

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' MOTION TO COMPEL PRODUCTION  
OF DOCUMENTS BY ALL DEFENDANTS**

Plaintiffs, JERRY GREENBERG and IDAZ GREENBERG (collectively "Greenberg"), move pursuant to Rule 37, Federal Rules of Civil Procedure, and Rule 26.1, General Rules for the Southern District of Florida, for an order compelling production of documents by Defendants, NATIONAL GEOGRAPHIC SOCIETY, NATIONAL GEOGRAPHIC ENTERPRISES, INC., and MINDSCAPE, INC. (collectively "the Society").

This case has been in litigation for more than four years, and has trailed its way to the Eleventh Circuit and to the Supreme Court. Liability has been found against all three defendants for the infringement of copyrights owned by plaintiff Jerry Greenberg in 62 photographs that were copied and published without his consent in a CD-ROM product called "108 Years of the

Complete National Geographic.” On February 19, 2002, in an amended order, the Court made it clear, in heeding the mandate of the Eleventh Circuit, that the remaining issues involve “the amount of damages and attorneys fees that are due, if any, as well as any injunctive relief that may be appropriate.” Order at 4.

This case has high visibility in the publishing world and in the creative community. It would be prejudicial to Jerry Greenberg, a solitary photographer who has spent enormous sums in seeking to protect his copyrights, if at this point he is to be denied fair access to documents from which he can develop his case for damages.

As he proceeds to develop the damage issues, Greenberg has encountered sweeping and wholly unwarranted resistance by the defendants in his attempts to obtain the production of documents. Pursuant to Rule 26.11, General Rules for the Southern District of Florida, Greenberg’s counsel has attempted to resolve the dispute with counsel for the defendants, but has been unsuccessful. Those attempts are addressed more specifically below.

### **Statutory Damages**

Greenberg seeks to recover statutory damages pursuant to the Copyright Act. 17 U.S.C. § 504(c). Damages can range up to \$30,000 for each work infringed. *Id.* In determining an award of statutory damages within the limits established in the Act, a fact-finder may consider the expenses saved and profits reaped by the defendants in connection with the infringements. N.A.S. Import Corp. v. Chenson Enterprises, Inc., 968 F.2d 250, 252 (2<sup>nd</sup> Cir. 1992). The Society to date has provided certain documents containing financial information.

If Greenberg can prove that the defendants’ infringing conduct was willful, a fact-finder can consider an award of damages, for each work infringed, up to \$150,000. 17 U.S.C. §

504(c)(2). Greenberg thus has a compelling need for discovery as to willfulness. Reckless disregard of the copyright holder's rights, rather than actual knowledge by the defendants of infringement, suffices to warrant award of the enhanced damages. Video Views, Inc. v. Studio 21, Ltd., 925 F.2d 1010, 1020 (7<sup>th</sup> Cir. 1991), cert. denied, 502 U.S. 861, 112 S.Ct. 181 (1991); RCA/Ariola Int'l, Inc. v. Thomas & Grayston Co., 845 F.2d 773, 779 (8<sup>th</sup> Cir. 1988); CBS, Inc. and RCA/Ariola v. Casino Record Distributors, 654 F.Supp. 677, 679 (S.D.Fla. 1987) (reckless disregard for plaintiff's rights constitutes willfulness).

Reckless disregard can exist in many ways. As an example, "willfulness would ordinarily be demonstrated where the infringer is provided oral or written notice of its infringing conduct by the copyright owner, yet 'passe[s] the matter off as a nuisance.'" Video Views, supra at 1021, quoting International Korwin Corp. v. Kowalczyk, 855 F.2d 375, 381 (7<sup>th</sup> Cir. 1988).

The record evidence is that long before the CD-ROM product at issue here reached the market, Greenberg's counsel wrote to the Society to caution against the use of his photographs in the product without his consent. The Society received but ignored the letter. Greenberg has a right to discover, among other things, what the defendants knew and when they knew it, when decisions were made regarding the marketing of the CD-ROM product, what contractual commitments were made in advance of the placement of the product on the market and the nature of those commitments, what dialogue took place within the offices of the defendants, and particularly the National Geographic Society, with reference to the proposed republication of numerous photographers' photographs and the consideration, or lack of it, of compensation for the photographers.

The Society has announced that it intends to rely on an advice-of-counsel defense, and it has produced certain correspondence relating to that defense. See letter from Naomi Jane Gray, counsel for the Society, attached as Exhibit F. But the quality of that defense is yet to be tested, and indeed it may be undermined by additional discovery. An announced reliance on the defense should not allow the Society to slam the door on Greenberg's substantial discovery efforts.

The Society contends that the "vast majority" of the documents Greenberg seeks are related to liability issues and not to damages. See Exhibit F. That objection was not stated in the defendants' responses to the requests for production of documents, and it cannot be made now in a letter. The withholding of documents on such a ground as an afterthought indicates very bad faith by the defendants in treating Mr. Greenberg's requests.<sup>1</sup> A review of the Greenberg requests shows plainly that the documents sought can reasonably lead to the discovery of admissible evidence -- as to the willfulness issues, certainly, and perhaps to other damage issues.

Five separate requests for production have been served on the three defendants -- two each on the National Geographic Society and National Geographic Enterprises, Inc. Responses to the five requests are annexed hereto in Exhibits A, B, C, D and E, which are referred to more specifically below. Each of the responses sets forth the text of each Greenberg request, followed by each defendant's response to that request.

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<sup>1</sup> In a preamble to each of the response documents served by the defendants is the assertion that "[t]he following responses shall not be construed as a waiver of any objection." That is flatly contrary to Rule 34, however, which states that a response shall include "the reasons for the objection" to the request for production. Greenberg should not be exposed to fresh objections at the whim of the defendants as he attempts to prepare his case.

