

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SALLY FAULKNER, JON KRAKAUER,
RICHARD CONNIFF, JOE BARABAN,
ELIZABETH ROYTE, JOHN KNOEBBER,
RICK RICKMAN, individually,

Plaintiffs,

v.

**SUMMONS IN A
CIVIL ACTION
CASE NUMBER:**

NATIONAL GEOGRAPHIC SOCIETY, NATIONAL
GEOGRAPHIC INTERACTIVE, EASTMAN KODAK
COMPANY, MINDSCAPE INC.,

Defendants,

-----X
TO:

NATIONAL GEOGRAPHIC INTERACTIVE & MINDSCAPE INC.
NATIONAL GEOGRAPHIC SOCIETY 88 ROWLAND WAY
711 5TH AVENUE, NOVATO, CA 94945
NEW YORK, N.Y.

EASTMAN KODAK COMPANY
90 PARK AVE
NEW YORK, NY 10016

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court
and serve upon

PLAINTIFF'S ATTORNEY

WEINGRAD & WEINGRAD, L.L.P.
350 Fifth Avenue, Suite 7720
New York, New York 10118
(212) 244-4187

**an answer to the complaint which is herewith served upon you, within twenty (20) days after
service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment
by default will be taken against you for the relief demanded in the complaint.**

CLERK

DATE

BY DEPUTY CLERK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

SALLY FAULKNER, JON KRAKAUER,
RICHARD CONNIFF, JOE BARABAN,
ELIZABETH ROYTE, JOHN KNOEBBER,
RICK RICKMAN, individually,

Plaintiffs

COMPLAINT

-against-

Jury Trial Demanded

NATIONAL GEOGRAPHIC SOCIETY, NATIONAL
GEOGRAPHIC INTERACTIVE, EASTMAN KODAK
COMPANY, AND MINDSCAPE INC.

Defendants

-----X

Plaintiffs by and through their attorneys, Weingrad & Weingrad, L.L.P. alleges as follows:

NATURE OF ACTION

1. This is an action on behalf of multiple claimants seeking damages for themselves and certification of a class action for damages brought on behalf of plaintiffs herein and in the companion action and all other similarly situated persons and entities, against the defendants for copyright infringement, unfair trade practices and unfair competition based on copyright infringement, breach of contract, and/or unjust enrichment arising therefrom. The Plaintiffs bring their action and ask for a class action certification under the Federal Rule of Civil Procedure, Rule 23.

JURISDICTION,

2. Exclusive jurisdiction over plaintiffs' claims lie with the United States District Court for the Southern District of New York, pursuant to the Copyright Act of 1976, U.S.C. 17, §301, U.S.C., 28 §1331, 1332, 1338(a)(b), 1391(b)(2), 1400 and its amendments.

3. The Venue is proper in this District pursuant to § 27 of the 1934 Act (15 U.S.C. §78 aa), and 28 U.S.C. § 1391(b). The Defendants's EASTMAN KODAK COMPANY, MINDSCAPE INC., NATIONAL GEOGRAPHIC SOCIETY, NATIONAL GEOGRAPHIC INTERACTIVE,¹ are doing business in the City and State of New York; Jurisdiction is grounded in the provisions of Rule 4(a) FRCP, and in pendent jurisdiction. A substantial part of the events, acts, omissions and infringements complained of herein, occurred in the Southern District of New York. At all relevant times herein, all of the defendants conducted substantial business and/or committed violations of United States law by acts committed in this District. _____

THE PARTIES HEREIN

The plaintiffs:

4. JON KNOEBBER, JOE BARABAN and RICK RICKMAN are professional photographers².

5. JON KRAKAUER, RICHARD CONNIFF and ELIZABETH ROYTE are professional writers.

6. SALLY FAULKNER, is a citizen and resident of the State of New Jersey, County of Sussex, and she is the successor in interest to a limited number of certain images created by her former husband, Douglas Faulkner the original images referred to herein; a copy of said images, are listed by published article. (*Exhibit 1, Volume III, Page 789-796*)

7. Plaintiff RICK RICKMAN is a citizen and resident of Laguna Niguel, County of Orange, California, and he created the original images referred to herein, a copy of said images, are listed by published article. (*Exhibit 1, Volume I, Page 10-56*)

¹The parties National Geographic Society and National Geographic Interactive are sometimes respectively referred to by their initials NGS and NGI.

8. The Plaintiff, JON KRAKAUER, is a citizen and resident of Washington State, County of Seattle; he created the original texts referred to herein, a copy of said text, is listed by published article. (*Exhibit I, Volume I, Page 100-139*)

9. The Plaintiff, RICHARD CONNIFF, is a citizen and resident of Connecticut, County of New London; he created the original texts referred to herein, a copy of said text, is listed by published article. (*Exhibit I, Volume III, Page 535-786*)

10. Plaintiff JOE BARABAN, is a citizen and resident of Texas, County of Harris; he created an original image referred to herein, a copy of the image, is listed by published article. (*Exhibit I, Volume I, Page 61-64*)

11. Plaintiff ELIZABETH ROYTE, is a citizen and resident of the State of New York, County of New York and she created the original texts referred to herein, a copy of said text, is listed by published article. (*Exhibit I, Volume I, Page 69-99*)

12. Plaintiff JOHN KNOEBBER, is a citizen and resident of Mexico, and he created an original image referred to herein, a copy of the said image, is listed by published NGS article. (*Exhibit I, Volume I, Page 65-69*)

13. All of the parties allege various causes of action based on the infringement of their essays or images. These plaintiffs include citizens of both the United States and/or foreign countries.

