

DOCKET NO. 00-10510-C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JERRY GREENBERG and IDAZ GREENBERG,
Plaintiffs/Appellants

vs.

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

Defendants/Appellees.

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

Reply Brief of Jerry Greenberg and Idaz Greenberg

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I.
THE COMPLETE GEOGRAPHIC PRODUCT

A. The “Contract” Contention

At page 7 of the Answer Brief, the Society attempts to construct a “contract” argument that is totally irrelevant to the appeal. In the final paragraph on that page, the Society renews its contention that Greenberg, “for the first time on this appeal,” claims that the Society’s reassignment of the copyrights deprived the Society of any legal right to reproduce the photographs in the Complete Geographic product. “Appellants,” according to the brief, “did not make this argument below. . . .”

Indeed, they did make that argument. In Greenberg’s summary judgment memorandum, in the statement of facts, it is written that “[t]he Complete Geographic product contains more than a dozen photographs taken by Mr. Greenberg for which he owns exclusive copyright.” R.1-25-3. Adjoining that statement in the memorandum is a citation to the transfer-of-copyright documents, incorporated in the memorandum, that are discussed in Part III of this brief. Most tellingly, the district court expressly found that copyright interest in various photographs had been assigned to Greenberg in 1985. R.1-25-9. Thus, the Society’s concoction of a “new contract theory” is not only not supported by the record but is flatly refuted by it.

At page 8 of the Answer Brief, the Society asserts that it had no opportunity to respond to the issue of reassignment of copyright to Greenberg or “to establish the contractual and factual context” in which the reassignment document¹ was prepared. Answer Br. at 8. The reality, however, is that the reassignment instruments, as noted above, formed the very basis for Greenberg’s infringement claims with respect to the Complete Geographic product, and the Society, in its reply memorandum seeking summary judgment, had every opportunity to challenge those instruments. It did not do so.² The “facts” the Society says it might have produced – they are proffered on page 8 of the brief – are not supported by any citation to the record, indeed are not in the record below, and should be ignored by the Court.

Therefore, the argument in Greenberg’s initial brief stands: Greenberg owned copyright to the disputed photographs, through an express transfer by the Society, and the Society had no right of any kind to republish those photographs in the Complete Geographic product – without regard to anything else in 17 U.S.C. § 201 (c).

¹ The Society’s argument is directed only to the 1985 transfer. The separate transfer in 1989 covered a different cluster of photographs.

² The contractual “facts” suggested in the brief are derived from contracts between the Society and Greenberg – documents that have existed in the Society’s files. In the Motion to Strike Appellants’ Arguments Not Raised Below, which was filed with its Answer Brief, the Society attaches copies of those contracts. They could have been placed in the record below during the summary judgment debate, with appropriate argument, but they were not. They have no place here.

B. The “Express Transfer” of Rights to Greenberg
Moots Any Further Application of 17 U.S.C. § 201 (c)

Section 201 (c) of the Copyright Act provides that if an “express transfer” of rights has taken place, with reference to a contribution to a collective work, the presumptive privileges set forth in that section do not ever come into play. The Society thus had no presumptive privilege to republish the Greenberg photographs.

In the Answer Brief, at 10, the Society, still again, insists that no express transfer of rights was alleged by Greenberg below. As discussed in Part III below, Greenberg alleged copyright ownership in his Amended Complaint, and in his summary judgment memorandum he provided documentary evidence of that ownership through transfers of rights to him by the Society. The 1985 transfer is a one-page assignment of all rights, prepared by the Corporate Counsel of the Society, who can be presumed to have known what she was doing. Her representations were sworn. The instrument, on its face, constitutes an “express transfer.”³

R1-25-Ex.B-Attach.1. The Society’s assertion that the transfer was not alleged below is simply wrong.

³ The second transfer, in 1989, has never been mentioned or challenged by the Society. The format of that instrument is different from that effecting the 1985 transfer, but its legal import is the same.

C. Even if an Express Transfer Had Not Occurred, None of the 17 U.S.C. § 201 (c) Privileges Authorized the Republication of Greenberg's Photographs

Pushing aside the express transfer issue, the Society proposes that two of the presumptive privileges in Section 201 (c) support the disputed reproductions in the Complete Geographic product. The Society's reproductions in that product, according to the brief, are "part of the particular collective work" or constitute a "revision of that collective work." Answer Br. at 26. The Society cannot have it both ways. Or either way.

As to the first proposition, the Society contends that the "particular collective work" language in Section 201 (c) means a specific edition or issue of a periodical. Answer Br. at 13. There is no question that the Complete Geographic product contains reproductions of certain issues of the Society's Magazine. The "particular collective work" clause of Section 201 (c), however, means just that: a particular issue of the monthly Magazine. The clause provides no legal authority for including a "particular collective work," or hundreds of them, in a new compilation – a new collective work or anthology – as is the case here. The Second Circuit construed the "particular collective work" clause to mean "a specific edition or issue of a periodical." Tasini v. New York Times Co., 1999 U.S. App. LEXIS 36241 (2nd Cir.

February 25, 2000).⁴ That is not what we are weighing here. The Society admitted to the district court that the Complete Geographic product is “a compilation of preexisting material,”

R.1-69-5, and registered the product as such with the U.S. Copyright Office,

R.1-66.⁵ Moreover, that new compilation consists of much more than a stack of old magazines.