**The Defendants Agreed to Produce Documents in Response to 79 Requests, But Now Refuse to do so**

Greenberg is required to ask the Court's help in obtaining documents responsive to 79 of his requests to the three defendants that they agreed in their formal responses to produce, and now refuse to produce. Thirty-nine of the responses agreed without qualification to produce the documents sought. Forty other responses agreed to produce the documents "if they exist." Before filing this motion, undersigned counsel asked the Society to respond to all of the 39 requests at once, and to inform Greenberg, with respect to the other 40, whether the responsive documents exist, and if so, to produce them. The Society refused to do so. The specific requests falling within this wholesale turnabout are as follows:

Exhibit A (National Geographic Society) (first request) -- 1, 2, 3, 4, 9, 10, 11, 13, 14, 15, 16, 17, 19, 20, 21, 22, 23, 24, 26, 27, 29, 30, 31, 35

Exhibit B (National Geographic Society) (second request) -- 1, 2, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18

Exhibit C (National Geographic Enterprises) (first request) -- 1, 2, 3, 9, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 23, 25, 26, 27, 28

Exhibit D (National Geographic Enterprises) (second request) -- 1, 2, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17

Exhibit E (Mindscape) (first request) -- 1, 2, 6, 7, 9, 10, 11, 13, 14, 17

It is a travesty to agree in formal papers to produce documents, and then to stonewall the plaintiff by failing to produce them. The Court should require the defendants to produce the documents encompassed above without further delay.<sup>2</sup> Greenberg's concerns with particular

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<sup>2</sup> With production the Society should be required, consistent with Rule 34, to identify the particular response to which each document produced actually complies. In its initial, limited production the Society simply shipped an undifferentiated stack of papers.

responses other than those listed above are discussed next. All emphasis in the following text has been added for this motion.

**A. National Geographic Society (first request)**

**Request 7.** All documents showing the number of product units of CD-ROM 108 *sold* by the Society, or by any subsidiary or licensee, from the date of the first distribution to November 1, 2001.

Response: In addition to its General Objections, the Society objects to this Request on the grounds that it is overly broad and unduly burdensome.<sup>3</sup> Subject to, and without waiving, the foregoing objections and its General Objections, the Society will produce documents sufficient to show the *gross revenues* attributable to CD-ROM 108 received by the Society, or by any subsidiary or licensee of the Society, from the date of first distribution until November 1, 2001.

Challenge: Gross revenues reveals nothing of the total number of units sold. The actual numbers are likely to belie the Society's pessimistic forecast, stated in a letter to photographers in 1997, that only a modest number would be sold.

\* \* \*

**Request 25.** All documents referring or relating to the republication of the Greenberg photographs in any publication or product, other than CD-ROM 108, after 1995.

Response: In addition to its General Objections, the Society objects to this Request on the grounds that it is vague, ambiguous, overly broad and not reasonably calculated to lead to the discovery of admissible evidence.

Challenge: Greenberg will show that the Society, prior to release of the CD-ROM product, utilized his photographs in other publications without his consent. The request could not be more germane to damages.

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<sup>3</sup> Objections by the defendants that document requests are overly broad and burdensome are hollow. Massive numbers of documents have been produced in a parallel case involving photographs incorporated in the same CD-ROM product and similar factual issues. Fred Ward and Charlotte Ward v. National Geographic Society, National Geographic Enterprises, Inc., Mindscape, Inc., and Dataware Technologies, Inc., Case No. 99-Civ-12385, U. S. District Court for the Southern District of New York. Although the scope of discovery there has been broader, the documents sought, and produced, in that case are comparable in important respects to those sought here.

\* \* \*

**Request 32.** All documents referring or related to internal decisions not to pay for the republication of *photographs* used in CD-ROM 108, or expressing doubt or uncertainty about such republication rights.

Response: In addition to its General Objections, the Society objects to this Request on the ground that it is vague and ambiguous. Subject to, and without waiving, the foregoing objections and its General Objections, the Society will produce documents pertaining to internal deliberations, discussions or decisions at the Society expressing doubt about the Society's right to use the *Greenberg photographs* in CD-ROM 108. [those documents have not been produced]

Challenge: The documents sought, which apply to all photographers and not just to Greenberg, could reasonably lead to admissible evidence as to willful infringement, which is crucial to Greenberg's case.

\* \* \*

**Request 33.** All documents referring or related to compensation for photographers with respect to CD-ROM 108 sent to or from any and all *officers and directors* of the Society, and any and all *editors and publishers* of the Society.

Response: In addition to its General Objections, the Society objects to this Request on the grounds that it is vague and ambiguous. Subject to, and without waiving, the foregoing objections and its General Objections, the Society will produce non-privileged correspondence with *Board Members and Board Minutes*, referring or related to compensation for photographers with respect to CD-ROM 108, in its possession, if any such documents exist. [those documents have not been produced]

Challenge: The Society is refusing to produce documents involving communications with *editors, publishers and officers*. On information and belief, there were numerous communications among such people regarding the wisdom of proceeding with the CD-ROM product and questions of compensation. Such information bears directly on the question of willful infringement.

**B. National Geographic Society (second request)**

**Request 5.** All documents showing the number of product *units* of CNG Digital Products sold by the Society, or by any subsidiary or licensee, from the date of the first distribution to November 1, 2001.

Response: In addition to its General Objections, the Society objects to this Request on the grounds that it is overly broad and unduly burdensome. Subject to, and without waiving, the

foregoing objections and its General Objections, the Society will produce documents sufficient to show the *gross revenues* attributable to the CNG Products *received* by the Society, or by any subsidiary or licensee of the Society, from the date of first distribution until November 1, 2001.