THE PARTIES IN THIS ACTION
THE DEFENDANTS:

14. Upon information and belief, and at all times relevant herein, Defendant THE NATIONAL GEOGRAPHIC SOCIETY was, and still is a domestic, Not for Profit corporation, organized and existing under, and by virtue of, the laws of the District of Columbia, and doing business within the City, County and State of New York, with offices located at 711 5TH AVENUE, NEW YORK, N.Y. and 1145 17TH STREET, N.W. WASHINGTON, D.C. 200364688; this corporation owned the limited rights to publish the magazine, "*NATIONAL GEOGRAPHIC*," from its inception over 108 years ago, (*sometimes referred to as NGS, National or the Magazine*).

² Photographers and text writers are sometimes referred to collectively as authors.

15. Upon information and belief, and at all times relevant herein, Defendant NATIONAL GEOGRAPHIC INTERACTIVE INC. (NGI) was, and still is, a Domestic, For Profit corporation, organized and existing under, and by virtue of, the laws of the State of Delaware, and doing business within the City, County and State of New York, with offices located at 1145 17TH STREET, N.W. WASHINGTON, D.C. 20036-4688. On information and belief, NGI is owned and/or controlled by THE NATIONAL GEOGRAPHIC SOCIETY (NGS) and/or its principles.

16. Upon information and belief, and at all times relevant herein, Defendant EASTMAN KODAK COMPANY was, and still is, a domestic corporation, organized and existing under, and by virtue of, the laws of the State of New Jersey, and doing business within the City, County and State of New York, with corporate shares of stock being publicly traded.

17. Upon information and belief, and at all times relevant herein, Defendant MINDSCAPE INC. was, and still is a domestic, for profit corporation, organized and existing under, and by virtue of the laws of the State of California, and doing business within the City, County and State of New York, with offices located at 88 Rowland Way, Novato, Ca. 94945 and six other states.

18. All of the Defendants contracted to do business with each other and create the infringing products complained of herein; the product as quoted contains, "178,567 pages with spectacular photographs, 9048 fascinating articles and 100 years of classic advertising." This quote is taken from the Defendants product packaging box.

THE COMPANION ACTION

19. A separate action was commenced in the United States District Court for the Southern District of New York under Docket Number 97 CIV. 9361 (LAK) relating to different Plaintiffs.

- a) The companion case was assigned to the Honorable Judge Louis A. Kaplan.
- b) An order was entered at the request of the defense attorney in that case, before an answer was interposed, staying all proceedings until a decision was rendered in a matter, then recently decided, *Tasini v The New York Times*, 981 F.Supp. 841.
- c) Defense counsel contended the decision in *Tasini* would be controlling in the companion action and an appeal was in progress.

- d) The Second Circuit rendered a decision on September 24, 1999, 192 F.3d 356, 1999-Copr.L.Dec.P27,955, 52U.S.P.Q.2d1186, 27MediaL.Rep.2281, which supported the Plaintiffs in Tasini and Douglas Faulkner and the other Plaintiffs in the companion case.
- e) On information and belief an application is pending for *en banc* review by the Second Circuit.
- f) The Claimants herein are filing their claim to toll the Statute of Limitations and protect their rights and the rights of others as may be appropriate which will, on information and belief, expire on January 1 2000.

THE PARTIES IN THE COMPANION CASE

20. MATRIX INTERNATIONAL, INC., as a Plaintiff in the companion action, is the New York corporate agent for the photographer Roger Hutchings, for one image; for Rick Rickman for one image; for Louis Psihoyos for one image, all published in National Geographic Magazine. (*Exhibit 1, Volume I, Page 7-9, 57-60; Volume III, Page 530-534*)

21. RICK RICKMAN now commences this action to protect rights to images not controlled by the Plaintiff Matrix but similarly published and infringed by the Defendants herein. (*Exhibit 1, Volume I, Page 10-56*)

22. MATRIX was and still is, a domestic corporation, organized and existing under, and by virtue of, the laws of the State of New York, and doing business within the City, County and State of New York.

23. Plaintiff ROGER HUTCHINGS, is a citizen and resident of London, England, and he created the original image referred to herein, a copy of said image, is listed by published article. (*Exhibit 1, Volume I, Page 57-60*)

24. The Plaintiff, in the companion action, LOUIS PSIHOYOS, is a citizen and resident of the State of Colorado, County of Boulder and he created the original images referred to herein; a copy of said images, are listed by published article. (*Exhibit 1, Volume I, Page 141-205; Volume II, Page 206-533*)

THE CLASS ACTION

25. The Plaintiffs herein maintains this action and requests class action certification under Rule 23(b)(1,2,3) of the Federal Rules of Civil Procedure. The members of the Classes are so

numerous that a joinder of all members is impracticable. As of the date of this filing and the last release of the Defendant's infringing product, "*The Complete National Geographic*" in *CD-ROM* and *DVD* format, the total number of authors whose works are included in the collection based on an estimation exceeds 1000; the partial list of the members is included herein. (Exhibit III)

26. The class bringing this action includes those individuals who have been adversely impacted by the Defendants' infringements, and consists of the following five subclasses of Plaintiffs, who have had their text or photographs or the text or photographs they represent not as authors but as agents or successors in interest, published by NGS in their magazine during the past 110 years and then reproduced electronically during the past three years, without payment or permission for the necessary rights.

SUBCLASS I

27. *SUBCLASS I* consists of all the writers and photographers who have contracted with the Defendant, National Geographic Society, referred to as NGS; they entered into written contracts which contain provisions of reversion of all rights back to the author after the first publication. These authors did not intend to have their work used for profit and commercial purposes on *CD-ROM* and in *DVD* formats for the price that they had originally negotiated. It is believed that there are hundreds of writers and photographers in this situation though the precise number is unknown; . Louis Psihoyos, Jon Krakauer and Richard Conniff are representative of this SUBCLASS.

