

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' RESPONSES TO
DEFENDANTS' FIRST SET OF INTERROGATORIES**

Plaintiffs, JERRY GREENBERG and IDAZ GREENBERG, hereby serve their responses to Defendants' First Set of Interrogatories, pursuant to Fed. R. Civ. P. 33, as follows:

Specific Responses

INTERROGATORY NO. 1: Identify by name, and position held, every fact witness that Plaintiffs will use, or intend to use, or may use, at trial, and provide a brief summary of each witness' testimony.

Answer: To date, actual and potential witnesses are the following:

a. Jerry Greenberg and Idaz Greenberg. At the present time, it is expected that both will testify, among other things, as to (a) the photographs that were infringed, (b) the factual

history and nature of the infringements, (b) the willful nature of the infringements, (c) the long-term relationship between Jerry Greenberg and the National Geographic Society, (d) economic realities in the marketplace for photographers, and (e) the determination of an appropriate amount of damages in the statutory damages context.

b. A corporate representative for Boy's Life Magazine, who is expected to discuss the purchase by the magazine of certain photographs taken by Jerry Greenberg.

The plaintiffs reserve the right to call all witnesses listed, or to be listed, by the defendants.

INTERROGATORY NO. 2: Explain the legal and factual bases for Plaintiffs' contention that the infringement of copyrights in the Greenberg photographs was willful.

Answer: The evidence will include the following:

- a. The transfer of rights to the photographs was absolute, and the Society had no basis whatever to re-use the photographs without prior consent.
- b. A pattern of infringements of Greenberg's photographs by the Society.
- c. In April 1997, Greenberg's counsel wrote to warn the Society not to use his photographs in the CNG product without his consent. The Society never responded.
- d. In May 1997, Thomas Stanton sent a letter regarding the CNG product to 2500 contributors to the monthly magazine. The letter was not sent to Greenberg.
- e. When a page is printed in hard copy from the CNG product, the copyright notice on the hard copy implies that NGS owns the copyright in the photograph(s), and invites a user to assume that Greenberg has no copyright interest.
- f. Infringement was found as a matter of law more than two years ago, by the Eleventh Circuit Court of Appeals, but the infringing continues.
- g. High-level managers and editors at NGS had grave doubts about copyright abuse in the CNG product before it went on the market.
- h. Questions put to outside legal counsel by NGS were generally irrelevant to the contemplated use of the Greenberg photographs. The advice received, even if relevant, had no legal significance for National Geographic Enterprises or Mindscape. The opinion by attorney Robert Sugarman in July 1997 was received after the CNG project was committed and substantially completed (confirmed

in part by modification dates in the file directory of Jpeg images in each CD-ROM). Infringing conduct began in 1996 with the copying of the monthly issues. Outside legal counsel were not provided by NGS with significant information relating to the CNG product, and the opinions sought were limited in scope. In one opinion received in early 1997, outside counsel warned that the legal risks had clearly increased since a previous opinion.

- i. The CNG product makes it easy for an end-user to unlawfully copy, transmit to others, and modify protected material such as the Greenberg photographs.
- j. The Moving Covers Sequence is not addressed in any legal guidance sought and obtained by NGS.
- k. NGS has steadfastly represented that the CNG product contains only 'slavish' copies from the monthly magazines. The Moving Covers Sequence is a completely separate new work.
- l. NGS has steadfastly represented that the CNG product contains only 'slavish' copies from the monthly magazines. The product contains much more than 'slavish' copies.

INTERROGATORY NO. 3: Since the 1976 Copyright Act came into existence Congress has amended the Act twice to enlarge the range of statutory damages, including damages for willful infringement, that may be awarded. Identify the base range, and the range for willful infringement, that you contend must apply to this litigation, and explain the legal basis for your contention.

Answer: The current range -- from \$750 to \$30,000, with a maximum of \$150,000 for willful infringement -- became effective on December 9, 1999 through Public Law 106-160. That enactment states that the damages will be applicable "to any action brought on or after the date of the enactment of this Act, regardless of the date on which the alleged activity that is the basis of the action occurred." Because the Greenberg action arose prior to that date, the current damage limits do not apply.

The range of damages was changed previously, effective March 1, 1989, pursuant to Public Law 100-568. Section 10 of that enactment provided a range from \$500 to \$20,000, with a maximum for willful infringement of \$100,000. Section 13 provided that "any cause of action arising under Title 17, United States Code, before the effective date of this Act shall be governed by the provisions of such title as in effect when the cause of action arose." The language makes it clear that the range of damages provided in the 1989 amendment will apply to any cause of action arising under Title 17 after the effective date of the 1989 enactment. The Greenberg action arose after March 1, 1989.


Jerry Greenberg


Idaz Greenberg

STATE OF FLORIDA

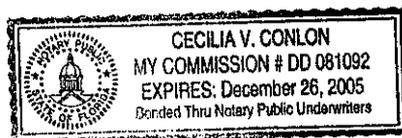
COUNTY OF MIAMI-DADE

BEFORE ME, the undersigned authority, personally appeared this 20th day of November, 2002, Jerry Greenberg, who upon being first duly sworn deposes and says that he has read the above and foregoing Answers to Interrogatories and the same are true and correct to the best of his knowledge and belief. Jerry Greenberg is personally known to me, or presented his Florida Driver License as identification.

WITNESS my hand and seal in the County and State last aforesaid, this 20th day of November, 2002.



NOTARY PUBLIC,
State of Florida

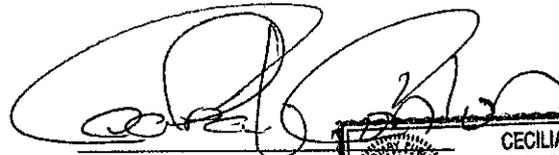


STATE OF FLORIDA

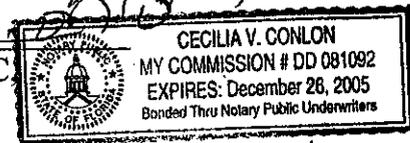
COUNTY OF MIAMI-DADE

BEFORE ME, the undersigned authority, personally appeared this 20th day of November, 2002, Idaz Greenberg, who upon being first duly sworn deposes and says that she has read the above and foregoing Answers to Interrogatories and the same are true and correct to the best of her knowledge and belief. Idaz Greenberg is personally known to me, or presented per Florida Drivers License as identification.

WITNESS my hand and seal in the County and State last aforesaid, this 20th day of November, 2002.



NOTARY PUBLIC
State of Florida



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Certificate of Service

I hereby certify that a copy of the foregoing answers to interrogatories was served by mail on Edward Soto, Esq., Weil, Gotshal & Manges LLP, 701 Brickell Avenue, Suite 2100, Miami, FL 33131; and by facsimile and mail on Robert G. Sugarman, Esq., Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York NY 10153 this 19th day of November, 2002.

Norman Davis