

IN THE  
**United States Court of Appeals**  
FOR THE ELEVENTH CIRCUIT

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JERRY GREENBERG, Individually, *Plaintiff-Appellee,*  
IDAZ GREENBERG, Individually, *Plaintiff,*

—v.—

NATIONAL GEOGRAPHIC SOCIETY, a District of Columbia Corporation,  
NATIONAL GEOGRAPHIC ENTERPRISES, INC., a Corporation,  
MINDSCAPE, INC., a California Corporation,  
*Defendants-Appellants.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF FLORIDA

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**BRIEF OF AMICUS CURIAE MAGAZINE PUBLISHERS OF  
AMERICA, INC. SUPPORTING DEFENDANTS-APPELLANTS**

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June 7, 2006

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**CERTIFICATE OF INTERESTED PERSONS  
AND CORPORATE DISCLOSURE STATEMENT**

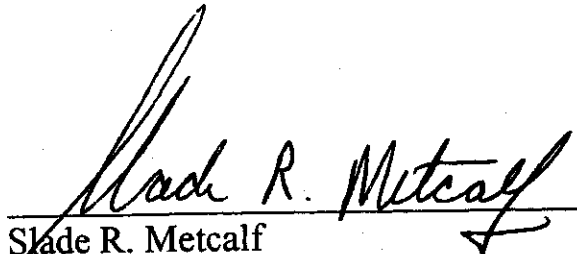
In accordance with Federal Rule of Appellate Procedure 26.1 and 11th Cir. Rules 26.1-1 to 3, 28-1(b) and 29-2, *amicus curiae* the Magazine Publishers of America, Inc. states that it has no parent companies and no publicly held company owns 10 percent or more of its stock.<sup>1</sup>

*Amicus curiae* the Magazine Publishers of America, Inc. further certifies that it believes the certificate of interested persons contained in the Brief of Appellants is complete except for the addition of the following individuals:

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Dated: New York, New York  
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<sup>1</sup> In an effort to fully inform this Court of all interests, the National Geographic Magazine Group, a subsidiary of appellant the National Geographic Society, is a member of *amicus curiae*, Magazine Publishers of America, Inc.

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**IDENTIFICATION OF *AMICUS CURIAE* AND  
STATEMENT OF INTEREST AND AUTHORITY TO FILE**

*Amicus curiae* the Magazine Publishers of America, Inc. (“MPA”) is the largest industry association for magazine publishers. The MPA, established in 1919, represents over 240 domestic publishing companies that produce more than 1,400 magazine titles. The MPA represents the interests of weekly, monthly and quarterly publications that produce titles on topics that cover politics, religion, sports, industry, and virtually every other interest, avocation or pastime enjoyed by Americans. The MPA has a long history of advocating on copyright issues.

The MPA supports the principal arguments advanced by the appellants National Geographic Society, National Geographic Enterprises, Inc., and Mindscape, Inc. (collectively “National Geographic”) related to the interpretation of 17 U.S.C. § 201(c). The MPA is submitting this *amicus* brief to support National Geographic’s request that this Court reconsider its decision in Greenberg v. National Geographic Society, 244 F.3d 1267 (11th Cir.), cert. denied, 534 U.S. 951, 122 S.Ct. 347 (2001) (“Greenberg I”) in light of the Supreme Court’s decision in New York Times Co., Inc. v. Tasini, 533 U.S. 483, 121 S.Ct. 2381 (2001).<sup>2</sup>

The periodical publishing industry as a whole would benefit from a unified analysis of section 201(c) of the Copyright Act. Magazines and newspapers would

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<sup>2</sup> On May 24, 2006, counsel for appellee Jerry Greenberg and counsel for appellants National Geographic consented to the filing of this brief.

then be able to continue to revise their collective works in new media without any concern that the road map provided by the Tasini court of what constitutes a privileged revision under the Act is in fact the law of the land. The MPA respectfully requests that this Court follow Tasini and remove once and for all any remaining uncertainty that may exist in this area.