⁴ The Society stresses that the holding in Tasini II does not apply here because that case involved only the issue of “revision” in Section 201 (c). Greenberg has not invoked the Tasini II holding or the facts in that case, but does rely, as set forth in detail in the Initial Brief, on the Second Circuit’s construction of the statutory language in Section 201 (c). To date, no other appellate court has parsed that language so thoroughly. (In Exhibit B, attached to the Answer Brief, the Society appended a copy of the September 24, 1999 Tasini decision; the Second Circuit amended and superseded that decision on February 25, 2000.)

⁵ At page 18, the Society devotes only two sentences to the Form VA registration form. [cite] The form “had not been filed at the time of the District Court’s grant of summary judgment, and was not, therefore, raised below.” The summary judgment order was entered on May 14, 1998. The Society filed the registration form on July 14, 1998. The form contained remarkable admissions as to the Complete Geographic product that had not been made previously to the district court by the Society, and had not been available to Greenberg for summary judgment purposes. Those admissions are extremely material here, and this Court should consider them.

As to the second proposition, the Society now says for the first time⁶ that the Complete Geographic product qualifies as a “revision” under Section 201 (c). The Society defines “revision” as a “new, amended, improved, or up-to-date version” of a periodical, Answer Br. at 22, but the Society’s brief, throughout, insists that the Complete Geographic product is none of those things. The Society argues that the magazine issues are included in the Complete Geographic product exactly as they appeared in the original monthly issues. See, e.g., R.1-19-6. The product cannot qualify as a “revision.”

The Society labors at length, at pages 22-26 of its brief, to distinguish the facts and the holding in Tasini II. Greenberg has never suggested that the factual circumstances there have any bearing on this case. Nor does the holding apply here.⁷ Tasini II is germane, as indicated above, because of the Second Circuit’s construction of Section 201 (c), which provides a basis for applying that statutory language to the facts here.

⁶ In footnote 5 of the Answer Brief, the Society insists that it argued in the court below that the “revision” clause of Section 201 (c) should apply. This Court is urged to review the citations in the brief in support of that proposition. Nothing said below advanced the revision argument.

⁷ Thus, the district court’s heavy reliance below on the earlier Tasini decision in the Southern District of New York (which has been reversed) was misapplied.

D. The Complete Geographic Is
A New Collective Work

The Society's core thesis is that the Complete Geographic product is nothing more than a stack of old magazines stapled together electronically. At page 13, the Society says: "Appellants' claim that 'no product like [CD-ROM 108] existed prior to 1997' is simply wrong." The only evidence they cite for that conclusion is evidence far removed from the record. The Society attempts a comparison with bound volumes of periodicals and microfilm and microfiche reproductions. For the purposes of this action, those are phantoms.

The Copyright Act reserves to the owner of a copyright the exclusive right to reproduce and distribute a protected work. 17 U.S.C. § 106. Notwithstanding that reservation, libraries and archives, where, the Society acknowledges, bound volumes and microfilm copies of its Magazine tend to exist, Answer Br. at 13, were given very limited dispensation by Congress to copy a protected work. According to the Act, it is not an infringement of copyright "for a library or archives . . . to reproduce no more than one copy . . . of a work . . . if the reproduction or distribution is made without any purpose of direct or indirect commercial advantage . . ." 17 U.S.C. § 108 (a)(1). The Society cannot find refuge there with its comparison to microfilm and microfiche.

E. The Society Cannot Alter
Its Own Admission That It Created
A New Collective Work, or Alter the
Components that Legally Make it One

The Society asserts, still again, that the Complete Geographic is not a new collective work. Answer Br. at 13-18. However, the registration form filed by the Society with the Copyright Office states that (1) the work registered is the Complete Geographic product, (2) the work was completed in 1997,⁸ and (3) the work had never been registered before. Is the Society misleading the Copyright Office, or the Court? Compounding the matter is the Society's representation to the district court that the product is "a compilation of preexisting material" and that that compilation was registered. R.1-69-5.

In its brief, the Society does not even mention the statements it placed in the copyright registration form, and does not challenge with a single word Greenberg's characterization of those statements. The Society's rhetorical, repetitive denial that it created a new collective work conflicts with its own admissions.⁹

⁸ The most recent issue of the Magazine included in the Complete Geographic product is that of December 1996.

⁹ The Society admitted that its repositories did not have a full collection of all prior issues of the magazine, and that it had to assemble the missing volumes from various sources. Stanton Affidavit, R1-27. Still more evidence that no compilation like the Complete Geographic product ever existed before.

Notwithstanding the admissions, the Society insists that its new product has insufficient originality to be a new copyrightable work. Answer Br. at 14-15. But the Society registered it as a new work, and surely believed when it did so that sufficient originality existed (the Copyright Office did also).¹⁰

At page 13, the Society distorts Greenberg's argument regarding the existence of a new work, emphasizing that "selection and arrangement of material" is the essence of Greenberg's position. Those criteria, examined at length in Greenberg's initial brief, are important, but so are the numerous additional and original elements that were placed in the product by the Society. The Society at first dismisses this "small amount of additional material," Answer Br. at 18, as meaningless, but then

¹⁰ The Society cites to Sherry Mfg. Co. v. Towel King, 753 F.2d 1565, 1568 (11th Cir. 1985), where the Court held that the small variations in a towel copy were "virtually unnoticeable" and thus lacked sufficient originality to have copyright protection. The new elements contained in the Complete Geographic product, however, are noticeable and prominent, appearing on every disk every time the disk is opened. (Sherry was decided before the Supreme Court lowered the originality threshold for factual compilations, and by extension for collective works as a subset of compilations. Feist Publications v. Rural Tel. Service, 111 S.Ct. 1282, 1294 (1991)).

