

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division
CASE NO. 97-3924-CIV-SIMONTON

JERRY GREENBERG, individually,
and IDAZ GREENBERG, individually,

Plaintiffs,

vs.

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

Defendants.

**PLAINTIFFS' RESPONSE TO SUR-REPLY MEMORANDUM
BY DEFENDANTS DIRECTED TO PENDING MOTIONS
FOR PARTIAL SUMMARY JUDGMENT**

Plaintiffs, JERRY GREENBERG and IDAZ GREENBERG (together "Greenberg"), submit this response to the Sur-Reply Memorandum of Law in Further 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.

Despite its brevity, the sur-reply memorandum is defective in a number of ways.

First error. The defendants state, at page 2, that "Plaintiffs own four works, not sixty-five," and the four works referenced are the "four separate stories in four separate issues of the Magazine." (Emphasis added.) As an initial matter, Greenberg has never asserted ownership of any articles in the Society's monthly magazine.

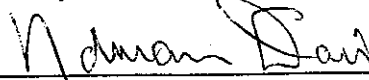
Second error. The four magazine articles, the defendants say, “each constitute a ‘work’ for purposes of statutory damages.” Mem. at 2. That is not so. “The total number of ‘awards’ of statutory damages . . . that a plaintiff may recover in any given action depends on the number of works that are infringed” MCA Television Ltd. v. Feltner, 89 F.3d 766, 770 (11th Cir. 1996) (emphasis added). No one in this law suit has ever alleged that the four articles under discussion were infringed by anyone. In Greenberg v. National Geographic Society, et al., 244 F.3d 1267, 1275 (11th Cir. 2001), the Court held that Greenberg’s photographs were infringed by the defendants; the Court said nothing about infringement of the articles.

Third error. The defendants state that Greenberg himself “viewed these whole stories as ‘works,’ as evidenced in his applications for copyright renewal or registration.” Mem. at 2. Greenberg’s reply memorandum in opposition to the defendants’ pending motion examines those applications in detail, and demonstrates that he registered only photographs, not articles. Indeed, three of the four articles under discussion also contain photographs by persons other than Jerry Greenberg, and the text for the articles was prepared by others. Greenberg could not have registered photographs and text he did not create or own. The articles can be viewed in the CNG product itself, a copy of which is in the record of this case.

Fourth error. The defendants continue their insistence that the Greenberg photographs can have economic viability only if they derive revenue.¹ That question is refuted in prior memoranda filed by Greenberg and need not be rebutted again.

¹ “Defendants are not seeking to have Plaintiffs place a dollar amount upon each photograph.” Reply Memorandum in Further Support of Defendants’ Cross-Motion for Partial Summary Judgment as to Number of Works Infringed, at 5.


STEEL HECTOR & DAVIS LLP
Attorneys for Plaintiffs



Norman Davis FBN 475335
Edwin G. Torres FBN 911569
200 S. Biscayne Boulevard
Suite 4000
Miami, FL 33131-2398
305-577-2988
305-577-7001 (fax)

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; and on Robert G. Sugarman, Esq., Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York NY 10153 this 25th day of September, 2002.



Norman Davis