UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division

CASE NO. 97-3924-CIV-SIMONTON

JERRY GREENBERG, individually,

Plaintiff,

vs.

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

Defendants.
_____/

PLAINTIFF'S MEMORANDUM OF LAW
ON THE LIABILITY OF DEFENDANT MINDSCAPE, INC.

Plaintiff JERRY GREENBERG ("Greenberg"), submits this memorandum in response to the Court's inquiry regarding the liability of Defendant Mindscape, Inc., and specifically in response to arguments made by this Defendant that there is no evidence of willfulness on its part to sustain the jury's verdict.

I. Mindscape is Jointly and Severally Liable for Willful Copyright Infringement

The Defendants have collectively moved for judgment as a matter of law under Rule 50 for various meritless grounds that have previously been addressed by Greenberg. One ground not previously addressed was the argument by Defendant Mindscape, Inc. that it was entitled to judgment as a matter of law, at least with respect to willful copyright infringement, based upon

the fact there is no evidence in the record that proves that it had actual knowledge that its conduct was infringing on Greenberg's copyrights.

Mindscape's liability in this case, however, is co-existent with the liability of the National Geographic Society and National Geographic Enterprises, Inc. (collectively "the Society"). There is no dispute that Mindscape was the entity that entered into a distribution agreement with the Society for the marketing and sale of the CD-108 product that infringes upon Greenberg's copyrights. Mindscape paid the Society royalties for the use of the original magazines so that it could scan, copy, manufacture, and sell CD-ROM versions of those magazines that contained 64 copyrighted works belonging to Greenberg. Thus, Mindscape has not disputed that it is an "infringer" under the Copyright Act, and as decreed by the Eleventh Circuit's and this Court's earlier orders.

Mindscape is, however, taking the position that it cannot be found to be a willful copyright infringer because there is no evidence in the record of any conduct on its part that demonstrated prior actual knowledge or reckless disregard of the existence of Greenberg's copyrights prior to the marketing of the CD-108 product. Factually, that is correct, at least to the point that the Eleventh Circuit's decision placed the Society *and* Mindscape on actual notice that their copying, marketing, and sale of the CD-108 product infringed Greenberg's copyrights. At that point, all the defendants including Mindscape were on notice that any future violations of Greenberg's copyrights could be deemed to be willful copyright infringement.

But even were that not so, Mindscape's liability is co-existent with that of the Society because Mindscape is jointly and severally liable for the Society's willful infringements. It is a well established principle for statutory damage purposes multiple infringers are jointly and severally liable, pursuant to the Copyright Act itself:

> "[T]he copyright owner may elect . . . to recover . . . an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, *or for which any two or more infringers are liable jointly and severally. . . .*"

17 U.S.C. § 504(c)(1). Thus, it is settled law that copyright infringement actions are treated like other tort cases and liability for damages is determined on a joint and several basis. *E.g., MCA, Inc. v. Wilson,* 677 F.2d 180, 186 (2d Cir. 1981); *Abeshouse v. Ultragraphics, Inc.,* 754 F.2d 467 (2d Cir. 1985); *Fitzgerald Publishing Inc. v. Baylor Publishing Inc.,* 807 F.2d 1110 (2d Cir. 1987); *Warner Bros., Inc. v. Dae Rim Trading, Inc.,* 677 F. Supp. 740, 769 (S.D.N.Y. 1988).

Accordingly, the three defendants here are jointly and severally liable for the damages awarded by the jury. Any differences in culpability between the various defendants can be addressed between them, such as through indemnification proceedings. In this case, that is already a moot point because the record is clear that Mindscape is indemnified by the Society for any damages flowing from this case.[1]

If these defendants had not been treated as joint and several defendants, then the jury would have been asked to reach individual damage awards against the three entities. That would have resulted in a possible award of $880,000 ($100,000 per work infringed for each of the Society defendants and $20,000 per work infringed for Mindscape). That, however, was appropriately not what the jury was requested to award; it was requested to award only one damage award that would apply to the three defendants together, which is entirely consistent with the settled law in this area. *See also RSO Records, Inc. v. Peri,* 596 F. Supp. 849 (S.D.N.Y. 1984) (awarding willfulness damages to all defendants on a joint and several basis).

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[1] The issue is also moot as a practical matter because, as represented by the Society and its counsel, Mindscape ceased operations by October 2000 and is no longer an existing entity.

II. Mindscape Waived Any Right to Argue to the Contrary

When this issue was raised during the arguments regarding the defendants' Rule 50(a) motions, counsel for Greenberg made this very same argument and proposed to the Society the option of ignoring the joint and several liability principle in favor of separate awards as to each defendant. (Tr.6.120-21). Understandably, the defendants never pursued this option, choosing instead to agree to the form of the jury instructions *and* verdict form that requested the jury to award only one damage award for all the defendants combined. This resulted in the maximum exposure to the defendants being reduced to where it is now – $400,000.

The defendants' acceptance of the form of the verdict form, that grouped all the joint defendants together and asked for a single damage award per work infringed, now constitutes an irreversible waiver of the issue. Though they filed a Rule 50(a) motion prior to that point, the defendants' acceptance of the Court's verdict form mooted their argument. The defendants could have urged that the jury make separate awards for each defendant but they, quite logically, opted for a single award that reduced their overall exposure. Under Rule 51, Fed. R. Civ. P., "[n]o party may assign as error the giving or the failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." This rule exists to "prevent unnecessary new trials because of errors the judge might have corrected if they had been brought to [her] attention at the proper time." *Pate v. Seaboard R.R.*, 819 F.2d 1074, 1082 (11th Cir. 1987).

Thus, even if the defendants' original Rule 50(a) argument was correct, they in effect abandoned their position by accepting the form of the jury's instructions and verdict as to the method by which the jury would calculate the awards. The defendants now cannot undo that waiver by re-arguing the point after the jury rendered its combined verdict.

III. Conclusion

For foregoing reasons, to the extent any remains as to Mindscape's individual liability for willful infringement, the Court should deny Mindscape's request for judgment as a matter of law, for a new trial or remittitur.

Dated: July 7, 2003

Respectfully Submitted,

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Certificate of Service

I hereby certify that a copy of the foregoing memorandum was served by mail on Edward Soto, Esq., Weil, Gotshal & Manges LLP, 701 Brickell Avenue, Suite 2100, Miami, FL 33131; by electronic means and mail on Stephen N. Zack, Boies, Schiller & Flexner LLP, 2800 Bank of America Tower, 100 Southeast Second Street, Miami, FL 33131; and by mail on Robert G. Sugarman, Esq., Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York NY 10153 this 7th day of July 2003.

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