

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 00-10510-C

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 *AMICUS CURIAE*,
AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, INC.,
IN SUPPORT OF PLAINTIFFS-APPELLANTS
AND IN OPPOSITION TO THE BRIEFS OF APPELLEES AND THEIR *AMICI*

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Greenberg v. National Geographic, Docket No. 00-10510-C
Certificate of Interest and
Corporate Disclosure Statement

Trial Judge:

The Honorable Joan A. Lenard

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The *Amicus Curiae* has no parent companies, no subsidiaries and no affiliates that have issued shares to the public.

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Plaintiffs:

Jerry Greenberg
Idaz Greenberg


Patricia A. Felch

Defendants:

National Geographic Society
National Geographic Enterprises, Inc.
Mindscape, Inc.

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STATEMENT OF INTEREST

The organization supporting this *amicus curiae* brief is:

The American Society of Media Photographers, Inc.

The American Society of Media Photographers, Inc., or ASMP, was founded in 1944 as the Society of Magazine Photographers. Its primary mission is to protect and promote the interests of professional photographers who earn their livings by making photographs for publication. ASMP is the largest organization in this country, or in the world, representing professional photographers who make photographs for publication in the various media. ASMP has approximately 6,000 members, most of whom are freelance photographers, who have been producing some of this country's best photography for publishers, advertising agencies and corporate clients for more than half a century. We estimate that there are over 100,000 freelance photographers with interests similar to those of our members in this country.

SUMMARY OF ARGUMENT

This reply is submitted to advise this Court of six falsifications made by defendants/appellees (hereinafter collectively “the Society”) and their *amici curiae* (hereinafter collectively “MPA *amici*”) in their briefs to this Court: the Society’s Answer Brief (hereinafter “Ans. Br.”) and the MPA *Amici*’s brief (hereinafter “MPA Br.”). Taken one by one, these falsifications might appear trivial. Seen in the context of the total effect the falsifications could have on this Court’s resolution of this case, however, the falsifications must be corrected. Therefore, the American Association of Media Photographers, Inc. (hereinafter “ASMP *amicus*”) is compelled to set the record straight.

First, MPA *amici*’s own arguments -- along with the Exhibit submitted by the Greenbergs in their Reply Brief -- belie the Society’s and its *amici*’s contentions that photographers and illustrators like the Greenbergs retain all sorts of rights despite the Society’s Section 201(c) “privileges”. Not only has the Society placed a copyright notice on each page of its CD-ROM set (“© 1997 National Geographic Society”), but the MPA *amici* argue that the Society has the right to “publish and republish” the Greenbergs’ photographs and illustrations without any restrictions. The copyright notice places a taint on the Greenbergs’ copyrights, thus, making it difficult, if not impossible, to license his photographs to others. Section 210(c) did not resurrect the unfairness of the indivisibility doctrine; it was supposed to abrogate “bundling”.

Second, MPA *amici* -- despite the fact that three of the defendants in *Tasini* are included in the MPA *amici* group -- apparently do not know the facts on which the Second Circuit premised its opinion. That, or MPA *Amici* are purposefully misrepresenting to this Court the issues presented in *Tasini* in order to force this Court into dealing with a red herring. Contrary to the MPA *amici*'s contentions, third-party (end-user) infringements were never raised in either the pleadings or the arguments by the *Tasini* plaintiffs. The freelancers' complaint and arguments contended that the publisher defendants directly infringed the freelancers' copyrights in their articles by copying and distributing them -- without authorization or compensation -- to the database defendants, to the tune of over \$2 million in gross profits per month. Both the publisher and database defendants were also accused of contributory and vicarious copyright infringement liability amongst themselves. It is important to know this truth, because *Sony* did not apply in *Tasini*, and it does not here; and it would be a waste of this Court's energy to seek in vain for some connection between this case and *Sony*.

