

COPY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 97-3924-CIV-LENARD Magistrate Judge Simonton

JERRY GREENBERG, individually, and IDAZ
GREENBERG, individually,

Plaintiffs,

v.

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

Defendants.

MAY 6,
2002

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS'
CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT
AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR
PARTIAL SUMMARY JUDGMENT AS TO NUMBER OF
WORKS INFRINGED**

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This memorandum of law is submitted on behalf of Defendants National Geographic Society, National Geographic Enterprises, Inc., and Mindscape, Inc. (collectively, "Defendants") in support of their cross-motion for partial summary judgment and in opposition to Plaintiffs' motion for partial summary judgment.

PRELIMINARY STATEMENT

The undisputed material facts demonstrate that all the photographs at issue in this case were published as compilations in four stories that appeared in four issues of *National Geographic Magazine* (the "Magazine"), and that Plaintiffs themselves filed only four applications for renewal or registration of copyright with the Copyright Office for the photographs in each of these four stories. Based on the language of the Copyright Act itself, there are thus four "works" at issue in this case for purposes of calculating statutory damages, if any. If partial summary judgment is to be awarded, therefore, it must be awarded to Defendants on their cross-motion.

Despite the clear language of the statute and their conduct, Plaintiffs seek a determination that there are actually 65 works for purposes of computing statutory damages. Their claim, which is based solely on a self-serving declaration by Plaintiff Jerry Greenberg ("Greenberg"), is based on the assertion that each individual photograph has "independent economic value." Given the undisputed genesis of the photographs, their publication as compilations by National Geographic and the wording of the statute, this argument is insupportable. In any event, if Plaintiffs' inverted presentation of the law were applied to this case, their motion must be denied since Defendants have not had the opportunity to test Greenberg's self-serving declaration through document discovery and depositions.

STATEMENT OF FACTS

On each of four separate occasions, the National Geographic Society (the "Society") commissioned Jerry Greenberg to take photographs to be used in stories about specific subjects. In each instance, Greenberg took numerous photographs and submitted them

to the Society. In each instance, personnel of the Society selected the number of photographs to be published in the story, arranged the selected photographs, along with text, and published the photographs and texts so selected and arranged in a story in the Magazine. See Declaration of Kent Kobersteen dated May 6, 2002 (“Kobersteen Decl.”) at ¶¶ 3-4.

With respect to the first three stories, the Society initially owned the copyrights in Greenberg’s photographs and, at his request, and pursuant to the existing agreement, transferred them to him in December, 1985. See Affidavit of Jerry Greenberg (“Greenberg Aff.”), Ex. A. When it came time to file for the renewal copyright term, Greenberg filed three applications with the Copyright Office – one for all of the photographs which appeared in the story in the January, 1962 issue, one for all of the photographs which appeared in the story in the February, 1968 issue and one for all of the photographs which appeared in the story in the May, 1971 issue. See Greenberg Aff., Ex. E. He did not file separate applications to renew the copyright in each image as a separate work. See id. With respect to the registration of the photographs which appear in the story in the July, 1990 issue, after publication in the Magazine, the photographs and the copyrights were returned to Greenberg, who proceeded to register the photographs with the Copyright Office in the same manner as the renewals – he filed one application for all of the photographs. Greenberg Aff., Ex. C (letter agreement dated June 14, 1989 regarding photographs for July, 1990 issue); Ex. D (excluding the previously renewed 1962 photographs, Greenberg registered the “photographs on pages 114, 115, 118, 119, 120, 121, 122, 123, 126, 127, 130, 132”).

PROCEDURAL HISTORY

Immediately after this suit was commenced, Defendants moved for summary judgment, which was granted by this Court on June 8, 1999. See Greenberg v. National Geographic Soc’y, No. 97-3924-Civ., 1999 WL 737890 (S.D. Fla. June 8, 1999), rev’d, 244 F.3d 1267 (11th Cir. 2001), cert. denied, ___ U.S. ___, 122 S.Ct. 347 (2001). On March 22, 2001, the Court of Appeals for the Eleventh Circuit reversed and remanded for, inter alia, a determination

of the amount of Plaintiffs' damages, if any. See Greenberg v. National Geographic Soc'y, 244 F.3d 1267, 1275-76 (11th Cir. 2001) (“[u]pon remand, the district court should ascertain the amount of damages and attorneys fees that are, if any, due”); see also Memorandum of Law in Support of Plaintiffs' Motion for Partial Summary Judgment as to Number of Works Infringed (“Plaintiffs' Memorandum of Law” or “Plaintiffs' Mem.”) at 2 (electing to claim statutory instead of actual damages).

