, and it is reserved in my name.

The Society produced to us documents numbered 17, 18, 19 and 20. Document 345 appears to be a pencil sketch related to document 18. Document 346 appears to be a pencil sketch related to document 17. We were not provided with pencil sketches related to documents 19 and 20. If they exist, please provide copies without delay so that we may make use of them at the forthcoming depositions. Additionally, we request that any drawings or artwork prepared by the artist after the pencil sketches represented by documents 345 and 346, and submitted to the Society, be timely produced. If the documents sought in this paragraph exist, they would be responsive to the plaintiffs' original document request. If the documents do not exist, I will accept your representation to that effect.

Finally, documents 347 through 350 are so dark that meaningful examination of them is not possible. I request that you provide at the forthcoming depositions the original documents from which the copies produced to us were made.

Sincerely,

Norman Davis

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

JERRY GREENBERG, individually,
and IDAZ GREENBERG, individually,

Plaintiffs,

vs.

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

Defendants

CASE NO. 97-3924
Filed in the U.S. District Court
for the Southern District of Florida

CIV-LENARD
Magistrate Judge Turnoff

SUBPOENA DUCES TECUM
IN A CIVIL CASE

TO: Warren Cutler
7900 Curtis Street
Chevy Chase, MD 20815

YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION: Kirkland & Ellis, 655 Fifteenth St., N.W. Suite 1200, Washington, D.C. 20005	DATE AND TIME June 18, 1998 at 11:00 a.m
--	---

YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below: **SEE ATTACHMENT**

PLACE Kirkland & Ellis, 655 Fifteenth St., N.W. Suite 1200, Washington, D.C. 20005	DATE AND TIME June 18, 1998 at 11:00 a.m
---	---

YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below:

PREMISES	DATE AND TIME
----------	---------------

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents or other persons who consent to testify on its behalf, and may set forth for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

ISSUING OFFICER, SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT) <i>Norman Davis</i> Attorney for Plaintiff	DATE 6/3/98
---	----------------

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER: Norman Davis, Steel Hector & Davis LLP, 200 S. Biscayne Blvd., Ste. 4000, Miami, FL 33131-2398, 305-577-2988

In accordance with the Americans with Disabilities Act of 1990, persons needing a special accommodation to participate in this proceeding, or if hearing impaired, should contact Norman Davis at (305) 577-2988 for assistance no later than seven days prior to the proceeding. (See Rule 45, Federal Rules of Civil Procedure, Parts C & D)

PROOF OF SERVICE			
SERVED	DATE	PLACE	
	SERVED ON (PRINT NAME)	MANNER OF SERVICE	
SERVED BY (PRINT NAME)	TITLE		
DECLARATION OF SERVER			

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____
DATE

SIGNATURE OF SERVER

ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Parts C & D:

(c) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it (i) fails to allow reasonable time for compliance; (ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (3) (B) (iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

- (iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or
- (iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) DUTIES IN RESPONDING TO SUBPOENA

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

ATTACHMENT

With reference to the Reefs and Oceans "Geopack" project for which you provided services to the National Geographic Society ("the Society"), or to any entity affiliated with the Society, please bring with you the following items:

- (1) All artwork in any form, including but not limited to drawings, paintings or rough sketches, created by you in the course of your work on the project.
- (2) All documents in your possession or control that were utilized by you in any manner in the course of your work on the project.
- (3) All documents given or loaned to you by the Society, or by any entity affiliated with the Society, or by anyone on the Society's behalf, that were utilized by you in any manner in the course of your work on the project.
- (4) All documents generated by you or delivered to you, with reference to the project, including but not limited to letters, memoranda, contracts and invoices.
- (5) Any and all documents prepared by you, with reference to the project, after completion of your work on the project.

With reference to the items listed above, "document" shall have its customary, broad sense to include written or graphic matter of every kind and description, whether printed or reproduced by any process, or written, and/or produced by hand, whether final or draft, original or reproduction, including but not limited to the following categories: letters, correspondence, facsimile communications, memoranda, proposals, offers, orders, exhibits, overlays and logs. "Document" includes the original of any document in whatever medium it may exist and any copy of such original, including a copy that differs in any way from such original.

**STEEL ■
HECTOR
■ DAVIS**

Steel Hector & Davis LLP
200 South Biscayne Boulevard
Miami, Florida 33131-2398
305.577.7000
305.577.7001 Fax

Norman Davis
305.577.2988

BY TELECOPY & MAIL

May 3, 1998

Robert G. Sugarman, Esq.
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153

Re: Jerry Greenberg, et al. v. National Geographic Society, et al.

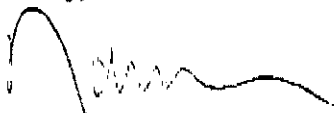
Dear Bob:

I was surprised to read that my April 24 letter had adopted "a far from conciliatory tone," inasmuch as my dictionary defines conciliatory as involving a friendly and unantagonistic manner. I have re-read my letter in vain to find anything unfriendly or antagonistic in it.

Your principal concern appears to be that the Greenbergs' most recent settlement proposal sought more money than did the original proposal. But the offer extended most recently is still below the level of relief the Greenbergs will request from the court, and that is the essence of settlement as I understand the term. You will disagree with that request, of course, and everyone here understands that the court may even agree with you. Then again, perhaps it will not.

Notwithstanding the statement in your letter that "further negotiations would serve no purpose," the Greenbergs are willing to participate in court-sponsored mediation in a timely manner. I assume that you will provide us with a draft of such a request.

Sincerely,



Norman Davis

STEEL ■
HECTOR
■ DAVIS

Steel Hector & Davis LLP
200 South Biscayne Boulevard
Miami, Florida 33131-2398
305.577.7000
305.577.7001 Fax

BY TELECOPY & MAIL

Norman Davis
305.577.2988

June 19, 1998

Naomi Gray, Esq.
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153

Re: Greenbergs v. National Geographic Society, et al.

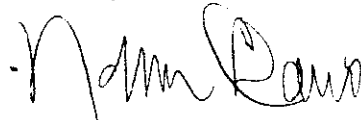
Dear Naomi:

I have reviewed the Certified Mediators List that was revised by the Southern District of Florida as of June 4, 1998. It is my understanding that you have a copy of that list. The following mediators on the list are known to me to be experienced and effective, and any of them would be acceptable for our dispute:

Edward S. Klein
Leslie W. Langbein
Martin A. Soll
Carolyn A. Smith
James A. McCauley, Sr.

In view of the court's deadline for naming a mediator, I urge you to give me your thoughts as soon as you are able.

Sincerely,



Norman Davis

STEEL ■
HECTOR
■ DAVIS

bcc: Jerry Greenberg

WEIL, GOTSHAL & MANGES LLP

767 FIFTH AVENUE · NEW YORK, NY 10153-0119

(212) 310-8000

FAX: (212) 310-8007

DALLAS
HOUSTON
MENLO PARK
(SILICON VALLEY)
MIAMI
WASHINGTON, D.C.

BRUSSELS
BUDAPEST
LONDON
PRAGUE
WARSAW

WATER'S DIRECT LINE

(212) 310-8078

August 13, 1998

VIA FACSIMILE

Norman Davis, Esq.
Steel, Hector & Davis LLP
200 South Biscayne Blvd.
Miami, FL 33131-2398

Re: Greenberg v. National Geographic Society

Dear Norman:

I write to follow up on the numerous requests for document production that the Society made during the deposition of Jerry Greenberg on May 28, 1998. For purposes of these requests, "Greenberg" shall include Jerry Greenberg, Idaz Greenberg and Seahawk Press. Please produce the following documents immediately:

- A copy of the Underwater Alphabet Book. J. Greenberg Dep. at pp. 27-31.
- Records sufficient to indicate the amount of any payments from Charlesbridge Publishing to Greenberg. J. Greenberg Dep. at pp. 27-31.
- Documents concerning any settlements and/or licensing arrangements for the use of any images owned by Greenberg without prior consent. J. Greenberg Dep. at pp. 32-33.

WEIL, GOTSHAL & MANGES LLP

Norman Davis, Esq.

August 13, 1998

Page 2

- The card produced by Nautilus Sub Sea Adventures which used images owned by Greenberg. J. Greenberg Dep. at pp. 37-38.
- Unredacted copies of Greenberg's financial journal reflecting settlements and/or payments for the use of Greenberg's images without prior permission. J. Greenberg Dep. at pp. 39-40.
- A copy of the contract with Stackpole Books dated January 21, 1997. J. Greenberg Dep. at pp. 41-43.
- A copy of the book West of Key West. J. Greenberg Dep. at pp. 41-43.
- A copy of the agreement with Habitat dated September 23, 1998. J. Greenberg Dep. at pp. 43-44.
- Any and all tear sheets concerning the use by J. Walter Thompson of images owned by Greenberg. J. Greenberg Dep. at pp. 46-48.
- A copy of the letter dated March 11, 1994 referenced in Jerry Greenberg Exhibit 13. J. Greenberg Dep. at p. 51.
- A sample of the T-shirt produced by Sherry Manufacturing which displayed the copyrighted images of Greenberg. J. Greenberg Dep. at pp. 51-52.
- Documents sufficient to indicate the amount of the fee charged the use in the motion picture "Jaws" of images owned by Greenberg. J. Greenberg Dep. at pp. 53-55.

