

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 00-10510

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<b>FILED</b>
<b>U.S. COURT OF APPEALS</b>
<b>ELEVENTH CIRCUIT</b>
<b>MAR 22, 2001</b>
<b>THOMAS K. KAHN</b>
<b>CLERK</b>

D. C. Docket No. 97-03924-CV-JAL

JERRY GREENBERG,  
DAZ GREENBERG,

Plaintiffs-Appellants,

versus

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

Defendants-Appellees.

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Appeal from the United States District Court  
for the Southern District of Florida

\_\_\_\_\_  
(March 22, 2001)

Before ANDERSON, Chief Judge, TJOFLAT and BIRCH, Circuit Judges.

FRED CHARLOFFE - I think this page says it all  
JLZ

### III. CONCLUSION

We conclude that the unauthorized use of the Greenberg photographs in the CNG compiled and authored by the Society constitutes copyright infringement that is not excused by the privilege afforded the Society under § 201(c). We also find that the unauthorized use of Greenberg's diver photograph in the derivative and collective work, the Sequence, compiled by the Society, constitutes copyright infringement, and that the proffered *de minimis* use defense is without merit. Upon remand, the court below is directed to enter judgment on these copyright claims in

favor of Greenberg. Counsel for the appellant should submit its documented claims for attorneys fees relative to this appeal to the district court for review and approval. We find the appellant to be the prevailing party on this appeal and, therefore, is entitled to an award of costs and attorneys fees. Upon remand, the district court should ascertain the amount of damages and attorneys fees that are due as well as any injunctive relief that may be appropriate. In assessing the appropriateness of 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.

**REVERSED and REMANDED.**

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Before ANDERSON, Chief Judge, TJOFLAT and BIRCH, Circuit Judges.

BIRCH, Circuit Judge:

This appeal requires us, as a matter of first impression in this circuit, to construe the extent of the privilege afforded to the owner of a copyright in a collective work to reproduce and distribute the individual contributions to the collective work "as part of that particular collective work, any revision of that collective work, and any later collective work in the same series" under 17 U.S.C. § 201(c).<sup>1</sup> In this copyright infringement case, the district court granted the defendants' motion for summary judgment, holding that the allegedly infringing work was a revision of a prior collective work that fell within the defendants' privilege under § 201(c). Because we find that the defendants' product is not merely a revision of the prior collective work but instead constitutes a new collective work that lies beyond the scope of § 201(c), we REVERSE.

I. BACKGROUND

The National Geographic Society ("Society") purports to be the world's largest nonprofit scientific and educational organization at approximately 9.5 million members, and is responsible for the publication of National Geographic Magazine ("Magazine"). Through National Geographic Enterprises, a wholly owned, for-

<sup>1</sup>Hereafter, all references to statutory sections ("§") will be to Title 17 of the United States Code, unless indicated otherwise.

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prompting from the user. Thus, the use of the Sequence in the context of the entire CNG is not a de minimis use that fails to reach the threshold of actionable copyright infringement. The two cases principally relied upon by the Society, Ringgold v. Black Entm'l Television, Inc., 126 F.3d 70 (2d Cir. 1997), and Amsinck v. Columbia Pictures Indus., Inc., 862 F.Supp. 1044 (S.D.N.Y. 1994), are not to the contrary. The "iconic" display at the beginning of each disc in the CNG product argues against the suggestion that the use of the Sequence in the CNG or the use of the Greenberg diver photograph in the Sequence is inconsequential. Accordingly, because we find the unauthorized use of the subject photograph to be both qualitatively and quantitatively significant, we reject the de minimis defense advanced by the Society and its putative co-infringers.

### III. CONCLUSION

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**REVERSED and REMANDED.**