The citation to New York Chinese v. U.E. Enters., Inc., 1989 U.S. Dist. LEXUS 2760 (S.D.N.Y. March 8, 1989) is inapposite. The entire analysis there involved a derivative work, not a collective work, and the standard for originality is not the same.

acknowledges that new elements such as the Kodak advertisement and the Moving Covers Sequence “are separately copyrightable.” Answer Br. at 17.

At page 18, the Society says that “[t]he 1997 copyright notice and subsequent registration of copyright ensure that these elements are protected from potential copyright infringement.” If worthy of such protection, can these be trivial elements? Unsaid, but also true, is that the “work” registered with the Copyright Office is shown in Part 1 of the registration form as the entire Complete Geographic product.

F. Exhibit A to the Society’s
Brief is Greatly Deceptive

The Society attached to its brief, as Exhibit A, “sample printouts from CD-ROM 108,” asking the Court to note the inferior quality of the hard copy compared with “a color photocopy of the paper Magazine.” Those sample printouts are deceiving. Using the Complete Geographic product, Greenberg printed hard copies of five pages from the same articles contained in the Society’s Exhibit A. See Idaz Greenberg Affidavit and attachments, affixed hereto as Exhibit 1. As the Greenberg exhibit demonstrates, an end-user of the product can obtain full-color or black-and-white, photo-quality copies from any page on any CD-ROM disk in the collection. The Society’s attempt to downplay the capability of the new product is misleading. The deception is aggravated by the fact that the Society’s hard-copy printouts were

obtained through a file code not readily available to the average user of the disks. An end-user, clicking on the “print” button on her screen, will always obtain 1997 copyright notice at the bottom of each and every page printed.¹¹ The Society obviously did not want that notice to appear in printouts provided to the Court.¹²

II. THE MOVING COVER SEQUENCE

A. *De Minimis*

The Society does not deny the claim, by Greenberg and by the *amicus curiae*, that the Moving Cover Sequence is a new derivative work. Instead, the appellees rely on two affirmative defenses that provide, in proper circumstances not present here, a justification for the unauthorized use of a protected work in the new derivative work.

That the Moving Cover Sequence meets the statutory definition of a derivative work is clear and unchallenged. The Copyright Act describes a derivative work as “based upon one or more preexisting works . . . [in a form] . . . in which a work may

¹¹ The widespread copyright notice arguably taints Greenberg’s copyrights. A third party viewing Greenberg’s photographs in the Complete Geographic product, and seeing repetitive claims to copyright by the Society, could easily be dissuaded from approaching Greenberg regarding the use of his photographs.

¹² A complete set of the Complete Geographic product is in the Court’s file. The Court, should it choose, can duplicate the Greenberg exhibit quite easily with a color printer.

be recast, transformed, or adapted.” 17 U.S.C. § 101. Any reasonable viewer of the sequence could have no quarrel with its status as a derivative work.¹³ The Society’s own description of the sequence, Answer Br. at 34, fits the statutory definition exactly.

How, then, can the Society contend that “recasting,” “transforming,” or “adapting” the Greenberg photograph is a *de minimis* use? Such use surely is more than an “insignificant violation of the rights of others.” Ringgold v. Black Entertainment Television, Inc., 126 F.3d 70, 74 (2nd Cir. 1997) (discussing *de minimis* application).¹⁴

At page 27, the Society’s brief relies on language in Amsinck v. Columbia Pictures Indus., Inc., 862 F. Supp. 1044, 1049 (S.D.N.Y. 1994), where the court in dicta said that *de minimis* would apply unless “some degree of permanence” existed as to the challenged use. The uses in Amsinck, while brief in the context of a full-length motion picture film, had no quality of permanence because a movie is usually seen by any given individual only one time. Here, the Moving Covers Sequence is a permanent fixture on every one of the 30 CD-ROM disks, and the sequence is seen

¹³ As noted elsewhere in this brief, the Society admits that the Moving Cover Sequence is “separately copyrightable.”

¹⁴ The Society’s quotation from Judge Newman in Ringgold, Answer Br. at 26-27, deals with a substantial similarity standard, not with *de minimis*.

every time a user opens any one of the disks.¹⁵ (The Society's expectation surely is that every user will consult the Complete Geographic product often, given the nature of the product.)¹⁶

Whether the Moving Covers Sequence is ever seen in any promotional or advertising material, or is depicted on packaging, is immaterial. Answer Br. at 28. The Society concludes, thus, that the sequence is not a "foreground emblem" for the entire 108-year Magazine collection. Answer Br. at 29. The Society contradicts itself. As noted previously by Greenberg, the Society refers to the Moving Cover Sequence as "the Complete National Geographic icon." Initial Brief at 40 n. 22.

The Society's statement that whether Greenberg's cover photograph has "artistic merit" carries no weight in a *de minimis* analysis, Answer Br. at 29, means nothing because that is not an aspect of the analysis. The qualitative aspect of the material in the copies does fit into the analysis. See, e.g., Ringgold, 126 F.3d at 77.

The Society's statement, at page 29, that the material used (Greenberg's

¹⁵ The Society's characterization of Greenberg's words as to the permanence question, Answer Br. at 27-28, is far wide of the mark. Whether images "are electronically and visually manipulated so that they metamorphose from one to another," Id., has nothing to do with permanence.