Third, MPA *amici* mischaracterize the Second Circuit's analysis of what comprises a "new anthology or entirely different...collective work", in which format Congress expressly precluded collective-work publishers from re-using freelancers' works. "Collective-work-originality" was not the main premise of the Second Circuit's holding that NEXIS® and the UMI CD-ROMs were new anthologies or entirely

different collective works and, thus, copyright infringements. The unauthorized commingling of so many previously published articles into the databases and CD-ROMs was the real basis for the Second Circuit's holding against the *Tasini* defendants/appellees for violating the constraints of Section 201(c) of the 1976 Copyright Act (17 U.S.C. § 201(c)). It is important to understand this distinction, because the truth will enable this Court to ignore the disingenuous attempts by the MPA *amici* to make up facts in order to invoke *Feist*, which concerned factual data collections, not a new CD-ROM anthology of innumerable photographs from innumerable issues of a periodical, as here.

Fourth, the Society's contention that the Society's CD-ROM set is just like binding, microfilm and microfiche ignores the realities that: (1) binding periodical issues does not require copying (which was done here); and (2) creating microfilmed or microfiched versions of periodicals requires copying, but is protected under both the "fair-use doctrine" and "library-exemptions" codified in the 1976 Copyright Act (which do not apply here). The Society has gone way beyond the mere binding or micrographic reproduction of past issues of the National Geographic Magazine. What the Society has done is copyright infringement.

Fifth, the MPA *amici*'s "decimation-of-history" argument borders on the preposterous. A decision in favor of the two Greenbergs here would not automatically require the Society to go back and edit all freelancers' photographs, illustrations,

articles and other contributions to the original periodicals from the CD-ROM sets of THE COMPLETE GEOGRAPHIC or any other new electronic product. To the contrary, publishers' and database producers' participation in the many already-existing copyright clearinghouses -- including the Publishing Rights Clearinghouse, which identifies freelancers, issues licenses for publishers' electronic re-uses of freelancers' contributions and pays freelancers what they are due for electronic re-uses of their contributions -- solves the problems MPA *amici* exaggerate in their brief.

Sixth, the Society totally misconstrues the argument made by the ASMP *amicus* about the Moving Covers Sequence. The ASMP *amicus* did not assert that there were only three covers featured in the Moving Covers Sequence. There are ten. The ASMP *amicus* merely spotlighted the first three covers, which metamorphose from the first cover (depicting a boat at sea), to Jerry Greenberg's 1962 cover (depicting a scuba diver swimming horizontally over a coral reef), to a multi-frame manipulation of the diver into a vertical position -- *i.e.*, the unauthorized derivative work -- and, finally, to the third cover (depicting a dancer, standing upright). The Society's argument about the Society's use of Greenberg's 1962 cover in the Moving Covers Sequence being *de minimis* is sheer nonsense, given its metamorphic (derivative) use with ten other covers right at the beginning of each and every one of the 30 compact discs in THE COMPLETE GEOGRAPHIC. Nor did the ASMP *amicus* admit that the covers go by so quickly that they cannot be seen. Idaz Greenberg has thoroughly examined -- frame-by-frame --

the time that Jerry Greenberg's photographic is featured in the Moving Covers Sequence on every disc in the set. There is no *de minimis* defense to violating an author's Section 106(2) exclusive rights to prepare derivative works; and, what the Society admits in its "fair-use" argument about "transformation" is an admission that the Society's use of Jerry Greenberg's scuba-diver photographic is an unauthorized derivative use of his copyrighted photograph. More compellingly, in the face of Jerry Greenberg's letter to the Society forbidding any use of his photographs in the CD-ROM product, the Society not only went ahead and used all of his re-assigned photographs, but chose to use one of them (the scuba diver) as an iconic representation of "the best" of National Geographic Magazine covers in the Moving Covers Sequence. If that isn't bad faith, it is certainly a slap in the face. The fact that the Society decided, in addition, to manipulate Greenberg's scuba-diver photograph is unadulterated copyright infringement and cannot be considered fair use.

