

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JERRY GREENBERG, individually,
and IDAZ GREENBERG, individually,

Plaintiffs,

CASE NO. 97-3924
CIV-LENARD
Magistrate Judge Turnoff

vs.

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

Defendants.

**PLAINTIFFS' REPLY MEMORANDUM IN
SUPPORT OF MOTION FOR SUMMARY
JUDGMENT ON LIABILITY FOR
COUNTS I AND II OF AMENDED COMPLAINT**

Plaintiffs, JERRY GREENBERG and IDAZ GREENBERG ("the Greenbergs"), submit this reply memorandum in support of their Motion for Summary Judgment on Liability for Count I and Count II of the Amended Complaint.

THE GREENBERGS' PURPORTED 'MONOPOLY'

Defendant, NATIONAL GEOGRAPHIC SOCIETY ("the Society"), greatly overreaching, accuses the Greenbergs of attempting to "assert a monopoly over the ability to depict" a creature in nature, which, the Society urges, does not "serve the public good."¹ *Id.* At no place in their memorandum -- no place -- do the Greenbergs make such a preemptive claim. The Society, and anyone else, is absolutely free to depict creatures in nature (and has done so in its monthly magazine for more than a century) in its own, original manner. However, neither the Society nor anyone else is free to plagiarize protected, original expressions of creatures in nature created by others. The Second Circuit has held that "[e]lements of originality in a photograph may include posing the subjects, lighting, angle, selection of film and camera, evoking the desired expression, and almost any other variant involved." Rogers v. Koons, 960 F.2d 301 (2nd Cir. 1992). The Greenbergs describe such elements of originality in their photographs in great detail in their initial memorandum, and they do assert protection over those original elements.

The Society says flatly, at page 5, that "the copyright law does not protect the depiction of a creature in nature." The statement has no support in law. It is inconceivable that the Society would ever tolerate such argument with respect to the thousands of photographs depicting creatures in nature for which the Society has claimed copyright protection over the years.

The Society insists that the Greenbergs cannot seek protection of only a "piece" of each Greenberg photograph. Mem. at 2. The Greenbergs' comparative exhibits demonstrate that the portion of the photographs copied is not quantitatively small. Even if it were, "if it is

¹ In furtherance of its "public good" stance, the Society quotes the Supreme Court: "The primary objective of copyright is not to reward the labor of authors, but to 'promote the Progress of Science and useful Arts.'" (quoting Article I § 8 of the Constitution.) Mem. at 2, note 3. But that article in the Constitution says much more that was omitted: that promoting the progress of science and useful arts is obtained "by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." That provision, said the Supreme Court, promotes an "important public purpose" by "motivat[ing] the creative activity of authors and inventors by the provision of a special reward." Harper & Row Publishers v. Nation Enterprises, 105 S.Ct. 2218, 2223 (1985). "The [limited] monopoly created by copyright thus rewards the individual author in order to benefit the public." Sony Corp. of America v. Universal City Studios, 104 S.Ct. 774, 782 (1984).

qualitatively important the trier of fact may properly find substantial similarity.” 4 NIMMER ON COPYRIGHT § 13.03 [A] [2]. See, e.g., Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985) (300 words out of 200,000 were clearly substantial); Woods v. Universal City Studios, Inc., 920 F.2d 62 (S.D.N.Y. 1996) (infringement was substantial where movie was 130 minutes long and infringing part was 5 minutes long). The portions copied by the Society, as shown in the Greenberg comparative exhibits, speak vividly for themselves as qualitatively significant portions of the Greenberg photographs.