¹⁶ The question of the length of the exposure of the Greenberg cover photograph in the sequence is treated in depth in his initial brief. The Court can also note the Second Circuit's point that repetition can reinforce the visual effect of a short segment. Ringgold, 126 F.3d at 76-77.

photograph) is “inconsequential in relation to the whole work” is misleading. In the context of the Complete Geographic product overall, the use of the photograph within an “iconic” display at the front of every disk in the package makes it anything but inconsequential. In the context of the Moving Covers Sequence, the photograph comprises one-tenth of the entire display – consequential indeed.¹⁷

B. Fair Use

Purpose and Character of the Use

“The first factor in a fair use inquiry is ‘the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.’” Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578, 114 S.Ct. 1164, 1171 (1994) (citation omitted). The Society leaps to propose that the Moving Covers Sequence is being exploited not for commercial gain but for an educational one. Answer Br. at 31-32. The sequence, we are informed, appears in connection with a collection of works that has educational value. Id. at 32.

It is undisputed that the sequence is contained in a product being sold widely for commercial gain by a for-profit subsidiary of the Society. It cannot be disputed,

¹⁷ The brief, noting that the image in Ringgold appeared for a longer duration than does Greenberg’s photograph, misses the point. In Ringgold the backdrop was a full-length movie. Here, the backdrop is an electronic montage of ten magazine covers that lasts less than a minute. The duration here is less important than the sheer impact that the photograph has in the highly dynamic Moving Covers Sequence.

moreover, that the Moving Covers Sequence has no inherent educational value in itself, and is obviously structured to promote the sale and use of a commercial product. “The crux of the profit/nonprofit distinction [in a fair use analysis] is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.” Harper & Row Publishers v. Nation Enters., 471 U.S. 539, 562, 105 S.Ct. 2218, 2231 (1985).

The Greenberg photograph may have some educational value, but any such value is associated with the 1962 article in the Magazine with which the photograph first appeared. To extract the photograph from the Magazine’s archive and manipulate it into a purely promotional piece is exactly the kind of exploitation the Supreme Court disdained. The Society relies on Triangle Publications, 626 F.2d 1171 (5th Cir. 1980), where the Court held that the plagiarizing of a TV Guide cover by a newspaper had the effect of disseminating information so that consumers could make rational purchase decisions. The newspaper’s use did not, accordingly, weigh heavily as to commercial gain. Here, in the Moving Covers Sequence, no public interest is involved – only the Society’s self-described use of the sequence as an “icon” to promote a commercial product.

The issue on this point is not at all whether the Complete Geographic product has educational value, because it does. But the Moving Covers Sequence, as a new derivative work (the Society concedes that it is separately copyrightable), has to be judged on its own.

“Transformative” Use of the Cover

The concept of transformative use can be an integral part of a fair use analysis under the first factor listed in Section 107 of the Act. Campbell, 114 S.Ct. at 1171-73; American Geophysical Union v. Texaco, Inc., 37 F.3d 881 (2nd Cir. 1994). A transformative use “adds something new, with a further purpose or different character.” Campbell at 1171. But transformative use also can result in the creation of a new derivative work. The statutory definition of such a work embodies recasting, transforming, or adapting. 17 U.S.C. § 101. Although denying that a derivative work resulted, the Society admits that the Moving Covers Sequence is transformative, and is “individually copyrightable.” Answer Br. at 18. It can be copyrightable under the Act only as a derivative work because it fits no other definition for a work in the Act.

The Society says: “Appellant also suggests the Society cannot make transformative use of the Cover without creating an unauthorized derivative work

. . . Were that the rule, however, transformative use would not be a factor which weighed in favor of the fair use defense.” Id. The reasoning is flawed. Every derivative work involves transformative use of something, but it surely does not follow that every derivative work is free of infringement because of a “fair use” transformation. A derivative work – such as a movie made from a book (“transforming” the book) – can qualify as fair use only if all of the other factors in the fair-use analysis fall the right way. As indicated in this discussion of fair use, those factors certainly do not excuse the Society from the infringing use of the Greenberg photograph.

Amount and Substantiality of the Use

The Society doggedly attempts to trivialize the amount and substantiality of its use of Greenberg’s photograph, using terms like “split second,” “fleeting and ephemeral,” and “barely discernable and identifiable.” Answer Br. at 39-40. This is pure exaggeration and hyperbole, as an observation of the sequence in any one of the 30 CD-ROM disks will show.

At bottom, however, the Society used all of the photograph, and it makes up fully one-tenth of the photographs in the Moving Cover Sequence (which the Society

deems worthy of copyright protection). None of the cases cited in the Society's argument approaches that level of usage.¹⁸

Effect on the Potential Market

The Society is impaled on the very law to which it turns on this question. In Pacific & Southern Co., Inc. v. Duncan, 744 F.2d 1490, 1496 (11th Cir. 1984), cited in the brief at page 41, this Court said that fair use cannot apply to "purposes that most directly threaten the incentives for creativity which a copyright tries to protect." In that case, a news clipping service used the television materials it had gathered for a purpose, according to the Court, that the affected TV station might use for its own benefit. The fact that the TV station "does not actively market copies of its news programs does not matter, for Section 107 looks to the 'potential market' in analyzing the effects" of an infringement. Id.

