

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

Miami Division  
CASE NO. 97-3924-CIV-LENARD-TURNOFF

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.

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**PLAINTIFFS' MEMORANDUM IN OPPOSITION  
TO DEFENDANTS' MOTION FOR RECONSIDERATION**

Plaintiffs, JERRY GREENBERG and IDAZ GREENBERG ("Greenberg"), submit this memorandum in opposition to the motion for reconsideration served by Defendants, NATIONAL GEOGRAPHIC SOCIETY, NATIONAL GEOGRAPHIC ENTERPRISES, INC., and MINDSCAPE, INC. (collectively "the Society"), and say:

On January 11, 2002, the Court entered an order granting Greenberg's motion to strike the defendants' answers. The Society now asks the Court to reconsider that order. The argument in support of the motion, as will be shown, is without merit.

### **The Timeliness Ruling Disposed of the Issues Now Raised**

The Society's sole basis for seeking reconsideration is that the Court erroneously read the corrected opinion of the Eleventh Circuit. Defs. Mem. at 1. While focusing on the mandate, the memorandum virtually ignores the primary grounds on which the Court granted Greenberg's motion to strike the answers: the answers were untimely, and were nonetheless served by the Society without Court approval in contravention of Rule 6. In its Order, at page 6, the Court said:

The Motion to Strike Defendants' Answers to Counts III and V of the Amended Complaint (D.E. 78), filed November 13, 2001, by Plaintiffs Jerry and Idaz Greenberg, is GRANTED. Defendants' Answers to Amended Complaint (D.E. 76, 77) are stricken as untimely, filed without leave of Court, and contrary to the Eleventh Circuit mandate.

Timeliness is mentioned in the Society's memorandum only as an afterthought, on page 7. Even there, the defendants do not advance a single fresh argument that might enlighten the Court.<sup>1</sup> At the top of page 7, they merely refer to argument previously directed by them to Greenberg's motion to strike.

Having summarily dismissed the timeliness issue ("putting all that aside," Defs. Mem. at 7) with nothing more persuasive than the argument advanced in an earlier memorandum addressed to the motion to strike, the Society now urges that it is inequitable to preclude

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<sup>1</sup> Nor should the timeliness issue be argued in a reply memorandum. General Rule 7C for the Southern District of Florida provides that a reply memorandum "shall be strictly limited to rebuttal of matters raised in the memorandum in opposition without reargument of matters covered in the movant's initial memorandum of law." The same rule, by clear implication, precludes argument of matters not covered in the initial memorandum.

“meritorious” defenses because the defendants filed their answers “a few days late.”<sup>2</sup> *Id.* Even meritorious defenses, however, are waived if not timely served. In any event, the record is clear, after argument by both sides, that the defenses that would have been asserted are not grounded in law.<sup>3</sup>

### **The Mandate Language**

Even if the timeliness issue was not controlling, the Society’s newest discussion of the Eleventh Circuit’s mandate has no legal consequence. The defendants contend that the mandate “clearly” contemplated litigation of additional liability issues. Defs. Mem. at 2. The Court already has rejected that proposition, and the defendants provide no new basis to resurrect it. The wordplay about the handwritten corrections, contrasted with the printed corrections, in the

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<sup>2</sup> The Society, in its memorandum opposing Greenberg’s motion to strike, suggested that “excusable neglect” might wash away the time problem. The Court obviously considered and rejected the suggestion. The Society in the current memorandum casually proposes that allowing late answers will not prejudice Greenberg. Def. Mem. at 7. Rule 12 (b) provides that “every defense, in law or fact . . . shall be asserted in the responsive pleading [answer],” but if the answer is not timely served there can be no defenses. The Society is asking that the door be opened a second time for such defenses, and suggesting with a straight face that that poses no prejudice for Greenberg. These are hardly *pro se* defendants.