ARGUMENT OF AMICUS CURIAE

The American Society of Media Photographers, Inc. (hereinafter "ASMP *amicus*"), respectfully submits this brief to correct the falsifications made by defendants/appellees (hereinafter "the Society") and their *amici* (hereinafter "the MPA *amici*") in their briefs to this Court. The ASMP *amicus* supports reversal of the District Court's order in Greenberg v. National Geographic Society, et al., 97-3924, Order (S.D. Fla. May 14, 1998) and a remand by this Court, with instructions to enter judgment in favor of the Greenbergs. The ASMP *amicus*, however, must identify the six falsities proffered by the Society and MPA *amici* and correct them, so that this Court will not be misled.

I. INTRODUCTION

The Society and the MPA *amici* cannot be allowed to get away with proffering falsifications to this Court. Although this Court might discover on its own how erroneous some of the contentions of the defensive briefs are, ASMP *amicus* has a duty to permit this Court to decide this appeal on its true, not false, merits.

II. THE SOCIETY HAS MADE IT NEARLY IMPOSSIBLE FOR THE GREENBERGS TO LICENSE THEIR PHOTOGRAPHS AND ILLUSTRATIONS TO OTHERS.

Contrary to arguments of the MPA *amici* (MPA Br. at 1, 4 and 17-21), Jerry and Idaz Greenberg have been stripped by the Society of any meaningful rights to license or otherwise convey their photographs and illustrations to others. That is contrary to

the whole scheme of Section 201 of the 1976 Copyright Act and must not be permitted by this Court.

First, as the Greenbergs submit in Exhibit 1 to their Reply brief, the Society has inserted a copyright notice -- in its own name -- on each and every page of all of the 30 CDS in THE COMPLETE GEOGRAPHIC. Anyone who prints out a photograph by Jerry Greenberg will get an accurate replica of the original photograph as it appeared in the original issue of the National Geographic Magazine (hereinafter "NGM"). But, the bottom of the print-out will contain: "© 1997 National Geographic Society". That is not only false marking, but also taints whatever authority Jerry Greenberg, himself, might have had to license or otherwise convey subsidiary rights in and to his NGM photographs to others.

Second, contrary to the MPA *amici*'s arguments (MPA Br. at 4), Section 201(c) was not a compromise permitting periodical publishers to "publish and republish" freelancers' contributions to collective works without limitation. Such an interpretation of Section 201(c) flies in the face of Section 201(d)(2)'s abrogation of the old, harsh "bundling" or "indivisibility of copyrights" doctrine. If the Society could exercise its "presumptive privilege" by publishing and republishing Jerry Greenberg's photographs whenever it felt like it, he would not -- and does not now -- have any "rights" left to license or convey his photographs to anyone else. This Court should not approve such a broad reading of Section 201(c)'s "presumptive privileges",

when their exercise by the Society emasculates any and all retained rights freelancers should have had otherwise.

III. THE TASINI COURT DID NOT DO WHAT MPA *AMICI* CLAIM.

It is one thing to disagree with a court's opinion. It is another thing entirely to purposefully misrepresent to this Court the factual bases and holdings of Tasini v. The New York Times, Inc., et al., 2000 WL 273942 (2d. Cir. (N.Y.) February 25, 2000), reh'g denied, mandate stayed (hereinafter "Tasini II").¹ If this Court's study of the Tasini II opinion alone could rectify the misrepresentations that the Society and the MPA *amici* make about that case, ASMP *amicus* would not have sought leave to file this Reply Brief. Unfortunately, though, the contrived arguments made by the Society and MPA *amici* are contradicted in parts of the Tasini record which are not available to this Court and, thus, must be corrected in this brief.²

¹ As noted by counsel for the Appellants, the Society attached the wrong opinion as an exhibit to its brief, the September 24, 1999 opinion. That opinion was amended by the Second Circuit on February 25, 2000. It must be noted, however, that Tasini II is different from the original September 24, 1999 opinion (Tasini I) in only one respect. Instead of using the word, "privilege", the Second Circuit in Tasini II adopted the term, "presumptive privilege" in the amended opinion. This Court also should be aware, and can take judicial notice, that the Second Circuit denied rehearing, as well as defendants' suggestion for rehearing en banc, shortly after the ASMP *amicus* filed its brief in this Court; and, on April 28, 2000, the Second Circuit stayed the issuance of the mandate in Tasini so that defendants could petition the United States Supreme Court for *certiorari*.