Greenberg's potential market for his photograph indisputably is the same as that for the Complete Geographic product. The exploitive, highly repetitive use of

¹⁸ If the Court should request, the appellants can provide an authenticated demonstration, on a computer terminal or in hard copy, of the precise duration of the Moving Covers Sequence and of the Greenberg photograph within it. That information, consisting of a frame-by-frame depiction of the use of the photograph, along with its computer-timed duration, is derived from coded information contained on each of the CD-ROM disks in the product.

his photograph in the Moving Covers Sequence, especially in a morphing and manipulative way, diminishes any potential value of the photograph to Greenberg.

The Society's own words fit the circumstances exactly: "One who duplicates a work exactly and then makes a profit by distributing the copy to the same market as that of the original work cannot claim fair use." Answer Br. at 41 (emphasis added). The Moving Cover Sequence duplicates Greenberg's photograph exactly, and then manipulates it into something else.

Good Faith

"Also relevant to the 'character' of the use is 'the propriety of the defendant's conduct' . . . 'Fair use presupposes good faith and fair dealing.'" Harper & Row, 471 U.S. at 562, 105 S.Ct. at 2231-32 (citations omitted). The absence of good faith is manifest here.

The Court should remember that in 1997, before the Moving Covers Sequence was in the market, Greenberg's counsel wrote to the Society, asserted Greenberg's ownership of copyright, and expressly denied permission for the use of any of Greenberg's photographs. The Society never responded.

In the very section of the brief where the Society extolls its "good faith," at page 38, the Society sets forth an argument in bad faith, claiming that Greenberg never notified the Society of his copyright ownership through reassignment. The

Society claims further that Greenberg “obviously learned of the letter” sent to other photographers by the Society to inform them of the upcoming marketing of the Complete Geographic product. *Id.* Greenberg, however, could not have based his notice letter to the Society (April 24, 1997) on a letter from the Society that was not written until May 21, 1997. As to Greenberg’s failure to mention the transfer to him of copyrights, the letter from Greenberg’s counsel specifically stated that he owned exclusive copyright to various photographs and expressly denied permission to use them. R.1-25-Ex. D-Attach. 1. The Society’s legal counsel, to whom Greenberg’s letter was addressed, never inquired as to the basis for his copyright claim, and indeed never responded at all. So much for “good faith.”

III.
ERRORS IN APPELLEES’
STATEMENT OF FACTS¹⁹

A. Other Compilations by the Society

The Answer Brief, at page 4, states: “There also is no dispute that monthly issues of the Magazine have been compiled and sold in bound volumes and have been compiled, photographed, and sold on microfilm and microfiche.” No citation to the record is provided. The record contains no facts to support the statement. The matter

¹⁹ For clarity and simplicity, the word “Society” should be read to refer to all of the appellees.

is important because, even if issues of the Magazine have been sold in bound volumes and compiled and reproduced on film, those “compilations” may be fundamentally different than the Complete Geographic product at issue here. (The phrase “bound volumes” implies the placing of existing periodicals in a binder, or otherwise binding together existing magazines. The phrase does not imply the copying of those periodicals, as here.)

The “bound volumes” and “microfilm and microfiche” mentioned by the Society may or may not have sufficient originality to qualify as new and separate collective works under the Copyright Act. The dispute here concerns the Complete Geographic product. Whether a dispute would exist as to other products identified in the Society’s brief cannot be known because there is nothing in the record either to raise or to resolve the question. References in the Answer Brief to such products should be stricken and disregarded.

B. The Stanton Letter to Photographers

At page 6 of the Answer Brief, the Society refers to a letter sent in 1997 by Thomas Stanton to each individual who had made a contribution to the Magazine that notified them of the impending release of the Complete Geographic product. “All contributors,” states the brief, “thus had the opportunity to come forward and claim

any contractual rights to repayment which they may have had.” Greenberg, the Society states, contacted the Society “in response to [the letter]”, Answer Br. at 6, to protest against the inclusion in the new product of photographs owned by him. The implication is that Greenberg was advised of his “rights” and was tardy in asserting them. That is a deliberate misrepresentation. In a supplemental affidavit, Stanton admitted that the May 21, 1997 letter was never sent to Greenberg! R1-27-2. In fact, the May 21 letter prepared by the Society was written after Greenberg’s letter to the Society. Greenberg’s letter, dated April 24, 1997 (written on his behalf by his counsel), asserted his copyright ownership. R1-25-Ex.D-Attach.1. The Society never responded to that letter, even to inquire as to the basis for that claim of ownership.

C. Transfer of Rights to Greenberg

At page 6 of the Answer Brief, the Society wrongly states to the Court that Greenberg asserts “in this appeal for the first time ever” that all rights to certain photographs had been transferred to him by the Society. The statement is wholly and deliberately in error. Greenberg’s Amended Complaint alleges, in paragraph 54, that Greenberg owns copyright to the disputed photographs. When summary judgment memoranda were being exchanged in the court below with respect to the Complete Geographic product, Greenberg attached to his responding memorandum copies of two documents that expressly demonstrate that copyright interest in certain

photographs had been reassigned (transferred) to Greenberg by the Society.²⁰ R1-25-Ex.B-Attach.1, 4. The instruments are the *sine qua non* of the infringement action brought by Greenberg. The language in the transfers is explicit, unambiguous and unqualified. Those instruments were never challenged in the court below.

Moreover, the district court acknowledged the 1985 transfer (one of two transfers in the record) of copyright to Greenberg by the Society. At page 4 of the order under review, the court noted that the defendants had questioned Greenberg's copyright claims because he had not registered his copyright in any of the photographs at issue. The court said, however, that "Greenberg has provided the Court with evidence . . . that on [December 18, 1985]²¹ Society assigned to him the copyrights in these photographs . . ." (Emphasis added.) R1-37-4.