## STATEMENT OF THE ISSUES

Whether this Court should reconsider its previous decision in this matter in light of the Supreme Court's decision in New York Times Co., Inc. v. Tasini, 533 U.S. 483, 121 S.Ct. 2381 (2001), and find that the electronic reproduction of past magazine issues containing freelance contributions in their original context is privileged pursuant to 17 U.S.C. § 201(c)?<sup>3</sup>

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<sup>3</sup> *Amicus curiae* Magazine Publishers of America, Inc. does not take a position as to the other issues identified by National Geographic in the Brief of Appellants.

## SUMMARY OF THE ARGUMENT

The MPA submits this *amicus* brief to respectfully urge this Court to reconsider Greenberg I and find that the electronic publication at issue here is a privileged revision under 17 U.S.C. § 201(c).

The Supreme Court established a standard in Tasini that materially shifts the focus in analyzing a proper revision under § 201(c). See Tasini, 533 U.S. 483. Once that new standard is applied to this action, as was done in Faulkner v. National Geographic Enterprises, Inc., 409 F.3d 26 (2d Cir.), cert. denied, 126 S.Ct. 833 (Dec. 12, 2005), it becomes clear that a finding of infringement in this matter is no longer viable.



## ARGUMENT

### **I. In Light Of Recent Decisions, This Court Should Reconsider *Greenberg I* And Find That The Product At Issue Here Is A Privileged Revision Under 17 U.S.C. § 201(c)**

With the benefit of the analysis employed in New York Times Co., Inc. v. Tasini, 533 U.S. 483, 121 S.Ct. 2381 (2001) this Court should find that the product at issue here is a proper and privileged electronic revision pursuant to 17 U.S.C. § 201(c).

#### **A. Background**

This case was brought by freelance photographer Jerry Greenberg (“Greenberg”), who sued for copyright infringement stemming from the republication of several of his photographs on a product developed and produced by National Geographic, “The Complete National Geographic” (“CNG”). See generally, Greenberg v. National Geographic Society, 244 F.3d 1267 (11th Cir.), cert. denied, 534 U.S. 951, 122 S.Ct. 347 (2001) (“Greenberg I”). The CNG is composed of 30 CD-ROMs that include every issue of National Geographic Magazine (the “Magazine”) from 1888 through 1996 in their original context and appearance. Id. at 1269. In Greenberg I, this Court focused on what it labeled the three distinct components comprising the CNG: (1) the moving covers sequence (the “Sequence”); (2) the digitally reproduced issues of the Magazine (the “Replica”); and (3) the computer program that is comprised of a storage repository

and a retrieval system (the "Program"). Id.

As described by this Court, the Sequence, which starts when a CD-ROM is loaded, lasts approximately 25 seconds and includes a series of ten past covers of issues of the Magazine that morph from one to the next. Id. The Magazines themselves contained in the CNG—the Replica—are faithful reproductions of the original magazines as they were published on paper. Id. Indeed, everything from the paper version of the magazine is visible on the CD-ROM—down to the fold in the middle of the pages. See *Faulkner v. National Geographic Enterprises, Inc.*, 409 F.3d 26, 30 (2d Cir.), cert. denied, 126 S.Ct. 833 (Dec. 12, 2005). Finally, the Program is a necessary technical component in order to access the Replica; the Replica would not be viewable without the Program. See *Greenberg I*, 244 F.3d at 1270.

**B. The Impact of *Tasini***

The provision of the Copyright Act at issue in this case, 17 U.S.C. § 201(c), states as follows:

Contributions to Collective Works—Copyrights in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.

17 U.S.C. § 201(c) (emphasis added).

After Greenberg I was decided in 2001, the Supreme Court set forth a road map in New York Times Co., Inc. v. Tasini, 533 U.S. 483, 121 S.Ct. 2381 (2001) for periodical publishers to follow if they want to revise their copyrighted collective works in a new medium. The Supreme Court road map follows a different course than in Greenberg I. Tasini involved the rights of freelance authors who had their articles republished in electronic databases. Tasini, 533 U.S. at 487, 121 S.Ct. at 2384. At issue was whether the original publishers of these articles were privileged under § 201(c) to reproduce and distribute the collective works through these electronic databases. Id. 533 U.S. at 488, 121 S.Ct. at 2384.