² Counsel for the ASMP *amicus* in this case also studied the record and wrote the appellants' brief for four of the plaintiffs/appellants in Tasini.

A. THE *TASINI* PLAINTIFFS DID NOT ALLEGE OR ARGUE THIRD-PARTY INFRINGEMENTS, BUT, INSTEAD, ALLEGED DIRECT, CONTRIBUTORY AND VICARIOUS LIABILITY OF THE NAMED DEFENDANTS FOR COPYRIGHT INFRINGEMENTS AMONG THEMSELVES.

The MPA *Amici*'s entire argument on the Second Circuit's failure to follow *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (MPA Br. at 7-9) rests on the false contention that the *Tasini* plaintiffs claimed liability of the defendants for third-party infringements (the end users' downloading of articles from the databases and CD-ROM products). That simply is not true, and the three entities also involved in *Tasini*, which have joined with the other MPA *amici*, should know better. The *Tasini* plaintiffs alleged and argued that the periodical publishers infringed the freelancers' copyrights in their articles directly by copying and distributing copies of their articles to the database producers without authorization or compensation of the freelancers. The *Tasini* plaintiffs also alleged and argued that all of the defendants were contributorily and vicariously liable for the infringements of each other.

Accordingly, the Second Circuit did not fail to properly apply *Sony*. Despite the *Tasini* defendants' attempts to inject that case into the litigation in New York, *Sony* was inapplicable to the allegations and arguments made by the *Tasini* plaintiffs. In fact, the Second Circuit never mentions *Sony* in the *Tasini I* or *Tasini II* opinions, because third-party infringements were not an issue. The MPA *Amici*'s argument invoking *Sony* should be disregarded.

B. THE SECOND CIRCUIT'S DETERMINATION THAT THE CD-ROM PRODUCTS AT ISSUE IN *TASINI* WERE "NEW ANTHOLOGIES OR ENTIRELY DIFFERENT...COLLECTIVE WORKS" WAS BASED ON THE FACT THAT DEFENDANTS COMMINGLED SO MANY ARTICLES INTO THE NEW ELECTRONIC WORKS.

The MPA *Amici* contend to this court (MPA Br. at 7 and 9-14) that the Second Circuit erred in its interpretation of Section 201(c) of the 1976 Copyright Act by imposing a "collective-work-originality" standard on the infringing products at issue in *Tasini*. See, Feist Publications, Inc. v. Rural Rel. Serv. Co., 499 U.S. 340 (1991). The *Tasini II* decision belies the MPA *amici*'s argument.

Although the Second Circuit did find that very little of the periodical publishers' original selection, coordination and/or arrangement survived in the infringing databases and CD-ROM products, that court did not base its decision -- that the electronic works were not "revisions" -- solely on a lack of transferred "originality" into the infringing products. To the contrary, as *Tasini II* clarifies, the Second Circuit found that the electronic products were "new anthologies or entirely different...collective works" and, thus, violative of Section 201(c)'s constraints, because the electronic products commingled too many individual articles from various periodical editions to be considered a "revision of that particular" periodical. *Tasini II*, at *8; see also, 17 U.S.C. 201(c).

The Second Circuit's opinion does not conflict with the holdings in *Feist*, because the two cases involve entirely different types of works. While *Feist* concerned

compilations of facts (names, addresses and phone numbers in the “white” pages of a phone directory), *Tasini* concerned electronic combinations of multitudes of articles originally published in periodicals and then re-used in electronic products without the authors’ authorization or compensation.

Specifically, and generally the Second Circuit found first that the NEW YORK TIMES ON DISC (NYTO), like THE COMPLETE GEOGRAPHIC in this case, contains articles “from only one publisher”. *Id.* Nevertheless, the Second Circuit found the NYTO CD-ROM to be a “new anthology”, because it contained “innumerable editions of the Times...[or] innumerable articles from these editions”. *Id.* Here, similarly, THE COMPLETE GEOGRAPHIC contains “innumerable editions of the [National Geographic]...[or] innumerable [photographs] from these editions”. It is, thus, the numerosity of editions and/or articles -- not the retention of the original periodical issues’ collective-work-originality -- that led the Second Circuit to its conclusion that the NYTO was a “new anthology” and not a “revision,” as the trial court had found.

