

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division

CASE NO. 97-3924-CIV-SIMONTON

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.

**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO
DEFENDANTS' MOTION IN LIMINE TO EXCLUDE
EVIDENCE AS TO STOCK PHOTOGRAPHIC AGENCIES**

Plaintiffs, JERRY GREENBERG and IDAZ GREENBERG (together "Greenberg"), submit this memorandum in opposition to Defendants' Motion in Limine for an Order Precluding Plaintiffs from Presenting Evidence Concerning Stock Photographic Agencies, served by Defendants, NATIONAL GEOGRAPHIC SOCIETY, NATIONAL GEOGRAPHIC ENTERPRISES, INC., and MINDSCAPE, INC. (together "the Society").

A. Introduction

The defendants propose that "the only issue to be tried in this action is the extent of statutory damages" to which Greenberg is entitled. A crucial aspect of statutory damages, however, is whether the Society willfully infringed the Greenberg copyrights. Mem. at 3. As to

willfulness, the defendants wave the issue away in a single sentence that states “the Society believed it had the right” to publish the Greenberg photographs. Mem. at 2. Greenberg challenges that proposition at great length in Plaintiffs’ Memorandum in Opposition to Defendants’ Motion in Limine to Exclude Evidence as to Willfulness. How the Society interacted with the stock photo agencies is directly relevant to Greenberg’s argument of willful infringement.

B. All Evidence as to Compensation Paid to Photo Agencies Should be Barred

Greenberg has no intention of using evidence as to monetary terms in negotiations with the photo agencies because it not relevant to his claims. The defendants, however, want to use such evidence because they have a different motive:

The only evidence concerning the Society’s dealings with the stock agencies which is relevant to this case is the amount of compensation paid by the Society to the stock agencies. As pointed out above, one of the factors the jury can consider is the revenue lost by the plaintiff as a result of the infringement or, put another way, how much the Society would have paid Greenberg had it negotiated with him. The amount the Society actually paid to stock agencies is probative of this issue.¹

Mem. at 4 n.5.

What the Society paid to the stock agencies is not probative of anything and is totally irrelevant to Greenberg’s damages. The Society’s own argument turns back on itself: “[T]he provisions of the stock agency contracts which led the Society to negotiate with stock agencies are meaningfully and substantially different than the Society’s agreements with Greenberg.”

¹ Greenberg had no indication until the defendants filed this motion that they intended to use such compensation information as evidence, and had no motivation to seek in limine the exclusion of evidence as to the stock agencies. The Court is urged, therefore, in ruling on the motion, to consider Greenberg’s own objections as to irrelevant and prejudicial evidence on the issues addressed here.

Mem. at 4. First, this action has everything to do with Greenberg's copyrights, and nothing to do with "the Society's agreements with Greenberg." Second, Greenberg is seeking damages for a violation of his rights under the law, and compensation paid to stock agencies in arm's-length transactions is fundamentally not the same thing.

Moreover, it is outrageously presumptive for the Society to compare photographs and photographers from different classes segregated by the Society itself. At page 1 of the memorandum, the Society distinguishes freelance photographers like Greenberg from stock photographic agencies, and pointedly notes that the Society "did not obtain any of Greenberg's images by licensing them from a stock agency."

The admission of such compensation evidence could lead a jury improperly to conclude that Greenberg's damages are to be guided by money paid in circumstances totally unlike his. That would highly prejudice Greenberg's claim for damages.

C. Greenberg Should be Free to Use Evidence of Reckless Conduct by the Society as to Stock Agencies

At page 2, the defendants explain that (a) an issue arose as to the Society's rights to use certain stock agency photographs, (b) the Society was unable to reach agreement with some stock agencies, and (c) the Society published 60 images in the CNG anyhow. That evidence is highly relevant to Greenberg's contention that the Society acted with reckless indifference to his rights.

Confronted with a dispute over rights, and unable to agree on money, the Society went ahead and published the disputed photographs without regard to whether it had rights or not. The jury could reasonably infer that the Society's decision to black-out the 60 images from the CNG is an admission that the Society either concluded it had no rights to use them, or removed the images to avoid litigation.

That the dispute over stock photo rights did not involve Greenberg does not diminish the value of that course of events as evidence of the Society's cavalier mind-set about rights in general.

The motion should be denied.


STEEL HECTOR & DAVIS LLP
Attorneys for Plaintiffs



Norman Davis FBN 475335
Edwin G. Torres FBN 911569
200 S. Biscayne Boulevard
Suite 4000
Miami, FL 33131-2398
305-577-2988
305-577-7001 (fax)

Certificate of Service

I hereby certify that a copy of the foregoing memorandum was served by mail on Edward Soto, Esq., Weil, Gotshal & Manges LLP, 701 Brickell Avenue, Suite 2100, Miami, FL 33131; and on Stephen N. Zack, Boies, Schiller & Flexner LLP, 2800 Bank of America Tower, 100 Southeast Second Street, Miami, FL 33131; and by facsimile and mail on Robert G. Sugarman, Esq., Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York NY 10153 this 10th day of January, 2003.


Norman Davis