There has been no discovery by Defendants regarding any issue relating to damages, including the issue currently before the Court -- the number of works for which statutory damages are available. Defendants have just served a request for production of documents and notices to take the depositions of the Plaintiffs. See Affirmation of Naomi Jane Gray sworn to on May 6, 2002 (“Gray Aff.”), Ex. 1. Among the subjects to be covered in Defendants' discovery are issues concerning the compilations, such as the circumstances surrounding the assignments to Greenberg to take the photographs at issue, the selection of the photographs which were published, the transfer of copyright to Greenberg, Greenberg's submission of the applications referred to above, and the extent to which Plaintiffs have exploited any of the images included in the four stories published in the Magazine. See id.

ARGUMENT

I. AN AWARD OF SUMMARY JUDGMENT IS APPROPRIATE ONLY WHERE THERE EXISTS NO GENUINE ISSUE OF MATERIAL FACT.

On a motion for summary judgment, the Court's role is to determine whether an issue of material fact exists for trial, not to weigh and determine the merits and truth of the evidence presented. See Paulucci v. Liberty Mutual Fire Ins. Co., 190 F. Supp.2d 1312, 1316 (M.D. Fla. 2002). Therefore, “[a] district court may grant summary judgment ‘if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as matter of law.’ Fed.R.Civ.P. 56(c) (2001).” National R.R. Passenger Corp. (Amtrak), CSX v. Rountree Transport and Rigging, Inc., Nos. 00-13811, 00-13986, 2002

WL 459731, *21 (11th Cir. March 26, 2002); see also Lombardi v. Lady of America Franchise Corp., No. 00CV7245CIV, 2002 WL 459717, *2 (S.D. Fla. March 4, 2002). A genuine factual dispute exists when, based upon the evidence, a reasonable jury could find in favor of the party opposing summary judgment; a fact is material if “it might affect the outcome of the suit under the governing substantive law.” Lombardi, 2002 WL 459717, *2; see also Anderson v. Liberty Lobby, Inc., 477 U.S. 246, 247-48 (1986); PT Indonesia Epson Indust. v. Orient Overseas Container Line, Inc., No. 99CV3373, 2002 WL 561376, *1 (S.D. Fla. April 11, 2002) (“A material fact is one that might affect the outcome of the case.”).

The party moving for summary judgment bears the initial burden of demonstrating that – viewing the evidence and all factual inferences most favorably to the non-moving party – there is no “genuine issue as to any material fact.” Glaxo Wellcome, Inc. v. Andrx Pharmaceuticals, Inc., 190 F. Supp.2d 1354, 1359 (S.D. Fla. 2002) (summary judgment is inappropriate “[i]f reasonable minds could differ on the inferences arising from the undisputed facts”) (internal citations omitted); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Only if the movant satisfies its initial burden does the burden shift to the party opposing summary judgment to “come forward with specific facts showing that there is a genuine issue for trial that precludes summary judgment.” See Glaxo Wellcome, Inc., 190 F. Supp.2d at 1359. In order for the non-moving party to rebut the movant’s assertions, it must rely upon more than the pleadings to demonstrate that there is a genuine issue of material fact, i.e. depositions, answers to interrogatories, and admissions on file. See McFadden v. Lockheed Martin Information Sys., No. 6:00-CV-894-ORL-3ABC, 2002 WL 596352, *1 (M.D. Fla. Jan. 18, 2002); see also Local Rule 7.5(D) (“All material facts set forth in the statement required to be served by the moving party will be deemed admitted unless controverted by the opposing party’s statement, if and only to the extent supported by specific references to pleadings, depositions, answers to interrogatories, admissions, and affidavits on file with the Court.”).