See for example the sample reference to publication contracts prepared by NGS:

A) Louis Psihoyos: contract for "*Dinosaurs of the Gobi*," dated April 26, 1995, where it is agreed that ninety days after publication, NGS will return to the author the copyright in all published and unpublished. (*Exhibit II, Page 17-22*)

B) Jon Krakauer: contract for "*Rocky Times For Banff*," dated June 21, 1993, where it is stated that the copyright will return back to the author upon request after 60 days from the first publication. (*Exhibit II, Page 11-14*)

C) Richard Conniff: contract for "*Toronto*," dated October, 19, 1994, wherein it is stated that the copyright will return back to the author upon request after 60 days from the first publication. (*Exhibit II, Page 60-62*)

SUBCLASS II

28. The *SUBCLASS II* consists of those writers and photographers who have contracts with the Defendant NGS, which specifically states that no electronic rights are granted to the National Geographic Society, and the only right granted concerns the print on paper or ink copies. These Plaintiffs did not intend to have their work used for profit and commercial purposes on *CD-ROM* and in *DVD* formats for the price that they negotiated. It is believed that there are hundreds of writers

and photographers in this situation though the precise number is unknown. Louis Psihoyos and Robert Hutchings are representative of this subclass.

See for example:

A) Louis Psihoyos, "*Ford Styrofoam Mockup in Turin*," (Exhibit 1 separately bound, Vol. II, Page 415) the contract, by invoice dated 06/26/95 from his agent, Matrix International Inc., to the National Geographic Society, specifically states that the license is for, "One Time North American English Language Print On Paper Magazine Rights Only Granted And One Time Japanese, Print On Paper Magazine Rights Granted Only-No Electronic Rights Granted." (*Exhibit II separately bound, Page 20*)

B) Roger Hutchings "*Photo of Bosnia*," by invoice dated 3/20/1996 from his agent, Matrix International Inc., to the National Geographic Society, addresses the publication rights of the image, giving one time paper print use only, stating that no other rights are given, specifically mentioning and excluding, electronic rights, are granted. (*Exhibit II separately bound, Page 7-10*)

SUBCLASS III

29. *SUBCLASS III* consists of those writers and photographers who have contracts with the defendant NGS, which grant to NGS only, the right for one time print on paper magazine. They did not intend to have their work used for profit and commercial purposes on *CD-ROM* and in *DVD* formats for the price that they negotiated. It is believed that there are hundreds of writers and photographers in this situation though the precise number is unknown. Roger Hutchings, Luois Psihoyos and Rick Rickman are representative of this subclass.

See for example:

A) Roger Hutchings, "*Photo of Bosnia*," by invoice dated 3/20/1996 from his agent, Matrix International Inc., to the National Geographic Society, addresses the publication rights of the image limited to a one time North America English language paper print use only. (*Exhibit II, Page 7-10*)

B) Rick Rickman "*Lake Havasu Belly Flop*," by invoice dated January 13, 1995 from his agent, Matrix International Inc., to National Geographic Society, addresses the publication rights for the image limited to a one time North America English language paper print only. (*Exhibit II, Page 2-6*)

C) Louis Psihoyos "*Tyrannosaurs Rex*," by invoice dated February 9, 1994 from his agent, Matrix International Inc., to National Geographic Society, addresses the publication rights for the image limited to a one time reproduction in *National Geographic Magazine*. (*Exhibit II, Page 42*)

SUBCLASS IV

30. *SUBCLASS IV* consists of all the writers and photographers and their successors in interest who became acquainted with the defendant NGS, with whom they entered into oral agreements, with the only intention to license the text or images for a one time, paper rights only in an educational magazine. They did not intend to have their work used for profit and commercial purposes on *CD-ROM* and in *DVD* formats for the price that they negotiated. It is believed that there

are hundreds of writers and photographers in this situation though the precise number is unknown. Sally Faulkner, John Knoebber, and Joe Baraban are representative of this *SUBCLASS*.

SUBCLASS. V

31. *SUBCLASS V* consists of all writers and photographers whose contracts with NGS states that NGS has the right to use, without further permission, their works for a new editorial use or in any NGS electronic media product, including *CD-ROM*, provided they pay for the usage; NGS failed to pay as agreed making their usage, an infringement of the rights of the Plaintiff's. It is believed that there are hundreds of writers and photographers and successors in interest in this situation though the precise number is unknown. Luois Psihoyos is the representative of this *SUBCLASS*.

See for example:

A) Luois Psihoyos' contract for "*Information Revolution*," dated October 8, 1995 in which it is stated that for the use of the work in an NGS electronic media product, NGS will make a payment according to the rates and fees established in the standard NGS contract with freelance photographers; no payments were made. (*Exhibit II, Page 20-22*)

B) Luois Psihoyos contract for "*What is this thing called sleep?*", dated April 26, 1995, contract for "*Dinosaurs*" dated August 3, 1993 and contract for "*Niger Sauropods*," dated August 31, 1993, in which it is stated that in the event of new editorial use of the work there will be an additional payment from NGS; no payments were made. (*Exhibit II, Page 15-16*)

32. The named Plaintiffs are adequate representatives of the *SUBCLASSES* based on the following: (1) the rights of all Plaintiffs and class members, concern the intellectual property rights of authors and photographers who have been published in NGS; (2) the rights of these plaintiffs' are representative of the rights of others who have been published and been infringed by the Defendants herein; (3) there are no significant differences between the claims and allegations of the named Plaintiffs herein and the other authors comprising the *SUBCLASSES*.

33. The Plaintiffs will fairly and adequately protect the interests of the members of the *SUBCLASSES* and have retained competent counsel, experienced in Federal copyright litigation and class actions. The Plaintiffs have no interests which are contrary to or in conflict with the rights of the members of the *SUBCLASSES* which they seek to represent.

