

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 96-3924 Civ-Lenard
Magistrate Judge Simonton (consent case)

JERRY GREENBERG, individually,

Plaintiff,

v.

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

Defendants.

JOINT PRE-TRIAL STIPULATION PURSUANT TO LOCAL RULE 16.1(E)

Pursuant to Local Rule 16.1(E) of the Rules of the United States District Court For the Southern District of Florida, Plaintiff Jerry Greenberg, by his attorneys, Steel, Hector & Davis LLP, and Defendants National Geographic Society, National Geographic Enterprises, Inc.,¹ and Mindscape, Inc.,² (collectively the "Society" or "Defendants"), by their attorneys, Weil, Gotshal & Manges LLP, hereby file this Joint Pre-Trial Stipulation.

I. **A SHORT CONCISE STATEMENT OF THE CASE BY EACH PARTY IN THE ACTION.**

A. Statement of Plaintiff.

Defendants have been found to be liable for infringing copyrights held by Plaintiff in certain photographs included in "The Complete National Geographic on CD-

¹ National Geographic Enterprises is incorporated under the name National Geographic Holdings, Inc. ("Holdings").

² Mindscape, Inc. has been dissolved and no longer exists.

ROM. Plaintiff has elected to seek statutory – rather than actual – damages and has opted for trial by jury. The Court will determine the number of works infringed,³ and the jury will determine the amount of statutory damages to be awarded to plaintiff per work infringed.

B. Statement of Defendants.

Beginning in 1961, the Society commissioned Plaintiff to take photographs for stories to be published in the National Geographic Magazine (the “Magazine”). Four stories were published in the January 1962, February 1968, May 1971 and July 1990 issues of the Magazine, consisting of 64 photographs. One of Plaintiff’s images appeared on each of the covers of the January 1962 and February 1968 issues of the Magazine. In addition to owning copyright in all of the issues of the Magazine as collective works, the Society initially owned the copyright in Plaintiff’s photographs which were published in the four stories in the Magazine. In 1985, Plaintiff requested the return of his copyright in his photographs published in the January 1962, February 1968 and May 1971 issues of the Magazine. That letter stated that, “[t]his reassignment would have no effect on the Society’s reuse of this material as this provision was covered in the original contracts for each assignment.” As a result of the letter, the Society conveyed to Plaintiff copyright in his photographs which appeared in the January 1962, February 1968 and May 1971 issues of the Magazine. The copyright in the photographs which appeared in the July 1990 issue of the Magazine was automatically conveyed to Plaintiff after publication pursuant to provisions of his assignment letter with the Society.

³ Defendants contend that the Court decided to leave the issue of the number of works at issue to the jury at the February 5, 2003 pre-trial conference.

In 1996, the Society initiated a proposal to reproduce all issues of the Magazine published between 1888 and 1996 in CD-ROM format. That proposal eventually became "The Complete National Geographic: 108 Years of National Geographic Magazine on CD-ROM" (the "CNG"), which has been continuously published since September 1997. The CNG was created by scanning each issue of the Magazine, page by page, into a computer system. The result is an exact image of each page as it appeared in the Magazine, including all text, photographs, graphics, advertising and attributions in the same format as in the paper version with no changes to the content, format or appearance of the issues of the Magazine.

Because the CNG is an exact image-based reproduction of the Magazine exactly as it appeared in print, it necessarily contained Plaintiff's photographs which appeared in the January 1962, February 1968, May 1971 and July 1990 issues of the Magazine. On December 23, 1997, Plaintiff filed his Amended Complaint, asserting claims for copyright infringement against Defendants with respect to the inclusion of his photographs in the CNG. On May 14, 1998, this Court granted Defendants' Motion For Summary Judgment, holding that § 201(c) of the Copyright Act of 1976 ("§ 201(c)") allowed Defendants to publish Plaintiff's images in "The Complete National Geographic." Greenberg v. Nat'l Geographic Soc'y, No. 97-3924-Civ., 1999 WL 737890 (S.D. Fla. June 8, 1999), rev'd, 244 F.3d 1267 (11th Cir. 2001), and cert. denied, 122 S. Ct. 347 (Oct. 9, 2001). Plaintiff appealed the decision to the Court of Appeals for the Eleventh Circuit, which reversed on March 22, 2001, and remanded the action to this Court to determine "the amount of damages and attorneys fees that are [due], if any, [] as

well as any injunctive relief that may be appropriate.” 244 F.3d 1267, 1276.⁴ The court went on to state that, “[i]n assessing the appropriateness of any injunctive relief, we urge the court to consider alternatives, such as mandatory license fees, in lieu of foreclosing the public’s computer-aided access to this educational and entertaining work.” *Id.*

Defendants filed a motion for rehearing and rehearing *en banc*, which was denied on June 8, 2001. No. 00-10510.CC (11th Cir, 2001).⁵ Defendants filed a Petition for Certiorari to the United States Supreme Court, which was denied on October 9, 2001. 122 S. Ct. 347.