II. PARTIAL SUMMARY JUDGMENT SHOULD BE GRANTED TO DEFENDANTS THAT THERE ARE ONLY FOUR WORKS FOR PURPOSES OF COMPUTING STATUTORY DAMAGES.

The Copyright Act provides that “statutory damages [may be awarded] for all infringements involved in the action, with respect to any one work” and further provides that “[f]or the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.” 17 U.S.C. § 504(c)(1). A compilation is defined in the Copyright Act as “a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.” 17 U.S.C. § 101; see also UMG Recordings, Inc. v. MP3.Com, Inc., 109 F. Supp.2d 223, 224-25 (S.D.N.Y. 2000).

The four stories published in the Magazine in which Greenberg’s photographs appeared are compilations, each of which, under the plain language of the statute, constitutes one work for purposes of computing statutory damages. The evidence establishes that: (1) pursuant to four separate assignments, for stories to be published in issues of the Magazine in 1962, 1968, 1971, and 1990, Greenberg submitted to the Society many more photographs than could be published; (2) personnel of the Society selected certain of the photographs submitted by Greenberg, arranged the selected images which, along with text, comprised a story which was published in the Magazine; (3) when the copyrights to the photographs for the 1962, 1968, and 1971 stories were transferred to Greenberg in 1985, they were described as all of the photographs from a particular issue of the Magazine, i.e., those selected and arranged by the Society and published as a story; and (4) each group of photographs was renewed or registered for copyright in one application. See Greenberg Aff., Exs. A, D, E.

Plaintiffs claim that the fact that Greenberg did not officially register or renew the copyrights as compilations, i.e., he did not check off the “compilation” box on the application, signifies that the photographs are not compilations as a matter of law. See Plaintiffs’ Mem. at 10-11. The case law, as well as Greenberg himself, expressly contradict this argument.

First, the filing of one registration form may, in fact, be dispositive of the number

of works involved. For example, the Court in Phillips v. Kidsoft L.L.C. awarded statutory damages per registration form for a book of mazes, not for each individual maze. See Phillips v. Kidsoft L.L.C., 52 U.S.P.Q.2d 1102, 1106-07 (D. Md. 1999); see also XOOM, Inc. v. Imageline, Inc., 93 F. Supp.2d 688, 693 (E.D. Va. 1999) (“there should be only one award of statutory damages per registration regardless of the number of infringements or the number of products containing infringing images”). The fact that Greenberg filed four registration forms supports finding that there are four works for purposes of computing statutory damages. See Greenberg Aff., Exs. D, E.

Even if the registration form is not dispositive – as one registration form may be utilized to register separate works for damages purposes (see 37 C.F.R. § 202.3(b)(3)(A)) – works like the stories at issue here each constitute a compilation regardless of the nomenclature utilized on the copyright registration or renewal form. For example, in Stokes Seeds Ltd. v. Geo. W. Park Seed Co., the Court held that the manner in which the work is registered with the Copyright Office is not dispositive of whether the work constitutes a compilation, and found that the plaintiff’s book of 122 photographs constituted one work for purposes of computing statutory damages even though the work was not officially registered as a compilation by the Register of Copyrights. See Stokes Seeds Ltd. v. Geo. W. Park Seed Co., 783 F. Supp. 104, 107-08 (W.D.N.Y. 1991) (“[t]his argument is not entitled to any weight in light of the fact . . . that such classifications have no significance with respect to the subject matter of a copyright or the exclusive rights provided by the Act”); see also UMG Recordings, Inc., 109 F. Supp.2d at 225 (holding an entire compact disk (“CD”) to be one work, as a compilation, for purposes of computing statutory damages despite the fact that the individual songs may be considered “independent works for other purposes.” (quoting H.R. Rep. No. 1476, 94th Cong., 2d Sess. 162, *reprinted in* 1976 U.S.C.C.A.N. 5659, 5778)).

