

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PRIME
COPY

JERRY GREENBERG, individually
and IDAZ GREENBERG, individually,

Plaintiffs,

v.

CASE NO. 97-3924 Civ-Lenard
Magistrate Judge Turnoff

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

Defendants.

**ORDER GRANTING
DEFENDANTS' MOTION
TO DISMISS COUNT II
AND TO DISMISS OR FOR
SUMMARY JUDGMENT ON
COUNTS III - V OF
PLAINTIFFS' AMENDED
COMPLAINT**

THIS CAUSE having come before the Court on the Defendants' Motion to Dismiss Count II and to Dismiss or For Summary Judgment on Counts III - V of Plaintiffs' Amended Complaint, and the Court having reviewed same, and being otherwise duly advised, it is **ORDERED** that the Defendants' Motion to Dismiss Count II and to Dismiss or For Summary Judgment on Counts III - V of Plaintiffs' Amended Complaint is hereby **GRANTED** and Counts II - V of the Amended Complaint are hereby dismissed with prejudice.

DONE AND ORDERED in Chambers, Miami, Dade County, Florida, this ___
day of _____, 1998.

Joan A. Lenard
United States District Judge

Copies to:

Robert G. Sugarman, Esq.
Naomi Jane Gray, Esq.
Edward Soto, Esq.
Valerie Itkoff, Esq.
Terrence B. Adamson, Esq.
Norman Davis, Esq.
David A. Aronberg, Esq.

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Defendants.

Motion For Scheduling Order

Preliminary Statement

The defendants, National Geographic Society (the "Society"), National Geographic Enterprises ("NGE") and Mindscape, Inc. ("Mindscape"), respectfully move this Court pursuant to S.D. Fla. L.R. 16.1.B.7 for the entry of a Scheduling Order setting a schedule for: (1) the resolution of the legal issues which control certain of the claims asserted in the complaint; and (2) settlement and mediation of the remaining claims.

The Parties

The plaintiffs, Jerry Greenberg and Idaz Greenberg, are creative artists and entrepreneurs who publish and distribute their works in books and other products. The Society is a nonprofit organization which is devoted to the discovery and dissemination of

information regarding the natural world in which we live. The Society produces periodicals, television programs, maps and atlases, educational games, and like products.

The Plaintiffs' Claims

The plaintiffs' claims involve three of the Society's products. Count I alleges that the "Oceans GeoPack" (the "GeoPack"), an educational game for children focusing on marine life, contains illustrations which are unauthorized copies of photographs in which the plaintiffs own copyright. Count II involves the Society's participation in the "Jason Project," an educational endeavor which permits schoolchildren, via satellite, to accompany deep-sea divers on research missions to explore the submarine world. Count II alleges that the Society reproduced, without authorization, a photograph in which the plaintiffs own copyright, in a brochure promoting the Jason Project.

Counts III - V involve "The Complete National Geographic" (hereinafter "CD-ROM 108"), a digital CD-ROM product containing all issues of the "National Geographic Magazine" (the "Magazine") published over the Magazine's 108 years. In 1997, along with NGE and Mindscape, a computer software company, the Society produced and began to sell CD-ROM 108, which reproduces each issue of the Magazine in digital electronic format. Each disk in the set also contains a short commercial message for Kodak and a multimedia sequence, dubbed the "Moving Covers Sequence" by the plaintiffs, which consists of a series of ten cover images from various issues of the Magazine which metamorphose from one into another. Each cover is visible only fleetingly; the cover at issue here is visible for less than one second.

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Counts III - V involve "The Complete National Geographic" (hereinafter "CD-ROM 108"), a digital CD-ROM product containing all issues of the "National Geographic Magazine" (the "Magazine") published over the Magazine's 108 years. In 1997, along with NGE and Mindscape, a computer software company, the Society produced and began to sell CD-ROM 108, which reproduces each issue of the Magazine in digital electronic format. Each disk in the set also contains a short commercial message for Kodak and a multimedia sequence, dubbed the "Moving Covers Sequence" by the plaintiffs, which consists of a series of ten cover images from various issues of the Magazine which metamorphose from one into another. Each cover is visible only fleetingly; the cover at issue here is visible for less than one second.