Defendants believe that the Eleventh Circuit’s ruling is contradicted by the United States Supreme Court’s decision in New York Times Co. Inc. v. Tasini, 533 U.S. 483, 121 S. Ct. 2381 (June 25, 2001), which suggests that Defendants’ conduct did not constitute infringement and their use was permitted under § 201(c), and have, therefore, continued to publish the CNG. Pursuant to the Eleventh Circuit’s mandate issued on October 16, 2001, a trial is scheduled to begin on February 24, 2003. The parties are prepared to have this Court determine whether injunctive relief and attorneys’ fees are appropriate and to have a jury determine a statutory damages amount.⁶ Defendants believe that certain issues can be decided by the Court as a matter of law, detailed in the below list of undisposed of motions.

II. BASIS FOR FEDERAL JURISDICTION.

This action arises under the Copyright Clause of the United States Constitution and the Copyright Act of 1976 (the “1976 Act”). U.S. Const. art. I, § 8, cl.

⁴ The brackets correct a typographic error in the opinion as it appears on Westlaw.

⁵ On June 25, 2001, the United States Supreme Court decided New York Times Co., Inc. v. Tasini, 533 U.S. 483, 121 S. Ct. 2381 (2001).

⁶ Plaintiff has elected to seek statutory damages pursuant to 17 U.S.C. § 504(c)(1)(1976).

8; 17 U.S.C. §§ 101 et seq. (1976). This Court has jurisdiction pursuant to 28 U.S.C. § 1331. Venue is proper in the Southern District of Florida pursuant to 28 U.S.C. § 1391(b) and (c).

III. PLEADINGS RAISING THE ISSUES.

1. As defined by Fed. R. Civ. P. 7(a), the only pleading which has been filed in this action is the Amended Complaint, which was filed on December 23, 1997.⁷ The issues to be resolved at trial arise from claims alleged in Count III and V of the Amended Complaint.

IV. LIST OF ALL UNDISPOSED OF MOTIONS OR OTHER MATTERS REQUIRING ACTION BY THE COURT.

A. Plaintiff's Outstanding Motions.

1. Plaintiffs' Motion For Permanent Injunctive Relief, dated November 4, 2002.
2. Plaintiffs' Motion In Limine To Exclude Challenges to Eleventh Circuit Decision, dated December 20, 2002.
3. It is Plaintiff's position that the Plaintiff's Motion For Partial Summary Judgment as to Number of Works infringed and Defendants' Cross Motion For Partial Summary Judgment as to Number of Works Infringed are still *sub judice*. It is Defendants' position that the Court decided to leave the issue of the number of works infringed to the jury at the pre-trial conference on February 5, 2003.

⁷ On January 11, 2002, this Court issued its Order Granting, In Part, Defendants Motion For Additional Order of Reference; Denying Defendants' Cross-Motion For Enlargement of Time; and Granting Plaintiffs' Motion to Strike Defendants' Answers.

B. Defendants' Outstanding Motions.

1. Defendants' Motion In Limine For an Order Precluding Plaintiffs From Presenting Any Evidence Concerning Stock Photographic Agencies, dated December 20, 2002.
2. Defendants' Motion In Limine For An Order Precluding Plaintiffs From Presenting Any Evidence Concerning Other Lawsuits Filed Against Defendants Concerning Any Version of "The Complete National Geographic" Product, dated December 20, 2002.
3. Defendants' Motion In Limine For an Order Precluding Plaintiffs From Presenting Any Evidence Concerning The GeoPack and Jason Poster and Any Other Infringements Alleged to Have Been Committed By Defendants, dated December 20, 2002.
4. Defendants' Motion In Limine For an Order Precluding Plaintiffs From Presenting Idaz Greenberg's and Michael Greenberg's Testimony At Trial, dated December 20, 2002.
5. Defendants' Motion In Limine or For Summary Judgment To Limit the Scope of the Trial On Statutory Damages and To Preclude the Introduction of Any Evidence Regarding Willfulness, dated December 20, 2002.
6. Defendants' Motion In Limine For An Order Precluding Plaintiffs From Presenting Any Evidence Concerning the Correctness of the Legal Opinions That Publication of Plaintiffs' Images in "The Complete National Geographic" Did Not

Constitute Copyright Infringement or Violate Plaintiffs' Contractual Rights, dated December 20, 2002.