WEIL, GOTSHAL & MANGES LLP

Norman Davis, Esq.

August 13, 1998

Page 3

In light of the impending deadline to complete fact discovery in this case, it is imperative that all of the above documents be produced promptly. Indeed, these documents should have been produced long ago. If you have any questions, please contact me or my associate, Sal Romanello.

Sincerely,

Naomi
Naomi Jane Gray

cc: Robert G. Sugarman, Esq.
Salvatore Romanello, Esq.

WEIL, GOTSHAL & MANGES LLP

767 FIFTH AVENUE : NEW YORK, NY 10153-0119
(212) 310-8000
FAX: (212) 310-8007

DALLAS
HOUSTON
MENLO PARK
(SILICON VALLEY)
MIAMI
WASHINGTON, D.C.

BRUSSELS
BUDAPEST
LONDON
PRAGUE
WARSAW

WIRE'S DIRECT LINE

(212) 310-8078

August 13, 1998

VIA FACSIMILE

Norman Davis, Esq.
Steel, Hector & Davis LLP
200 South Biscayne Blvd.
Miami, FL 33131-2398

*JG depo shd be
divulge amounts,
settlements terms (license)
arms-length
OK to give
list of depo requests
books*

Re: Greenberg v. National Geographic Society

Dear Norman:

I write to follow up on the numerous requests for document production that the Society made during the deposition of Jerry Greenberg on May 28, 1998. For purposes of these requests, "Greenberg" shall include Jerry Greenberg, Idaz Greenberg and Seahawk Press. Please produce the following documents immediately:

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WEIL, GOTSHAL & MANGES LLP

Norman Davis, Esq.

August 13, 1998

Page 2

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WEIL, GOTSHAL & MANGES LLP

Norman Davis, Esq.

August 13, 1998

Page 3

In light of the impending deadline to complete fact discovery in this case, it is imperative that all of the above documents be produced promptly. Indeed, these documents should have been produced long ago. If you have any questions, please contact me or my associate, Sal Romanello.

Sincerely,

Naomi
Naomi Jane Gray

cc: Robert G. Sugarman, Esq.
Salvatore Romanello, Esq.

STEEL ■
HECTOR
& DAVIS

370 South Bessie Boulevard
Miami, Florida 33131-2003
305.577.7000
305.577.7001 Fax

BY FEDERAL EXPRESS

Norman Davis
305.577.2988

August 24, 1998

Naomi Gray, Esq.
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153-0119

Re: Greenbergs v. National Geographic Society, et al.

Dear Naomi:

This will further respond to your letter of August 13, 1998. Our view is that a request for production of documents made in the course of a deposition is not binding on the other party, particularly in the absence of an agreement to produce the documents. Moreover, even if production was required under the rules, the Greenbergs would object to production because the request is overly broad and burdensome, and because the documents sought cannot reasonably lead to the discovery of admissible evidence as to Counts I and II. Without waiving the objection, and in a gesture of cooperation, various documents sought in your letter are being produced. The Greenbergs reserve the right to object to the admission of the documents as evidence, and request that you advise before any attempt to so utilize the documents in order that an objection can be considered and acted upon by the plaintiffs.

A search has indicated that the following items sought in your letter are no longer in the Greenbergs' possession. (Other documents in your list may also no longer exist.)

- Underwater Alphabet Book
- Book titled West of Key West
- Sherry Manufacturing T-shirt
- Documents re motion picture "Jaws"
- Stackpole Books agreement

Copies of the following documents are being produced:

(a) Copies of journals for 1993 through 1997, with prior redactions eliminated to the extent that they pertain to settlement arrangements for unauthorized use of the Greenbergs' copyrighted materials.

SECRET
DIRECTOR
N. DAVIS

Naomi Gray, Esq.
August 24, 1998
page two

(b) Copies of Seahawk Press invoices, previously withheld, that pertain to settlement arrangements for unauthorized use of the Greenbergs' copyrighted materials.

(c) Copy of a March 11, 1994 letter from Jerry Greenberg to Winthrop Scudder of the National Geographic Society.

(d) Copy of a card produced by Nautilus Subsea Adventures.

With reference to the journals described in (a) above, entry number 6 for September 1997 continues to be redacted until I can determine the extent of a confidentiality agreement entered into with an adverse party. An invoice pertaining to that settlement also is being withheld. I will inform you of what we are able to provide as quickly as possible.

Sincerely,



Norman Davis

Enclosures



NATIONAL
GEOGRAPHIC
SOCIETY

FAX Cover Sheet

To: JERRY GREENBERG

Company:

Phone:

Fax: 305-667-3572

From: BOB PERITT

Company: NG Store

Phone:

Fax:

Date:

**Pages including this
cover page:**

Comments

:

MARCH 17, 1996 WE DISCOVER & PURCHASE E.I./NGS
PRODUCT @ GET SMART

JULY 16, 1996 1ST LETTER TO JAY CUTLER @ E.I.

JULY 16, 1996 LORI WILSON (E.I.) TO NORMAN DAVIS

SEPT. 30, 1996

OCT. 3, 1996 LORI WILSON (E.I.) TO NORMAN DAVIS

OCT. 11, 1996 NORMAN DAVIS TO LORI WILSON (E.I.)

OCT. 28, 1996 G.R. CALCOTT (E.I.) TO SUZANNE ROSS
McDOWELL @ NATIONAL GEOGRAPHIC SOCIETY
"AGREEMENT E.I. & NGS APRIL 5, 1995"

NOV. 18, 1996 SUZANNE ROSS McDOWELL (NGS) TO N.D.
"ALL FISH OF SAME SPECIES"

DEC. 19, 1996 N. DAVIS TO SUZANNE ROSS McDOWELL (NGS)

JAN. 16, 1996 N. DAVIS TO SUZANNE ROSS McDOWELL (NGS)

FEB. 28, 1997 SUZANNE R. McDOWELL (NGS) TO N. DAVIS
"WE ARE PREPARED TO DEFEND"

MARCH 13, 1997 N. DAVIS TO SUZANNE R. McDOWELL (NGS) ⁷ PGS ^{A+B}
SETTLEMENT ~ 7 PAGES

APRIL 18, 1997 SUZANNE R. McDOWELL (NGS) TO N. DAVIS
SETTLEMENT

APRIL 23, 1997 N. DAVIS TO SUZANNE R. McDOWELL (NGS)
(ALSO MENTIONS PROPOSED CD-ROM) SETTLEMENT NOT
ACCEPTABLE

DEC. 5, 1997 N. DAVIS FILES AGAINST NGS & MINDSCAPE
CASE 97-3924 CIV.

JAN. 16, 1998	N.DAVIS TO R.SUGARMAN (NGS) SETTLEMENT
JAN. 28, 1998	R.SUGARMAN (NGS) TO N.DAVIS SETTLEMENT
APRIL 21, 1998	N.DAVIS TO R.SUGARMAN (NGS) SETTLEMENT
MAY 1, 1998	R.SUGARMAN (NGS) TO NORMAN DAVIS

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

**JERRY GREENBERG, individually,
and IDAZ GREENBERG, individually,**

Plaintiffs,

**CASE NO. 97-3924
CIV-LENARD**

v.

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

OFFER OF JUDGMENT

Defendants.

Pursuant to Rule 68 of the Federal Rules of Civil Procedure, Defendants National Geographic Society, National Geographic Enterprises, Inc. and Mindscape, Inc. hereby offer to allow judgment to be taken against them in the above-referenced action in the amount of \$8,750 with respect to Count I of the Amended Complaint and \$8,750 with respect to Count II of the Amended Complaint, ^{ENCLOSURE} together with costs and reasonable attorneys' fees accrued to date. This Offer of Judgment is made for the purposes specified in Rule 68, and is not to be construed either as an admission that Defendants are liable in this action or

that Plaintiffs have suffered any damage.

Dated: New York, New York
July 17, 1998



Robert G. Sugarman
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8078

MARCH 17, 1996 WE DISCOVER & PURCHASE E.I./NGS
PRODUCT @ GET SMART

JULY 16, 1996 1ST LETTER TO JAY CUTLER @ E.I.

JULY 16, 1996 LORI WILSON (E.I.) TO NORMAN DAVIS

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OCT. 11, 1996 NORMAN DAVIS TO LORI WILSON (E.I.)

OCT. 28, 1996 G.R. CALCOTT (E.I.) TO SUZANNE ROSS
McDOWELL @ NATIONAL GEOGRAPHIC SOCIETY

NOV. 18, 1996 SUZANNE ROSS McDOWELL (NGS) TO N.D.