Tasini focused on three different databases. The LEXIS/NEXIS database is a text-based archive of news articles, in which “each article appears as a separate, isolated ‘story’—without any visible link to the other stories originally published in the same newspaper or magazine edition.” Id. 533 U.S. at 490, 121 S.Ct. at 2385. That database does not publish any accompanying photographs or advertisements, and does not include any of the original formatting, such as headline size or page placement. Id. The other two databases are CD-ROM products, the New York Times OnDisc (“NYTO”) and the General Periodicals OnDisc (“GPO”). Id. 533 U.S. at 490, 121 S.Ct. at 2385-86. NYTO is a text-only system that contains only the New York Times in a format similar to

LEXIS/NEXIS, whereas the GPO is an image-based system that displays articles from approximately 200 publications or sections of publications as they appeared in the printed pages, including the original photographs, advertisements and formatting. Tasini, 533 U.S. at 490-91, 121 S.Ct. at 2386. However, a user cannot thumb through the electronic pages of the GPO or otherwise view an article in the context of its original publication in print, but rather can only view the as-published pages of the specific article he or she accesses from an index. Id. 533 U.S. at 491, 121 S.Ct. at 2386.

It is clear from the beginning of Justice Ginsberg's majority opinion—from the very first paragraph in fact—that the Court's § 201(c) analysis focuses entirely on context. See id. 533 U.S. at 487, 121 S.Ct. at 2384 (“[E]ach article is presented to, and retrievable by, the user in isolation, clear of the context the original print publication presented.”). In assessing whether use of the articles in the three databases was proper, the Tasini decision repeatedly points out that each article was presented to the user “clear of the context provided either by the original periodical editions or by any revision of those editions.” Id. 533 U.S. at 499, 121 S.Ct. at 2390-91. The Court ultimately held that all of the re-publications at issue in Tasini were not revisions because of the context: in two of the databases, the articles appeared without graphics, formatting or other articles, and in the GPO, the articles appeared individually divorced from the context in which they appeared in

print. Id. 533 U.S. at 500, 121 S.Ct. at 2391.

To emphasize its focus on context, the Supreme Court approved the use of microfilm and microfiche as a proper revision under § 201(c) and distinguished it from the databases at issue in Tasini. The Court noted that "Microforms typically contain continuous photographic reproductions of a periodical in the medium of miniaturized film. Accordingly, articles appear on the microforms, writ small, in precisely the position in which the articles appeared in the newspaper." Tasini, 533 U.S. at 501, 121 S.Ct. at 2391.

In making the distinction between the microform version of a representative article and the database versions at issue in the case, the Court noted that the article in microform was reproduced "on the film in the very same position, within a film reproduction of the entire Magazine, in turn within a reproduction of the entire ... edition." Id. Although microform includes multiple editions, and indeed allows a user to focus in only on a particular article, the Court noted, "Nonetheless, the user first encounters the Article in context. In the Databases, by contrast, the Articles appear disconnected from their original context." Id. This is the key to the Court's ultimate conclusion: "In short, unlike microforms, the Databases do not perceptibly reproduce articles as part of the collective work to which the author contributed or as part of any 'revision' thereof." Id. 533 U.S. at 502, 121 S.Ct. at 2392. The Court described microform as "a mere conversion of intact periodicals (or

revisions of periodicals) from one medium to another.” Id. The Court’s discussion regarding microform suggests that a faithful reproduction including the proper context—no matter the medium, electronic or otherwise—should be considered a proper and privileged revision under § 201(c).

**C. Under The *Tasini* Analysis, The CNG Is A Privileged Revision**

When reviewing the three components of the CNG under the Tasini rubric, it becomes clear that it is a proper revision pursuant to § 201(c). Here, the CNG does perceptively reproduce articles and photographs as part of a collective work that is presented in its full context—indeed the ultimate context—every complete issue for over 100 years.