Challenge: Gross revenues reveals nothing of the total number of units sold. The actual numbers are likely to belie the Society's pessimistic forecast, stated in a letter to photographers in 1997, that only a modest number would be sold.

\* \* \*

**Request 17.** All documents *referring or related to compensation* for stock photo houses for the republication of any photographs in CNG Digital Products.

Response: In addition to its General Objections, the Society objects to this Request on the grounds that it is overly broad. Subject to, and without waiving, the foregoing objection and its General Objections, the Society will produce documents sufficient to show the *compensation paid* to stock photo houses for the use of stock images in the CNG Products.

Challenge: The request asks not merely about compensation, but about discussions pertaining to compensation for stock photo houses. The trade press for photographers has claimed that great controversy, and much debate, existed within the Society with respect to photographs controlled by so-called "stock houses" with respect to their inclusion in the CD-ROM product. Indeed, documents already produced in support of the guidance-of-counsel defense contain certain discussions about stock-house photographs. The documents sought could reasonably lead to admissible evidence on the issue of willful infringement by the Society.

**C. National Geographic Enterprises (first request)**

**Request 25.** All documents referring or related to compensation for stock photo houses for the republication of any photographs in CD-ROM 108.

Response: In addition to its General Objections, the Society objects to this Request on the grounds that it is overly broad. Subject to, and without waiving, the foregoing objection and its General Objections, the Society will produce documents sufficient to show the *compensation paid* to stock photo houses for the use of stock images in the CNG Products.

Challenge: The request asks not merely about compensation, but about *discussions pertaining to compensation* for stock photo houses. The trade press for photographers has claimed that great controversy, and much debate, existed within the Society with respect to photographs controlled by so-called "stock houses" with respect to their inclusion in the CD-ROM product. Indeed, documents already produced in support of the guidance-of-counsel defense contain certain discussions about stock-house photographs. The documents sought could reasonably lead to admissible evidence on the issue of willful infringement by the Society.



\* \* \*

**Request 28.** All documents referring or related to internal decisions not to pay for the *republishing of photographs* used in CD-ROM 108, or expressing doubt or uncertainty about such republication rights.

**Response:** In addition to its General Objections, Enterprises objects to this Request on the ground that it is vague and ambiguous. Subject to, and without waiving, the foregoing objections and its General Objections, Enterprises will produce documents in its possession pertaining to internal deliberations, discussions or decisions at Enterprises expressing doubt about Enterprises' or the Society's right to use *the Greenberg photographs* in CD-ROM 108.

**Challenge:** Enterprises has narrowed the request from republication of photographs to a response that it will produce documents pertaining only to the *Greenberg* photographs. Greenberg's discovery of discussions and decisions pertaining to all photographers could easily and reasonably lead to admissible evidence on the issue of willful infringement.

**D. National Geographic Enterprises (second request)**

**Request 16.** All documents *referring or related to compensation* for stock photo houses for the republication of any photographs in CNG Digital Products.

**Response:** In addition to its General Objections, Enterprises objects to this Request on the grounds that it is overly broad. Subject to, and without waiving, the foregoing objection and its General Objections, Enterprises will produce documents sufficient to show the *compensation paid* to stock photo houses for the use of stock images in the CNG Products.

**Challenge:** The request asks not merely about compensation, but about *discussions pertaining to compensation* for stock photo houses. The trade press for photographers has claimed that great controversy, and much debate, existed within the Society with respect to photographs controlled by so-called "stock houses" with respect to their inclusion in the CD-ROM product. Indeed, documents already produced in support of the guidance-of-counsel defense contain certain discussions about stock-house photographs. The documents sought could reasonably lead to admissible evidence on the issue of willful infringement by the Society.

**E. Mindscape, Inc. (first request)**

**Request 5.** All documents showing the number of product *units* of CNG Digital Products *sold* by Mindscape, or by any subsidiary or licensee, from the date of the first distribution to November 1, 2001.

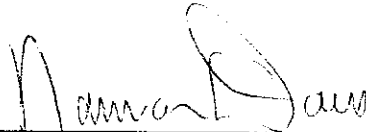
Response: In addition to its General Objections, Mindscape objects to this Request on the grounds that it is overly broad and unduly burdensome. Subject to, and without waiving, the foregoing objections and its General Objections, Mindscape will produce documents sufficient to show the *gross revenues* attributable to the CNG Products received by Mindscape from the date of first distribution until November 1, 2001.

Challenge: Gross revenues reveals nothing of the total number of units sold. The actual numbers are likely to belie the Society's pessimistic forecast, stated in a letter to photographers in 1997, that only a modest number would be sold.

WHEREFORE Plaintiffs, JERRY GREENBERG and IDAZ GREENBERG, seek an order compelling the production of documents as set forth above, and awarding fees and costs relating to the preparation of this motion.

Respectfully submitted,

STEEL HECTOR & DAVIS LLP  
Attorneys for Plaintiffs  
200 S. Biscayne Boulevard  
Suite 4000  
Miami, FL 33131-2398  
(305) 577-2988  
(305) 577-7001 fax

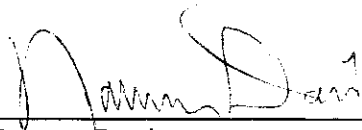


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Norman Davis  
Fla. Bar No. 475335

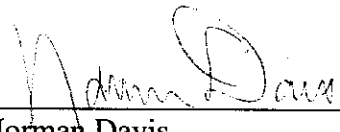
Certification

I hereby certify, pursuant to Rule 37 (a) (2), that before filing this motion I conferred in good faith with counsel for the defendants, by letter and orally, in an unsuccessful attempt to resolve the issues addressed in this motion.