DEC. 19, 1996 N.DAVIS TO SUZANNE ROSS McDOWELL (NGS)

JAN. 16, 1996 N.DAVIS TO SUZANNE ROSS McDOWELL (NGS)

FEB. 28, 1997 SUZANNE R. McDOWELL (NGS) TO N. DAVIS

MARCH 13, 1997 N.DAVIS TO SUZANNE R. McDOWELL (NGS) (7
PGS)

APRIL 18, 1997 SUZANNE R. McDOWELL (NGS) TO N. DAVIS

APRIL 23, 1997 N.DAVIS TO SUZANNE R. McDOWELL (NGS)
(ALSO MENTIONS PROPOSED CD-ROM)

DEC. 5, 1997 N.DAVIS FILES AGAINST NGS & MINDSCAPE
CASE 97-3924 CIV

JAN. 16, 1998	N.DAVIS TO R.SUGARMAN (NGS)
JAN. 28, 1998	R.SUGARMAN (NGS) TO N.DAVIS
APRIL 21, 1998	N.DAVIS TO R.SUGARMAN (NGS)
MAY 1, 1998	R.SUGARMAN (NGS) TO NORMAN DAVIS

BY CERTIFIED MAIL

April 23, 1997

Suzanne Ross McDowell
Assistant Vice President
Legal Affairs, Publications
National Geographic Society
1145 17th Street, N.W.
Washington, D.C. 20036-4688

Dear Ms. McDowell:

This will acknowledge receipt of your letter dated April 18, 1997, which responded to our letter to you dated March 13, 1997. Your conclusion that no infringement has occurred with respect to the Educational Insights materials appears to foreclose any possibility of resolving that dispute without litigation. Your proposal to pay Mr. Greenberg \$500 for the use of his sea fan photograph was unacceptable when first made and is unacceptable now. Mr. Greenberg has serious concerns in other areas, as indicated in our letter, but is interested only in a global resolution of all matters covered in the letter.

We will proceed as indicated in the March 13 letter, and in any action that is brought in the Southern District of Florida we expect to name Educational Insights, Inc. as an additional defendant. The nature of a purported licensing agreement between that company and the Society as to the disputed materials is unclear to us, but in any event such an agreement is external to our client's interests.

Mr. Greenberg has become aware that the Society is embarked on a project that apparently will reproduce on one or more CD-ROMs, for distribution and sale, past issues of the Society's magazine covering 100 years. This is notice that any photographs provided by Mr. Greenberg to the Society which appeared in past issues of the magazine -- for which Mr. Greenberg owns exclusive copyright or for which Mr. Greenberg authorized one-time use for a single issue -- may not be used for the CD-ROM project, or any other project, without his prior written permission. The Society has no right -- under copyright, contract, or any other theory -- to use Mr. Greenberg's creative works for purposes other than those that were authorized by him with respect to particular issues of the magazine. In view of this notice, Mr. Greenberg will regard any unauthorized use of his works in the CD-ROM project as willful infringement, and he will seek the fullest remedies available to him.

In view of the impasse in the matter, please return to the undersigned the exhibit book that was specially prepared and provided to you for negotiation purposes. As stated in our March 13 letter, that exhibit was and is the property of Mr. Greenberg.

Your courteous response to our March 13 letter, while seriously deficient, in our view, in its discussion of applicable law, is appreciated. It is unfortunate that the Society -- zealously

Suzanne Ross McDowell

April 23, 1997

page two

protective of its own rights -- has adopted a cavalier position here where demonstrable rights of another are at issue. Your statement, for example, that copyright protection is available for photographs of natural objects only if a copy is virtually identical, if true, would surely pose grave difficulties for the Society's own storehouse of photographs). In due course we will allow a court to decide the proper standard for infringement of such photographs.

Very truly yours,

Norman Davis

STEEL ■
HECTOR
■ DAVIS

Steel Hector & Davis LLP
200 South Biscayne Boulevard
Miami, Florida 33131-2398
305.577.7000
305.577.7001 Fax

BY TELECOPY

Norman Davis
305.577.2988

January 16, 1997

Suzanne Ross McDowell
Assistant Vice President
National Geographic Society
1145 17th Street, N. W.
Washington, DC 20036-4688

Dear Ms. McDowell:

On December 19, 1996, I wrote to you with reference to our clients' dispute with Educational Insights, Inc. to determine what responsibility the National Geographic Society is prepared to accept in the matter. We have received no response. Our clients are interested in proceeding without further delay, and a clarification of the Society's role will be appreciated.

Sincerely,



Norman Davis

bcc: Jerry Greenberg

West Palm Beach
561.650.7200
561.655.1509 Fax

Tallahassee
904.222.2300
904.222.8410 Fax

Key West
305.292.7272
305.292.7271 Fax

Caracas
582.951.4105
582.951.4106 Fax



NATIONAL
GEOGRAPHIC
SOCIETY

SUZANNE ROSS McDOWELL
Assistant Vice President
LEGAL AFFAIRS, PUBLICATIONS

February 28, 1997

Norman Davis, Esq.
Steel Hector & Davis LLP
200 South Biscayne Boulevard
Miami, FL 33131-2398

Dear Mr. Davis:

I am responding to your letter of January 16, 1997 in which you ask what responsibility the Society is prepared to accept concerning your client's dispute with Educational Insights. With respect to the editorial content that the Society provided to Educational Insights, we are prepared to defend any copyright infringement claims and Educational Insights is prepared to defer to us in this matter.

Sincerely,

s:\drafts\davisedu.ltr

DRAFT

December 19, 1996

Suzanne Ross McDowell
Assistant Vice President
National Geographic Society
1145 17th Street, N. W.
Washington, DC 20036-4688

Dear Ms. McDowell:

This pertains to your letter to me dated November 18, 1996. I regret the inordinate delay; preparations for a trial absorbed the bulk of my time in recent weeks. Your letter states that your response is to my letters of July 16, 1996 and October 15, 1996 to Educational Insights, Inc. ("Educational Insights"), and you indicate that your response is pursuant to a "mutual agreement" between the National Geographic Society ("the Society") and Educational Insights.

In the circumstances we are reluctant to pursue the matter with the Society, at this stage at least, because our clients believe that one or more infringements has occurred in the publication and sale of the disputed materials by Educational Insights. We are aware that the Society's copyright notice appears on those materials, but our initial attempts to resolve the matter will be directed to the using party. If the Society will accept responsibility for uses of the materials by Educational Insights -- that has not yet occurred -- we will reconsider our approach. I can say as a general proposition that we are not persuaded by the Society's position, as set forth in your letter, that no infringement has occurred. We will elaborate on that proposition when the proper party or parties has been more adequately identified. If that identification is not forthcoming, we will proceed by dealing directly with Educational Insights.

I look forward to your response.

Sincerely,

Norman Davis

NATIONAL GEOGRAPHIC SOCIETY

SUZANNE ROSS McDOWELL
Assistant Vice President
LEGAL AFFAIRS, PUBLICATIONS

November 18, 1996

Norman Davis, Esq.
Steel Hector & Davis LLP
200 South Biscayne Boulevard
Miami, FL 33131-2398

Dear Mr. Davis:

By mutual agreement between Educational Insights and the National Geographic Society, I am responding to your letters of July 16, 1996 to Jay Cutler and October 15, 1996 to Lori Wilson, both of Educational Insights, Inc. I apologize for the delay in responding.

In your letter of July 16, you state that your clients, owners of an enterprise doing business as Seahawk Press, believe that four parts of the artwork for *Fish of the Coral Reef*, Educational Insights Code 2043, are unauthorized copies of photographs to which your client holds the copyright. The National Geographic Society produced the artwork for *Fish of the Coral Reef*.

As you can imagine, at National Geographic, we are very sensitive to the rights of copyright holders. The Society holds many copyrights itself and interacts on a daily basis with photographers, artists and writers who hold copyrights. We make every effort to recognize the rights of copyright holders and to compensate them for use of their intellectual property where appropriate.

The parts of the artwork that your client claims have been unlawfully copied are: (1) two divers; (2) a redband parrotfish; (3) a stoplight parrotfish; and (4) a moray eel. In your letter of October 15, 1996, you identified for us sources where the photographs were published and we have examined the photographs in *The Living Reef*. As you know, copyright infringement exists when there is unlawful copying of the photograph. As discussed below, while there are similarities between parts of the artwork and your client's photographs, there are also significant differences between the two. Thus, we do not believe there has been copying within the meaning of the copyright law.

1. Redband parrotfish. The angle of the fish and the coloration of the fish are different from the photograph. The front fin in the artwork is red, below the front fin is whiter, the tail is brighter and has less blue, and the eye and mouth are different. It is true that the shape is the same, but that is dictated as a matter of scientific accuracy.

Norman Davis
November 18, 1996
Page two

2. Divers. There are significant differences between the photographs of divers and the artwork. Both photographs are of adult divers while the artwork pictures children. In addition, the bubbles are different, and the position of the fins, legs and arms are different. The hair and clothing are different. Moreover, there are numerous photographs showing divers in approximately this position, because it is the position that human anatomy takes when diving.
3. Stoplight parrotfish. The coloration of the artwork is more fluorescent and brighter than the coloration in the photograph and there are other photographs of fish with the fluorescent color shown in the illustration. The angle and shape of the illustration and photograph are the same, but this is the shape of a parrot fish. With a different shape, it is a different fish. The angle is the angle that many fish take when feeding. There are numerous photographs of fish in similar positions.
4. Moray eel. The photograph and the illustration are different species. The illustration is a goldentail while the photograph is a green moray eel. In addition, the eel in the illustration is in a different position, the "flap" on its back is different, the angle of its head is different, its mouth is different and its eyes are a different color. As to the general position, there are numerous photographs of moray eels in approximately this position.