34. A class action is superior to other available methods for the fair and efficient adjudication of this controversy since joinder of all members is impracticable. Furthermore, as the damages suffered by individual members may be relatively small, the expense and burden of individual litigation make it virtually impossible for the *SUBCLASS* members to individually seek redress for the wrongs done to them. The Plaintiff's know of no difficulty which will be encountered

35. There is a well-defined community of interest in the questions of law and questions of fact involved in this case. Common questions of law and fact exist as to all members of the *SUBCLASSES*, and predominate over any questions affecting solely individual members of the Class. Among the questions of law and fact common to the *SUBCLASSES* and the Plaintiffs herein include but are not limited to the following:

- a.. Whether the Copyright Act was violated by defendants when they transferred the property rights of the plaintiffs' herein, from a Not-For-Profit entity, NGS, to a For-Profit entity, NGI and then contracted and sold the licensing of the electronic rights for sale in a *CD-ROM* and *DVD* format to the other Defendants;
- b. whether the copyright of the authors was infringed by defendants by creating and selling the products complained of herein;
- c. Whether defendants acted with scienter when they created the original infringing product and continued to create and market the new product after being put on actual notice by the filing of an action seeking similar relief by other plaintiffs, in the companion action see docket 97 Civ. 9361 (LAK), Douglas Faulkner et al vs. NGS et al.; on information and belief further actual notice to the Defendant NGS by the institution of a suit by photographer Jerry Greenberg now in the Eleventh Circuit in Florida and letter claims submitted by photographer James Pickeral individually and on behalf of about 30 other photographers and their respective attorneys. This notice was give early in 1997 but was ignored.
- d Whether the defendant NGS breached their contracts with the members of the *SUBCLASSES*;
- e. Whether Class members were damaged and if so the measure of damages

THE PARTIES IN THE COMPANION CASE ARE SEEKING
SIMILAR RELIEF TO THE PLAINTIFFS HEREIN

36. MATRIX INTERNATIONAL, INC., is the New York corporate agent for the photographer Roger Hutchings, for one image; for Rick Rickman for one image; for Louis Psihoyos for one image. (*Exhibit II, Page 2-4*)

37. The Plaintiff MATRIX INTERNATIONAL, INC. was acting as agent for THREE individual images, one created by each of the following photographers: ROGER HUTCHINGS, LOUIS PSIHOYOS, and RICK RICKMAN. (*Exhibit II, Page 2-5, 7-10, 20-22*) . 38.

MATRIX was and still is, a domestic corporation, organized and existing under, and by virtue of, the laws of the State of New York, and doing business within the City, County and State of New York; a copy of said images, are listed by published article. (*Exhibit I, Volume I, Page 7-10, 57-60, Volume II, Page 530-533*)

39. Plaintiff ROGER HUTCHINGS, is a citizen and resident of London, England, and he created the original image referred to herein, a copy of said images, are listed by published article. (*Exhibit I, Volume I, Page 57-60*)

40. Plaintiff DOUGLAS FAULKNER, is a citizen and resident of the City of New York, County of New York, he created original images referred to herein, a copy of said images, are listed by published article. (*Exhibit I, Volume I, Page 2-6*) (His former wife, SALLY FAULKNER is a Plaintiff herein as successor in interest to certain images enumerated in *Exhibit I, Volume III, Page 789-796*)

SUMMARY ALLEGATIONS

41. The Defendant, NGS is a magazine publisher that now publishes monthly, creating collective works that contain text articles with images, some of which were created by the plaintiffs which are the subject of this suit. The images and text have been particularized in the annexed Exhibit I, separately bound..

42. For more than a century the National Geographic Society, as a Not-For-Profit entity, has published their magazine in paper format, documenting world adventures for educational purposes. In this format the Defendant, NGS as a Not-For-Profit entity, was able to avoid taxes and keep its costs and payment to authors down to a minimum.

43. The original mission of the magazine has undergone major changes in the past five years.

44. After five generations of family leadership, under the direction of Bill Allen, in 1995 the magazine was published in a non English editions, Japanese, and in 1997, Spanish.

45. In 1996 the National Geographic Society established National Geographic Ventures, the Society's wholly owned, For-Profit, taxable subsidiary, which includes television, maps and interactive entertainment as part of their For-Profit format.

46. The Defendant, NGS, transferred the rights to publish 108 years of "*National Geographic*," the magazine, and later 109 and also 110 years, to the defendant NGI; on information and belief that they contracted with the other Defendants, to publish, manufacture and distribute "*National Geographic*" in the new format called, "*The Complete National Geographic 108 Years of National Geographic Magazine on CD-ROM*" during 1997 the 108 years edition, during 1998 the 109 years edition, during 1999 the 110 years edition and versions in DVD format; after all Defendants were put on actual notice of their lack of rights by the filing of the companion suit, they published the additional infringing product, "*The Complete National Geographic 110 Years of*

National Geographic Magazine on CD-ROM" and a later version in DVD ³format; on information and belief, all Defendants received the benefits therefrom.

47. The Defendants, all financed and participated in the publishing of "*National Geographic*" in the new format "*The Complete National Geographic 108 Years of National Geographic Magazine on CD-ROM*" and a later updated version in DVD format and "*The Complete National Geographic 110 Years of National Geographic Magazine on CD-ROM*" and a current version in DVD format.

48. Plaintiffs allege that they are the owners of, and/or the successor in interest to or agent for certain contract rights of copyrighted images and text, which were infringed, by all of the Defendants, through the unauthorized alteration, publication, sale, distribution and use thereof, and/or plaintiffs allege that defendant, *NATIONAL GEOGRAPHIC SOCIETY*, breached their contracts with the plaintiffs, and/or, in the alternative, that this defendant abandoned the contracts with plaintiffs and/or all of the Defendants were unjustly enriched thereby. Said contracts were the original agreements made at a time when it was not in the contemplation of the parties to have the images used For-Profit in a *National Geographic Magazine on CD-ROM* or DVD format; in addition, the plaintiffs make claims for unjust enrichment, common law unfair competition, tortious misappropriation of goodwill, federal dilution, injury to business reputation, and failure to provide legible credits.