V. **CONCISE STATEMENT OF UNCONTESTED FACTS WHICH WILL REQUIRE NO PROOF AT TRIAL, WITH RESERVATIONS, IF ANY.**

Plaintiff's Assignments

1. Beginning in 1961, the Society on four occasions commissioned Plaintiff to take photographs for stories to be published in the Magazine.
2. Four stories were published in the January 1962 ("Key Largo"), February 1968 ("Sharks"), May 1971 ("Buck Island") and July 1990 ("Pennekamp Reef") issues of the Magazine, consisting of 64 photographs. One of Plaintiff's images appeared on each of the covers of the January 1962 and February 1968 issues of the Magazine.
3. Plaintiff's first assignment was commissioned in 1961. He took many photographs and submitted them to the Magazine. The Magazine chose 31 photographs and they were published together with text in the "Key Largo" story in the January 1962 issue of the Magazine.
4. Plaintiff's second assignment was commissioned in 1967. He took many photographs and submitted them to the Magazine. The Magazine chose ten photographs and they were published together with text in the "Sharks" story in the February 1968 issue of the Magazine.
5. Plaintiff's third assignment was commissioned by a letter agreement dated August 8, 1969. He took many photographs on the assignment and

submitted them to the Magazine. The Magazine chose seven photographs and they were published together with text in the "Buck Island" story in the May 1971 issue of the Magazine.

6. Plaintiff's fourth assignment was commissioned by a letter agreement dated June 14, 1989. He took many photographs on the assignment and submitted them to the Magazine. The Magazine chose 12 photographs and they were published together with text in the "Pennekamp Reef" story in the July 1990 issue of the Magazine. The agreement for that assignment provided that all rights including the copyright belong to the Society, but that the photographs along with all rights to the photographs would be returned to Plaintiff after publication, and they were returned in 1990.

Assignment of Copyright to Plaintiff

7. By agreement between Plaintiff and the Society, the copyright in the individual photographs published in the January 1962, February 1968, May 1971 and July 1990 issues of the Magazine were initially owned by the Society.

8. By letter dated November 15, 1985, Plaintiff requested the transfer of copyright in his photographs published in the 1962, 1968 and 1971 issues of the Magazine.

9. The assignment letter for the photographs published in the July 1990 issue of the Magazine automatically conveyed the copyright in Plaintiff's photographs to him after publication in the Magazine.

10. The Society at all times relevant to this litigation owned the copyright in the collective work, i.e. the Magazine.

The "Complete National Geographic."

11. In 1996, the Society initiated a proposal to reproduce all issues of the Magazine published between 1888 and 1996 in CD-ROM format. In order to accomplish the proposal, the Society granted NGV, Inc. ("NGV"), its wholly-owned taxable subsidiary, a license to reproduce all issues of the Magazine – at that time 108 years – in their entirety in digital format. NGV subsequently contracted with National Geographic Enterprises ("NGE") to achieve the goal of reproducing all issues of the Magazine in the digital format. The result was the CNG.

12. The CNG was created by scanning each issue of the Magazine published between 1888 and 1996, page by page, into a computer system. The scanning process created an exact image of each page as it appeared in the Magazine, including all text, photographs, graphics, advertising and attributions in the same arrangement and format as in the paper version with no changes to the content, format or appearance of the issues of the Magazine. Within the CNG, the issues of the Magazine appear chronologically, from the earliest at the beginning of the first disk to the latest at the end of the thirtieth disk.

13. As with the print copies of the Magazine, the stories in the CNG may be retrieved in a number of different ways. A user may retrieve a particular issue of the Magazine using a visual table of contents that displays the cover of each Magazine in chronological order and then turn to a story in that issue. A user may search for stories

written by a particular author, or dealing with a particular topic, by means of an electronic search engine that contains the same information as the print indices published by the Society. Regardless of which method is used, in order to find a particular contribution in an issue of the Magazine, the user must insert the disk on which the relevant issue of the Magazine appears before viewing the desired story.

14. At the beginning of each disk of CD-ROM 108, a brief series of multimedia sequences appears. These sequences display the Society's logo, followed by a promotional message for Kodak, and a sequence depicting, very briefly, the covers of ten issues of the Magazine that transition digitally from one into another (the "Moving Cover Sequence").

15. The Society, through NGV, entered an agreement with Mindscape, Inc. ("Mindscape") in 1996, to manufacture, market, and distribute the "CNG" among other products, in return for the right to receive royalties on all sales made by Mindscape.

16. The CNG was first released commercially in and has been continuously published since September 1997.

17. At the time the CNG was released, Plaintiff owned the copyright in the individual photographs and the Society owned the copyright in the collective work.⁸

⁸ Defendants contend that information concerning Plaintiff's recordation and registration of copyright is relevant for purposes of trial, while Plaintiff contends that such information is irrelevant. If this information is deemed relevant by the Court for purposes of trial, the following facts are not disputed: In 1988, Plaintiff filed a Certificate of Recordation with the U.S. Copyright Office with respect to the copyrights which were conveyed to him in 1985. He subsequently filed three certificates with the Copyright Office seeking renewal of copyrights covering the photographs in the 1962, 1968 and

18. In December 1997, Plaintiff sued the Society, NGE and Mindscape for copyright infringement with respect to his photographs.

19. In May 1998, the district court granted Defendants' motion for summary judgment on the ground that inclusion of Plaintiff's photographs in the CNG was within Defendants' privilege under § 201(c) of the 1976 Act.