THE SOCIETY COPIED PROTECTIBLE EXPRESSION

The Society labors hard to assert that “a fish is a fish,” and that the only similarity at issue here is that the Society’s illustrations depict only the same subject matter as in the Greenberg photographs. Mem. at 6. As the Greenbergs’ initial memorandum emphasizes, again and again, it is not the *idea* of a fish or a diver that is protected but Mr. Greenberg’s *unique and creative expression* of a fish or a diver. One of the leading authorities on copyright emphasizes the problem of attempting to fit visual works into the analysis proposed by the Society:

The judicial tendency . . . to sidestep the analytic dissection of unprotectible idea from protectible expression probably stems from the concern that dissection in the visual arts will improperly bias infringement decisions against copyright owners. Unlike literary or musical works, visual works can always be compared simultaneously, side-by-side, by judge or jury. Unlike literary and musical works, visual depictions are completely and graphically bounded by the artists’ intentions. A picture is not only worth a thousand words; it also conveys its message in a single unambiguous image. As a consequence, the danger exists that, in dissecting the plaintiff’s work to determine whether the defendant has appropriated any of its protected expression, courts will emphasize specific differences between works rather than their more substantial similarities.

II P. Goldstein, COPYRIGHT § 8.2, at 64-65. In their comparative exhibits, the validity of which has not been challenged, the Greenbergs have provided the Court with *side-by-side comparisons* from which the protectible and nonprotectible components speak for themselves. The Society proposes that their artist-agent engaged only in portraying in his artwork the physical features of the fish and divers shown in the Greenberg photographs. Mem. at 6. The comparative exhibits

demonstrate that he copied a great many aspects *far beyond* the physical features inherent in fish and divers.²

THE SOCIETY'S COPIES ARE SUBSTANTIALLY SIMILAR

In its memorandum, starting at page 7, the Society proposes that for substantial similarity to exist the plaintiffs "*must* prove near identity" between the works because the Greenbergs' claim deals with creatures in nature. (Emphasis added.) That is not the standard, and the cases cited to support it are misapplied. In Designers View v. Publix Super Markets, 764 F.Supp. 1473, 1478 (S.D.Fla. 1991) (Hoeveler, J.), the court said that "near identity *may* be required in a situation where the expression of the works and the idea of those works are indistinguishable." (Emphasis added.) In that case, the court found that similarity existed only in the subject matter, the acrylic medium used in panels depicting fruits, vegetables and baked goods, and in "gross concept." *Id.* That is not the case here, where the Greenberg photographs -- unlike the crude images on acrylic panels in Designers View -- cleanly display original expression.

Similarly, in Jungle Rags, Inc. v. Rainbow Graphics, Inc., 29 U.S.P.Q.2d 1704 (M.D.Fla. 1993), cited by the Society, the court held that when an idea and its expression are inseparable, the plaintiff *may* have to show near identity between the works at issue. Thus, the Society's argument that the Greenbergs "must" demonstrate near identity is in error. The appropriate standard in the Eleventh Circuit, set forth in detail in the Greenbergs' initial memorandum at pages 13-14, embraces the following:

- Substantial similarity exists where an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work.
- The ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them and regard the aesthetic appeal of the original and copy as the same.

² In February 1968, the Society published on the cover of its magazine a photograph of an Oceanic Whitetip shark, shown in Ex. K, ¶ 5, attached to this memorandum. If "an Oceanic Whitetip shark is an Oceanic White tip shark," as the Society's formulation would have it, then by such reasoning the cover photograph would enjoy no copyright protection, a position the Society would hardly endorse. (The photograph shown was taken by Mr. Greenberg.)

-- The key to the 'ordinary observer' test is the *similarities* rather than the differences.

The Society then discusses each of the disputed fish images, noting differences that on inspection are quite minor, and concludes as to each fish image that "these differences" preclude a finding of substantial similarity. As the standards above indicate, however, the proper focus is not on difference, but on similarity. The Greenberg exhibits -- *displaying the Society's illustrations and the Greenberg photographs side-by-side* -- are all the Court needs with which to apply the standards described above.

The Society's memorandum devotes considerable energy to an attempt to distinguish the two sets of scuba divers at issue. Mem. at 9. The memorandum states that one of the divers drawn by artist Warren Cutler is a girl, but nothing in the record supports that statement. Indeed, at his deposition Cutler was asked to identify aspects of his illustration that he considered to be different from the photograph, Cutler deposition at 63-66, and he never mentioned sex as a differentiating factor. Again, the Greenberg comparative exhibits show the similarity of the divers to be far more than substantial.