In Counts III and IV, the plaintiffs claim that CD-ROM 108 infringes upon their copyrights in "more than a dozen" unidentified contributions to the Magazine. Count V alleges that the inclusion of the cover of the January 1962 issue of the Magazine in the Moving Covers Sequence infringes upon their copyright in that photograph.

Procedural History

The plaintiffs filed their initial complaint on December 5, 1997 and subsequently served an Amended Complaint on December 23, 1997. The defendants' time to respond to the Amended Complaint would have expired on January 12, 1998. However, prior to serving the Amended Complaint, the plaintiffs consented to, and the Court accepted, an extension of time to respond to the initial complaint until January 30, 1998.

Due to the intervening holiday season and the fact that there was a change in the senior legal officer at the Society, the defendants' counsel was unable to meet with the Society to discuss this matter until January 13, 1998. Thus, the defendants were unable to begin preparations to respond to the plaintiffs' complaint until two weeks before the January 30 deadline. Given these logistical obstacles, the lack of prejudice to the plaintiffs, the significance of the legal issues involved, and the efficiencies to the parties and the Court suggested herein, some additional time to respond is appropriate. The defendants desire to bring this matter to a prompt resolution by filing a dispositive motion on Counts III - V as opposed to simply answering the complaint.

Relief Requested

Counts I and II: GeoPack and Jason

The plaintiffs' claims arising out of the GeoPack and the Jason Project are ripe for settlement, as the parties have commenced settlement negotiations and the defendants intend to seek mediation should those negotiations fail to resolve the claims. The defendants respectfully submit that the interests of judicial economy would be served if these settlement discussions and the mediation were allowed to proceed with respect to these counts prior to the expenditure of significant time and money on discovery. Therefore, the defendants request an order staying all proceedings with respect to these claims to allow settlement discussions and mediation to proceed according to the following schedule: settlement discussions to be completed by February 27; mediation to commence within ten days thereafter if settlement discussions fail to resolve the plaintiffs' claims.

Counts III - V: CD-ROM 108

The plaintiffs have asserted two claims with respect to CD-ROM 108, both of which present pure legal issues appropriate for resolution by the Court on a motion for summary judgment. Counts III and IV allege that the defendants have infringed the plaintiffs' copyrights in "more than a dozen" unidentified photographs, which were published in the original hard copies of the Magazine, by reproducing those issues of the Magazine electronically in CD-ROM 108.

This issue is governed by §201(c) of the Copyright Act, which grants the publisher of a collective work, such as a magazine, "the privilege of reproducing and distributing a contribution as part of that particular collective work, any revision of that

collective work, and any later collective work in the same series." 17 U.S.C.A. §201(c).

The only reported decision on this issue is in Tasini v. New York Times Co., 1997 WL 681314 (S.D.N.Y. Oct. 29, 1997) (attached hereto as Exhibit A), in which Judge Sonia Sotomayor held that § 201(c) permitted the defendants in that case to reproduce issues of the New York Times, Sports Illustrated and other publications in electronic media, including CD-ROM. Tasini is currently on appeal to the Court of Appeals for the Second Circuit.¹

Count V alleges that the use of the cover photograph of the January 1962 issue in the Moving Covers Sequence infringes the plaintiffs' copyright in that photograph. This claim also presents a legal issue which is ripe for resolution on a motion for summary judgment. There are no issues of fact with respect to any of these claims which would preclude such a resolution. Should the defendants prevail upon their motion, Counts III - V will be resolved; should the plaintiffs prevail, the only remaining issue before the judge will be damages.