The Society's contention that the reassignment, or transfer, of the copyrights was raised for the first time in this Court ignores the plain record.

²⁰ When Greenberg's photographs were first published in various articles they were works for hire and were owned by the Society. The 1985 transfer of "all right, title, and interest, including copyright" in the now-disputed photographs conveyed ownership to Greenberg without qualification or limitation. The second transfer occurred in 1989. R1-25-Ex.B-Attach. 4.

²¹ The district court's order identified the date of the assignment as December 18, 1995. On the transfer instrument itself, the date is shown as December 18, 1985. The error obviously is a clerical one.

D. Duration of Moving Covers Sequence

The Society's efforts to minimize the significance of its unauthorized use of the Greenberg photograph in the Moving Covers Sequence is strained beyond fair play. At page 5, and elsewhere, the photograph is said to be visible for a "split second," which is transparent nonsense. Even more seriously, the Society's brief, at page 5, states that the Moving Covers Sequence lasts in its entirety only ten seconds. A simple measurement with the sweep-hand on a watch shows that the sequence lasts at least 26 seconds and closer to 30. The Court is urged to confirm these distortions by sampling the Complete Geographic product that is in the record. R1-19-Ex.A.

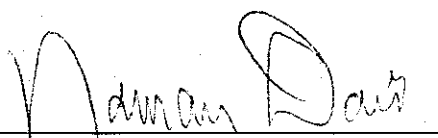
The misrepresentations of the record discussed above are deliberate and inexcusable. They certainly affect any equities that come into play in this appeal.

**IV.
CONCLUSION**

The Appellees have not undermined a single substantive argument in Greenberg's initial brief. The relief sought there should be granted.

CERTIFICATE OF COMPLIANCE

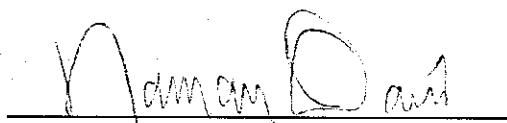
I hereby certify that this brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32 (a) (7). The brief utilizes proportional spacing and consists of approximately 5,890 words.



Norman Davis

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief was served by hand on Edward Soto, Esq., Weil, Gotshal & Manges LLP, 701 Brickell Avenue, Suite 2100, Miami, FL 33131; and by Federal Express on Robert G. Sugarman, Esq., Weil Gotshal & Manges LLP, 767 Fifth Avenue, New York, NY 10153 this 3RD day of May, 2000.



Norman Davis

MIA_1998/578613-1



DOCKET NO. 00-10510-C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JERRY GREENBERG and IDAZ GREENBERG,
Plaintiffs/Appellants

vs.

NATIONAL GEOGRAPHIC SOCIETY, et al.,
Defendants/Appellees.

AFFIDAVIT OF IDAZ GREENBERG

1. My name is Idaz Greenberg. The statements in this affidavit are based on my personal knowledge.

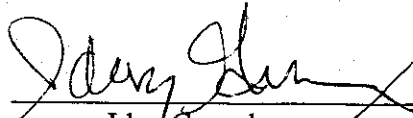
2. I reside at 6840 S. W. 92nd Street, Miami, Florida. With my husband, Jerry Greenberg, I operate a small publishing business known as Seahawk Press.

3. I purchased a product called "108 Years of the Complete Geographic Magazine," consisting, among other things, of 30 CD-ROM disks containing copies of certain issues of the monthly magazine of the National Geographic Society.

4. By following on-screen instructions that appear when a disk is opened, I clicked on the "print" button and printed certain pages from the January 1970 and January 1920 issues of the magazine. The print-outs I obtained are attached to and incorporated in this affidavit.

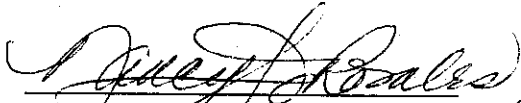
5. For the copying, I used a low-cost color printer, and high-quality print paper.

AFFIANT SAYS NOTHING FURTHER.

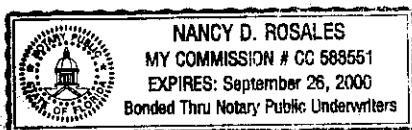

Idaz Greenberg

STATE OF FLORIDA)
) ss
COUNTY OF MIAMI-DADE)

The foregoing instrument was acknowledged before me this 2nd day of May, 2000, by Idaz Greenberg, who was sworn and who said that the information set forth above is true and correct. Idaz Greenberg is personally known to me, or produced A FLORIDA DRIVER LICENSE as identification.


Notary Public NANCY D. ROSALES

My commission expires:





January 1970

NATIONAL GEOGRAPHIC

Berlin

ON BOTH SIDES OF THE WALL

Article and photographs by
HOWARD SOCHRIEK

JUST BELOW our hovering helicopter, the raincoat-clad sentry of the Berlin Wall left the city separating tangle of people, world powers, and, when they showed a concrete narrow thoroughfare, even the dead, from the dead.

Capt. Richard H. Barnter, Chief of Staff of the United States Command in Berlin, pointed to a section with both arms and a finger wide.

That narrow area between them is called the death strip, he said. It was 400 feet long, and East Berlin workmen, under guard, were carefully raking the land mine, booby-trap wire. They were watched by rifle-looking dogs tethered to long running lines. One of the guard dogs, a bulldog, appeared at our feet. His bark drowned in the chatter of blades as we swung away.