THE 'FAIR USE' DEFENSE FAILS HERE

At great length, the Society argues the doctrine of fair use, which assumes copyright infringement but excuses it in limited situations. The Society's arguments for invocation of the doctrine do not hold up under examination -- not one.

Argument: The Geopack is educational for children, and does not exploit the photographs for commercial gain

The Greenberg photographs, and the Greenberg books in which they appear, *also* are produced for educational purposes, and for children as well. Exhibit K ¶ 3. Those books are checked for accuracy by ichthyologists and invertebrate experts. *Id.* The books were cataloged by the International Oceanographic Foundation. They have been used for course studies at many high schools and universities. They are circulated by some public library systems. They are used by SeaCamp, a marine environment to teach children about undersea life. Moreover, the

Greenberg publications are sold in many stores featuring educational children's toys and games. Id.

As for commercial gain, the Court need only review the licensing agreement between the Society and Educational Insights, Inc., the end-user of the infringing images at issue here. See Exhibit B to the plaintiffs' original memorandum. The Society awarded to Educational Insights an "exclusive, perpetual, world-wide license" to distribute and sell the GeoPack product. In return, the Society received an initial lump-sum payment for creating and producing the product (which presumably covered the Society's actual investment) as well as *ongoing* royalty payments in perpetuity based on sales of the product. Id. So much for "not exploiting" the infringed images for commercial gain.³

In its lengthy argument to the effect that commercial-use-doesn't-count, the Society stresses the "public interest" in disseminating "important information to consumers." Def. Mem. at 13, 14. It is gratuitous, indeed, for the Society to dismiss the Greenbergs' books as incapable of serving the same interest and disseminating important information as well.

Argument: The GeoPack product makes "transformative" use of the Greenberg photographs

The "transformative" argument derives primarily from cases where the use of copyrighted material in parody form was asserted as a defense against infringement. In Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579, 114 S.Ct. 1164, 1171 (1994), the Supreme Court said that a use is transformative if it "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message." Even a cursory examination of the Greenberg comparative exhibits shows that the copies in the GeoPack product did not imbue the Greenberg photographs with "new expression, meaning, or message."

The Society contends that its use of the Greenberg photographs in the GeoPack product is transformative because the "nature and purpose" of the GeoPack is entirely different from the Greenberg's book, in that the book is merely "commercial" and the GeoPack serves a loftier purpose of teaching children about marine life. The argument is wrong on both points. As

³ The Greenbergs also license many of their works. Ex. K, ¶ 4. The Society, of course, never sought a license from them.

discussed above, the GeoPack is by any definition a commercial enterprise for the Society, and the Greenberg photographs are by any definition educational in character -- targeted for teaching children (and adults) about marine life.

Argument: The Society has acted in good faith.

The Society's memorandum simply asserts good faith as a conclusory matter. Mr. Rosbotham, it is said, "would take action if he had any reason to be concerned about copyright issues." Yet Mr. Rosbotham was given annotated pencil sketches by the artist, identifying book and page number where he consulted Greenberg's photographs (all in one Greenberg book), and the record does not show that Mr. Rosbotham raised even an eyebrow. The Society scrutinized the pencil sketches, annotations and all, and instructed artist Warren Cutler to proceed with the artwork. Cutler depo., 40. Cutler could not remember whether Mr. Rosbotham, or anyone else, cautioned him against copying. Cutler depo., 58. The Society's memorandum, at page 15, states that "there has been no suggestion that [Cutler] traced or otherwise copied Plaintiffs' photographs." To the contrary, the artist's pencil sketches and the Greenberg comparative exhibits suggest, and demonstrate, that tracing almost certainly occurred.

On three separate occasions, in 1975, 1994 and 1996, the Society utilized, without consent, photographs for which Mr. Greenberg held copyright. Ex. K ¶ 8. That, too, should enter the good-faith equation.

Finally, the Court should ponder why the National Geographic Society, with obviously enormous resources and with photographic archives that it *owns*, developed over many decades, should find it necessary to infringe (the affirmative defense assumes infringement) photographs created by a solitary professional photographer who works out of his home *without asking first*. The good-faith argument attempted here is a shell.