In summary, while we have given Seahawk Press' claim careful and sympathetic review, we do not believe that the artist has infringed the copyright in your client's photographs. It is important to keep in mind that the artwork at issue depicts species of fish and that, by definition, all photographs and illustrations of a particular species will bear some similarity to each other.

Please call me if you wish to discuss this matter further.

Sincerely,

Suzanne Ross McDowell



October 28, 1996

Suzanne Ross McDowell
Legal Affairs, Publications
NATIONAL GEOGRAPHIC SOCIETY
1145 17th Street, N. W.
Washington, DC 20036-4688

Dear Ms. McDowell:

Lori Wilson recently brought to my attention the correspondence which has been exchanged between the law firm of Steel Hector & Davis, National Geographic and ourselves pertaining to a potential copyright infringement.

I reviewed this material and the Development and Distribution Agreement between Educational Insights and National Geographic dated April 5, 1995 and concluded that the indemnification clause, paragraph 7a on page 4, makes the National Geographic Society responsible for responding to assertions of infringement such as those described by Mr. Norman Davis of Steel Hector & Davis.

Accordingly, I am bundling up this entire file and forwarding it to you so that you can respond to Mr. Davis.

I have spoken to him over the phone and he told me that the material originally appeared in the National Geographic but that it was assigned back to his clients (He also mentions this in his October 15 letter, a copy of which is attached).

Because we have no idea of the nature of the reassignment, and he did not realize that this work was published under license from National Geographic, it may very well be that while you have used items to which his clients have copyright rights, they do not have exclusive copyright rights and National Geographic as the original copywriter may be free to continue the use of such material.

In any case, it seems to me that this is a matter for National Geographic rather than Educational Insights to unscramble.

We will, of course, provide any documentation or material in our possession that you request.

Sincerely,

G.R. Calcott
Vice Chairman and Chief Financial Officer

GRC/lw
Enclosures

CC: Norman Davis Steel Hector & Davis*
Joseph Price Price, Gess & Ubell*
*Exhibits excluded from your copy.



October 28, 1996

Suzanne Ross McDowell
Legal Affairs, Publications
NATIONAL GEOGRAPHIC SOCIETY
1145 17th Street, N. W.
Washington, DC 20036-4688

Dear Ms. McDowell:

Lori Wilson recently brought to my attention the correspondence which has been exchanged between the law firm of Steel Hector & Davis, National Geographic and ourselves pertaining to a potential copyright infringement.

I reviewed this material and the Development and Distribution Agreement between Educational Insights and National Geographic dated April 5, 1995 and concluded that the indemnification clause, paragraph 7a on page 4, makes the National Geographic Society responsible for responding to assertions of infringement such as those described by Mr. Norman Davis of Steel Hector & Davis.

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In any case, it seems to me that this is a matter for National Geographic rather than Educational Insights to unscramble.

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Sincerely,

G.R. Calcott
Vice Chairman and Chief Financial Officer

GRC/lw
Enclosures

CC: Norman Davis Steel Hector & Davis*
 Joseph Price Price, Gess & Ubell*
 *Exhibits excluded from your copy.

STEEL ■
HECTOR
& DAVIS

Steel Hector & Davis LLP
200 South Biscayne Boulevard
Miami, Florida 33131-2398
305.577.7000
305.577.7001 Fax

August 27, 1996

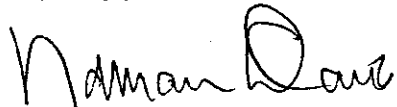
Norman Davis
305.577.2988

Jay A. Cutler, President
Educational Insights, Inc.
16941 Keegan Avenue
Carson, CA 90745

Dear Mr. Cutler:

On July 16, 1996, we wrote to you on behalf of clients in Miami who are concerned that unauthorized copies of their copyrighted works appear in certain products distributed by your company. We requested, among other things, that you confirm the origin of the illustrations highlighted in the enclosure, and that you identify that source for us. We have had no response to that letter, and we request again the information sought therein.

Very truly yours,


Norman Davis

cc: J. Greenberg



16941 Keegan Avenue • Carson, CA 90748-1307 • USA
Telephone: (310)884-2291 • (800)933-3277 • Fax: (310)884-2013

FAX TRANSMITTAL

Date: September 3, 1996

To: STEEL HECTOR AND DAVIS

Attn: Norman Davis

From: Lori Wilson

Fax #: (305) 577-7001

Number of Pages (including this page) 1

If you do not receive any part of this fax or if parts are illegible, please call the sender immediately.

Dear Mr. Davis:

We received your letter today questioning our response time. We did send a fax to your attention on July 23 and another on August 30. Did you not receive these??

I sent the second fax to your attention on Friday, crossing your recent letter in the mail, updating you that we ARE still trying to get answers in regard to your client and the four illustrations in question.

I spoke today with the necessary party and I'm waiting on a return call. As mentioned in my Friday's fax, I hope to have this situation resolved by the end of this week.

Please give me a call direct (310) 884-2291 if you have any questions or concerns.

Thank you,

DRAFT

October 11, 1996

Lori Wilson
Educational Insights, Inc.
16941 Keegan Avenue
Carson, CA 90746-1307

ACTUALLY
6 IMAGES THAT WE
HAVE COPYRIGHTS TO.

Dear Ms. Wilson:

This will acknowledge your facsimile transmission dated October 3, 1996. You requested various details as to the copyrighted images that were first discussed in our letter to Jay A. Cutler dated July 16, 1996. Your Fax Transmittal makes reference to "four illustrations in our product." Our previous correspondence referred only to "various" illustrations. Discussed below are the specific images, and the code numbers of the Educational Insights products in which they appear, that our clients are challenging.

"Fish of the Coral Reef" (Code 2043). Two parrotfish and moray eel. Our client's photographs appear in a book titled "The Coral Reef" which contains notice of copyright. The redband parrotfish is at page 26. The stoplight parrotfish appears at page 27. The moray eel is at pages 42-43. The same photographs also appear in a book titled "The Living Reef," which contains copyright notice. The redband parrotfish appears on the cover of that book and on page 49. The stoplight parrotfish appears in "The Living Reef" on page 50. The moray eel appears on pages 83-84 of that book. Copyright for "The Coral Reef" was registered with the U. S. Copyright Office in 1976, and copyright for "The Living Reef" was registered in ~~1970~~ 1972.

"Coral Reef" (Code 1431). Two scuba divers. Our client's photograph of the bent-knee diver appeared in the January 1962 issue of National Geographic Magazine, and the National Geographic Society registered the copyright in that year. On December 18, 1985, the Society assigned all right, title and interest in the photograph, including copyright, to Jerry Greenberg. The assignment document was recorded in the U. S. Copyright Office on September 16, 1988. A certificate of renewal registration for the copyright was filed with that office in January 1990. The photograph of the bent-knee diver appears in our clients' "The Coral Reef" at pages 62-63, and also appears in "The Living Reef" at pages 73-74. The photograph of the upright diver appeared in "The Living Reef," discussed above, at page 17.

"Creatures of the Open Ocean" (Code 3907). Bull shark. Our client's original photograph of the shark appeared in a ~~poster~~ poster titled "World Beneath the Waves," which contained copyright notice, and the copyright was registered with the U. S. Copyright Office in 1973.

Ms. Lori Wilson
October 11, 1996
page two

(Our clients will take up their concerns with respect to other shark illustrations that appear in your "Creatures of the Open Ocean" with another entity at a later time.)

Three exhibits are enclosed that illustrate the basis for our clients' concerns. Two overlays were prepared from the parrotfish illustrations displayed in your Code 2043 product, and an overlay was prepared from the bull shark illustration in your Code 3907 product. The similarity of the originals and the copies, from a copyright perspective, is quite striking.

Please refer to our letter of July 16, 1996 to Mr. Cutler regarding the information our clients seek regarding the challenged illustrations discussed above. That letter sought, among other things, information as to the use of the challenged illustrations in other products or in promotional materials utilized by Educational Insights. With adequate information in hand, we will set forth our clients' expectations with regard to unauthorized use by Educational Insights of the protected images discussed herein. Because considerable time has elapsed since our original letter to Mr. Cutler, please provide a detailed response without additional delay.

Very truly yours,

Norman Davis

Enclosures



16941 Keegan Avenue • Carson, CA 90746-1307 • USA
Telephone: (310)884-2291 • (800)933-3277 • Fax: (310)884-2013

FAX TRANSMITTAL

Date: October 3, 1996
To: STEEL HECTOR AND DAVIS
Attn: Norman Davis
From: Lori Wilson
Fax #: (305) 577-7001

Number of Pages (including this page) 1

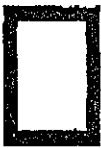
If you do not receive any part of this fax or if parts are illegible, please call the sender immediately.