Id. Likewise, this Court should find that THE COMPLETE GEOGRAPHIC is a new anthology and, thus, violative of Congress’ express prohibitions regarding Section 201(c). *See*, Appendix to the ASMP *amicus* brief, at p. 14.

IV. THE COMPLETE GEOGRAPHIC IS NOT AT ALL LIKE A BOUND SET OF PERIODICALS OR THE MICROGRAPHIC REPRODUCTIONS LIBRARIES HAVE OFFERED TO THE PUBLIC UNDER EXPRESS EXEMPTIONS IN THE COPYRIGHT ACT.

The Society makes two arguments (Ans. Br. at 10, 13-14 and 20-21) that strain both the truth and the abiding principles of the 1976 Copyright Act. First, the Society claims that THE COMPLETE GEOGRAPHIC is just like a bound periodical, as if the Society merely miniaturized all of its 108 years of magazine issues electronically and plunked them into a nice little box. Second, the Society contends that THE COMPLETE GEOGRAPHIC is no different than microfilms and microfiche, which have been around for years, but never complained about as copyright infringements.

A. BINDING DOES NOT REQUIRE COPYING AND, THUS, IS NOT A VIOLATION OF AN AUTHOR'S SECTION 106 EXCLUSIVE RIGHTS.

As the Greenbergs thoroughly detail in both their original and reply briefs, the Society did a lot more than merely digitize the Society's original periodical issues and bind them into a box. As this Court can see when it reviews the CD-ROM set, THE COMPLETE GEOGRAPHIC is not a miniature bound volume of over 1,200 NGM issues.

More importantly, periodical binding does not now, and never did, require copying, which would have violated authors', photographers' and periodical publishers' Section 106 exclusive copyrights and which the Society did here. Whether binding was done by the original periodical publisher, or a library itself, binding periodical issues required merely gluing issues together and binding the collection of

issues with hard covers in order to survive the wear and tear of library patrons' uses. In sum, there is no intrusion into a copyright owner's rights if one merely binds periodicals issues together.

But, that is not what the Society did here. It selected certain issues from various editions of the NGM that were originally published by the Society; deleted insert maps and advertising copy; copied into a digitized format what was left of the selected editions; and then added features at the beginning of each CD (titles and the Kodak and Moving Covers Sequences) and at the end of each CD (credits and indexing). In other words, the Society created a "new anthology or entirely different...collective work", in violation of Congress' intent as to Section 201(c). See, Appendix to the ASMP *amicus*' brief, at p. 14.

B. MICROFILMS AND MICROFICHE DO REQUIRE COPYING, BUT ARE COVERED BY THE EXPRESS EXEMPTIONS OF SECTIONS 107 AND 108 OF THE 1976 COPYRIGHT ACT.

Similarly, the arguments by the Society -- that THE COMPLETE GEOGRAPHIC is just like microfilm or microfiche -- have no merit. In contrast to mere binding, microfilming and microfiching do require copying, which would violate the original copyright owners' Section 106 exclusive copyrights. Congress, however, placed right after Section 106 both Section 107 and 108, along with a number of other industry-specific exceptions to Section 106. The fact that Sections 107 and 108 were included in the 1976 Act proves that Congress knew about the long-term practice of

micrographically reproducing periodicals for libraries and did not consider such uses to be infringing. Otherwise, Section 108 would not be so clear on its exemptions from copyright liability for both the creators and buyers of such micrographic reproductions.

Section 107 of the 1976 Copyright Act is a codification of the “fair-use doctrine”. And, that doctrine applies quintessentially to libraries that offer microfilm and microfiche for patrons, edification, education, criticism, scholarship and all of the other permitted-use categories delineated in Section 107. Thus, libraries that offer microfilm and microfiche fall within the fair-use doctrine, as codified in Section 107; and no copyright liability attaches to libraries as a result of their purchase, creation and/or offering of microfilms and microfiche for public use.