At the end of a small street, Buchscheiden, was a high, new air-raid warning siren, and a 10-foot concrete watchtower. A tank next to a machine gun wobbled, strutting through a park, when the German Democratic Republic, the communist state that rules in the Soviet zone of defeated Nazi Germany, imprisoned its own people by building this wall.

As our chopper zigzagged and zigzagged along the twisting course of the barrier, two

pages of the city below handled a tapestry of its history. Guards patrolled the grassy moorland covering Hitler's bunker, the underground shelter where the Führer, when finally and often struck, The Brandenburg Gate emblem of imperial Berlin, seemed to sit and wait as Stoencheim in the evening 1945. Just inside West Berlin, the famous Reichstag Assembly restored 100 years ago, the Nazis destroyed it before they abolished the emergency powers that ended parliamentary government.

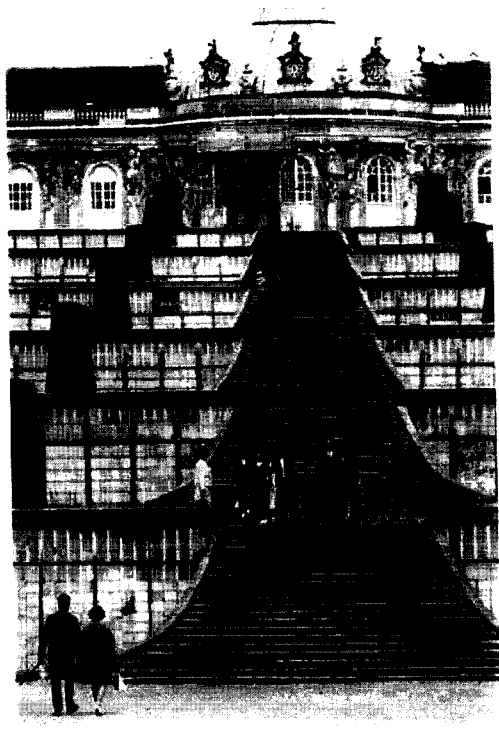
It reflected on its face, Berlin began to only 500 years ago, colonized its inland, the town called Kolbn on a sandy island to the Spree River, and a riverbank settlement named Berlin. As the settlement grew, the city connected by a bridge.

Even in this early settlement, when the two small communities merged with each other and shared a common meeting hall, the ancient town had a modern feel to it. It was governed by the Margrave of Brandenburg as a part of the Mark, one of several border regions used as buffers against the threat of Slavic incursions from the East.

For 500 years Berlin grew under the rule of the Hohenzollerns. The second of that line



sunlight on the facade of the 1755-60 television tower, built at the other side.



Summer retreat of a Prussian ruler, Schloss Sanssouci bespeaks the French tastes of Frederick the Great. In the 1740's he designed the rococo residence with french floor plans and named it "Castle Without Care." Tourists by the thousands visit the palace in Potsdam, outside West Berlin in East Germany.

The statistics are truly appalling. Between 1941 and 1945, the Nazis herded 200,000 persons into the camp—political undesirables, Jews, and captured Russian soldiers. 100,000 of them were killed by shooting or hanging. Of 15,000 Russian prisoners brought here, 15,000 were murdered.

Jürgen Tietz and I drove to Sachsenhausen early one rainy Sunday afternoon. A rain mist hung over the camp as we arrived. Built in the form of a huge walled triangle about

2,000 feet long on each side, it sits in a pine forest. On each corner of the triangle and at regular intervals along the wall are watch towers that once housed Hitler's elite guard, the Schutzstaffel. On all sides today I saw Russian soldiers, members of the occupation army, now living in the former SS barracks.

Prisoners were quartered communally in one-story frame barracks 100 feet long and 30 feet wide. Around a roll call square, 50 such barracks were arranged in the shape of a fan

The new Bird
Larger, lower, wider
And comfortable

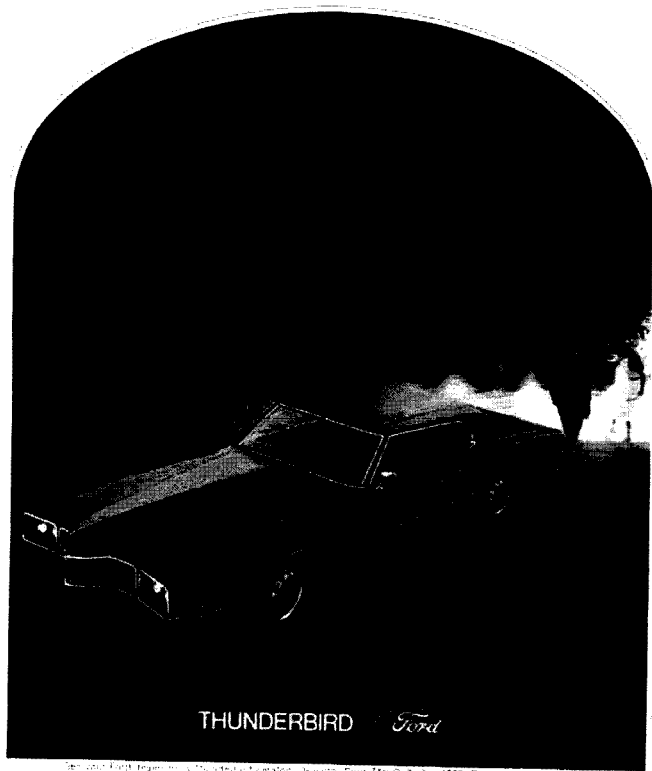
The new Bird
Powerful Thunderbird V-3
Power steering, power front disc
brakes, power ventilation, New belted
radial-ply tires. And a transmission
you can shift for yourself or
automatically. All standard.