  
\_\_\_\_\_  
Norman Davis

Certificate of Service

I hereby certify that a copy of the foregoing plaintiffs' motion 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 5th day of March, 2002.

  
\_\_\_\_\_  
Norman Davis

MIA2001/86113-1

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Complete National Geographic.” On February 19, 2002, in an amended order, the Court made it clear, in heeding the mandate of the Eleventh Circuit, that the remaining issues involve “the amount of damages and attorneys fees that are due, if any, as well as any injunctive relief that may be appropriate.” Order at 4.

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If Greenberg can prove that the defendants’ infringing conduct was willful, a fact-finder can consider an award of damages, for each work infringed, up to \$150,000. 17 U.S.C. §

504(c)(2). Greenberg thus has a compelling need for discovery as to willfulness. Reckless disregard of the copyright holder's rights, rather than actual knowledge by the defendants of infringement, suffices to warrant award of the enhanced damages. Video Views, Inc. v. Studio 21, Ltd., 925 F.2d 1010, 1020 (7<sup>th</sup> Cir. 1991), cert. denied, 502 U.S. 861, 112 S.Ct. 181 (1991); RCA/Ariola Int'l, Inc. v. Thomas & Grayston Co., 845 F.2d 773, 779 (8<sup>th</sup> Cir. 1988); CBS, Inc. and RCA/Ariola v. Casino Record Distributors, 654 F.Supp. 677, 679 (S.D.Fla. 1987) (reckless disregard for plaintiff's rights constitutes willfulness).

Reckless disregard can exist in many ways. As an example, "willfulness would ordinarily be demonstrated where the infringer is provided oral or written notice of its infringing conduct by the copyright owner, yet 'passe[s] the matter off as a nuisance.'" Video Views, supra at 1021, quoting International Korwin Corp. v. Kowalczyk, 855 F.2d 375, 381 (7<sup>th</sup> Cir. 1988).

The record evidence is that long before the CD-ROM product at issue here reached the market, Greenberg's counsel wrote to the Society to caution against the use of his photographs in the product without his consent. The Society received but ignored the letter. Greenberg has a right to discover, among other things, what the defendants knew and when they knew it, when decisions were made regarding the marketing of the CD-ROM product, what contractual commitments were made in advance of the placement of the product on the market and the nature of those commitments, what dialogue took place within the offices of the defendants, and particularly the National Geographic Society, with reference to the proposed republication of numerous photographers' photographs and the consideration, or lack of it, of compensation for the photographers.

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The Society contends that the "vast majority" of the documents Greenberg seeks are related to liability issues and not to damages. See Exhibit F. That objection was not stated in the defendants' responses to the requests for production of documents, and it cannot be made now in a letter. The withholding of documents on such a ground as an afterthought indicates very bad faith by the defendants in treating Mr. Greenberg's requests.<sup>1</sup> A review of the Greenberg requests shows plainly that the documents sought can reasonably lead to the discovery of admissible evidence -- as to the willfulness issues, certainly, and perhaps to other damage issues.

Five separate requests for production have been served on the three defendants -- two each on the National Geographic Society and National Geographic Enterprises, Inc. Responses to the five requests are annexed hereto in Exhibits A, B, C, D and E, which are referred to more specifically below. Each of the responses sets forth the text of each Greenberg request, followed by each defendant's response to that request.

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<sup>1</sup> In a preamble to each of the response documents served by the defendants is the assertion that "[t]he following responses shall not be construed as a waiver of any objection." That is flatly contrary to Rule 34, however, which states that a response shall include "the reasons for the objection" to the request for production. Greenberg should not be exposed to fresh objections at the whim of the defendants as he attempts to prepare his case.

**The Defendants Agreed to Produce  
Documents in Response to 79  
Requests, But Now Refuse to do so**

Greenberg is required to ask the Court's help in obtaining documents responsive to 79 of his requests to the three defendants that they agreed in their formal responses to produce, and now refuse to produce. Thirty-nine of the responses agreed without qualification to produce the documents sought. Forty other responses agreed to produce the documents "if they exist." Before filing this motion, undersigned counsel asked the Society to respond to all of the 39 requests at once, and to inform Greenberg, with respect to the other 40, whether the responsive documents exist, and if so, to produce them. The Society refused to do so. The specific requests falling within this wholesale turnabout are as follows:

Exhibit A (National Geographic Society) (first request) -- 1, 2, 3, 4, 9, 10, 11, 13, 14, 15, 16, 17, 19, 20, 21, 22, 23, 24, 26, 27, 29, 30, 31, 35

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responses other than those listed above are discussed next. All emphasis in the following text has been added for this motion.

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**Request 7.** All documents showing the number of product units of CD-ROM 108 *sold* by the Society, or by any subsidiary or licensee, from the date of the first distribution to November 1, 2001.

**Response:** In addition to its General Objections, the Society objects to this Request on the grounds that it is overly broad and unduly burdensome.<sup>3</sup> Subject to, and without waiving, the foregoing objections and its General Objections, the Society will produce documents sufficient to show the *gross revenues* attributable to CD-ROM 108 received by the Society, or by any subsidiary or licensee of the Society, from the date of first distribution until November 1, 2001.

**Challenge:** Gross revenues reveals nothing of the total number of units sold. The actual numbers are likely to belie the Society's pessimistic forecast, stated in a letter to photographers in 1997, that only a modest number would be sold.

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**Challenge:** Greenberg will show that the Society, prior to release of the CD-ROM product, utilized his photographs in other publications without his consent. The request could not be more germane to damages.