Additionally, Section 108 provides non-profit libraries with exemption from Section 106 liability for various copying activities, including the use of “facsimile” formats for archival purposes. 17 U.S.C. § 108(b) Interestingly, the House Report (No. 94-1478) for the 1976 Copyright Act on the § 108(b) library exemption states:

Under this exemption, for example, a repository [which meets the non-profit library requirements of sub-section a(2) of Section 108] could make photocopies of manuscripts by microfilm or electrostatic process, but could not reproduce the work in “machine-readable” language for storage in an information system.

17 U.S.C.A. § 108, Historical and Statutory Notes (West, 1996), at p. 220.

According to this exemplification of Congress’ intent, not even the Society’s library would be immune from copyright infringement liability for making machine-

readable copies of its or anyone else's works for storage in an information system.

And yet, that is exactly what the Society has done in THE COMPLETE GEOGRAPHIC.

V. JUDGMENT FOR PHOTOGRAPHER WILL NOT RESULT IN ANY DECIMATION OF OUR NATIONAL ARCHIVE OR HISTORY.

The MPA *Amici* contend (MPA Br. at 2-4) that judgment for this one Photographer and Illustrator will require all publishers, database producers and CD-ROM distributors to delete all non-employees' works from their electronic products. Otherwise, MPA *amici* argue, the publishers and electronic distributors will have the daunting task of locating all of their freelance authors and artists, obtaining their authorization for electronic re-uses and then paying them their due.

One undisputed fact in this case, though, is that the Society did write a letter to all of its freelancers and others advising of the soon-to-be-released COMPLETE GEOGRAPHIC. See, Ans. Br., Record Excerpts, at R1-20, Exhibit B, pages 1-2. If the Society was able to write its freelancers to tell them they would not be paid for "further editorial uses" of their works in THE COMPLETE GEOGRAPHIC, it can do so again, this time to negotiate a fair price for the unauthorized uses of the freelancers' works in THE COMPLETE GEOGRAPHIC. That CD-ROM set is, of course, a "new anthology or entirely different...collective work"and, thus, in violation of Congress' intent for the parameters of Section 201(c). See, Appendix to the ASMP *amicus*' brief, at p. 14.

Additionally, this Court can take judicial notice of the many web-page and news articles issued after the Second Circuit first issued its Tasini I opinion (reversing the

trial court with instructions to enter judgment in favor of the freelance authors). Virtually every article mentioned the existence of copyright clearinghouses that perform the same types of royalty-gathering-and-paying services as ASCAP, BMI and SESAC do for musicians and recording companies. In fact, the Publishing Rights Clearinghouse ("PRC") was established specifically to serve as a conduit between freelancers and electronic publishers so that publishers would not be sued for copyright infringement, and freelancers would be compensated for electronic re-uses of their works in any form. All the Society has to do in order to avoid the liabilities and drudgery exaggerated by the MPA *amici* is join the PRC.

VI. DEFENDANTS/APPELLEES' UNAUTHORIZED ALTERATION OF PHOTOGRAPHER'S "SCUBA DIVER" PHOTOGRAPH IN THE MOVING COVERS SEQUENCE IS *DE FACTO* INFRINGEMENT OF PHOTOGRAPHER'S § 106(2) COPYRIGHTS.

In a misguided effort to position the Society outside of the *Tasini II* holdings, the Society has painted itself into an inescapable trap of liability. The trap has two facets: (1) irreconcilable inconsistencies between the Society's arguments to this Court and its verified copyright registration application submitted to the Copyright Office; and (2) fatal admissions in its fair-use argument, confirming its "transformative" alterations of Jerry Greenberg's "scuba diver" photograph, which alterations constitute the Society's unauthorized creation of a work derivative of Jerry Greenberg's photograph, in violation of his Section 106(2) exclusive rights.

A. THE SOCIETY CANNOT ARGUE NOW WHAT IT VERIFIED WAS NOT TRUE WHEN IT APPLIED FOR REGISTRATION OF ITS COPYRIGHTS IN THE COMPLETE GEOGRAPHIC.