The new Bird
Depend on it. Astrotechnology
and a computer-designed
ride provide smooth, reliable flight.

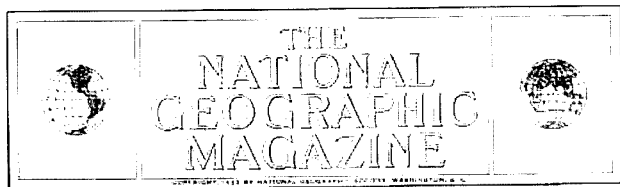
The new Bird,
2 doors or 4. Sunroof or no.
Buckets or Bench seats. All up to you.

The new Bird,
Paint to fly. Built to last.
At your Ford dealer's now.

1970 THUNDERBIRD OF THUNDERBIRDS



© 1969 Ford Motor Co. Thunderbird related. Model. Dear Ford. New 1970 Thunderbird. V-3 V-6



THE LAST ISRAELITISH BLOOD SACRIFICE

How the Vanishing Samaritans Celebrate the Passover on Sacred Mount Gerizim

By JOHN D. WHITING

Illustrated by the author. Photographs by the author. The Samaritan Passover on Mount Gerizim. (See page 10.)

*Illustrated with the only set of mounted photographs ever taken of this ancient rite—
inside and outside—the mountain fortress of the Samaritans.
Courtesy Photographers, Jerusalem, Palestine.*

SHECHEM, Samaria, and Naphtali were once great cities of the ancient civilized world. Today their glory and importance are no more, save in history. Here, then, we find a dying and almost extinct community of Samaritans, the remnant of a once numerous sect whose persistence, continuation, and literal performance of the Passover Sacrifice have attracted the attention of students for more than three centuries.

Nablus, the modern Shechem, is the only home of the Samaritans of today, a town of about 27,000 inhabitants, lying some forty miles north of Jerusalem. The population is 4000 Samaritans, the remainder being composed of various Christian sects, together with a mere handful of Samaritans. Bar es set no law has settled there; the Biblical axiom still holding good, "for the Jews have no dealings with the Samaritans."

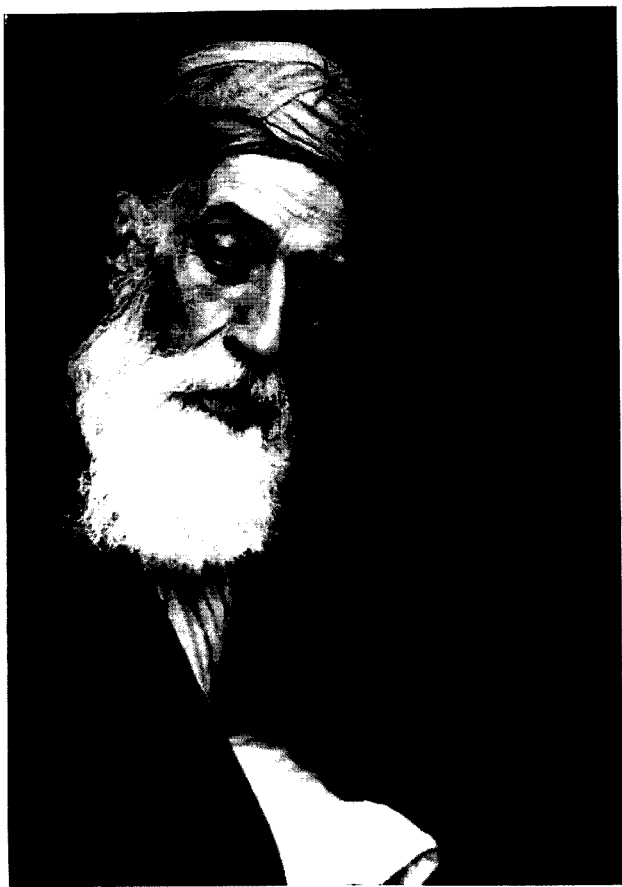
Besides being a center of trade, Nablus has gained a little fame for its soap, made of pure olive oil, a variety which, though crudely manufactured, is used almost exclusively by the people of the city, and is

much prized by the natives of Syria and Egypt.

The town lies in a confined valley running east and west, between twin mountains. Each some 6000 feet above sea level, which looms up on the north, and the lesser Gerizim, about 200 feet lower, which rises in on the south, with a basin in places only a few hundred yards from that of a mile.

From the lower slopes of Gerizim issue numerous and clear springs. The modern town and therefore rest up in their direction. These waters, after filling the demand made upon them by the city, and their way into extensive gardens to the west, where flourish fig trees, laden with delicious fruit, pomegranates hung with dark bloom and fruit, yellow quinces, walnuts, mulberries, olives, and occasional bitter-orange trees raised for the perfume extracted from the flowers. Among the trees many varieties of vegetables grow in abundance.

The houses of the town are domed, arched and lattice-windowed, constructed from the soft, white limestone of Mount



LEONARDUS, HIGH PRIEST OF THE SAMARITAN HIGH PRIESTS
Leonardus is a member of the priestly family that traces its lineage to the tribe of Levi. The oldest Samaritan lineage that persisted till modern times was his wife's.