<sup>3</sup> In the current memorandum, in footnote 5, the defendants attempt to shore up a proposed defense that propounds unspecified liability questions under the 1909 Copyright Act. Citing to Roth v. Pritikin, 710 F.2d 934, 937 (2nd Cir. 1983), they assert that the 1909 Act governs those of Greenberg’s photographs published prior to January 1, 1978, the effective date for the current Copyright Act. That might be true as to ownership issues if ownership was unchanged after that date. But copyright interest in the photographs at issue in this litigation was transferred unconditionally to Greenberg long after 1978. See Exhibits A and B to Greenberg’s motion to strike. The Roth court said: “Whoever holds an interest in a copyright on or after January 1, 1978, has a right to the protections afforded by the new statute, although the creative work may previously have been governed by the 1909 Act . . . .” 710 F.2d at 938.

appellate court's opinion is of no consequence because the Eleventh Circuit's direction is perfectly clear.

In the Defendants' Petition for Rehearing and Petition for Rehearing en Banc, the Society asked the Eleventh Circuit to "reverse the judgment and remand the case for the adjudication of any other factual, legal, or equitable defenses to infringement." Defs. Mem., Ex. B at n. 3. The Eleventh Circuit denied the petitions. The Eleventh Circuit did agree, after entry of its opinion, that it was procedurally improper to direct entry of judgment for Greenberg because that was a role reserved to this Court after considering the remaining issues of damages and fees. It also was procedurally improper to declare Greenberg to be the prevailing party for purposes of attorneys' fees because such a determination is at the discretion of the district court after weighing various factors. See generally Fogerty v. Fantasy, Inc., 510 U.S. 517, 533-34 and n. 19, 114 S.Ct. 1023, 1033 and n. 19 (discussing discretion of district courts in awarding attorneys' fees in copyright cases). Moreover, a complaint, as here, may contain several causes of action, with differing outcomes. See generally 4 M. Nimmer & D. Nimmer, NIMMER ON COPYRIGHT § 14.10[B] at p. 14-142. Thus the Eleventh Circuit procedurally corrected its opinion (did not amend it) with no change in the original date of entry of the opinion.

The Eleventh Circuit did not say, as is commonly seen in appellate opinions, that the case was remanded to the district court "for further proceedings consistent with this opinion." In the uncorrected opinion the Eleventh Circuit instructed as follows:

Upon remand, the district court should ascertain the amount of damages and attorneys fees that are due as well as any injunctive relief that may be appropriate . . . .

Defs. Mem. Ex. A. In the corrected opinion entered on the same date, the instruction was as follows:

Upon remand, the district 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.

Defs. Mem. Ex. C. That is the mandate, and it should be read in the context of the Eleventh Circuit's denial of petitions seeking rehearing in part because of the existence of liability issues. The only reasonable construction of the mandate language -- certainly that adopted by this Court -- is that no other liability issues exist.<sup>4</sup>

### Conclusion

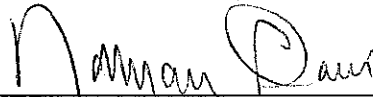
The defendants' answers do not exist in the record. Accordingly, there are no defenses in the record. The liability door is closed. Nothing in the defendants' memorandum offers the Court any basis to reconsider its order.

If the Court, for reasons not apparent in the circumstances, does elect to reconsider, it should take up Greenberg's alternative motion to strike all defenses as legally insufficient. Each of the asserted defenses has been argued sufficiently in the record for such a determination.

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<sup>4</sup> The Society's memorandum proposes that the handwritten markings in the corrected opinion evidently provided to the district court and not to the parties -- almost surely an administrative slip -- somehow enhance the defendants' position on the issue of liability. The memorandum suggests that this Court did not "pick up" the handwritten notations. Defs. Mem. at 3. "The added words 'if any' are vertically handwritten in small writing in the margin without any lie to indicate where they should be placed." *Id.* Very much to the contrary, the handwritten corrections in the final paragraph of the opinion, shown in Exhibit D to the defendants' memorandum, show very clearly where "if any" was to be placed. The only fair reading of the margin notes is that "if any" modified only references by the appellate court to injunctive relief. In any event, the placement of the modifier does not alter the plain language of the mandate.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing plaintiffs' memorandum was served by mail on Edward Soto, Weil, Gotshal & Manges, LLP, 701 Brickell Avenue Boulevard, Suite 2100, Miami, Florida 33131; and via Federal Express on Robert G. Sugarman, Weil, Gotshal & Manges, LLP, 767 Fifth Avenue, New York, New York 10153, this 28<sup>th</sup> day of January, 2002.



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Norman Davis

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