20. On March 22, 2001, the Eleventh Circuit Court of Appeals reversed the district court's decision on the ground that the CNG was a "new work" and was therefore not within the scope of Defendants' § 201(c) privilege.

21. On June 8, 2001, the Eleventh Circuit Court of Appeals denied Defendants' Petition for Rehearing and Petition For Rehearing En Banc.⁹

22. On October 9, 2001, the Supreme Court denied Defendants' Petition For Certiorari. On October 16, 2001, the Eleventh Circuit Court of Appeals issued its mandate to this Court.

23. Plaintiff's photographs continue to be included in the CNG and related products.

1971 issues of the Magazine. Respectively, in July 1990, Plaintiff filed with the Copyright Office an application for Copyright Registration relating to the twelve photographs taken by him which appeared in the July 1990 issue of the Magazine.

⁹ Plaintiff contends that the United States Supreme Court's opinion in New York Times v. Tasini, 533 U.S. 483, 121 S. Ct. 2381 (2001), issued on June 25, 2001, is not relevant for purposes of trial. Defendants contend that the Tasini decision is relevant for purposes of trial. The parties do not dispute, however, that the United States Supreme Court issued its opinion in Tasini on June 25, 2001.

VI. A STATEMENT IN REASONABLE DETAIL OF ISSUES OF FACTS WHICH REMAIN TO BE LITIGATED AT TRIAL.

1. Because Plaintiff has elected to seek statutory damages, the amount of such statutory damages award.
2. In assessing statutory damages, the trier of fact will need to determine whether Defendants' infringement was (1) innocent;¹⁰ (2) neither innocent, nor willful; or (3) willful.¹¹
3. Whether the advice of counsel received by Defendants was relevant and timely, and whether Defendants' reliance on the advice was reasonable.
4. The revenues, if any, lost by Plaintiff as a result of the publication of the CNG.
5. The expenses saved by Defendants by infringing Plaintiff's copyrights.
6. Defendants contend that the profits Defendants made which are attributable to the infringement should be considered when making an award of statutory

¹⁰ The Plaintiff's position is that the issue of innocent infringement is not relevant to the trial as a matter of law.

¹¹ Defendants contend that, in order to support a finding of willful infringement, Plaintiff must prove that Defendants knew they were infringing Plaintiff's copyrights or recklessly disregarded the high probability that they were infringing his copyrights. Defendants acknowledge that in order to prove innocent infringement, they must prove that they were not aware that their acts constituted infringement of the copyright, had no reason to believe that they were infringing or that their actions were taken in the good faith belief of the innocence of their conduct. Plaintiff disagrees that the contention and acknowledgement in this footnote are properly set forth in a pre-trial stipulation.

damages. Plaintiff contends that the profits Defendants made as a result of the publication of the CNG may be considered by the jury.

7. The value of Plaintiff's copyrights and whether that value was affected by publication of the CNG.¹²
8. The number of works infringed.¹³
9. Whether Plaintiff was paid \$6,375, including a \$500 bonus, and reimbursed approximately \$7,375 for expenses in connection with the assignment for the "Key Largo" story published in the January 1962 issue of the Magazine.¹⁴
10. Whether Plaintiff was paid \$2,164.42 and reimbursed \$1,030.20 for his expenses in connection with the assignment for the "Sharks" story published in the February 1968 issues of the Magazine.
11. Whether Plaintiff was paid \$3,500 dollars for his photographs and "text information" and reimbursed \$8,395.45 for his expenses in connection with the assignment for the "Buck Island" story published in the May 1971 issue of the Magazine.
12. Whether, in connection with the "Pennekamp Reef" story which was published in the July 1990 issue of the Magazine, Plaintiff was paid \$350 per day for

¹² Plaintiff contends that the value of Plaintiff's copyrights are not relevant for purposes of trial.

¹³ See *supra* Section IV(A) at ¶ 3.

¹⁴ Defendants believe that the issues set forth in Paragraphs 9, 10, 11, 12, 14 and 16 of Section VI are uncontested. Plaintiff believes that these issues have no relevance for purposes of trial.

photography work, and \$175 for days spent in transit or in consultation with the Society's editorial staff while preparing the story with the Illustrations Editor, and whether the Illustrations Editor had the final say as to when the "Pennekamp Reef" story was complete for purposes of publication.