Argument: The Photographs Have Already Been Published

The argument should not be dignified. The Court can imagine the reaction of the Society if plagiarizers asserted a right to copy the thousands of photographs that have been "first" published in the Society's magazine. Photographs -- very good ones -- have been the Society's life blood for decades. Photographs, and very good ones as the record shows, are also Mr. Greenberg's life blood.

Argument: Uses of the Greenberg photographs were not substantial

The Society contends that the Greenbergs assert copyright only in their book, "The Living Reef," and not in the individual photographs, Mem. at 16, arguing therefrom that the Society has used only a small portion of the copyrighted work. A single photograph is a copyrightable work.

1 NIMMER ON COPYRIGHT § 2.08. The work is protectible from the moment it is fixed in a tangible medium of expression, such as film. 17 U.S.C. § 102 (a). The Greenbergs' book is a collective work, defined by the Act as a work in which separate works, such as the individual photographs, are assembled into a collective whole. 17 U.S.C. § 101. Copyright notice for the book protects all of the individual works it contains. 2 NIMMER ON COPYRIGHT § 7.12 [C][1]. The Society's contention is nonsense.⁴

Argument: The Greenbergs' potential market is not impaired.

The Society's bald declaration that its product and the Greenbergs' are "targeted at totally disparate markets and serve totally different purposes" is not supported in the record, as discussed above.

COUNT II -- THE SEA FAN

The Society does not challenge the Greenbergs' claim of copyright infringement, but resorts instead to "fair use," the equitable doctrine to which the Society's memorandum devotes so much space and type.

Argument: The "public service" umbrella.

The Society claims that it opted to use the sea fan photograph in the Jason Project material "purely" as a matter of public service. Why the Society did not reach into its truly vast library of photographs, which it owns, to find a usable photograph is not explained. The purpose of Jason, says the memorandum, "is not for the Society (a non-profit organization) to make money, but to further its organizational mandate for the increase and diffusion of geographic

⁴ The Society thus unfurls another argument that it would fiercely contest if used against the Society's own photographs. Can anyone believe that the Society claims copyright only in its monthly magazine, and not in the individual photographs it contains?

knowledge in its broadest sense.” Mem. at 17. Where is it written that a non-profit corporation cannot make money, and even lots of it?

As for the “diffusion of geographic knowledge,” that is surely a worthy purpose. But in the weighing of equities the Society is attempting to put an altruistic face on its casual infringement of copyrights owned by others. That is not what “fair use” is about.

Argument: “Transformative” use of the sea fan.

With astonishing license, the memorandum states, at page 18, that “Plaintiffs concede that the Society’s use of the Sea Fan in the Jason Poster is transformative.” The plaintiffs concede no such thing. As discussed above, a “transformative” use “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.” Campbell, 114 S.Ct. at 1171. “Flopping” the Greenberg sea fan photograph and “cropping” it hardly rises to the level of new expression or meaning contemplated by the Supreme Court. Instead, it sinks to the level of not only misappropriating a copyrighted image but altering it for the convenience of placement in the Society’s poster.

Argument: The sea fan is not prominent in the poster.

“The sea fan,” says the Society, “occupies a very small amount of space in the upper right-hand corner of the poster, far from the visual focus of the ensemble.” Mem. at 20. Once more, that is not a proper test. “No plagiarist can excuse the wrong by showing how much of his work [the plagiarist’s] he did not pirate.” Sheldon v. Metro Goldwyn Pictures Corp., 81 F.2d 49, 56 (2d Cir. 1936), cert. denied, 298 U.S. 669 (1936). To suggest “that liability may turn, in some degree, on the importance of the original material that a defendant adds to the copied material . . . is an erroneous statement of law.” 4 NIMMER ON COPYRIGHT § 13.05[B][1].

Argument: The Society Acted in Good Faith.