First, the Society argues that there is “very little” new selection, coordination and/or arrangement in THE COMPLETE GEOGRAPHIC and, thus, the CD-ROM set is merely a “revision” (Ans. Br. at 14-17). If so, why did the Society attempt and succeed, in 1998, in registering for copyright protection the CD-ROM set on a form VA (when all of its previous registrations of the individual issues of its magazine were registered on TX forms); why did the Society check the “no” box in Section 5 of the copyright application in answer to the question about whether “the work or any part of it” had been registered before (when all of the original issues were registered); and why did the Society not identify all of its previous registrations of its individual issues in its registration application for the CD-ROM set (when to do so might have suggested that the Society thought that the CD-ROM set was a “revision”)? The answer to all three questions is simple. The Society did not see THE COMPLETE GEOGRAPHIC as anything other than a completely new product until it was sued by the Greenbergs and found itself in a bind under the rulings in *Tasini II*.

More importantly, in arguing now that there is nothing really “new” in the CD-ROM set, the Society has admitted that it was not entitled to the copyright registration it obtained from the Copyright Office, because the mere digitization of an original work is not sufficient originality to entitle the digitizer to copyright protection. See,

the MPA *amici*'s acknowledgment of this truism (MPA Br. at 13, note 9). Perhaps, realizing this dangerous admission of fraud on the Copyright Office (17 U.S.C. § 506), the Society then attempts to cover up that dilemma by suggesting that the registration was meant to protect just the Kodak ad and Moving Cover Sequences (Ans. Br. at 17). As the Greenbergs point out, however, the verified, registration application that became the Society's copyright certificate does not claim such added elements of originality in Section 6. By the Society's own admissions, the Society's copyright registration in THE COMPLETE GEOGRAPHIC should be canceled, revoked or otherwise terminated.

B. THE SOCIETY'S ADMISSION IN ITS FAIR-USE ARGUMENT THAT IT TRANSFORMED THE "SCUBA DIVER" PHOTOGRAPH IS AN ADMISSION OF LIABILITY FOR VIOLATING JERRY GREENBERG'S SECTION 106(2) EXCLUSIVE COPYRIGHTS.

Worse, the Society goes to great lengths to claim that creation of the Moving Covers Sequence was "transformation" sufficient to come under the "fair-use" doctrine (Ans. Br. at 33-35). The "transformation" element of the fair-use doctrine may be essential in an analysis of whether a parody meets the requirements of "fair use", because a parody must invoke, but transform, enough of the original copyrighted work to succeed as parody. *See, Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). But, an admission of transformation is also an admission of creating an unauthorized derivative work. By making this "transformation" argument, the Society has admitted that it altered Jerry Greenberg's "scuba diver" photograph, and that is an admission of

its liability for infringing Jerry Greenberg's § 106(2) exclusive copyrights, unless the Society can establish its re-use and alterations of Jerry Greenberg's "scuba diver" photograph as "fair use".

1. The Moving Covers Sequence Is Not Fair Use.³

As detailed by the Greenbergs in their Reply Brief, the fair-use doctrine as codified in Section 107 of the Copyright Act does not apply here. Despite Jerry Greenberg's letter forbidding the Society from re-using his photographs in THE COMPLETE GEOGRAPHIC, the Society went ahead and used all of his photographs that had been previously published by the Society -- even though the Society had re-assigned all rights, including the copyrights, back to Jerry Greenberg. In addition, despite the cease and desist letter, the Society selected one of Jerry Greenberg's photographs to serve as an "iconic" representation of 108 years of the National Geographic Magazine and manipulated and altered it so that one cover would appear to mesh into another in that "iconic" representation. One who acts in bad faith cannot claim fair use. *Harper & Row Publishers, Inc. V. Nation Enterprises*, 471 U.S. 539, 562-63 (1985)

³ Thee Society's CD-ROM set is not "fair use" at all. The Greenbergs have thoroughly debunked the Society's fair-use arguments; and so the ASMP *amicus* will not duplicate efforts in this Reply brief, except to argue the following.