13. Whether the copyright in the photographs not used in the four stories published by the Society in the January 1962, February 1968, May 1971 and July 1990 issues of the Magazine and those not otherwise owned by the National Geographic by agreement of the parties are owned by Plaintiff and whether Plaintiff is free to use those photographs in any manner he deems appropriate. Specifically since 1985, whether Plaintiff has been able to exploit the photographs as he saw fit, including, without limitation, using them in books he published or licensing their use to others. And whether, on at least five occasions, Plaintiff received compensation by licensing the use of photographs taken while on assignment for the Society in other publications.¹⁵

14. Whether the letter dated November 15, 1985 in which Plaintiff requested the return of copyright in his photographs published in the 1962, 1968 and 1971 issues of the Magazine stated that, "[t]his reassignment would have no effect on the Society's reuse of this material as this provision was covered in the original contracts for each assignment." Whether, as a result of Plaintiff's request for transfer of his

¹⁵ Defendants believe that it is uncontested that Plaintiff does own copyright in the images, that Plaintiff is free to use the photographs in any manner he deems appropriate. Defendants further believe that Plaintiff can exploit the photographs as he sees fit, including, without limitation, using them in books he published or licensing their use to others and that, on at least five occasions, Plaintiff received compensation by licensing the use of the photographs taken while on assignment for the Society in other publications.

copyrights, by letter dated December 18, 1985, the Society conveyed to Plaintiff copyright in those of his photographs which appeared in the January 1962, February 1968 and May 1971 issues of the Magazine.

15. Whether or not the CNG provides tools to the user for cutting, pasting or altering any of the digital pages and whether individual images and texts can be viewed outside the context in which they were originally published. Further, whether CNG displays an exact image of every page of every issue of the Magazine and whether the scanning process selected by the Society does not reproduce the same high resolution as the original, print Magazine.¹⁶

16. Whether the procedure for retrieving stories in the CNG replicates, electronically, the process of finding a contribution in a bound volume or on microfilm.

17. Whether the logo, Kodak message and Moving Cover Sequence play the first time a user boots up the CNG and at the beginning of each subsequent session. Further, whether the user can skip the sequence by mouse-clicking on it once in subsequent sessions.¹⁷

¹⁶ Defendants believe the issues set forth in Paragraph 15 are uncontested.

¹⁷ Defendants think the issues set forth in Paragraph 17 are uncontested. Plaintiffs contend that the second sentence of Paragraph 17 is not relevant for purposes of trial.

18. Whether the Society believed it did not need Plaintiff's permission to include his photographs in the CNG and whether, as a result of that alleged belief, did not obtain such permission.¹⁸

VII. A CONCISE STATEMENT OF ISSUES OF LAW ON WHICH THERE IS AGREEMENT.

1. Because Plaintiff has elected statutory damages and this action was filed on December 23, 1997, the applicable statutory damages range in effect between 1989 and 1999 is applicable for purposes of this trial. 17 U.S.C. § 504(c) (1989) (repealed); see 4 Nimmer § 14.04[B][1][b] at 14-50. That statutory damages range is \$500-\$20,000 per work infringed, with a possible reduction to \$200 per work infringed for innocent infringement¹⁹ and a possible enhancement to \$100,000 per work infringed for willful infringement. 17 U.S.C. § 504(c) (repealed).

2. It is Plaintiff's burden to prove willfulness. Wow Flutter Music v. Len's Tom Jones Tavern, Inc., 606 F. Supp. 554, 555-56 (W.D.N.Y. 1985).

3. Good faith and reasonable reliance on the advice of counsel is a defense to willfulness. See Branch v. Ogilvy & Mather, Inc., 772 F. Supp. 1359, 1365 (S.D.N.Y. 1991); Al-Site Corp. v. VSI Int'l Inc., 144 F. Supp. 2d 1322, 1324 (S.D. Fla. 1999).

¹⁸ Plaintiff contends that this issue does not require litigation at trial.

¹⁹ The Plaintiff's position is that the issue of innocent infringement is not relevant to the trial as a matter of law.

4. The defendant's state of mind, rather than the legal correctness of the legal advice, is the relevant inquiry when determining whether a defendant reasonably relied on the advice of counsel that its activity did not constitute infringement. Ortho Pharm. Corp. v. Smith, 959 F.2d 936, 944 (Fed. Cir. 1992); Studiengesellschaft Kohle, m.b.H. v. Dart Industries, Inc., 862 F.2d 1564, 1579 (Fed. Cir. 1988).

5. The law provides for one statutory damages award per work infringed, not an award based on the number of times Defendants infringed any individual work. 17 U.S.C. § 504(c)(1).

VIII. A CONCISE STATEMENT OF ISSUES OF LAW WHICH REMAIN FOR DETERMINATION BY THE COURT.²⁰

1. Those issues of law raised by the parties in the pending motions listed in Section IV.

2. Whether an infringement is considered innocent when: (1) the defendants were not aware that their acts constituted infringement of the copyright; (2) the defendants had no reason to believe that their acts constituted an infringement of the plaintiff's copyrights. 17 U.S.C. 504(c)(2); Los Angeles News Serv. v. Reuters Television Int'l, 149 F.3d 987, 995 (9th Cir. 1998); or (3) the defendants' conduct was made in good faith belief of the innocence of their conduct and that they were reasonable in holding that good faith belief. 4 Melville B. Nimmer & David Nimmer, Nimmer on

²⁰ The legal issues set forth in this section are accompanied by various legal citations provided by Defendants, who drafted the stipulation. Plaintiff does not concede that those citations are necessarily correct or complete, and reserves the right to provide his own legal authorities at the appropriate time.