The Court in Itar-Tass Russian News Agency v. Russian Kurier, Inc., relying upon Stokes Seeds Ltd., also refused to be bound by the number of allegedly separate articles involved. Upon reviewing the publications at issue, the Court determined that each publication

was a compilation, and that 28 registered articles appearing in 15 different publications warranted only 15, not 28, separate awards of statutory damages. See Itar-Tass Russian News Agency v. Russian Kurier, Inc. No. 95 Civ. 2144(JGK), 1997 WL 109481, *16 (S.D.N.Y. 1997), rev'd in part on other grounds, 153 F.3d 82 (2d Cir. 1998) (“While there are 28 eligible articles, each article is not separately compensable. ‘[a]ll parts of a compilation or derivative work constitute one work.’ 17 U.S.C. § 504(c)(1) [other citations omitted]. Therefore, the relevant issue is how many ‘works’ were infringed upon, not how many copyrights were violated. [citations omitted]. Copying a series of photographs that were originally published in one book is considered one infringement. [citation to Stokes Seeds Ltd. omitted].”). Here, the Society did not publish or re-publish the individual photographs as individual photographs, nor did the Society, like for example the defendants in Playboy Enterprises, “market[]each of the images separately.” See Playboy Enterprises v. Sanfilippo, 46 U.S.P.Q.2d 1350, 1356 (S.D. Cal. 1998). The Society published, and then republished, compilations of those selected photographs with text in the Magazine.

Moreover, Plaintiffs cannot credibly contend that Greenberg’s failure to register or renew the copyrights specifically as a compilation is dispositive, when they explicitly assert that Greenberg allegedly mistakenly classified the 1962 photographs included in the July, 1990 issue as a derivative work. See Plaintiffs’ Mem. at 4; Greenberg Aff. ¶ 6. Although Greenberg was not mistaken, as the compilation in the July, 1990 issue constitutes a derivative work of the 1962 compilation,¹ Greenberg has demonstrated that he was uncertain as to how to register his photographs and that registration forms, in particular his own, are not facially dispositive of the classification of a work.

Greenberg cannot have it both ways. He cannot allege that he “misunderstood”

¹ See 17 U.S.C. § 101 (“A ‘derivative work’ is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a ‘derivative work’”).

the registration form when he purportedly improperly described part of the 1990 submission as a derivative work, while asserting that his failure to register the photographs as a compilation prevents the Court from defining them as such for purposes of computing statutory damages. As Courts have done in other circumstances, see supra, this Court must determine whether the works in fact constitute compilations. If the Court concludes that the photographs constitute four compilations, it must award statutory damages as to each compilation, not as to each photograph comprising the compilation.

All of the uncontroverted, and incontrovertible, evidence clearly demonstrates that the works involved were compilations: (1) Greenberg was given four assignments; (2) Greenberg took and submitted many photographs; (3) personnel of the Society selected certain of the photographs and arranged them, together with text, into four stories, each on a particular subject and each was published in an issue of the Magazine; (4) copyrights to each of the sets of photographs in the first three stories were transferred to Greenberg as a group, and the copyrights to the photographs published in the July, 1990 issue of the Magazine were returned as a group to Greenberg after publication in the Magazine; and (5) Greenberg registered or renewed the copyright in the photographs by filing one registration form which included all of the photographs published in each story. See Greenberg Aff., Exs. A, C, D, E; Kobersteen Decl. ¶¶ 3-4.

Thus, there is no genuine issue of material fact as to the number of works available for statutory damages – it should be declared to be four as a matter of law. MCA Television Ltd. v. Feltner, 89 F.3d 766 (11th Cir. 1996), the case on which Plaintiffs principally rely is not applicable.² In that case, the court held that an episode of a television series, as

² Similar to MCA Television Ltd., other cases involving registration of multiple works on a single registration form are distinguishable on their facts. See, e.g., Playboy Enterprises, 46 U.S.P.Q.2d at 1355-56 (finding each photograph a separate violation where “defendant marketed each one of thee [sic] images separately”) (emphasis supplied); Costar Group, Inc. v. Loopnet, Inc. 164 F. Supp.2d 688, 711 (D. Md. 2001) (although recognizing that multiple works for statutory damages purposes may be registered on a single registration form, held that plaintiff’s evidence supporting its claim of multiple works “strains credulity”).

opposed to the entire series, constituted a “work.” Here, the text and photographs were published as parts of compilations. The episodes in MCA Television Ltd. were not a part of a compilation. Indeed, in interpreting the relevance of “independent economic value” in analyzing whether an entire episode constituted a “work” for purposes of calculating damages, the Eleventh Circuit emphasized the independent production and airing of each episode:

Each episode was produced independently from the other episodes and each was aired independently from preceding and subsequent episodes. Moreover, each episode, and not each series, was individually copyrighted by [plaintiff].