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<sup>3</sup> Objections by the defendants that document requests are overly broad and burdensome are hollow. Massive numbers of documents have been produced in a parallel case involving photographs incorporated in the same CD-ROM product and similar factual issues. Fred Ward and Charlotte Ward v. National Geographic Society, National Geographic Enterprises, Inc., Mindscape, Inc., and Dataware Technologies, Inc., Case No. 99-Civ-12385, U. S. District Court for the Southern District of New York. Although the scope of discovery there has been broader, the documents sought, and produced, in that case are comparable in important respects to those sought here.

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Challenge: The documents sought, which apply to all photographers and not just to Greenberg, could reasonably lead to admissible evidence as to willful infringement, which is crucial to Greenberg's case.

\* \* \*

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Response: In addition to its General Objections, the Society objects to this Request on the grounds that it is vague and ambiguous. Subject to, and without waiving, the foregoing objections and its General Objections, the Society will produce non-privileged correspondence with *Board Members and Board Minutes*, referring or related to compensation for photographers with respect to CD-ROM 108, in its possession, if any such documents exist. [those documents have not been produced]

Challenge: The Society is refusing to produce documents involving communications with *editors, publishers and officers*. On information and belief, there were numerous communications among such people regarding the wisdom of proceeding with the CD-ROM product and questions of compensation. Such information bears directly on the question of willful infringement.

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**Request 5.** All documents showing the number of product *units* of CNG Digital Products *sold* by the Society, or by any subsidiary or licensee, from the date of the first distribution to November 1, 2001.

Response: In addition to its General Objections, the Society objects to this Request on the grounds that it is overly broad and unduly burdensome. Subject to, and without waiving, the

foregoing objections and its General Objections, the Society will produce documents sufficient to show the *gross revenues* attributable to the CNG Products *received* by the Society, or by any subsidiary or licensee of the Society, from the date of first distribution until November 1, 2001.

Challenge: Gross revenues reveals nothing of the total number of units sold. The actual numbers are likely to belie the Society's pessimistic forecast, stated in a letter to photographers in 1997, that only a modest number would be sold.

\* \* \*

**Request 17.** All documents *referring or related to compensation* for stock photo houses for the republication of any photographs in CNG Digital Products.

Response: In addition to its General Objections, the Society objects to this Request on the grounds that it is overly broad. Subject to, and without waiving, the foregoing objection and its General Objections, the Society will produce documents sufficient to show the *compensation paid* to stock photo houses for the use of stock images in the CNG Products.

Challenge: The request asks not merely about compensation, but about discussions pertaining to compensation for stock photo houses. The trade press for photographers has claimed that great controversy, and much debate, existed within the Society with respect to photographs controlled by so-called "stock houses" with respect to their inclusion in the CD-ROM product. Indeed, documents already produced in support of the guidance-of-counsel defense contain certain discussions about stock-house photographs. The documents sought could reasonably lead to admissible evidence on the issue of willful infringement by the Society.

**C. National Geographic Enterprises (first request)**

**Request 25.** All documents referring or related to compensation for stock photo houses for the republication of any photographs in CD-ROM 108.

Response: In addition to its General Objections, the Society objects to this Request on the grounds that it is overly broad. Subject to, and without waiving, the foregoing objection and its General Objections, the Society will produce documents sufficient to show the *compensation paid* to stock photo houses for the use of stock images in the CNG Products.

Challenge: The request asks not merely about compensation, but about *discussions pertaining to compensation* for stock photo houses. The trade press for photographers has claimed that great controversy, and much debate, existed within the Society with respect to photographs controlled by so-called "stock houses" with respect to their inclusion in the CD-ROM product. Indeed, documents already produced in support of the guidance-of-counsel defense contain certain discussions about stock-house photographs. The documents sought could reasonably lead to admissible evidence on the issue of willful infringement by the Society.

\* \* \*

**Request 28.** All documents referring or related to internal decisions not to pay for the *republishing of photographs* used in CD-ROM 108, or expressing doubt or uncertainty about such republication rights.

**Response:** In addition to its General Objections, Enterprises objects to this Request on the ground that it is vague and ambiguous. Subject to, and without waiving, the foregoing objections and its General Objections, Enterprises will produce documents in its possession pertaining to internal deliberations, discussions or decisions at Enterprises expressing doubt about Enterprises' or the Society's right to use *the Greenberg photographs* in CD-ROM 108.

**Challenge:** Enterprises has narrowed the request from republication of photographs to a response that it will produce documents pertaining only to the *Greenberg* photographs. Greenberg's discovery of discussions and decisions pertaining to all photographers could easily and reasonably lead to admissible evidence on the issue of willful infringement.

#### **D. National Geographic Enterprises (second request)**

**Request 16.** All documents *referring or related to compensation* for stock photo houses for the republication of any photographs in CNG Digital Products.

**Response:** In addition to its General Objections, Enterprises objects to this Request on the grounds that it is overly broad. Subject to, and without waiving, the foregoing objection and its General Objections, Enterprises will produce documents sufficient to show the *compensation paid* to stock photo houses for the use of stock images in the CNG Products.

**Challenge:** The request asks not merely about compensation, but about *discussions pertaining to compensation* for stock photo houses. The trade press for photographers has claimed that great controversy, and much debate, existed within the Society with respect to photographs controlled by so-called "stock houses" with respect to their inclusion in the CD-ROM product. Indeed, documents already produced in support of the guidance-of-counsel defense contain certain discussions about stock-house photographs. The documents sought could reasonably lead to admissible evidence on the issue of willful infringement by the Society.

#### **E. Mindscape, Inc. (first request)**

**Request 5.** All documents showing the number of product *units* of CNG Digital Products *sold* by Mindscape, or by any subsidiary or licensee, from the date of the first distribution to November 1, 2001.