**COUNT I
FIRST CAUSE OF ACTION COPYRIGHT INFRINGEMENT ON BEHALF OF ALL
PLAINTIFFS AND MEMBERS OF ALL OF THE SUBCLASSES
AGAINST ALL DEFENDANTS**

49. The subject images and text are wholly original with the plaintiffs and they are copyrightable subject matter under the laws of the United States. All images and texts were created by plaintiffs and were registered by them with Library of Congress Register of Copyrights if required. (*Exhibit I, Volume 1-III*)

50. Since creation of the subject images and text, the plaintiffs have complied in all respects with the Copyright Act and all other laws governing copyright, and have secured the exclusive rights and privileges in and to the copyright of said images and text, and/or will receive a certificate of registration from the Register of Copyrights; a copy of the copyrights, or applications for copyright, are itemized in the annexed Exhibit I or in the alternative, the plaintiffs will ask this Court to adjudicate their copyrights based on these registrations, and any registrations made by the

defendants herein, in trust for the plaintiffs, pursuant to the Copyright Act and the Berne Convention; some of the images were made outside the geographic United States and thus Copyright Registration is not a prerequisite to this suit.

51. At all times, the subject images and text were published by plaintiffs or their agents, and all copies of them made by defendants, were published under their authority or license, in print format, and have now been published in a *CD-ROM* and later in a *DVD* format, which is in violation of the Plaintiff's rights under the provisions and laws governing copyright, or in violation of the plaintiffs' contracts.

52. Plaintiffs have been, and still are, the sole proprietors of, or successors in interest or agent for all rights, title, and interest in the copyright in said images and text. (*Exhibit I*)

53. Prior to and on or about January 1997, and thereafter, the defendants infringed said copyrights by reproducing said images and publishing and placing in the general market, by mail order catalogue, or for sale in the State of New York and worldwide, the images and text which were copied from plaintiffs' copyrighted images and text, known as "*NATIONAL GEOGRAPHIC*," in the new format "*THE COMPLETE NATIONAL GEOGRAPHIC 108 Years of National Geographic Magazine on CD-ROM*" and later a edition in *DVD* format, "*NATIONAL GEOGRAPHIC*," and "*THE COMPLETE NATIONAL GEOGRAPHIC 109 & 110 Years of National Geographic Magazine on CD-ROM*" as aforesaid.

54. On or about July 1997 and thereafter, the Douglas Faulkner and others notified the defendant, National Geographic Society, and thus this defendant was aware, that they were about to publish copyrighted images and text, by the publication of the subject products, as part of an advertising campaign and/or For-Profit business promotions, by sale of a *CD-ROM* sets and later version in *DVD* format, the collection of magazines, and related products, with substantial changes by adding advertising for the defendants the NATIONAL GEOGRAPHIC SOCIETY, NATIONAL GEOGRAPHIC INTERACTIVE, EASTMAN KODAK COMPANY, MINDSCAPE INC., and others, by adding sound and music with the ads, by the addition of an animated movie to the product and animated ads, by deleting the full size supplemental maps that were periodically routinely included with the original, non profit magazine publications, and by adding a Kodak Sweepstakes promotion on the package shrink wrapping which promoted Kodak and its products and minimizing some of the required credits to the authors, by making them illegible, and by copyright claim on behalf of NGS.

55. On or about 1997, and thereafter, defendants have been publishing, selling and otherwise marketing and using the plaintiffs' images and text, and the images of other contributors, as aforesaid, and have thereby been engaging in unfair trade practices, and in unfair competition, against plaintiffs, to their damage and unjustly enriching the Defendants.

56. The Non-Profit **National Geographic Society**, which has an Internal Revenue Service status of 501(C)(3) non profit, is now in competition with the Plaintiffs, who do not have the tax-exempt status; the Plaintiffs were and are selling for profit, and the competition dilutes their market and value by using the NGS's photo agency, the National Geographic Image Collection/Image Sales and the products the CD-ROM and DVD to unfairly compete with the plaintiff's herein and members of the *SUBCLASSES*.

57. On information and belief, the licenses which the National Geographic Image Collection/Image Sales uses for the licensing of the Plaintiff's rights in photographs, is For-Profit, to be used to promote themselves and the *National Geographic Magazine* and their related products the intent being a For-Profit use.

58. The Defendant, The National Geographic Society impliedly agreed to protect and defend plaintiffs' images and text and copyrights, but this defendant intentionally and wilfully violated plaintiffs' rights, as aforesaid, in 1997 and thereafter, and as a result the plaintiffs' and members of the *SUBCLASSES* were damaged, and continue to be damaged.

59. Some of the images and text were created at a time when the technology of CD-ROM and DVD images did not exist.

60. The plaintiffs were not employees of NGS at a time when their works were created; some of the works may have been created while performing work for hire on behalf of a Not-For-Profit entity, but thereafter the rights transferred were not all rights but intended to be limited which limitation of rights was ignored by NGS.

61. Some of the freelance text and photo authors negotiated an express transfer of some rights under written or oral contracts which varied in their express provisions relating to the rights granted and transferability of the rights. (*Exhibit II*)

62. The express rights have been summarized in the *Exhibit III*, made a part hereof however the plaintiffs refers the Court, by reference, to the full text of the contracts and copyrights submitted separately, in determining the issues herein.

63. The divergent rights assigned by the Plaintiffs to NGS are exemplified in A thru H:

- A) One image, referred to herein as the Matrix as agent for Rickman the "*BELLY FLOP*," specifically addresses the publication rights of the image restrictions, by limiting the right to a one time paper print use. (*Exhibit II separately bound, Pages 2-5*)
- B) Some contracts specifically states that no electronic rights are granted to the National Geographic Society, and that the only right granted concerns print on paper. For example for the use of the photo of Louis Psihoyos, the "Ford Styrofoam Mockup in Turin," the contract, by invoice dated 06/26/95 from his Psihoyos's agent, Matrix International Inc., to the National Geographic Society, specifically states that the license is for:

"One Time North American English Language Print On Paper Magazine Rights Only Granted And One Time Japanese Print On Paper Magazine Rights Granted Only-No Electronic Rights Granted." (*Exhibit I separately bound, Page 20*)

And the contract for Roger Hutchings's "*Photo of Bosnia*," (*Exhibit II separately bound, Pages 7*) by invoice dated 3/20/1996 from his agent, Matrix International Inc., to the National Geographic Society, addresses the publication rights of the image, as limited to a one time paper print use only, stating that no other rights, including specifically electronic rights, are granted.