First, the Replica—the reproduction of issues of the Magazine on the CNG—is precisely what the Supreme Court was describing in Tasini as a proper revision. This Court has noted that the Replica is a faithful reproduction of the issues of the Magazine: “What the user of the CNG sees on his computer screen, therefore, is a reproduction of each page of the Magazine that differs from the original only in the size and resolution of the photographs and text. Every cover, article, advertisement, and photograph appears as it did in the original paper copy of the Magazine.” Greenberg I, 244 F.3d at 1269. The user cannot even “separate the photographs from the text or otherwise ... edit the pages in any way.” Id.

One court has had the benefit to analyze the present issue after the Supreme

Court's Tasini decision. In Faulkner v. National Geographic Enterprises, Inc., 409 F.3d 26 (2d Cir. 2005), several freelance photographers and writers challenged the same CNG product at issue here. With the ability to use the rubric established in Tasini as a guide, the Second Circuit noted that "The individual images and texts are therefore viewed in a context almost identical—but for the use of a computer screen and the power to move from one issue to another and find various items quickly—to that in which they were originally published." Id. at 31. The court concluded that "because the original context of the Magazines is omnipresent in the CNG and because it is a new version of the Magazine, the CNG is a privileged revision." Id. at 38. Focusing on the context, the court noted that issues of the Magazine on the CNG were presented to the user in the same format as printed issues, and that although a user could focus on a particular page, so too could a microfilm user or a reader of the original copy of the magazine. Id. As such, when focusing on the Replica using the guidelines in Tasini, it is clear that the presentation in the CNG is the kind of revision the Supreme Court would approve.

Additionally, in light of the analysis in Tasini, it seems clear that the presence of the computer Program in the CNG does not remove the product from protection under § 201(c). Computer programs were clearly central to the republication of articles in Tasini. 533 U.S. at 489, 491, 121 S.Ct. at 2385, 2386 ("The Print Publisher codes each article to facilitate computerized retrieval, then

transmits it in a separate file”; the company producing the GPO “‘burns’ images of each page of these sections onto CD-ROMs”; “The computer program searches available indexes and abstracts, and retrieves a list of results matching the query”). Yet despite the digital complexities, the Tasini Court focused not on the conversion of the articles from a print format to an electronic format, or on the database or program necessary to power the ability to access the articles, but rather entirely on context, holding that the republication of the articles was not privileged under § 201(c) “because the databases reproduce and distribute articles standing alone and not in context ... .” Id. 533 U.S. at 488, 121 S.Ct. at 2384.

While focusing on context, as the Tasini decision instructs, the Second Circuit in Faulkner acknowledged that although the CNG includes the Program, “It does not add any creative elements to the Magazines” or remove copyright protection from the CNG. See Faulkner, 409 F.3d at 31, 38. The court noted that the “transfer of a work from one medium to another generally does not alter its character for copyright purposes.” Id. at 40. Indeed, the inclusion of the computer Program is essential for any electronic compilation. As acknowledged by this Court, without the Program, issues of the Magazine could be stored on a CD-ROM, “but the individual ‘pages’ of the Magazine would not be efficiently accessible to the user of the CNG”, thus effectively negating any usefulness of the compilation. Greenberg I, 244 F.3d at 1270. The inclusion of the Program does not upset the



balance established by the Supreme Court in Tasini.

Finally, the presence of the Sequence also does not remove the CNG from the privilege afforded by § 201(c). The Tasini Court made reference to the House Report on the 1976 Copyright Act, which suggests that additions like the Sequence do not automatically remove a product from § 201(c) protection. See Tasini, 533 U.S. at 496-97, 121 S.Ct. at 2389. When discussing § 201(c), the House Report states, “[U]nder the language of this clause a publishing company could reprint a contribution from one issue in a later issue of its magazine, and could reprint an article from a 1980 edition of an encyclopedia in a 1990 revision of it; the publisher could not revise the contribution itself or include it in a new anthology or an entirely different magazine or other collective work.” H.R. Rep. No. 94-1476, at 122-23 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5738 (emphasis added).

