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Thus, the use of the Sequence in the context of the entire CNG is not a *de minimis* use that fails to reach the threshold of actionable copyright infringement. The two cases principally relied upon by the Society, Ringgold v. Black Entm't Television. Inc., 126 F.3d 70 (2d Cir. 1997), and Amsinck v. Columbia Pictures Indus., Inc., 862 F. Supp. 1044 (S.D.N.Y. 1994), are not to the contrary. The "iconic" display at the beginning of each disc in the CNG product argues against the suggestion that the use of the Sequence in the CNG or the use of the Greenberg diver photograph in the Sequence is inconsequential. Accordingly, because we find the unauthorized use of the subject photograph to be both qualitatively and quantitatively significant, we reject the de minimis defense advanced by the Society and its putative coinfringers.

## **III. CONCLUSION**

We conclude that the unauthorized use of the Greenberg photographs in the CNG compiled and authored by the Society constitutes copyright infringement that is not excused by the privilege afforded the Society under § 201(c). We also find that the unauthorized use of Greenberg's diver photograph in the derivative and collective work, the Sequence, compiled by the Society, constitutes copyright infringement, and that the proffered de minimis use defense is without merit. remand the completer is disselective and internet or these concept complet and a constant of the second for the s oppered the contract of the co for a prise with the second of approved the the the appellage to bette provading party on ilicated and the second and second attention of the strict court should ascertain the amount of damages and attorneys fees that are due, if any, as well as any injunctive relief that may be appropriate. In assessing the appropriateness of injunctive relief, we urge the court to consider alternatives, such as mandatory license fees,

in lieu educa REV in lieu of foreclosing the public's computer-aided access to this educational and entertaining work.

REGIONAL

**REVERSED** and **REMANDED**.

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## National Geographic Society

1145 17th Street N.W., Washington, D.C. 20036-4688

TERRENCE B. ADAMSON Executive Vice President

January 29, 2003

Telephone: (202) 857-7449 Fax: (202) 429-5744 E-mail: tadamson@ngs.org

## Via Overnight Courier

Mr. Jerry Greenberg c/o Norman Davis, Esq. Steel Hector & Davis LLP 200 South Biscayne Blvd. Miami, FL 33131-2398

Dear Mr. Greenberg:

As you know, the National Geographic continues to believe that it is entitled to publish the Complete National Geographic under 201(c) of the Copyright Act and its agreements with you. This notwithstanding, we sent you a check in the amount of \$2,834 on December 11, 2002, which you returned uncashed. That amount was calculated based upon our expert's calculation of value of the works at issue.

Given that there is currently a judgment on liability, which the Society believes should be reversed on appeal, we are sending you a check for \$13,000 which represents \$200 per "work infringed," calculated using 65 works. As I stated in my letter of December 11, 2002, we do not concede that the number of "works" is 65, but are basing our calculation on that number since that is what you allege. The Society does not believe it lawfully owes any monies for the publication at issue, much less for 65 works, and intends to appeal the decision to the appropriate forum.

We do recognize, however, that because of the judgment on liability, the parties are forced to try the damages phase of the case, which will be a significant expense to you. In an effort to save you the expense of trying the case, the Society is willing to pay you \$13,000, which represents what we believe will be your maximum recovery based upon the evidence at a trial. The payment of this amount does not waive, in any way, the National Geographic's defenses to the claim or its right to take an appeal. Rather, if you accept such amount, the parties would enter into a Final Judgment in that amount, from which the Society would, in its sole discretion, take an appeal. This would save you the expenses associated with trying the damages case and provide you with the maximum Mr. Jerry Greenberg c/o Norman Davis, Esq. Page Two January 29, 2003

amount the Society believes you would receive were the case tried. Even if the Society were to prevail on an appeal of the Final Judgment, it will not seek the reimbursement of the \$13,000 from you. Thus, you have no risk associated with any appeal of the Final Judgment.

Sincerely, In

Enclosure – Check for \$13,000.00

cc: Stephen N. Zack, Esq. Robert Sugarman, Esq.