Dear Mr. Davis:

To assist us in researching the claim that your clients believe we are using unauthorized copies of four illustrations in our product entitled "Fish of the Coral Reef", please identify for us the name of the copyright holder or copyright holders and the Seahawk publications (list issues and page numbers) or product in which these illustrations may be found.

Please forward this information to my attention as soon as possible to help expedite our progress. Also, I will be on vacation from Wednesday, October 9 until October 21 when I'll be back in the office. I will be leaving all the information regarding this case with our CFO's assistant in my absence.

Thank you,
Lori



NATIONAL
GEOGRAPHIC
SOCIETY

SUZANNE ROSS McDOWELL
Assistant Vice President
LEGAL AFFAIRS, PUBLICATIONS

FACSIMILE MESSAGE

TO: Lori Wilson
FAX NO.: (305) 577-7001
DATE: September 30, 1996
TOTAL # OF PAGES: 1

Dear Lori:

I suggest the following language for the first paragraph of your fax to Mr. Davis:

To assist us in researching the claim that your clients believe we are using unauthorized copies of four illustrations in our product entitled "Fish of the Coral Reef," please identify for us the name of the copyright holder or copyright holders, the specific illustrations that your clients claim have been copied, and the Seahawk publication or product in which these illustrations may be found.

[Use your second and third paragraph here]

Please call me if you wish to discuss this language or if I can assist in any other way. Thanks for your help.

Sincerely,

This facsimile transmission is intended only for the addressee shown above. It may contain information that is privileged, confidential or otherwise protected from disclosure. Any review, dissemination or use of this transmission or its contents by persons other than the addressee is strictly prohibited. If you have received this transmission in error, please notify us immediately and mail the original to us at the below address.

**Educational
Insights®**


16941 Keegan Avenue • Carson, CA 90748-1307 • USA
Telephone: (310)884-2291 • (800)933-3277 • Fax: (310)884-2013

FAX TRANSMITTAL

Date: October 3, 1996

To: STEEL HECTOR AND DAVIS

Attn: Norman Davis

From: Lori Wilson

Fax #: (305) 577-7001

Number of Pages (including this page) 1

If you do not receive any part of this fax or if parts are illegible, please call the sender immediately.

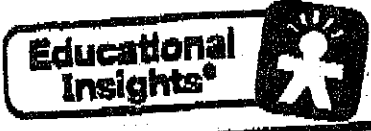
Dear Mr. Davis:

To assist us in researching the claim that your clients believe we are using unauthorized copies of four illustrations in our product entitled "Fish of the Coral Reef", please identify for us the name of the copyright holder or copyright holders and the Seahawk publications (list issues and page numbers) or product in which these illustrations may be found.

Please forward this information to my attention as soon as possible to help expedite our progress. Also, I will be on vacation from Wednesday, October 9 until October 21 when I'll be back in the office. I will be leaving all the information regarding this case with our CFO's assistant in my absence.

Thank you,

Lori



16941 Keegan Avenue • Carson, CA 90746-1307 • USA
Telephone: (310)884-2291 • (800)933-3277 • Fax: (310)884-2013

FAX TRANSMITTAL

Date: July 23, 1996
To: STEEL HECTOR AND DAVIS
Attn: Norman Davis
From: Lori Wilson
Fax #: (305) 577-7001

Number of Pages (including this page) 1

If you do not receive any part of this fax or if parts are illegible, please call the sender immediately.

Dear Mr. Davis:

We received your letter dated July 16, 1996 and want to express our concern over the issue you've presented regarding the possible use of unauthorized illustrations on our 3-D GeoPack titled "Fish of the Coral Reef".

We would like you to know that we are investigating the four illustrations in question and will notify you as soon as we have any information.

In the meantime, feel free to contact me if you have any questions.

July 16, 1996

VIA FEDERAL EXPRESS

Jay A. Cutler, President
Educational Insights, Inc.
16941 Keegan Avenue
Carson, CA 90745

Dear Mr. Cutler:

We represent the owners of an enterprise that conducts business in Miami as Seahawk Press. Their sole business activity is the creation and distribution for sale of books, cards, posters, apparel and artifacts. Their products contain and feature only works that are original creations, in photographs and illustrations, primarily depicting undersea creatures and environments. The Seahawk Press products are distributed and sold widely in the United States, predominantly in coastal areas, and in other parts of the world.

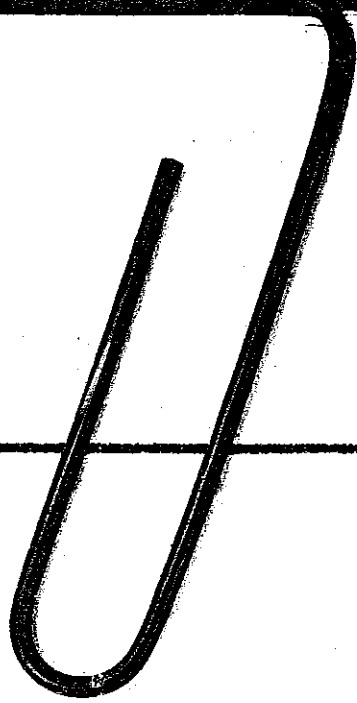
This inquiry is directed to a product, evidently manufactured and distributed by Educational Insights, bearing the title "Fish of the Coral Reef." As we understand it, the product is part of a series called the 3-D Reefs and Oceans GeoPack. "Fish of the Coral Reef," which was purchased in South Florida, bears a designation as Code 2043. For convenience we will refer to the product here as the Coral Reef display.

That product contains a number of illustrations that our clients believe to be unauthorized copies of illustrations on which they hold United States copyrights. The disputed illustrations are highlighted in yellow on the enclosed copy of the front cover of the Coral Reef display. We note that the only copyright notice shown in the Coral Reef display is that of the National Geographic Society. Before proposing a course of action, we request that you confirm the origin of the illustrations highlighted in the enclosure, i.e., whether the illustrations were created by or for Educational Insights, Inc. or were obtained in some manner from another source. If the latter is the case, we ask that you identify that source for us. Additionally, if the disputed illustrations are utilized by your company in products other than the Coral Reef display, we request that you so advise us.

We look forward to your anticipated cooperation.

Very truly yours,

Norman Davis



**Educational
Insights®**



16941 Keegan Ave., Carson, California 90746-1307
(310) 884-2000 ■ Fax (310) 605-5048

CIETY

my attention the correspondence which has been exchanged between
vis. National Geographic and ourselves pertaining to a potential

DRAFT

BY TELECOPY & MAIL

April 21, 1998

Robert G. Sugarman, Esq.
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153

Re: Jerry Greenberg, et al. v. National Geographic Society, et al.

Dear Bob:

The contents of this letter are intended solely for the purpose of exploring a settlement of the dispute as to Counts I and II of the Amended Complaint and with the expectation that the contents will be used for no other purpose. Our clients, as you are aware, are engaged in a time-consuming and costly phase in preparing responses to discovery requests pertaining to Counts I and II. The Greenbergs already have incurred more than \$15,000 in attorney's fees and some \$2,000 in costs with respect to those counts, and those numbers are escalating. Encompassed in those amounts are unsuccessful attempts by their counsel, before proceeding to litigation, to resolve issues as to those counts with Educational Insights, Inc. and with the National Geographic Society. Thus, in an attempt to halt the growing expense, the Greenbergs are prepared to make one last proposal to resolve Counts I and II by settlement. If this attempt is unsuccessful, they are resolved to allow the court to determine whether infringements have occurred, and if so, to award damages.

The only leverage the Greenbergs have in a settlement discussion is their conviction that their works have been infringed and that they are entitled to fair redress. They are prepared to continue their investment in the litigation if necessary. Their adversaries are bountifully endowed, while the Greenbergs are not. On the other hand, they are not hand-to-mouth artists who must struggle to pursue their creative efforts. The Greenbergs have operated a modestly successful business, attributable only to the quality of their works, that has produced revenues in excess of \$2,500,000, and significant license fee arrangements with various entities, in the last five years. The enclosed promotional fliers illustrate some of their current products.

Nor are the Greenbergs litigious. In the last decade they have resolved scores of disputes over infringements of their works without litigation, and have filed complaints in only a handful of circumstances. In other reasonably comparable disputes the Greenbergs obtained amounts of

Robert G. Sugarman, Esq.
April 24, 1998
page two

\$35,000, \$58,000, \$49,000, and \$195,000 in the course of settling the controversies. A number of settlements included licensing arrangements for the continued use of various images.

Your January 28, 1998 letter set forth standards for compensation that the Greenbergs believe are not appropriate here. What the Society has typically paid, or rates that may exist in the current market, are not relevant because the Greenbergs would not have been amenable to such rates, and they were deprived of any chance to decline such rates. No one approached them to determine whether four times the "market rate" was acceptable. Mr. Greenberg agreed to specific compensation by the Society over the years because his work was for a nonprofit entity with nonprofit purposes. That is no longer the situation. In comparison, Mr. Greenberg was paid \$9,800 by J. Walter Thompson for one photograph used in an advertisement. That photograph, for which Mr. Greenberg owns copyright, appeared first in the July 1990 National Geographic magazine.