In the context of this action, the House Report’s encyclopedia example is instructive as to why the Tasini Court focused on context in analyzing a revision under § 201(c). The House Report establishes that it is proper for a publisher to reprint an article from a 1980 encyclopedia series in the 1990 version. As such, Congress would have agreed that the entry on George Washington serving as the nation’s first president from the 1980 edition of the Encyclopedia Britannica could be republished unchanged in the 1990 version without copyright infringement. However, given that the purpose of an encyclopedia is to stay current and up to

date, Congress must also have anticipated that the unchanged article on George Washington in the 1990 version would necessarily have to appear alongside numerous new entries on topics that took place in the intervening decade. So, for example, alongside the unchanged George Washington article, would be a new entry on the 1988 presidential election that chose George H.W. Bush as the nation's 41st president. Indeed, it would be easy to anticipate, even in 1976, that the differences between the 1980 edition and the 1990 edition of the encyclopedia would be quite significant. As a result, this example clearly illustrates that the addition of the Sequence should not remove the CNG from the protection of § 201(c), as Congress contemplated and approved extending the § 201(c) privilege to republications of unchanged materials that are accompanied by new elements.

Once again, following the direction provided by Tasini, the Second Circuit assessed whether the addition of the Sequence impacted the applicability of § 201(c). The court noted that “a permissible revision may contain elements not found in the original”, and thus concluding that such additions do not “substantially alter the original context which, unlike that of the works at issue in Tasini, is immediately recognizable.” Faulkner, 409 F.3d at 40. As the House Report indicates, and Faulkner follows, additions like the Sequence are permissible and do not strip a product from § 201(c) protection.

Using Tasini as a guide, this Court should reassess its analysis in Greenberg

I and focus on the context of the CNG. Such a reassessment will achieve very important jurisprudential goals. Greenberg I stands in contrast to Tasini and Faulkner. That contrast has led to uncertainties under the Copyright Act. By following the Tasini road map, this court will, after years of uncertainty, finally provide the 1400 magazines represented by the MPA and other periodical publishers a clear, unified standard to follow when they seek to offer the public their archives. The MPA urges the Court to reconsider its earlier decision and deem the CNG a proper, privileged revision under § 201(c).

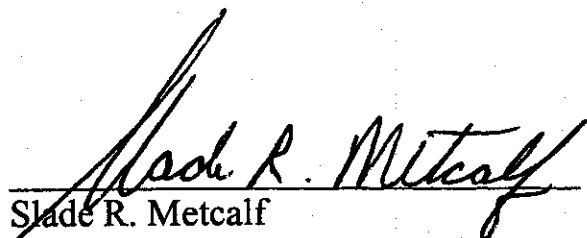
### CONCLUSION

For the reasons stated, this Court should reconsider its previous determination and find that the product at issue here is a privileged revision pursuant to 17 U.S.C. § 201(c).

Dated: New York, New York  
June 7, 2006

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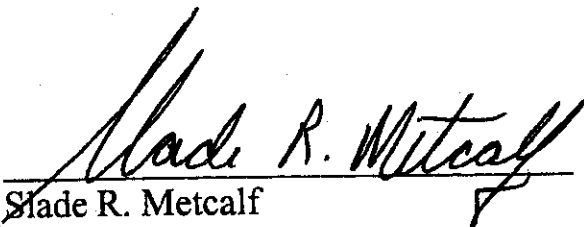
  
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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,175 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii)

2. This brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

Dated: New York, New York  
June 7, 2006

  
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**CERTIFICATE OF FILING AND SERVICE**

This is to certify that I have this day filed one (1) original and six (6) true and correct copies of the foregoing Brief of *Amicus Curiae* Magazine Publishers of America, Inc. Supporting Defendants-Appellants by sending the same via Federal Express overnight delivery to the Clerk of the Court, United States Court of Appeals for the Eleventh Circuit, 56 Forsyth Street, N.W., Atlanta, Georgia 30303.

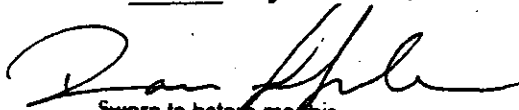
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