MCA Television Ltd., 89 F.3d at 769 (emphasis supplied). Moreover, unlike the four groups of photographs at issue here, which were each published as one story on one topic, the television episodes in the aforementioned cases aired on different dates and did not necessarily involve the same topic even if the plot line was woven throughout more than one episode. See, e.g., Twin Peaks Prods. Inc. v. Publications Int’l. Ltd., 996 F.2d 1366, 1381 (2d Cir. 1993) (noting that its conclusion might differ, based upon the circumstances of the individual case, if the television series was adapted from a single work, i.e., a mini-series based upon one book). Applied here, each of the four stories at issue here is the analog of the episodes at issue in MCA Television Ltd. Each of the four stories was independently produced and published as a compilation, and Plaintiffs filed one application for renewal or registration for each of the four stories.

Plaintiffs’ suggestion that each of the 64 photographs should be viewed like an entire episode of a television program would be a complete inversion of the holding and rationale of the Eleventh Circuit in MCA Television Ltd. The 64 photographs were not produced “independently” from each other in 64 separate assignments; nor were they “independently” published from each other in 64 separate articles or issues of the Magazine.

MCA Television Ltd. is also inapposite to this case because the number of works was conclusively established by the parties’ joint pre-trial stipulation and not by a judicial determination as to whether each television episode actually had independent economic value as a factual matter. See MCA Television Ltd., 89 F.3d at 769-71.

Accordingly, the Court should grant Defendants' cross-motion for partial summary judgment that the number of works for purposes of computing statutory damages is four.

III. IF THIS COURT DENIES DEFENDANTS' CROSS-MOTION, IT IS IMPROPER TO GRANT PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT.

A. Plaintiffs Have Not Shown That There Is No Disputed Issue Of Material Fact.

Plaintiffs ask this Court to declare as a matter of law that the number of works at issue, and for which statutory damages are available, is sixty-five because each of the photographs has "independent economic value." See MCA Television Ltd., 89 F.3d at 769; see also Gamma Audio & Video, Inc. v. Ean-Chea, 11 F.3d 1106, 1116-17 (1st Cir. 1993); Walt Disney Co. v. Powell, 897 F.2d 565, 569-70 (D.C. Cir. 1990). Plaintiffs admit that there were only four separate contributions to the Magazine. See Plaintiffs' Mem. at II.A, B; Greenberg Aff. ¶¶ 2, 8-11; Exs. D, E. They also acknowledge that the photographs included in each contribution were renewed or registered on a single form with the Copyright Office. See Plaintiffs' Mem. at II.A, B; Greenberg Aff. ¶¶ 3, 5; Exs. D, E.

The only support for Plaintiffs' argument is the few sentences in Greenberg's affidavit in which he claims that he had "various opportunities to make other commercial use of the photographs," including licensing them to advertising agencies and publishers, reprinting the photographs in books marketed by his own company, as well as other commercial overtures. Greenberg Aff. ¶ 12. Such paltry evidence is insufficient, on its own, to conclude that each photograph has independent economic value or its own copyright life.

Nor have the courts established – as a matter of law – that individual photographs, or for that matter, any individual item contained within a group of items, automatically possesses independent economic value. As pointed out above, in MCA Television Ltd., the case on which Plaintiffs most heavily rely, the number of works at issue was never in dispute; it was established by the parties' voluntary joint stipulation, and the Court of Appeals simply refused to override the trial judge's interpretation of that stipulation. See MCA Television Ltd., 89 F.3d at 770-71.