2. The Moving Covers Sequence is Not De Minimis Usage.

Contrary to the Society's arguments (Ans. Br. at 26-31), its manipulation and alteration of Jerry Greenberg's "scuba diver" photograph was not *de minimis*. Any unauthorized change of an original copyrighted work violates the author's Section 106(2) rights. See, 17 U.S.C. § 106(2) and 101 (definition of "derivative" works).

None of the cases cited by the Society concern claims of derivative infringement. They all involve outright copying, for which only some courts have held a *de minimis* use to be a defense. Other courts, however, have found *de minimis* arguments made in defense of copyright infringement claims to be unwieldy, incapable of providing certainty to future copyright owners and, indeed, contrary to the Constitutional purposes of the Patent and Copyright Clause (U.S. Const. Article I, Section 8[8]). See e.g., *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1069-1070 (7th Cir. 1994).

The undisputed facts of this case establish that Jerry Greenberg's copyrighted and re-assigned "scuba diver" photograph was: (1) used by the Society despite his cease and desist letter; (2) selected by the Society to be part of an "iconic" representation of 108 years of its publishing despite his cease and desist letter; (3) altered in such a way that the diver is moved from the horizontal position in which Jerry Greenberg chose to photograph the diver swimming over a coral reef into a vertical position with none of the other elements of Jerry Greenberg's original

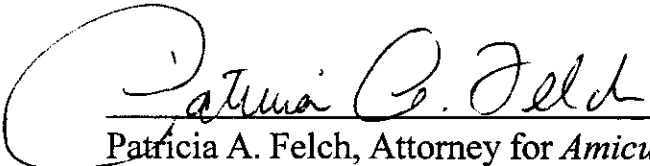
photograph; and (4) appears at the beginning of each and every one of the 30 CDS that make up THE COMPLETE GEOGRAPHIC. Those uses are not *de minimis*. They are infringements of Jerry Greenberg's Section 106(2) exclusive copyrights.

CONCLUSION

The Society and its MPA *amici* have misrepresented a great deal to this Court. This reply sets the record straight. This Court should reverse the District Court's order and remand this case with instructions to enter judgment for the Greenbergs.

Respectfully submitted by:

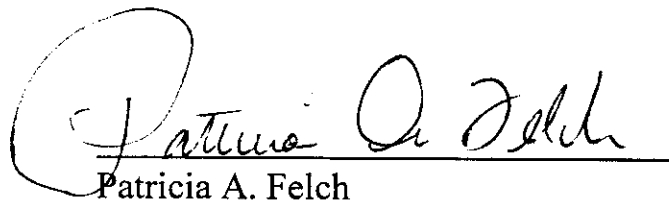
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Certificate of Compliance with Fed. R. Civ. Proc. 32(a)(7)(B)

I, Patricia A. Felch, an attorney, certify that this brief complies with the type-volume limitations provided in the Rules of the United States court of Appeals for the Eleventh Circuit, by containing -- other than such words as appear in brief sections where word counts are not required -- less than 4,000 words, much less than half of the word limit for Plaintiffs/Appellants.


Patricia A. Felch

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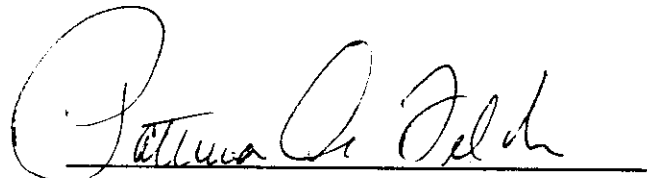
I, Patricia A. Felch, an attorney, certify that I have caused to be served the requisite number of copies of the **REPLY BRIEF OF *AMICUS CURIAE*, THE AMERICAN ASSOCIATION OF MEDIA PHOTOGRAPHERS, INC., IN SUPPORT OF PLAINTIFFS/APPELLANTS AND IN OPPOSITION TO THE BRIEFS OF APPELLEES AND THEIR *AMICI***, by placing them in pre-stamped, pre-addressed envelopes, which were then deposited in the postal box of the United States Postal Service in Ten South Wacker Drive, Chicago, Illinois, to:

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on this 5th day of May, 2000.


Patricia A. Felch