Copyright, § 14.04[B][2][a]; Childress v. Taylor, 798 F. Supp. 981, 994 (S.D.N.Y. 1992).²¹

3. Whether a defendant may be an innocent infringer even if it received notice from the plaintiff claiming that the defendant's acts were infringing. Branch v. Ogilvy & Mather, Inc., 772 F. Supp. 1359, 1364 (S.D.N.Y. 1991)("[E]ven if defendant continues to infringe after having been notified of its allegedly illegal actions, the infringement is not necessarily intentional.").²²

4. Whether it is Defendants' burden to prove they were innocent infringers.²³

5. Whether an infringement is considered willful if the defendant knew she was infringing the plaintiff's copyright, or acted with a reckless disregard of the high probability that her actions constituted infringement. 17 U.S.C. 504(c)(2); CBS, Inc. v. Casino Record Distributors of Florida, Inc., 654 F. Supp. 677, 679 (S.D. Fla. 1987).

6. Whether there is a requirement that the infringement be malicious to be willful.

²¹ Defendants contend that the jury should be permitted to determine whether, as a factual matter, Defendants were innocent infringers. The Plaintiff's position is that the issue of innocent infringement is not relevant to the trial as a matter of law.

²² See supra n. 21.

²³ See supra n. 21.

7. Whether or not the fact that a defendant has been sent a notice by a plaintiff that its activity may be infringing is sufficient in itself for a finding of willful infringement. See Branch, 772 F. Supp. at 1364.

8. Whether a finding of willfulness is inappropriate where the case involves a novel or complex issue of law. See Princeton Univ. Press v. Michigan Document Servs., Inc., 99 F.3d 1381, 1392 (6th Cir. 1996) (en banc); Hearst Corp. v. Stark, 639 F. Supp. 970 (N.D. Cal. 1986).

9. Whether or not an award of attorneys' fees is appropriate under Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994) and the Eleventh Circuit standard for awarding attorneys' fees to a prevailing party in a copyright infringement action.²⁴

10. Whether there is only one award per work infringed even when there are multiple defendants. See Branch, 772 F. Supp. at 1364; 17 U.S.C. § 504(c)(1); Latin American Music Co., Inc. v. Spanish Broadcasting Systems, Inc., 866 F. Supp. 780, 783 (S.D.N.Y. 1994); see also 4 Nimmer on Copyright 14.04 [E][2][d] at 14-78.

11. Whether a statutory damages award may be set on the low end of the statutory damages range if there are a large number of works involved. Dae Han Video Production, Inc. v. San, 1990 WL 265976 (E.D. Va. 1990).

12. Whether, in making an award of statutory damages, it is appropriate for the court or the jury, as the case may be, to consider, in addition to

²⁴ The parties agree that arguments for and against an award of attorneys' fees should be reserved for post-trial motions.

whether the infringement was innocent or willful: (1) the prior conduct of the parties, including any correspondence between them and the circumstances surrounding the transfer of copyright from the Society to Greenberg; (2) the revenues, if any, lost by Plaintiff as a result of the Defendants' infringing conduct; (3) the expenses saved by Defendants; (4) the profits Defendants made which are attributable to the infringement; (5) the value and/or nature of the copyright and whether it was affected by the infringement. F.W. Woolworth Co. v. Contemporary Arts, Inc., 344 U.S. 228, 232, 73 S. Ct. 222, 225 (1925); see also Morley Music Co. v. Café Cont'l, Inc., 777 F. Supp. 1579, 1582 (S.D. Fla. 1991); Walt Disney Co. v. Video 47, Inc., 972 F. Supp. 595, 603 (S.D. Fla. 1996); Nick-O-Val Music Co., Inc. v. P.O.S. Radio, Inc., 656 F. Supp. 826, 829 (M.D. Fla. 1987); Stevens v. Aeonian Press, Inc., 2002 WL 31387224 at *2 (S.D.N.Y. Oct. 23, 2002); Blue Seas Music, Inc. v. Fitness Surveys, Inc., 831 F. Supp. 863, 866 (N.D. Ga. 1993); Harris v. Emus Records Corp., 734 F.2d 1329, 1335 (9th Cir. 1984); (6) evidence of prior infringements by Defendants if the infringements reveal Defendants' state of mind with regard to the infringement or infringements in this case rather than merely demonstrate a propensity to infringe, or, in and of itself, prove that Defendant infringed with knowledge in the circumstances of the particular case; and (7) the need, if any, to deter Defendants from committing infringements in the future. F.W. Woolworth Co. v. Contemporary Arts, Inc., 344 U.S. at 233, 73 S. Ct. at 225; Chi-Boy Music v. Charlie Club, Inc., 930 F.2d 1224, 1229 (7th Cir. 1991); see also Dream Dealers Music v. Parker, 924 F. Supp. 1146, 1153 (S.D. Ala. 1996); Stevens, 2002 WL 31387224 at *3 (S.D.N.Y. Oct. 23, 2002); Childress v. Taylor, 798 F. Supp. 981, 994 (S.D.N.Y. 1992).