The statement in your letter that the Greenbergs "have suffered no loss" in the value of their copyrights is not sustainable. Some of the Greenbergs' products are directed to children, and they have the dismaying experience of competing in that market with infringements of their own images in an Educational Insights product. Your letter notes that the Society was solicitous regarding the sea fan infringement. Not yet acknowledged is that the sea fan episode was the third time that the Society had used Mr. Greenberg's copyrighted photographs without consulting him. The amount offered him by the Society as compensation was not acceptable.

The proposal that is enclosed contains a higher number than previously because the Greenbergs' legal expense has escalated. You should note, as well, that the proposed license fee has been substantially reduced. If the offer is not accepted by the close of business on May 1, 1998, the offer will be automatically withdrawn. The Greenbergs are people of conscience and goodwill, and their offer is made in that context.

Sincerely,

Norman Davis

Enclosure

Settlement Proposal - Counts I and II

(1) The Society will pay to the Greenbergs the sum of \$42,000.00. That sum is inclusive of all legal expense to date that is related to the claims in Counts I and II.

(2) Additionally, the Society will pay to the Greenbergs each year the sum of \$1,000.00 as a license fee for the continued use by Educational Insights, Inc. of the disputed images in its product. The fee for 1998 will be paid with the amount stated in (1) above. Fees for any subsequent years will be paid by January 1 of each year of license. The license will expire at the end of each year and no further fees will be required upon receipt by the Greenbergs of a sworn statement by an officer of Educational Insights, Inc. or the Society that all manufacture, distribution and sale of the product containing the disputed images has ended.

(3) In order to safeguard against any future problems, the Society (and its affiliates, if applicable) will promptly provide to Mr. Greenberg a visual inventory of all photographs created originally by him, or any copies or derivatives that the Society is holding in its files, archives, libraries, databases or elsewhere. Mr. Greenberg will thereupon, utilizing the inventory, identify all such items for which he holds copyright and for which he can demonstrate such copyright or other proprietary right, and provide such identification to the Society. The Society will provide written assurance that no photographs or items so identified will ever be published, distributed, licensed, sold or otherwise utilized by the Society, or by others with its consent or participation, without a prior written agreement with Mr. Greenberg.

(4) Copyright in the disputed images in the Educational Insights product will be assigned to Mr. Greenberg by the Society. Such assignment will not be effective as to any other images contained in that product.

(5) Upon satisfaction of the items listed above, the Greenbergs are willing to execute a limited release applicable to the matters addressed in Counts I and II.

Settlement Proposal - Counts I and II

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- (2) Additionally, the Society will pay to the Greenbergs each year the sum of \$1,000.00 as a license fee for the continued use by Educational Insights, Inc. of the disputed images in its product. The fee for 1998 will be paid with the amount stated in (1) above. Fees for any subsequent years will be paid by January 1 of each year of license. The license will expire at the end of each year and no further fees will be required upon receipt by the Greenbergs of a sworn statement by an officer of Educational Insights, Inc. or the Society that all manufacture, distribution and sale of the product containing the disputed images has ended.
- (3) In order to safeguard against any future problems, the Society (and its affiliates, if applicable) will promptly provide to Mr. Greenberg a visual inventory of all photographs created originally by him, or any copies or derivatives that the Society is holding in its files, archives, libraries, databases or elsewhere. Mr. Greenberg will thereupon, utilizing the inventory, identify all such items for which he holds copyright and for which he can demonstrate such copyright or other proprietary right, and provide such identification to the Society. The Society will provide written assurance that no photographs or items so identified will ever be published, distributed, licensed, sold or otherwise utilized by the Society, or by others with its consent or participation, without a prior written agreement with Mr. Greenberg.
- (4) Copyright in the disputed images in the Educational Insights product will be assigned to Mr. Greenberg by the Society. Such assignment will not be effective as to any other images contained in that product.
- (5) Upon satisfaction of the items listed above, the Greenbergs are willing to execute a limited release applicable to the matters addressed in Counts I and II.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
CASE NO. 97-3924-CIV-LENARD/TURNOFF

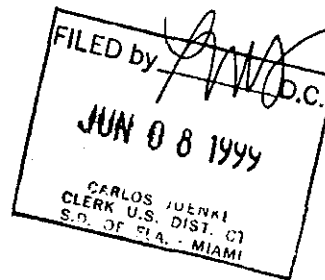
JERRY GREENBERG and
IDAZ GREENBERG,

Plaintiffs,

vs.

NATIONAL GEOGRAPHIC
SOCIETY, NATIONAL
GEOGRAPHIC ENTERPRISES,
INC., and MINDSCAPE, INC.,

Defendants.



ORDER AMENDING SCHEDULING ORDER AND REFERRING THIS MATTER TO
MAGISTRATE JUDGE TURNOFF FOR A SETTLEMENT CONFERENCE

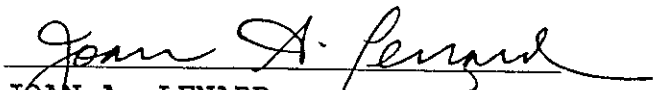
THIS CAUSE is before the Parties' Joint Motion to Amend the Scheduling Order, filed March 31, 1999, and Plaintiff's Motion to Continue Trial, filed April 28, 1999. The Court, having considered the motion and the record in this case, it is

ORDERED AND ADJUDGED that the Parties' Joint Motion to Amend the Scheduling Order, filed March 31, 1999 is GRANTED IN PART AND DENIED IN PART. Discovery remains closed and an Order setting a new trial date will follow. Accordingly, Plaintiff's Motion to Continue Trial, filed April 28, 1999 is GRANTED. It is further

ORDERED AND ADJUDGED that this case is REFERRED to U.S.

Magistrate Judge William C. Turnoff for purposes of holding a settlement conference at his earliest convenience. All parties and counsel shall attend this conference subject to Judge Turnoff's order.

DONE AND ORDERED in Chambers at Miami, Florida, this 8 day of June, 1999.


JOAN A. LENARD
UNITED STATES DISTRICT JUDGE

- cc: Magistrate Judge Turnoff
- Norman Davis, Esq.
Steel, Hector & Davis
Suite 4000
First Union Financial Center
Miami, FL 33131-2398
- Valerie Itkoff, Esq.
Weil, Gotshal & Manges
701 Brickell Ave., Suite 2100
Miami, FL 33131
- Robert Sugarman, Esq.
Weil, Gotshal & Manges
767 Fifth Avenue
New York, NY 10153

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
CASE NO. 97-3924-CIV-LENARD/TURNOFF

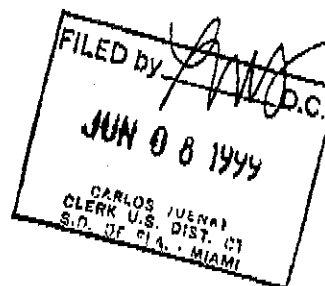
JERRY GREENBERG and
IDAZ GREENBERG,

Plaintiffs,

vs.

NATIONAL GEOGRAPHIC
SOCIETY, NATIONAL
GEOGRAPHIC ENTERPRISES,
INC., and MINDSCAPE, INC.,

Defendants.



ORDER AMENDING SCHEDULING ORDER AND REFERRING THIS MATTER TO
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Magistrate Judge William C. Turnoff for purposes of holding a settlement conference at his earliest convenience. All parties and counsel shall attend this conference subject to Judge Turnoff's order.

DONE AND ORDERED in Chambers at Miami, Florida, this 8 day of June, 1999.

Joan A. Lenard
JOAN A. LENARD
UNITED STATES DISTRICT JUDGE

cc: Magistrate Judge Turnoff

Norman Davis, Esq.
Steel, Hector & Davis
Suite 4000
First Union Financial Center
Miami, FL 33131-2390

Valerie Itkoff, Esq.
Weil, Gotshal & Manges
701 Brickell Ave., Suite 2100
Miami, FL 33131

Robert Sugarman, Esq.
Weil, Gotshal & Manges
767 Fifth Avenue
New York, NY 10153

WEIL, GOTSHAL & MANGES LLP

A LIMITED LIABILITY PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

767 FIFTH AVENUE • NEW YORK, NY 10153-0119

(212) 310-8000

FAX: (212) 310-8007

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(SILICON VALLEY)

MIAMI

WASHINGTON, D.C.

BRUSSELS

BUDAPEST

LONDON

PRAGUE

WARSAW

ROBERT G. SUGARMAN
DIRECT LINE (212) 310-4184

May 1, 1998

VIA FACSIMILENorman Davis, Esq.
Steel, Hector & Davis LLP
200 South Biscayne Blvd.
Miami, FL 33131-2398Re: Greenberg v. National Geographic Society et al.