In Louis Psihoyos's contract for "*Information Revolution*" dated February 10, 1994, it is stated that NGS may use, without further permission, any of the photographs taken in this assignment, in any NGS electronic media product, including but not limited to *CD-ROM*, and "upon such use NGS will pay you for such use according to the rates and fees established hereafter in the standard NGS contract with freelance photographers." (See the contract for the "*Information Revolution*" dated February 10, 1994 (*Exhibit I separately bound, Page 20*)).

No payments were made.

- C) The contract for Jon Krakauer's, "*Rocky Times for Banff*" (*Exhibit II separately bound, Page 11-14*) dated June 21, 1993, specifically states that:

"The material will be a specially commissioned work for hire in National Geographic Magazine and you hereby grant all rights of first publication of the Material throughout the world exclusively to us."

The rights granted are limited to the first publication of the material, and they are granted only to the National Geographic Magazine, a Not For Profit entity, no transfer of rights of alienation is given which would give to NGS the authority to transfer the rights from Not-For-Profit to the For-Profit, National Geographic Interactive, NGI. (See the contract for Jon Krakauer's, "*Rocky Times for Banff*" dated June 21, 1993. (*Exhibit II separately bound, Page 11-14*))

- D) In Louis Psihoyos's contract for "*Dinosaurs*" dated February 11, 1991 it is stated "if NGS makes further use (promotional, advertising, or other editorial use) of a photograph selected for publication, it will make additional appropriate payment to you." (*Exhibit II separately bound, Page 17-19*)

No payments were made.

- E) In most of the contracts it is stated that NGS will return, after a determined period of time after the first publication, to the photographers the copyright in all published and unpublished photographs.

For example in the Louis Psihoyos's contract for "*Dinosaurs of the Gobi*," dated April 26, 1995, it is stated that ninety days after publication, the NGS will return to the author the copyright in all published and unpublished photographs. (*Exhibit II separately bound, Pages 27*)

F) Some contracts with the photographers, specifically transfers the publication rights of the images, exclusively to the NGS, by the use of the word exclusively the intent is clear that these Plaintiff's intended to exclude the right of NGS to any further transfer. . Some rights were clearly withheld as evidenced by the fact that paragraph (b) provided that, in spite of the reference to commissioned work, NGS agreed to pay for any additional usage. (*Exhibit II separately bound, Pages 17-19*) (*Psihoyos contract Feb. 11, 1991, para 5*)

No additional payments were made.

G) The right to assign or transfer the license, under the law, had to be in writing, however NGS made the transfer to NGI and others, in spite of the fact that the rights were transferred to them with limitations as a Not-For-Profit entity, and most of the rights NGS had, reverted in many of the contracts, back to the Plaintiffs. For example:

Louis Psihoyos "*Dinosaurs*" dated Feb. 11, 1991 (*Exhibit II separately bound, Pages 17, Contract page 2 par.5*)

"*African Dinosaurs*" dated Oct. 8, 1995 (*Exhibit II separately bound, Pages 35, Contract page 3 par.8*)

Richard Conniff "*Toronto*" dated Oct. 19, 1994 (*Exhibit II separately bound, Pages 60, Contract page 2 par.2*)

Jon Krakauer "*Rocky Times For Banff*" dated June 21, 1993 (*Exhibit II separately bound, Pages 11, Contract page 2 par.2*)

H) In the contracts, where there is no statement of reversion of the copyright from NGS back to the Plaintiffs, the intention of the authors was to transfer their rights to a Not-For-Profit corporation, existing for educational purposes and not to the For-Profit, National Geographic Interactive. The Plaintiffs did not intend to have their work used for profit on *CD-ROM* and in *DVD* formats without permission and for the original negotiated price.

64. Many of the contracts transferred copyright to NGS at a time when the negotiated contract could not address digitization, *CD-ROM*, and *DVD* because they did not exist.

65. The defendant's NGS, Kodak and Mindscape on information and belief entered into a joint venture and/or partnership license agreement, to manufacture and distribute the *CD-ROM* and *DVD* products that are complained of herein.

56. The process by which each NGS magazine is prepared and changed to an NGI profit center, in an overly simplified expression follows:

a) The Plaintiff's rights are transferred from each Plaintiff or the agent to the Not-For-Profit entity, NGS, and then again to a For-Profit entity the Defendant, NGI (NATIONAL GEOGRAPHIC INTERACTIVE).

b) The rights on information and belief are transferred again to the new joint venture between the Defendants.

c) The full size maps originally part of the NGS publications are not digitized but later sold as a separate product.

d) The defendant Kodak, inserts their animated video with an advertising message and music onto each *CD-ROM* or *DVD*.

e) The animated video also contains an advertisement of Microsoft whose logo is clearly visible.

f) The animated video is designed in such a way that it is reloaded and replayed each time the disks are started

g) Credits for Kodak, Dataware, Laser Multimedia and National Geographic Interactive staff are shown on the screen at the end of the products use;

h) New special packaging is prepared to accommodate the new media *CD-ROM and DVD*.

i) Credits and logos for AT&T Corporation, AT&T WorldNet, Quick Time and Apple are printed on the packaging.

l) Mindscape along with Kodak added their logo and advertisement to the exterior packaging or along with Broderbund..

m) A promotional sweepstake enhancement is inserted into the packaging material to promote Kodak's products which material becomes an integral part of the packaging.

n) The image and text are scanned from a paper magazine to electronic impulses, digitized for reproduction in their new format *CD-ROM or DVD*.

o) The magazines are downloaded onto *CD-ROM* grouping about 10 years of publication in one *CD-ROM* box.

p) The new box packaging is prepared with the cover advertisement for the sponsoring joint venturers and the tear off sweepstake enhancement promotion so the package as seen from the outside by the user are completely different from the original presentation in that magazine. :

1) The user cannot open the package without touching the Kodak sweepstake addition;

2) The user viewing the cardboard packaging cannot avoid seeing the added logos;

q) The inner boxes each contained in newly designed packaging, each inner box opening in book fashion and containing about 10 years of the original magazines in their new format.

r) The CD ROM disks have been designed with the following distinguishing changes from the original presentation in magazine form:

1) The user cannot load any of the individual *CD-ROM* disks without having to listen to and watch the Kodak advertisement for their name and products for about 60 seconds.