13. Whether, as a matter of law, the Defendants can claim to be innocent infringers.

14. The number works infringed.²⁵ Alternatively, whether the "compilation" provision in § 504(c)(1) has any applicability at trial.

15. Whether Defendants became willful infringers by continuing to use the photographs after the Eleventh Circuit's ruling in Greenberg.

16. Whether the jury should make a single award for all three Defendants.

IX. EACH PARTY'S NUMBERED LIST OF TRIAL EXHIBITS, OTHER THAN IMPEACHMENT EXHIBITS, WITH OBJECTIONS, IF ANY, INCLUDING THE BASIS OF ALL OBJECTIONS TO EACH DOCUMENT.²⁶

1. Plaintiff's Exhibit List is attached hereto as Schedule B. Plaintiff intends to offer those Exhibits marked with an asterisk, and may offer the other Exhibits on Schedule B if the need arises. Defendants' objections to Plaintiff's Exhibits and the reasons therefore have been noted using the codes provided in Local Rule 16.1 and the listing of additional objections.²⁷

²⁵ Defendants contend that the Court decided to leave this issue to the jury at the February 5, 2003 pre-trial conference.

²⁶ As requested by the Court, the parties' have prepared a list of Joint Exhibits, attached hereto as Schedule A (the "Joint Exhibit List"). Each party's Exhibit List (Schedules B and C hereto) therefore includes only those documents not included on the Joint Exhibit List.

²⁷ Pursuant to Local Rule 16.1, the following codes have been used where appropriate: A-Authenticity; I-Contains inadmissible matter (mentions insurance, prior convictions, etc.); R-Relevance; H-Hearsay; UP-Unduly Prejudicial-Probative Value Outweighed By

2. Defendants' Exhibit List is attached hereto as Schedule C.

Plaintiff intends to offer those Exhibits marked with an asterisk, and may offer the other Exhibits on Schedule C if the need arises. Plaintiff's objections to Defendants' Exhibits and the reasons therefore have been noted using the codes provided in Local Rule 16.1 and the listing of additional objections above.

3. The parties reserve their right to object pursuant to the standards of Rule 16.1 to those Exhibits on each party's Exhibit List which have not been produced or identified as of the date of this filing.

Undue Prejudice; P-Privileged. In addition, the following codes have been used: C- Cumulative; NP-Not Produced (therefore unable to determine whether objectionable at this time and reserve right to object at a later time); NB- No Bates Number; NS-Not a Reasonably Specified Document(s).

EACH PARTY'S NUMBERED LIST OF TRIAL WITNESSES.

B. Plaintiffs' List of Trial Witnesses.

1. Witnesses Plaintiff Expects to Present at Trial.

(i) Jerry Greenberg
6840 S.W. 92nd Court
Miami, FL 33156

(ii) Idaz Greenberg²⁸
6840 S.W. 92nd Court
Miami, FL 33156

2. Witnesses Plaintiff May Call If the Need Arises.

(i) Michael Greenberg
6840 S.W. 92nd Court
Miami, FL 33156

(ii) William E. Butterworth
1325 W. Walnut Hill Lane
Irving, Texas 75015

(iii) Robert Sugarman
Weil Gotshal & Manges
767 Fifth Avenue
New York, New York 10153-0119

(iv) Reg Murphy
c/o National Geographic Society
1145 17th Street N.W.
Washington, D.C. 20036-4688

²⁸ Defendants have filed a motion to preclude this witness' testimony. See Defendants' Motion In Limine For an Order Precluding Plaintiffs From Presenting Idaz Greenberg's and Michael Greenberg's Testimony at Trial, dated December 20, 2002.

- (v) Suzanne Dupré
c/o National Geographic Society
1145 17th Street N.W.
Washington, D.C. 20036-4688
- (vi) Any person listed on the trial witness list of Defendant.
- (vii) Impeachment witnesses
- (viii) Rebuttal witnesses.

C. Defendants' List of Trial Witnesses.²⁹

1. Fact Witnesses Defendants Expect to Present at Trial.

- (i) Terrence B. Adamson
National Geographic Society
1145 17th Street, N.W.
Washington, D.C. 20036
- (ii) Michael Collins
C/O National Geographic Society
1145 17th Street, N.W.
Washington, D.C. 20036
- (iii) Suzanne Dupré
Senior Associate Counsel of the Corporation for
National and Community Service
2934 28th Street Northwest
Washington, D.C. 20008-3413

²⁹ With the exception of the following witnesses, Plaintiff plans to seek to exclude testimony of Defendants' witnesses on the ground that no information was supplied concerning their expected testimony pursuant to Federal Rule of Civil Procedure 26(e) or in responding to Plaintiff's interrogatories: Terrence B. Adamson Suzanne Dupré, John Fahey, John Griffin, Paul Kilmer, Kent J. Kobersteen, John Rutter, Thomas Stanton and Robert Sugarman.

