

MEMO
by: Jim Pickerell

POTENTIAL CLAIMS AGAINST NATIONAL GEOGRAPHIC

The following are some of the Potential Claims the plaintiffs believe they have against National Geographic.

I. Breach of Contract.

A. Written assignment agreements by and between NGS and the photographer(s), which were drafted by NGS, provides that, "if NGS makes further use (promotional, advertising or other editorial use) of a photograph selected for publication, it will make additional payment to [the photographer]..."

1. The CD's containing our photographers pictures are obviously being used for :promotional, advertising or other editorial use." A review of the CD Roms clearly reveals that "The Complete National Geographic", contains promotional and advertisements for NGS as well as for Eastman Kodak. The agreement(s) between our clients specifically state that promotional use and advertising is a "further use".

2. "Further use" is the same as the industry standard which precludes more than a "one time use" for a one time payment;

3. The photographers contracted with the not for profit National Geographic Society and now see their work appear in the for profit National Geographic Interactive ("NGI") CD Roms. The transfer from NGS to NGI of the NGS copyrights to our photographers' images and the payment of licensing fees and/or royalties by NGS to NGI for use of these copyrights evidences a "further use" of these photographs;

4 - To benefit it's customers, NGS/NGI made available to the purchasers of the CD Roms the ability to download our photographers' images, for "further use".

5 - Since the term "for further use" was drafted by NGS any ambiguity of this term will be strictly construed against NGS and in favor of the photographer(s); and

6 - Likewise, the term "additional payment" will be construed against your client and will include royalties and compensation, as well as costs and attorneys fees to collect this "additional payment".

B. Assignments by photographers at NGS' request by brief letter of agreement, drafted by NGS, which does not provide that NGS may make further use or more than "one time use" of the photographs done on assignment.

C. Oral assignment by photographers at NGS' request, would be governed by custom and usage in the industry on a "one time use", for a one time fee basis, and precludes further use of the photographs by NGS.

D. Stock sales to National Geographic, whereupon NGS agreed,

by acceptance of an invoice from the stock photo agency, which was the photographer's agent for that purpose, that NGS would only use photographs for a specific purpose. Therefore, NGS only had rights which were specifically permitted to NGS, which did not include reproduction of the photograph electronically onto a CD Rom for worldwide distribution.

E. Stock sales without invoice. The custom and usage in the industry provides that NGS would have a "one time use", for a one time fee, for each photograph provided by stock photographers or stock photo agencies.

F. Even if NGS would be permitted to reproduce these photographs on a CD Rom, NGS is authorizing, without restriction, purchasers of the CD Rom, to download these photographs for further and unlimited use by the customer.

II. Unjust Enrichment

A. Assignment of photographers by NGS would be governed by custom and usage in the industry for a "one time use", for a one time payment and preclude further use of the photographs by NGS without additional compensation.

B. The photographers assigned rights to their copyright of the photograph submitted to the not for profit NGS based upon the not for profit NGS representation that NGS would make a one time use of the photograph. This assignment of copyright allowed NGS to publish the photograph for one time. This assignment by the photographer to NGS would never had been done for a one time fee, if the photograph was to be transferred to the for profit NGI and used electronically in a commercial enterprise.

C. Contracts/invoices between stock photo agencies and the not for profit NGS provided for specific use of the photographs which are not transferable to any other entity.

D. The industry standard provides that fees for use of photographs are agreed to based upon the amount of usage. When additional usage is made, additional payment is required. The reuse fee is frequently higher than the original fee.

E. Photographers took assignment fees, as well as license fees, from NGS based upon a specific amount of usage. All the photographers believed that they were being paid for an assignment, based upon NGS' one time use. If the photographers would have known that NGS was going to make further use of their photographs, the photographers would have charged more for the initial assignment.

F. Photographers worked for less compensation from the not for profit NGS, than they would have for a profit making entity. No one intended that the not for profit NGS would transfer these photographs to the for profit NGI.

G. Based on their ownership and control of their images photographers had made financial arrangements, prior to the issuance of the CD Rom, for the reproduction of their images for other commercial use; i.e. marketing these images, in electronic form, to school children. This arrangement provides royalties directly to the photographer. By NGS allowing these same images to

be downloaded from the CD Rom to these same customers, NGS is unfairly taking this residuary benefit from the photographer.

III. Fraud

Representations by NGS and/or its agent, "Total Clearance", that, "the product (NGI's CD Rom) does not allow users to cut and paste photographs or text, and while the photographs or text can be printed, the quality is inferior to a photocopy of the magazine itself", was untrue when made, was made to induce stock photo agencies to enter into agreements with Total Clearance and NGI to receive inferior usage fees, was relied upon by the stock photo agencies when they signed such agreement, to the detriment of the stock photo agencies.

IV. Copyright Violations.

A. Photographers assigned copyrights of photographs to NGS. No photographer assigned copyrights to NGI.

B. Some photographers assigned copyrights of photographs to NGS and NGS re-assigned those copyrights back to the photographer after the photographs were published in the National Geographic Magazine. The specific photographs which are copyrighted by the photographer, which now appear in the CD Rom, do not contain the copyright notice which must be attributed to that individual photographer on an individual photograph.

C. NGS has published the CD Rom in violation of all the photographer(s) copyrights. We are well aware of the decision in Tasini, but do not believe that the facts therein would apply to this instant matter. As opposed to the defendants in Tasini, NGS has never previously sold the contents of the magazine for electronic use or even put the contents of its magazine on microfilm, no photographs were the subject of the Tasini decision, just text, and we respectfully disagree with Judge Sotomayer's interpretation of the Copyright Law, Section 201(c), and believe that here decision will be overturned. Inter alia, the revision of a collective work was never intended to mean a revision to a new and different medium, for a different use, never contemplated by the parties.

We would also like to discuss and examine the tax status (IRC 501(c)(3)) of NGS, in its relationship to NGI.