The Rock Wheeler letter is cited by the Society, Mem. at 18-19, to demonstrate an “oversight” and a “spirit of cooperation, honesty and fair dealing.” However, the Society’s use of the sea fan was the *third* time Mr. Greenberg’s photographs had been utilized by the Society without his consent. Ex. K, ¶ 8. An isolated, after-the-fact acknowledgment of improper use, does not overcome the Society’s proclivity to improperly use Mr. Greenberg’s photographs, and does not amount to the good faith required.

The remaining arguments advanced by the Society with reference to Count II and the sea fan -- "factual in nature" and "previously published" -- have been discussed elsewhere in this reply memorandum and need not be repeated.

Fair use, the parties agree, is an equitable rule of reason to be applied so that the law of copyright does not rigidly stifle creativity. But the obverse is also true. Equity should not empower a giant enterprise, with nearly boundless resources, to stifle the creativity of a small entrepreneur whose constitutionally-protected works the Society has so cavalierly abused. If what the Society has called "fair use" should prevail, what photographer will ever have the incentive to assert his rights against such a powerful adversary?

CONCLUSION

The Greenbergs' copyrights have been infringed. As to Count I, the comparative exhibits leave no doubt as to substantial similarity. As to Count II, the Society does not challenge the allegation of infringement. As to both counts, the "fair use" defense fails by its own terms.

The Court, as finder of fact and arbiter of law, should grant the Greenbergs' motion and award summary judgment on liability as to Counts I and II.

Respectfully submitted,


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Certificate of Service

I hereby certify that a copy of the foregoing was served by mail on Valerie Itkoff, Esq., Weil, Gotshal & Manges LLP, 701 Brickell Avenue, Suite 2100, Miami, FL 33131 and Robert G. Sugarman, Esq., Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York NY 10153 this 23rd day of October, 1998.



Norman Davis



RECYCLED PAPER



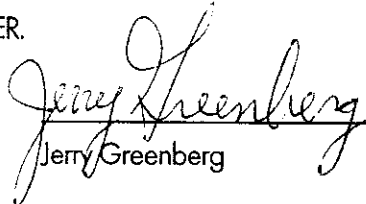
SECOND SUPPLEMENTAL
AFFIDAVIT OF JERRY GREENBERG

1. My name is Jerry Greenberg. The statements in this affidavit are based on my personal knowledge.
2. I reside at, and conduct my business from, 6840 S.W. 92nd Street, Miami, Florida.
3. Idaz Greenberg and I operate a small publishing business known as Seahawk Press. Our books and other materials on undersea life are all created for educational purposes, ranging from the interests of casual divers to those of serious scholars. Each book is checked for accuracy by ichthyologists and invertebrate experts. Our books were cataloged by the International Oceanographic Foundation, and are in the public library system. They have been used for course studies at many high schools and universities. They are used by SeaCamp, a marine environment to teach children about undersea life. Our materials are marketed and sold in many stores in the United States and in various parts of the world. Our products are not sold in a vacuum, but in competition with other products that have educational purposes including children's toys and games.
4. A significant source of supplemental income for our business is the licensing of images. In recent years, we have entered into license arrangements with more than three dozen entities, some of which renewed the licenses with our approval and continue to do business with us.
5. In February, 1968, the National Geographic Society published in its monthly magazine an article entitled Sharks: Wolves of the Sea. On assignment from the magazine, I took thousands of photographs for the article. One of the photographs, depicting an Oceanic Whitetip shark, was used on the cover of the February, 1968 issue of the magazine. A copy of the cover is incorporated into this affidavit as Attachment I.
6. In our book, "The Living Reef," are photographs of a Stoplight Parrotfish, a Redband Parrotfish, and a Green Moray. From 30 to 100 photographs were taken of each of the three fishes for purposes of the book project. Every one of those photographs was unique in a variety of ways, indicative of the many variables in the fish itself, the setting, the lighting, the camera, and other factors.

The selection of the three photographs of those fish that appear in the book reflect our artistic judgment as to the best expression of each individual fish.