(iv) John Fahey
National Geographic Society
1145 17th Street, N.W.
Washington, D.C. 20036

(v) Ian Rose
2077 Mill Road
Novato, California 94947

(vi) Thomas Stanton
The Gale Group
27500 Drake Road
Farmington Hills, Michigan 48331-3535

(vii) Robert G. Sugarman
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153

2. Fact Witnesses Defendants May Call If the Need Arises.

(i) Terrie Clifford
National Geographic Society
1145 17th Street, N.W.
Washington, D.C. 20036

(ii) Andrew Freedman
Gores Technology Group
10877 Wilshire Boulevard, Suite 1805
Los Angeles, CA 90024

(iii) Jerry Greenberg
6840 S.W. 92nd Street
Miami, Florida 33156

(iv) John Griffin
National Geographic Society
1145 17th Street, N.W.
Washington, D.C. 20036

- (v) Angelo M. Grima
National Geographic Society
1145 17th Street, N.W.
Washington, D.C. 20036
- (vi) Paul Kilmer
Holland & Knight LLP
2099 Pennsylvania Avenue, Suite 100
Washington, D.C. 20006
- (vii) Kent J. Kobersteen
National Geographic Society
1145 17th Street, N.W.
Washington, D.C. 20036
- (viii) Robert Madden
123 Congressional Drive
Stevensville, MD 21666
- (ix) David McEvoy
Gores Technology Group
10877 Wilshire Boulevard, Suite 1805
Los Angeles, CA 90024
- (x) Floretta D. McKenzie
C/O National Geographic Society
1145 17th Street, N.W.
Washington, D.C. 20036
- (xi) Mark Radcliffe
Gary, Cary Ware & Freidenrich LLP
400 Hamilton Avenue
Palo Alto, CA 94301
- (xii) Nathaniel P. Reed
C/O National Geographic Society
1145 17th Street, N.W.
Washington, D.C. 20036

(xiii) Jose Rodriguez

KPMG
One Biscayne Tower
2 South Biscayne Boulevard
Miami, Florida 33131

(xiv) John Rutter

National Geographic Society
1145 17th Street, N.W.
Washington, D.C. 20036

(xv) Scott Santulli

National Geographic Society
1145 17th Street, N.W.
Washington, D.C. 20036

(xvi) Eric Stone

Riverdeep, Inc.
399 Boylston Street
Boston, MA 02116

3. Fact Witnesses Whose Testimony Defendants Expect to Present
By Means of a Deposition.³⁰

(i) William E. Butterworth

Boys Life Magazine
1325 West Walnut Hill Lane
Irving, Texas 75015

(ii) Suzanne Dupré

Senior Associate Counsel of the Corporation for
National and Community Service
2934 28th Street Northwest
Washington, D.C. 20008-3413

³⁰ Plaintiff does not presently intend to introduce testimony by means of any deposition. Moreover, Plaintiff objects to the admission in evidence of deposition testimony from other pending actions to the extent that Plaintiff has not yet been provided with a transcript of that testimony, including but not limited to the testimony of Kent J. Kobersteen and Thomas Stanton. Additionally, Plaintiff objects to the use of the deposition transcripts of Kobersteen, Stanton and Dupré as hearsay.

(iii) Jerry Greenberg

6840 S.W. 92nd Street
Miami, Florida 33156

(iv) Kent J. Kobersteen

National Geographic Society
1145 17th Street, N.W.
Washington, D.C. 20036

(v) Thomas Stanton

The Gale Group
27500 Drake Road
Farmington Hills, Michigan 48331-3535

4. Defendants' Expert Witnesses.

a. Experts Witness Defendants Expect to Present at Trial.

(i) Jane Kinne

316 North Wilton Road
New Canaan, CT 06840

b. Expert Witness Defendants May Call If the Need Arises.

(i) Paul Kramer

Kramer Love & Cutler
675 Third Avenue
New York, NY 10017

X. ESTIMATED TRIAL TIME

The parties estimate that the trial, scheduled to begin on February 24, 2003 will last five (5) days.

XI. WHERE THE ATTORNEYS' FEES MAY BE AWARDED TO THE PREVAILING PARTY, AN ESTIMATE OF EACH PARTY AS TO THE MAXIMUM AMOUNT PROPERLY ALLOWABLE.

Plaintiff claims that he is entitled to attorneys' fees in the estimated amount of \$300,000-\$400,000 based on present circumstances.

Defendants contend that Plaintiff is not entitled to attorneys' fees under the standard set forth in Fogerty v. Fantasy, 510 U.S. 517, 114 S. Ct. 1023 (1994) and the Eleventh Circuit's standard for awarding attorneys' fees to a prevailing plaintiff in a copyright infringement action.³¹

³¹ Plaintiff will make a post-trial motion seeking attorneys' fees. Defendants will oppose that motion.

Dated: Miami, Florida
February 13, 2003

Respectfully submitted,

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