2) The users can now search for individual articles, authors or topics with a new software search engine which program has been added to the product;

3) The user can now search for an individual advertisement such as Kodak, and the program will also show the related topics, such as other similar products from the same or different companies;

4) The Defendant NGS undertook the major task to index the advertisements and regional ads ;

5) The images, articles and authors have been altered with the insertion of computer tags to facilitate a unique search;

6) An index has been added to direct the user to the correct disk for insertion which they can insert and use over and over after watching the added Kodak video commercial;

7) Special search screens which first list the search results have been added;

8) Special display screens have been designed to enable users to visually see 10

- 9) Software to activate the screen with keystrokes and the computer mouse have been inserted to activate the visualization of the desired result;
- 10) Software to permit enlargement has been inserted into the new product;
- 11) Software to permit printing in color or black and white has been added to the new product;
- 12) Software to permit searching and bringing up to the screen a limited result by date, topic, and author and advertisements, has been added to the new product;
- 13) The new software permits the launch of an Internet browser that will access directly to the National Geographic web site by computer link which makes the connection simple and automatic for the viewer using the Microsoft browser.
- 14) The minimum system requirement printed on the package suggests the usage of a printer enabling reproduction by the end user without any control, or limitation for secondary usage,.
- 15) The printing is of a completely different quality from the original high quality;
- 16) The inevitably low quality print out of images offer no alternative.
- 17) The distribution of the product is made separate and apart from the NGS's magazine; the magazine is distributed substantially to subscribers and the products are sold in retail shops, by catalogue and on the internet.

COUNT II
SECOND CAUSE OF ACTION BREACH OF CONTRACT
AGAINST NATIONAL GEOGRAPHIC SOCIETY

57. The plaintiffs entered into a written or oral agreement with the defendant, The National Geographic Society, to license to them the subject images for one time non exclusive use by this defendant except for the Plaintiffs Baraban who gave no license and Faulkner and Knoebber whose license was substantially oral. The rights are summarized in Exhibit 3, and the Plaintiffs refer the Court to the full text of the documents constituting the agreements in determining the issues herein.

58. The Defendant, National Geographic Society, agreed to purchase from certain plaintiffs the right to use the copyrighted images and text as it appears in the original Not-For-Profit, educational magazine.

59. The defendant, National Geographic Society abandoned and/or breached the licensing contracts, when it transferred the rights under the contracts to the Defendants NATIONAL GEOGRAPHIC INTERACTIVE, EASTMAN KODAK COMPANY, and MINDSCAPE INC., all corporations being motivated for profit.

60. The National Geographic Society transferred, their Not-For-Profit image collection in the magazine to National Geographic Interactive for profit making purposes.

61. Plaintiffs duly performed all of the terms, covenants and conditions of the agreements to be performed on their part and, delivered the images to The National Geographic Society for their Not-For-Profit use.

62. The Defendant, NGS, actually and impliedly agreed to pay certain fees for the one time magazine publication of the images for Not-For-Profit educational use and in some contracts agreed to pay additional fees for any additional uses but failed to make such payment.

63. Defendants National Geographic Society agreed to purchase from plaintiffs the right to use the images and text created by the plaintiffs but abandoned and breached the contract when they induced the plaintiffs to license to the defendant National Geographic Society a recognized not-for-profit corporation, and then assigned their rights to the defendant NATIONAL GEOGRAPHIC INTERACTIVE, an undisclosed, separate entity, set up specifically for profit.

64. The plaintiffs did not contract to place the images in a for-profit media; the rate negotiated would have been more for an expanded license for profit usage with the advertisements for KODAK, NGS, NGI AND MINDSCAPE, and others, which use was not implied or stated.

65. The defendants have failed to respond to the demand to cease and desist in their use, sales and infringement in 1997 and continue infringing with the aforesaid products and others may exist.

66. Thereafter, defendant National Geographic Interactive began selling the product in New York City without intent of paying the plaintiffs for the images and text in the *CD-ROM's and the* and *DVD* format Format; the sales were made in stores, by mail order and elsewhere in the state of New York and worldwide.

COUNT III
THIRD CAUSE OF ACTION UNJUST
ENRICHMENT AGAINST DEFENDANT NGS

67. In the alternative, and in the event that plaintiff has no adequate remedy at law, based upon the aforesaid contracts, with the defendant NGS, it would be unfair, unjust, and inequitable for these defendants to retain, and be enriched by the fruits and benefits gained from the Plaintiff's works by their improper actions, as aforesaid, for which plaintiffs seek damages and equitable relief as may be just. **COUNT IV**

COMMON LAW UNFAIR COMPETITION AGAINST ALL DEFENDANTS

68. The acts of the Defendants constitute unfair competition and were designed to trade upon the popularity, good will and intellectual property owned by the plaintiffs without permission to reproduce electronically without payment. The Defendants infringed upon the rights of the plaintiff's, to exploit the aforesaid creations, in their effort to "*palm off*" the *CD-ROM* images, to members of the public who have been and will be misled, regarding the actual origin or ownership

of the images, and who were induced to buy the defendant's by purchase of the *CD-ROM* and later version the *DVD* format, in place of those publications initially authorized by the plaintiffs some of which are still on the market for sale, for purchase or license from the plaintiffs.