The defendants respectfully request that the Court address these legal issues at the outset of the action, prior to any discovery or further litigation, as a decision on the law will determine whether there is any liability. Local Rule 16.1.B requires the parties to meet; to exchange documents, witness lists, and other evidence; and to agree upon a scheduling report and order. Strict adherence to this rule would be inefficient in a case such as this one, where the action can be determined on a motion for summary judgment without document production or other costly discovery.

1. The briefing schedule in Tasini is as follows: record on appeal to be filed by January 27, 1998; appellant's brief and joint appendix to be filed by February 3, 1998; appellee's brief to be filed by March 17, 1998; argument to be heard as early as the week of April 7, 1998.

This motion is made in good faith and not for any improper purposes of delay. Rather, the defendants need adequate time to brief the unique and dispositive legal issues presented. The requested extension of time would promote efficiency in resolving the action and would not prejudice any party. Although, upon consultation, the plaintiffs' counsel has refused to join in the instant motion, he was unable to state any prejudice which would result to the plaintiffs from the relief requested herein. Thus, the defendants request an order (1) staying discovery pending the filing and resolution of the defendants' motion; and (2) setting the following schedule for briefing the defendants' motion:

Defendants' Moving Papers	February 20, 1998
Plaintiffs' Opposition Papers	____, __, 1998
Defendants' Reply Papers	____, __, 1998

Memorandum of Law

Pursuant to Rule 6(b)(1), Fed. R. Civ. P., the court for cause shown may at any time in its discretion "with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by a previous order." The defendants have stated that they require an extension of time within which to serve its responses to the plaintiffs' Amended Complaint and that the request for enlargement is not intended for improper delay. Furthermore, this request was made prior to the expiration of time for filing a response to the Amended Complaint. The Court has wide discretion to grant such requests. See Yanafsky v. Wernick, 362 F. Supp. 1005, 1014 (D.C.N.Y. 1973); 4A Wright & Miller, Federal Practice and Procedure: Civil 2d §1165. In the absence of bad faith or prejudice to the adverse party, an application for the extension of time will normally be granted. 4A Wright & Miller, supra.

Conclusion

For the foregoing reasons, the defendants respectfully request the entry of an order: (1) staying all proceedings with respect to the plaintiffs' claims based on the GeoPack and the Jason Project; (2) establishing a deadline of February 27, 1998 by which the parties are to complete settlement negotiations for the GeoPack and Jason claims, with mediation to commence within ten days thereafter should settlement negotiations fail; and (3) setting the following schedule for the defendants' motions to dismiss the remaining claims:

Defendants' Moving Papers	February 20, 1998
Plaintiffs' Opposition Papers	_____, ___, 1998
Defendants' Reply Papers	_____, ___, 1998

Dated: Miami, Florida
January 21, 1998

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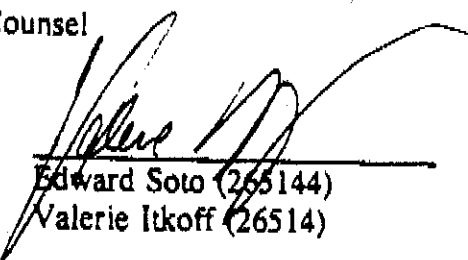
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Of Counsel

By:



Edward Soto (265144)
Valerie Itkoff (26514)

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that the foregoing has been sent by U.S. mail this 21st day of January, 1998 to Norman Davis and David A. Aronberg, Steel Hector & Davis LLP, 200 South Biscayne Boulevard, 40th Floor, Miami, Florida 33131-2398, attorneys for plaintiff.

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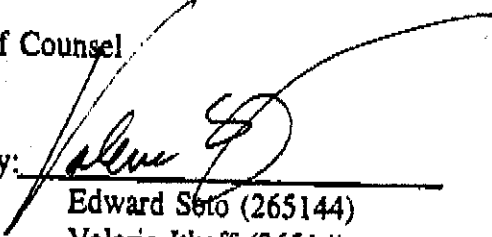
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