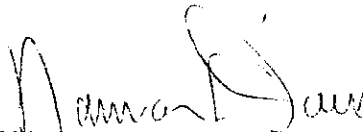
Response: In addition to its General Objections, Mindscape objects to this Request on the grounds that it is overly broad and unduly burdensome. Subject to, and without waiving, the foregoing objections and its General Objections, Mindscape will produce documents sufficient to show the *gross revenues* attributable to the CNG Products received by Mindscape from the date of first distribution until November 1, 2001.

Challenge: Gross revenues reveals nothing of the total number of units sold. The actual numbers are likely to belie the Society's pessimistic forecast, stated in a letter to photographers in 1997, that only a modest number would be sold.

WHEREFORE Plaintiffs, JERRY GREENBERG and IDAZ GREENBERG, seek an order compelling the production of documents as set forth above, and awarding fees and costs relating to the preparation of this motion.

Respectfully submitted,

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Norman Davis  
Fla. Bar No. 475335

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.

**PLAINTIFFS' MOTION TO COMPEL PRODUCTION  
OF DOCUMENTS BY ALL DEFENDANTS**

Plaintiffs, JERRY GREENBERG and IDAZ GREENBERG (collectively "Greenberg"), move pursuant to Rule 37, Federal Rules of Civil Procedure, and Rule 26.1, General Rules for the Southern District of Florida, for an order compelling production of documents by Defendants, NATIONAL GEOGRAPHIC SOCIETY, NATIONAL GEOGRAPHIC ENTERPRISES, INC., and MINDSCAPE, INC. (collectively "the Society").

This case has been in litigation for more than four years, and has trailed its way to the Eleventh Circuit and to the Supreme Court. Liability has been found against all three defendants for the infringement of copyrights owned by plaintiff Jerry Greenberg in 62 photographs that were copied and published without his consent in a CD-ROM product called "108 Years of the

Complete National Geographic." On February 19, 2002, in an amended order, the Court made it clear, in heeding the mandate of the Eleventh Circuit, that the remaining issues involve "the amount of damages and attorneys fees that are due, if any, as well as any injunctive relief that may be appropriate." Order at 4.

This case has high visibility in the publishing world and in the creative community. It would be prejudicial to Jerry Greenberg, a solitary photographer who has spent enormous sums in seeking to protect his copyrights, if at this point he is to be denied fair access to documents from which he can develop his case for damages.

As he proceeds to develop the damage issues, Greenberg has encountered sweeping and wholly unwarranted resistance by the defendants in his attempts to obtain the production of documents. Pursuant to Rule 26.11, General Rules for the Southern District of Florida, Greenberg's counsel has attempted to resolve the dispute with counsel for the defendants, but has been unsuccessful. Those attempts are addressed more specifically below.

**Statutory Damages**

Greenberg seeks to recover statutory damages pursuant to the Copyright Act. 17 U.S.C. § 504(c). Damages can range up to \$30,000 for each work infringed. *Id.* In determining an award of statutory damages within the limits established in the Act, a fact-finder may consider the expenses saved and profits reaped by the defendants in connection with the infringements. N.A.S. Import Corp. v. Chenson Enterprises, Inc., 968 F.2d 250, 252 (2<sup>nd</sup> Cir. 1992). The Society to date has provided certain documents containing financial information.

If Greenberg can prove that the defendants' infringing conduct was willful, a fact-finder can consider an award of damages, for each work infringed, up to \$150,000. 17 U.S.C. §

504(c)(2). Greenberg thus has a compelling need for discovery as to willfulness. Reckless disregard of the copyright holder's rights, rather than actual knowledge by the defendants of infringement, suffices to warrant award of the enhanced damages. Video Views, Inc. v. Studio 21, Ltd., 925 F.2d 1010, 1020 (7<sup>th</sup> Cir. 1991), cert. denied, 502 U.S. 861, 112 S.Ct. 181 (1991); RCA/Ariola Int'l, Inc. v. Thomas & Grayston Co., 845 F.2d 773, 779 (8<sup>th</sup> Cir. 1988); CBS, Inc. and RCA/Ariola v. Casino Record Distributors, 654 F.Supp. 677, 679 (S.D.Fla. 1987) (reckless disregard for plaintiff's rights constitutes willfulness).

Reckless disregard can exist in many ways. As an example, "willfulness would ordinarily be demonstrated where the infringer is provided oral or written notice of its infringing conduct by the copyright owner, yet 'passe[s] the matter off as a nuisance.'" Video Views, supra at 1021, quoting International Korwin Corp. v. Kowalczyk, 855 F.2d 375, 381 (7<sup>th</sup> Cir. 1988).

The record evidence is that long before the CD-ROM product at issue here reached the market, Greenberg's counsel wrote to the Society to caution against the use of his photographs in the product without his consent. The Society received but ignored the letter. Greenberg has a right to discover, among other things, what the defendants knew and when they knew it, when decisions were made regarding the marketing of the CD-ROM product, what contractual commitments were made in advance of the placement of the product on the market and the nature of those commitments, what dialogue took place within the offices of the defendants, and particularly the National Geographic Society, with reference to the proposed republication of numerous photographers' photographs and the consideration, or lack of it, of compensation for the photographers.

The Society has announced that it intends to rely on an advice-of-counsel defense, and it has produced certain correspondence relating to that defense. See letter from Naomi Jane Gray, counsel for the Society, attached as Exhibit F. But the quality of that defense is yet to be tested, and indeed it may be undermined by additional discovery. An announced reliance on the defense should not allow the Society to slam the door on Greenberg's substantial discovery efforts.