Although Greenberg alleges that each of the photographs at issue is commercially viable independently, he registered or renewed them with the Copyright Office not as sixty-five independent items, but as four groups each of which was published as one story. See Greenberg Aff. ¶¶ 3, 5, Exs. D, E. Furthermore, he annexes no proof that any of the individual images have independent economic value despite annexing purported proof of other aspects of his claim, and despite the fact that such proof would be readily accessible if it were to exist. See Greenberg Aff. ¶ 12 (alleges that he marketed the images via his own publishing company).

Accordingly, there has been no showing that each of the photographs at issue is in fact independently viable. No court has declared such a proposition as a matter of law (in fact, several have declared the opposite), and Plaintiffs have submitted nothing to substantiate Greenberg's bald assertion of independent economic value. As described in Point II, supra, the only factual allegations beyond dispute lead to the conclusion that if summary judgment is appropriate it should be granted as to Defendants' cross-motion.

B. Plaintiffs' Motion Is Premature.

As demonstrated above, Plaintiffs have not presented any evidence as to the independent commercial viability of each individual photograph, including the evidence referenced in paragraph 12 of the Greenberg affidavit. They have not, therefore, met their initial burden – to demonstrate that each photograph has independent economic value. Should the Court find that Plaintiffs have met their initial burden, their motion still should be denied since Defendants have had no discovery regarding this issue, and cannot, therefore, counter Plaintiffs' assertions. See McFadden, 2002 WL 596352, *1; Local Rule 7.5(D) (both requiring depositions, answers to interrogatories, etc., to sustain the non-movant's burden). Thus, for example, Defendants have not had the opportunity to question Mr. Greenberg about the conclusory assertions of "independent economic value" contained in his self-serving declaration. See Gray Aff. ¶ 2. It would be manifestly unfair for Plaintiffs' motion to be granted before Defendants have an opportunity to conduct discovery – which will certainly demonstrate that there are genuine issues of material fact.

Nor is there any purpose to ruling on this issue at this time or prejudice to Plaintiffs if such a ruling is not made. As indicated above, discovery has just commenced and will continue for some time. No trial date has been set. Thus, it makes much more sense to make the decision on this issue after discovery is completed and in the context of a pre-trial motion in limine or jury instructions.

IV. IF PLAINTIFFS ARE GRANTED PARTIAL SUMMARY JUDGMENT, THE NUMBER OF WORKS SHOULD BE DECLARED TO BE 64, NOT 65, AS THE MOVING COVER SEQUENCE IS AN ADDITIONAL USE OF THE SAME WORK.

Should the Court grant Plaintiffs' partial motion for summary judgment, it cannot as a matter of law, permit Plaintiffs to recover twice for the same image as requested in Point III.D of Plaintiff's Memorandum of Law. In direct contravention of a case upon which they rely (Powell cited in Plaintiffs' Mem. at 7), Plaintiffs attempt an end-run around 17 U.S.C. § 504(c)(1)'s mandate of statutory damages per work infringed regardless of the number of infringements. To that effect, Plaintiffs assert that they are entitled to double recovery for the same photograph on the grounds that including the photograph within the issue of the Magazine infringed and in the separate Moving Cover Sequence give rise to separate causes of action. See Plaintiffs' Mem. at III.D.

In Powell, the Court of Appeals reversed that part of the District Court's award of statutory damages for six infringements by a T-shirt vendor's unauthorized use of the images of Mickey and Minnie Mouse in various poses. See Powell, 897 F.2d at 569-70. According to the District Court, "Mickey is still Mickey whether he is smiling or frowning, running or walking, waving his left hand or his right." Id. at 570 (finding two, not six, works infringed); see also Stokes Seeds Ltd. 783 F. Supp. at 108 (reiterating that an award of statutory damages is based upon the number of works infringed, not upon the number of times the work was infringed and awarding statutory damages for one work for a compilation of 122 photographs even where there was evidence that some of the photographs were utilized more than once).

CONCLUSION

For all of the reasons stated above, Defendants' cross-motion should be granted and Plaintiffs' motion should be denied.

Dated: May 6, 2002

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that the foregoing has been sent by Federal Express this 6th day of May, 2002 to Norman Davis and David A. Aronberg, Steel Hector & Davis LLP, 200 South Biscayne Boulevard, 40th Floor, Miami, Florida 33131-2398, attorneys for Plaintiffs.

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