69. The Defendant has newly copyrighted all editorial content and images in its name during 1997, stating that "*All Rights Are Reserved*," and adding a new copyright claim to each page of the new product without specifically reserving the plaintiffs' rights, or giving proper visible attribution; in addition, on information and belief, they have filed their own registration for their product without owning the rights they were claiming.

70. All of the acts by NGS are wilful with knowing intent to deny the Plaintiff's of their contractual and statutory rights which acts were done with reckless disregard for the Plaintiff's rights.

71. The Defendants' activities are likely to confuse consumers as to the source, and imply the plaintiff's sponsorship or approval of the use of the images and text and unless the Defendants are enjoined and restrained from producing, licensing, manufacturing, printing, distributing, selling, marketing, promoting, advertising and otherwise exploiting the images and text, and the plaintiff's names and reputations, to which the defendants do not hold a license, the plaintiffs will be irreparably damaged, for which they have no adequate remedy at law.

72. By reason of the foregoing, plaintiffs are entitled to a permanent injunction, enjoining Defendants from further acts of unfair competition, and for an award of compensatory and punitive damages against the Defendants in an amount to be determined at the trial and legal fees.

COUNT V
TORTUOUS MISAPPROPRIATION OF
GOODWILL AGAINST ALL DEFENDANTS

73. The acts of Defendants constitute tortuous misappropriation of the goodwill and reputation of the plaintiffs.

74. The Defendants have usurped, for their own commercial advantage, the unique elements and features of the Plaintiff's copyrighted images and text.

75. The Defendant's conduct is specifically designed to trade upon the phenomenal popularity and goodwill of plaintiffs' valuable images and text.

76. Unless Defendants is enjoined and restrained from producing, licensing, manufacturing, printing, distributing, selling, marketing, promoting, advertising, and otherwise exploiting the images and text, plaintiffs will be irreparably damaged, for which they will have no

77. By reason of the foregoing, plaintiffs are entitled to a permanent injunction enjoining Defendants from further acts of misappropriation of goodwill, and for an award of compensatory and punitive damages against the Defendants, in an amount to be proved at trial and legal fees.

**COUNT VI
FEDERAL DILUTION AGAINST ALL DEFENDANTS**

78. Plaintiffs' images and text are inherently arbitrary and highly distinctive, and are strong and indeed famous, as a result of and because of their artistic and marketplace significance.

79. The commercial and copyrighted use by the Defendants of the infringing images and text is likely to dilute the distinctive character of plaintiffs' images and text in violation of §43(c) of the Lanham Act, 15 U.S.C. S 1125(c).

80. As a proximate result of the acts of defendants as alleged herein, plaintiffs have suffered and will continue to suffer great damage to their business, goodwill, reputation, and profits, while defendants are profiting at plaintiffs' expense. The precise amount of the damage to plaintiffs and the unlawful profits accruing to defendants has not yet been determined. Plaintiffs will seek leave to amend the complaint once the amount of such damages and unlawful profits has been determined, or will prove them at trial of this action.

81. Plaintiffs have no adequate remedy at law against these acts of dilution, unless defendants are enjoined by this Court, plaintiffs will continue to suffer irreparable harm.

WHEREFORE, plaintiffs respectfully demand judgment certifying the *SUBCLASSES* under the Federal Rule of Civil Procedure, Rule 23 and, on behalf of themselves and the members of the *SUBCLASSES* prays for judgment:

1. Declaring this action to be a proper class action pursuant to Rules 23, of the Federal Rules of Civil Procedure on behalf of the Class defined herein, and declaring plaintiffs to be proper class representatives and plaintiffs' counsel as counsel for the class;
2. Awarding the plaintiffs and all members of the class compensatory damages in an amount to be proven at trial;
3. Awarding the Plaintiffs and members of the Class prejudgement interest, as well as reasonable attorneys' fees, expert witness fees and other costs;
4. That Defendants be enjoined during the pendency of this action, and permanently thereafter, from infringing the aforesaid copyright of the Plaintiffs' in any manner, and from further publishing, selling, marketing and/or otherwise disposing of any copies of the infringing images and text, as aforesaid.
5. That Defendants be required to pay to the Plaintiffs such damages as the plaintiffs have sustained in consequence of the Defendant's infringement of said copyright, and/or of the aforesaid unfair trade practices, and/or of the aforesaid unfair competition, and to account for:

(a) all gains, profits, and advantages derived by Defendants from the aforesaid unfair trade practices and unfair competition, and/or,

(b) all gains, profits, and advantages derived by Defendants from their infringements, and/or

(c) damages as to this court will appear proper within the provisions of the statutes, but not less than One Hundred Thousand Dollars (\$100,000.00) for each such infringement.

6. That Defendants be required to deliver up, to be impounded during the pendency of this action, all copies of said images in its possession or under its control, and to deliver up for destruction all infringing copies, all plates, digital or electronic copies, and all other matter for making such infringing copies.

7. That Defendants pay to the Plaintiffs the costs of this action and statutory and/or reasonable attorneys' fees.

8. That the Plaintiffs have such other and further relief as is just, including punitive and statutory exemplary damage to be fixed.

9. That Defendants be required to pay to the Plaintiffs the monetary benefit conferred on defendants by reason of its aforesaid wrongful use of the Plaintiffs' property.

10. That the Defendants be directed to return all original material, art work, duplicate transparencies in the possession of the publisher/manufacturers to the Plaintiffs' herein or have damages assessed as to the value of the loss.

11. That they have such other and further relief as may be just and proper, together with reasonable interest, attorney's fees where provided for by law and the costs and disbursements of this action all in excess of \$25,000,000.00 Dollars.

Dated: New York, New York
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