7. In our book, "The Living Reef," are photographs of two scuba divers. I took more than 50 separate photographs of each diver for purposes of the book project. Every photograph captured on film was unique in a variety of ways, indicative of the many variables in the diver, the setting, the lighting, the camera, and other factors. The selection of the photographs of the divers that appear in the book reflect our artistic judgment as to the best expression of each individual diver.
8. In 1975, 1994 and 1996, the National Geographic Society utilized one or more of my photographs, for which I owned the copyrights, in various Society publications without my prior consent.

AFFIANT SAYS NOTHING FURTHER.



Jerry Greenberg

STATE OF FLORIDA

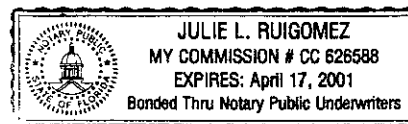
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COUNTY OF MIAMI-DADE)

The foregoing instrument was acknowledged before me this 22 day of October, 1998, by Jerry Greenberg, who was sworn and who said that the information set forth above is true and correct. Mr. Greenberg is personally known to me, or produced JL DL Jerry Greenberg as personal identification.



Notary Public





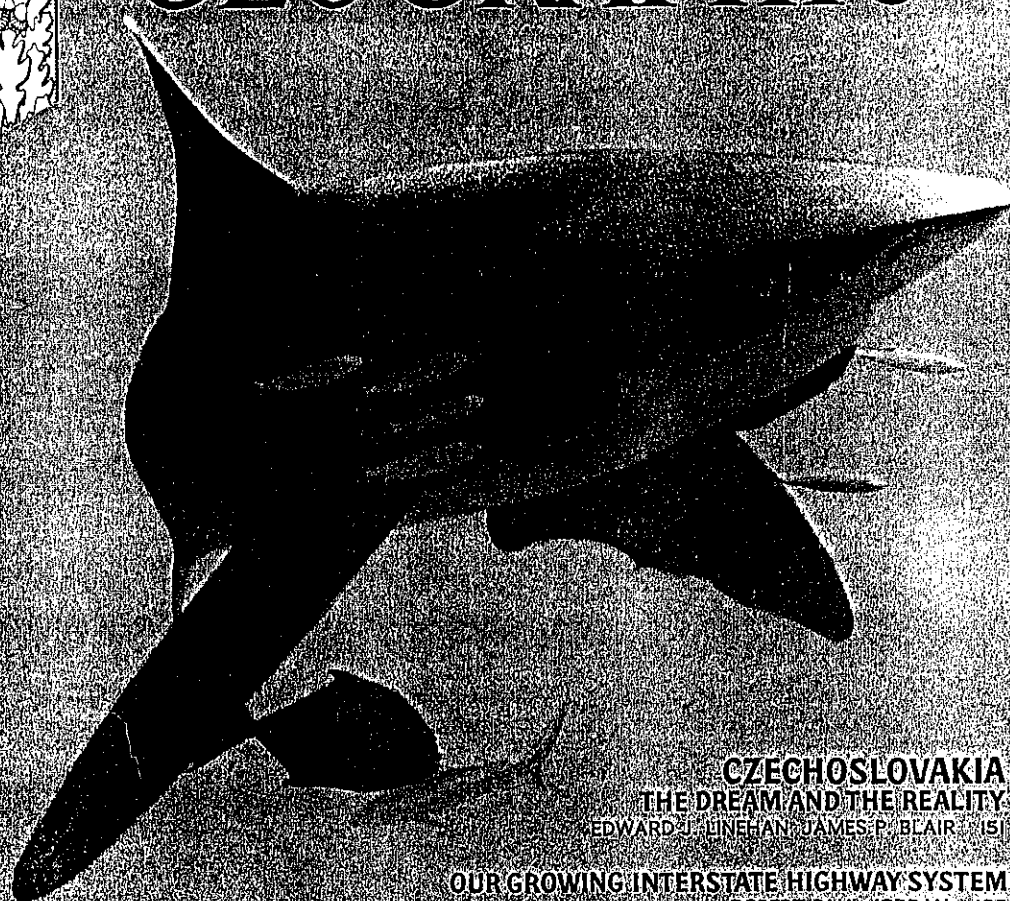
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