The Society contends that the "vast majority" of the documents Greenberg seeks are related to liability issues and not to damages. See Exhibit F. That objection was not stated in the defendants' responses to the requests for production of documents, and it cannot be made now in a letter. The withholding of documents on such a ground as an afterthought indicates very bad faith by the defendants in treating Mr. Greenberg's requests.<sup>1</sup> A review of the Greenberg requests shows plainly that the documents sought can reasonably lead to the discovery of admissible evidence -- as to the willfulness issues, certainly, and perhaps to other damage issues.

Five separate requests for production have been served on the three defendants -- two each on the National Geographic Society and National Geographic Enterprises, Inc. Responses to the five requests are annexed hereto in Exhibits A, B, C, D and E, which are referred to more specifically below. Each of the responses sets forth the text of each Greenberg request, followed by each defendant's response to that request.

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<sup>1</sup> In a preamble to each of the response documents served by the defendants is the assertion that "[t]he following responses shall not be construed as a waiver of any objection." That is flatly contrary to Rule 34, however, which states that a response shall include "the reasons for the objection" to the request for production. Greenberg should not be exposed to fresh objections at the whim of the defendants as he attempts to prepare his case.

**The Defendants Agreed to Produce Documents in Response to 79 Requests, But Now Refuse to do so**

Greenberg is required to ask the Court's help in obtaining documents responsive to 79 of his requests to the three defendants that they agreed in their formal responses to produce, and now refuse to produce. Thirty-nine of the responses agreed without qualification to produce the documents sought. Forty other responses agreed to produce the documents "if they exist." Before filing this motion, undersigned counsel asked the Society to respond to all of the 39 requests at once, and to inform Greenberg, with respect to the other 40, whether the responsive documents exist, and if so, to produce them. The Society refused to do so. The specific requests falling within this wholesale turnabout are as follows:

Exhibit A (National Geographic Society) (first request) -- 1, 2, 3, 4, 9, 10, 11, 13, 14, 15, 16, 17, 19, 20, 21, 22, 23, 24, 26, 27, 29, 30, 31, 35

Exhibit B (National Geographic Society) (second request) -- 1, 2, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18

Exhibit C (National Geographic Enterprises) (first request) -- 1, 2, 3, 9, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 23, 25, 26, 27, 28

Exhibit D (National Geographic Enterprises) (second request) -- 1, 2, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17

Exhibit E (Mindscape) (first request) -- 1, 2, 6, 7, 9, 10, 11, 13, 14, 17

It is a travesty to agree in formal papers to produce documents, and then to stonewall the plaintiff by failing to produce them. The Court should require the defendants to produce the documents encompassed above without further delay.<sup>2</sup> Greenberg's concerns with particular

<sup>2</sup> With production the Society should be required, consistent with Rule 34, to identify the particular response to which each document produced actually complies. In its initial, limited production the Society simply shipped an undifferentiated stack of papers.

responses other than those listed above are discussed next. All emphasis in the following text has been added for this motion.

**A. National Geographic Society (first request)**

**Request 7.** All documents showing the number of product units of CD-ROM 108 sold by the Society, or by any subsidiary or licensee, from the date of the first distribution to November 1, 2001.

**Response:** In addition to its General Objections, the Society objects to this Request on the grounds that it is overly broad and unduly burdensome.<sup>3</sup> Subject to, and without waiving, the foregoing objections and its General Objections, the Society will produce documents sufficient to show the *gross revenues* attributable to CD-ROM 108 received by the Society, or by any subsidiary or licensee of the Society, from the date of first distribution until November 1, 2001.

**Challenge:** Gross revenues reveals nothing of the total number of units sold. The actual numbers are likely to belie the Society's pessimistic forecast, stated in a letter to photographers in 1997, that only a modest number would be sold.

\* \* \*

**Request 25.** All documents referring or relating to the republication of the Greenberg photographs in any publication or product, other than CD-ROM 108, after 1995.

**Response:** In addition to its General Objections, the Society objects to this Request on the grounds that it is vague, ambiguous, overly broad and not reasonably calculated to lead to the discovery of admissible evidence.

**Challenge:** Greenberg will show that the Society, prior to release of the CD-ROM product, utilized his photographs in other publications without his consent. The request could not be more germane to damages.

<sup>3</sup> Objections by the defendants that document requests are overly broad and burdensome are hollow. Massive numbers of documents have been produced in a parallel case involving photographs incorporated in the same CD-ROM product and similar factual issues. Fred Ward and Charlotte Ward v. National Geographic Society, National Geographic Enterprises, Inc., Mindscape, Inc., and Dataware Technologies, Inc., Case No. 99-Civ-12385, U. S. District Court for the Southern District of New York. Although the scope of discovery there has been broader, the documents sought, and produced, in that case are comparable in important respects to those sought here.



\* \* \*

**Request 32.** All documents referring or related to internal decisions not to pay for the republication of *photographs* used in CD-ROM 108, or expressing doubt or uncertainty about such republication rights.

**Response:** In addition to its General Objections, the Society objects to this Request on the ground that it is vague and ambiguous. Subject to, and without waiving, the foregoing objections and its General Objections, the Society will produce documents pertaining to internal deliberations, discussions or decisions at the Society expressing doubt about the Society's right to use the *Greenberg photographs* in CD-ROM 108. [those documents have not been produced]

**Challenge:** The documents sought, which apply to all photographers and not just to Greenberg, could reasonably lead to admissible evidence as to willful infringement, which is crucial to Greenberg's case.

\* \* \*

**Request 33.** All documents referring or related to compensation for photographers with respect to CD-ROM 108 sent to or from any and all *officers and directors* of the Society, and any and all *editors and publishers* of the Society.