Dear Norman:

The National Geographic Society is both distressed and dismayed by your letter dated April 24, 1998, which purports to seek a settlement of Counts I and II of the Amended Complaint, but which adopts a far from conciliatory tone. The Greenbergs are happy to impose a one-week deadline for the Society to respond to its settlement proposal, but took three months to respond to the Society's generous settlement offer (which greatly exceeded the reasonable market value of the Greenbergs' photographs by any standard, as explained in detail, and which provided for payment of reasonably attorneys' fees incurred up to that time). And, the Greenbergs now expect the Society to reimburse them for legal expenses which they have incurred solely due to their own procrastination. Had the Greenbergs addressed my January 28 letter promptly -- instead of ignoring it and serving the Society with document requests and interrogatories -- then they would not have generated the legal fees that they now assert that the Society should pay.

In every settlement negotiation in which I have been involved, the settling parties' responses seek to narrow the gap between their respective demands. The Greenbergs have done the opposite -- demanding more money now than they did in their last demand. Accordingly, the Society believes that further negotiations would serve no purpose and that the parties should proceed immediately to court-sponsored mediation as provided by the

WEIL, GOTSHAL & MANGES LLP
Norman Davis, Esq.
May 1, 1998
Page 2

Local Rules, and asks that the Greenbergs join in a request to that effect. If the Greenbergs truly wish to attain a just and speedy resolution without resorting to a costly trial, then they should readily agree to this request. In keeping with the Greenbergs' view of the amount of time which should be given to respond to settlement communications, the Society demands an answer as to whether the Greenbergs will join in a request for mediation by May 8, 1998. If we do not hear from you by that date, we will unilaterally file such a motion and indicate that the Greenbergs refuse to join in the request.

Sincerely,



Robert G. Sugarman

cc: Terrence B. Adamson, Esq.
Angelo M. Grima, Esq.

NGS
LARGE PRINTS FOR
EXHIBITS ~

SPEEDY 1 HOUR PHOTO
6798 S.W. 40 ST. 261800
MIAMI, FL 33155

A555A

CUSTOMER COPY
SALES SLIP

CITY	CLASS	DESCRIPTION	PRICE	AMOUNT
				27.24
SUB TOTAL				27.24
TAX				
MISC.				
TOTAL				27.24

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STEEL ■
HECTOR
■ DAVIS

Steel Hector & Davis LLP
200 South Biscayne Boulevard
Miami, Florida 33131-2398
305.577.7000
305.577.7001 Fax

March 13, 1997

Norman Davis
305.577.2988

Suzanne Ross McDowell
Assistant Vice President
Legal Affairs, Publications
National Geographic Society
1145 17th Street, N.W.
Washington, D.C. 20036-4688

Dear Ms. McDowell:

This letter has two objectives. In Part I, we will take up again the matter of Educational Insights, Inc., which has been the subject of previous correspondence. In Part II, we will set forth our concerns as to other matters disputed by our client, Jerry Greenberg, with reference to the National Geographic Society ("the Society").

Part I

We believe that our client's copyrights have been infringed through the unauthorized copying, display, sale and/or preparation of derivative works, by the Society and by Educational Insights, of original works created by Jerry Greenberg. It appears from the Educational Insights materials, purchased in Florida last year, that the images our client is disputing were acquired by that company from the Society, complete with copyright notice asserted by the Society as to the disputed images (and others) in the Educational Insights products. You indicated in your most recent letter that the Society accepts responsibility for responding to our concerns. It appears that Educational Insights may not initially have been aware of any infringement, but our correspondence to them provided notice of copyright protection. Notwithstanding that notice, Educational Insights has continued the distribution and sale of the disputed materials; our client advises that a set of the disputed materials was purchased recently in Florida. Educational Insights, therefore, may have its own exposure in this dispute.

In your letter of November 18, 1996, you attempted to persuade us that no infringement of copyright has occurred in the circumstances here. You conceded that "there are similarities" with respect to the images but insisted that there are "significant differences" between the Society's illustrations and our client's photographs. Our view -- markedly different -- is that the Society's illustrations are at least substantially similar to the original works. We will discuss each illustration, as you did in that letter.

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An exhibit, in a loose-leaf binder ("Exhibit 1"), is enclosed that demonstrates the infringements. On page 1, the images highlighted in yellow are those being challenged. On the following pages, the side-by-side comparative images are supplemented with transparencies made from each image in the Educational Insights product and overlaid on our client's original works. Each of the challenged images is discussed below.

(1) Redband parrotfish. [Exhibit 1, page 3] You stated that the angle of the fish is different from the photograph, but that is not correct. The angle of the fish is almost precisely the same, including bends in the body and the angle of the tail. The perspective from which our client's photograph was taken is also reflected in the copy. You stated that the shape of the fish is unavoidably the same, but we do not agree. Hundreds of photographs or illustrations of a Redband parrotfish may exist, but not one matches the positioning and the contours captured in Mr. Greenberg's photograph. The color differences you cite are minor and not legally relevant. The photograph was originally published by Mr. Greenberg in "The Living Reef" (copyright 1972 A-397524) and is currently published in "The Coral Reef" (copyright 1975 A-722127). The photograph was never provided to the Society for any use of any kind, although several copies of "The Coral Reef" were sent to the Society many years ago.

(2) Stoplight parrotfish. [Exhibit 1, page 5] The differences you cite are minimal. The similarities are substantial. Our client will continue to insist that his photograph was infringed. The photograph was originally published in "The Living Reef" and is currently published in "The Coral Reef." Both the original and the copy are identical in size. The photograph was never provided to the Society for any use of any kind.

(3) Green moray. [Exhibit 1, page 7] Your letter states that the photograph depicts a green moray eel but that the illustration shows a goldentail. Significantly, the Society's illustration labels the creature a "moray eel." In its underwater life, a moray rarely presents much of its body out of its lair. The Greenberg photograph shows a moray emerging about halfway. Other similarities in the photograph and the copy are substantial, as the exhibit indicates. The moray photograph was originally published in "The Living Reef" and is currently published in "The Coral Reef." The photograph was never provided to the Society for any use of any kind.

(4) Divers. We categorically disagree with your depiction of differences between our client's photographs and the illustrations in your package. The comparisons speak for

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themselves, and the overlays on pages 9 and 11 of Exhibit 1 plainly demonstrate a striking similarity.

(a) The lead diver [Exhibit 1, page 9] was originally published by National Geographic Magazine in January 1962 (copyright 1962 B-960824). Copyright as to that photograph was assigned to Jerry Greenberg on December 18, 1985, and Mr. Greenberg renewed the copyright in 1989 (RE-478-546). The photograph is currently published in "The Coral Reef." You will note that the lead diver is using an old-style two-hose regulator, with double tanks.

(b) The flowing-hair diver [Exhibit 1, page 11] was originally published in "The Living Reef" and was also published in a poster titled "Living Corals of the Tropical Atlantic" (copyright 1974 K-107129). That diver is using a customized mini-double tank rig made for the Greenbergs' son. The tanks are floating upward because the rig did not have a crotch strap for fastening the tanks down.

(5) Bull shark. [Exhibit 1, pages 13 and 15] Your November 18 letter ignored our discussion of a bull shark illustration in Educational Insights' "Creatures of the Open Ocean" (Code 3907). The bull shark photograph was provided to the Society from Mr. Greenberg's files in 1963 with other materials pertaining to a photo essay on sharks and shark research. The essay was eventually published by the Society, but the bull shark photograph was not used, and his photograph was belatedly returned to Mr. Greenberg. The bull shark photograph was first published by Mr. Greenberg in "Fish Men Fear: Shark" (copyright 1969 A-106-687), and subsequently in his poster titled "Shark!" (copyright 1974 K-107-130). The photograph is currently published in "Sharks and Other Dangerous Sea Creatures" (copyright 1981 VA-70-254), and in "Beneath Coral Seas" (copyright 1986 VA-240-616).

The enclosed Exhibit 1 has two separate comparisons of the bull shark image. On page 13 is an overlay, prepared from the Society's image, placed atop Mr. Greenberg's file photograph. The images are exactly the same with the exception of the tail. The modified tail in the Society's image was taken from a separate Greenberg photograph of a bull shark that was provided to the Society, and the tail modification can be quickly seen in the display on page 15 of Exhibit 1.

In a letter to Mr. Greenberg, dated December 29, 1967, Bryan Hodgson stated that Mr. Greenberg's shark transparencies "were in the possession of Bill Bond, who used them

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DAVIS

1975 MR. S. 1997
GREENBERG DIVER

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as reference material for his painting in the SHARKS story." Our contention is that they were not used merely for reference purposes but were copied. The painting referred to by Bond is the same used in Educational Insights' "Creatures of the Open Sea" (Code 3907).

(6) Other sharks. Inadvertently not included in our correspondence with Educational Insights was discussion regarding three other shark images that are contained in their "Creatures of the Open Sea." Other unauthorized copies include a great hammerhead shark, an oceanic whitetip shark, and a silky shark that Mr. Greenberg believes were copied from photographs provided to the Society by him for the article that was published in 1968. Comparisons of the whitetip shark images are shown on pages 16 and 17 of Exhibit 1. The whitetip photograph was delivered by Mr. Greenberg to the Society in the 1960s, but was never published in the magazine. The Society may have kept other unpublished slides from the shark assignment and used them for these illustrations.

Resolution of the dispute regarding the images in the Educational Insights material is discussed below, following Part II.