**Response:** In addition to its General Objections, the Society objects to this Request on the grounds that it is vague and ambiguous. Subject to, and without waiving, the foregoing objections and its General Objections, the Society will produce non-privileged correspondence with *Board Members and Board Minutes*, referring or related to compensation for photographers with respect to CD-ROM 108, in its possession, if any such documents exist. [those documents have not been produced]

**Challenge:** The Society is refusing to produce documents involving communications with *editors, publishers and officers*. On information and belief, there were numerous communications among such people regarding the wisdom of proceeding with the CD-ROM product and questions of compensation. Such information bears directly on the question of willful infringement.

#### B. National Geographic Society (second request)

**Request 5.** All documents showing the number of product *units* of CNG Digital Products *sold* by the Society, or by any subsidiary or licensee, from the date of the first distribution to November 1, 2001.

**Response:** In addition to its General Objections, the Society objects to this Request on the grounds that it is overly broad and unduly burdensome. Subject to, and without waiving, the

foregoing objections and its General Objections, the Society will produce documents sufficient to show the *gross revenues* attributable to the CNG Products *received* by the Society, or by any subsidiary or licensee of the Society, from the date of first distribution until November 1, 2001.

**Challenge:** Gross revenues reveals nothing of the total number of units sold. The actual numbers are likely to belie the Society's pessimistic forecast, stated in a letter to photographers in 1997, that only a modest number would be sold.

\* \* \*

**Request 17.** All documents *referring or related to compensation* for stock photo houses for the republication of any photographs in CNG Digital Products.

**Response:** In addition to its General Objections, the Society objects to this Request on the grounds that it is overly broad. Subject to, and without waiving, the foregoing objection and its General Objections, the Society will produce documents sufficient to show the *compensation paid* to stock photo houses for the use of stock images in the CNG Products.

**Challenge:** The request asks not merely about compensation, but about discussions pertaining to compensation for stock photo houses. The trade press for photographers has claimed that great controversy, and much debate, existed within the Society with respect to photographs controlled by so-called "stock houses" with respect to their inclusion in the CD-ROM product. Indeed, documents already produced in support of the guidance-of-counsel defense contain certain discussions about stock-house photographs. The documents sought could reasonably lead to admissible evidence on the issue of willful infringement by the Society.

#### C. National Geographic Enterprises (first request)

**Request 25.** All documents referring or related to compensation for stock photo houses for the republication of any photographs in CD-ROM 108.

**Response:** In addition to its General Objections, the Society objects to this Request on the grounds that it is overly broad. Subject to, and without waiving, the foregoing objection and its General Objections, the Society will produce documents sufficient to show the *compensation paid* to stock photo houses for the use of stock images in the CNG Products.

**Challenge:** The request asks not merely about compensation, but about *discussions pertaining to compensation* for stock photo houses. The trade press for photographers has claimed that great controversy, and much debate, existed within the Society with respect to photographs controlled by so-called "stock houses" with respect to their inclusion in the CD-ROM product. Indeed, documents already produced in support of the guidance-of-counsel defense contain certain discussions about stock-house photographs. The documents sought could reasonably lead to admissible evidence on the issue of willful infringement by the Society.

\* \* \*

**Request 28.** All documents referring or related to internal decisions not to pay for the republication of photographs used in CD-ROM 108, or expressing doubt or uncertainty about such republication rights.

**Response:** In addition to its General Objections, Enterprises objects to this Request on the ground that it is vague and ambiguous. Subject to, and without waiving, the foregoing objections and its General Objections, Enterprises will produce documents in its possession pertaining to internal deliberations, discussions or decisions at Enterprises expressing doubt about Enterprises' or the Society's right to use the *Greenberg photographs* in CD-ROM 108.

**Challenge:** Enterprises has narrowed the request from republication of photographs to a response that it will produce documents pertaining only to the *Greenberg photographs*. Greenberg's discovery of discussions and decisions pertaining to all photographers could easily and reasonably lead to admissible evidence on the issue of willful infringement.

**D. National Geographic Enterprises (second request)**

**Request 16.** All documents referring or related to compensation for stock photo houses for the republication of any photographs in CNG Digital Products.

**Response:** In addition to its General Objections, Enterprises objects to this Request on the grounds that it is overly broad. Subject to, and without waiving, the foregoing objection and its General Objections, Enterprises will produce documents sufficient to show the *compensation paid* to stock photo houses for the use of stock images in the CNG Products.

**Challenge:** The request asks not merely about compensation, but about *discussions pertaining to compensation* for stock photo houses. The trade press for photographers has claimed that great controversy, and much debate, existed within the Society with respect to photographs controlled by so-called "stock houses" with respect to their inclusion in the CD-ROM product. Indeed, documents already produced in support of the guidance-of-counsel defense contain certain discussions about stock-house photographs. The documents sought could reasonably lead to admissible evidence on the issue of willful infringement by the Society.

**E. Mindscape, Inc. (first request)**

**Request 5.** All documents showing the number of product *units* of CNG Digital Products sold by Mindscape, or by any subsidiary or licensee, from the date of the first distribution to November 1, 2001.

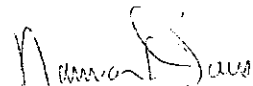
**Response:** In addition to its General Objections, Mindscape objects to this Request on the grounds that it is overly broad and unduly burdensome. Subject to, and without waiving, the foregoing objections and its General Objections, Mindscape will produce documents sufficient to show the *gross revenues* attributable to the CNG Products received by Mindscape from the date of first distribution until November 1, 2001.

**Challenge:** Gross revenues reveals nothing of the total number of units sold. The actual numbers are likely to belie the Society's pessimistic forecast, stated in a letter to photographers in 1997, that only a modest number would be sold.

WHEREFORE Plaintiffs, JERRY GREENBERG and IDAZ GREENBERG, seek an order compelling the production of documents as set forth above, and awarding fees and costs relating to the preparation of this motion.

Respectfully submitted,

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