Part II

Mr. Greenberg, as you may be aware, has had a professional and business relationship with the Society spanning a period of some three decades. He has carefully documented that relationship. Many photographs were provided by him to the Society's publications pursuant to contracts, according to the terms of each. Many other photographs were provided in good faith by Mr. Greenberg for the Society's consideration, without the protection of a contract. On some assignments when submitted photographs were not published, the Society retained "selects" that should have been returned to him. Mr. Greenberg eventually discovered, however, that the Society, without his permission, had published, or permitted the publication of, various materials for which the Society had no copyright or contract rights, but for which Mr. Greenberg had proprietary rights.

A separate loose-leaf exhibit ("Exhibit 2") is enclosed that illustrates the unauthorized uses discussed below.

(A) An infringement appeared in a promotional piece for the Society that was published in September 1975. Mr. Greenberg possessed a copyright in the photograph used. The infringing photograph, showing a scuba diver cruising among reefs and fans, first

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appeared by arrangement with Mr. Greenberg in 1967 in the Society's book titled "World Beneath the Sea." The photograph subsequently was published by Mr. Greenberg in 1969 in a book titled "Adventures of a Reefcomber" (A-129-935). It was subsequently published by Mr. Greenberg in 1972 in "The Living Reef" (A-397-524). Both books contained copyright notice, and each copyright was registered. In 1973, by agreement with Mr. Greenberg, the Society republished the photograph in a second edition of "World Beneath the Sea." No further use by the Society was ever authorized. Exhibit 2, pages 1-2.

(B) An unauthorized use appeared in the March/April 1994 issue of Traveler magazine, published by the Society. Displayed on page 70 of the issue was a photograph of a skin diver "swimming through a coral jungle," in the language of the caption. That photograph originally appeared in the Winter 1985/86 issue of Traveler, pursuant to a written agreement between Mr. Greenberg and the Society. That agreement, by its terms, limited the Society's rights to one-time publication. The photograph was copyrighted in 1985 by Mr. Greenberg (VA-417-426). The 1994 publication was not authorized by the agreement. The Society eventually conceded that the use was unauthorized and paid Mr. Greenberg. Exhibit 2, pages 3-4.

(C) A photograph of a sea fan, originally authorized by Mr. Greenberg for one-time use in the Society's magazine in July 1990, was improperly included in a color brochure promoting the 1996 Jason Project. The Society acknowledged the impropriety, with apologies, in a letter dated October 26, 1995, from Rock Wheeler. That infringement has not been resolved. In a letter to Mr. Greenberg dated October 26, 1995, Rock Wheeler admitted that the Society had violated Mr. Greenberg's copyright by using the photograph. "We realize the importance of copyright," Mr. Wheeler wrote, "and that we have committed a serious violation." Exhibit 2, pages 5-6.

Mr. Greenberg has attempted on literally dozens of occasions through the years to guard against unauthorized uses of his photographs by the Society and to recover photographs that the Society had no legal right to retain. There may have been other unauthorized uses. In at least one instance his request for the return of materials was adamantly refused. In a letter to Mr. Greenberg dated April 18, 1994, W. Allan Royce advised that the Society was entitled by contract to retain photographs created by Mr. Greenberg pursuant to assignments given to him by the Society's magazine. "None of this material," he wrote, "is going to be returned to you." We challenge the Society to demonstrate, through the written agreements to which Mr. Royce's letter referred, that the

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MARCH/APRIL
1994

1996
MARCH
1994
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JULY, 1990

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Society ever obtained any right to retain in its files any material provided by Mr. Greenberg, after the one-time publication to which he agreed, and for the article on which the assignment was based, had been satisfied.

The one exception to that principle was an agreement between Mr. Greenberg and the Society in 1962, in which the magazine was permitted to pull and to keep "a few selects," which we understand to be photographs not published but with ongoing potential for publication. Instead, more than 50 selects were pulled. It is a reasonable inference that the Society has hundreds of Mr. Greenberg's photographs in hard-copy files, on videodisc, or in other electronic storage and retrieval systems that may be in use. You will appreciate that each photograph submitted on assignment by Mr. Greenberg and actually used in a Society publication was accompanied by literally dozens of other photographs from which a final selection was made. Samples of the Society's photographic indexing in Mr. Greenberg's possession make it clear that materials created by him can be located in the Society's files.

Mr. Greenberg, for a period of years, allowed the Society to retain photographs by him that were never intended for publication. That era of good faith reliance on his part has passed. We believe that at least one of the unauthorized uses of his photographs described in this Part II, as well as those described in Part I, are actionable in the U. S. District Court for the Southern District of Florida. The unauthorized uses of his copyrighted works is one aspect of the problem. The fact that the Society is using some of those works in publications and for purposes that compete unfairly with Mr. Greenberg in his own business ventures is another.

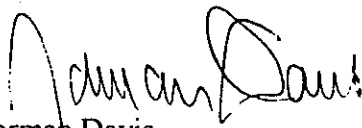
Mr. Greenberg's objective is to resolve *all* of the matters set forth in this letter, completely and with finality, and not on a piecemeal basis. Enclosed is a settlement proposal -- containing two separate options -- that can accomplish that objective. If a settlement cannot be concluded to our client's satisfaction, we will proceed with an action in federal court in Florida that will name the Society as defendant. Educational Insights, Inc. may also be named because of its continuing use of the protected photographs. Our client is not interested in protracted negotiations. We must receive a response from the Society with respect to the two enclosed options by the close of business on Friday, April 18, 1997. Mr. Greenberg's legal expense to date is incorporated in the settlement options. Any additional legal expense more than nominal in nature will change the damage amounts sought. The enclosed loose-leaf exhibits are the property of Mr. Greenberg and must be returned upon the conclusion of this matter.

STEEL ■
HECTOR
■ DAVIS

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We have represented Mr. Greenberg on copyright matters for many years and have found him to be eminently reasonable in demands directed to infringing parties. That fact is reinforced by the infrequent occasions when it has been necessary to seek the assistance of a federal court, and on each such occasion the effort has been successful. We look forward to a response on or before the aforesaid date.

Very truly yours,


Norman Davis

Enclosures

bcc: Jerry Greenberg

● OPTION A
#6 +
OPTION B
#5 THE
SAME

● OPTION # A
#5
OPTION # 4
THE SAME

● OPTION A
#4 +
OPTION B
#3 SAME

Option A

- (1) Mr. Greenberg must be paid damages by the Society, for itself and for Educational Insights, Inc., in the amount of \$35,000, inclusive of legal expense incurred by him to date.
- (2) Educational Insights, Inc. must immediately and permanently cease and desist from any further use in any manner of the disputed images.
- (3) The Society must immediately and permanently cease and desist from any use in any manner, by itself or by others with its consent, of any original works of Jerry Greenberg, or copies thereof, that may be in the Society's possession or control.
- (4) The Society must provide assurances, satisfactory to Mr. Greenberg, that no photographs ever provided by him to the Society, or copies or derivatives, will ever be published, distributed, licensed, sold or otherwise utilized by the Society, or by others with its consent or participation, in any manner whatsoever.
- (5) Copyright in the disputed images in the Educational Insights products must be assigned to Mr. Greenberg by the National Geographic Society on a form that we will provide. The assignment will not be effective as to any other images contained in those products.
- (6) Copyright asserted by the Society on all photographs by Mr. Greenberg that have been published in the Society's publications must be assigned to Mr. Greenberg on a form that we will provide.

Option B

(1) Mr. Greenberg must be paid damages by the Society, for itself and for Educational Insights, Inc., in the amount of \$40,000, inclusive of legal expense incurred by him to date. Such payment will entitle Educational Insights, Inc. to continue to utilize the disputed images only, and only in presently-existing products, for the remainder of 1997.

(2) After 1997, Educational Insights, Inc. and/or the National Geographic Society may enter into a license agreement that permits Educational Insights, Inc. to continue to utilize the disputed images only, and only in presently-existing products, for all of 1998. The license fee for that period is \$4,000, whether or not the disputed images are utilized during the entire period. Such payment must be received by Mr. Greenberg no later than December 31, 1997. The licensee(s) will have the option of renewing the license on the same terms, for a license fee of \$4,000, for any succeeding year, provided that notice of renewal and the license fee are received by Mr. Greenberg no later than December 31 of the year of the expiring license. If the license is not renewed for any year, all rights of the licensee(s) will end at the expiration of an existing license, and neither the Society nor Educational Insights, Inc. may thereafter use any of the disputed images in any manner. We will prepare the license agreement.

(3) The Society must provide assurances, satisfactory to Mr. Greenberg, that no photographs ever provided by him to the Society, or copies or derivatives, will ever be published, distributed, licensed, sold or otherwise utilized by the Society, or by others with its consent or participation, in any manner whatsoever (apart from the uses contemplated in paragraph (2) above).

(4) Copyright in the disputed images in the Educational Insights products must be assigned to Mr. Greenberg by the National Geographic Society on a form that we will provide. The assignment will not be effective as to any other images contained in those products.

(5) Copyright asserted by the Society on all photographs by Mr. Greenberg that have been published in the Society's publications must be assigned to Mr. Greenberg on a form that we will provide.