

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

JERRY GREENBERG, individually and
IDAZ GREENBERG, individually,

Plaintiffs,

v.

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

Defendants.

**DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO
PLAINTIFFS' MOTION FOR PERMANENT INJUNCTIVE RELIEF**

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CASE NO. 96-3924 CIV-LENARD

Defendants National Geographic Society, National Geographic Enterprises, Inc.,¹
and Mindscape, Inc.,² by their attorneys Weil, Gotshal & Manges LLP, respectfully submit this
memorandum of law in opposition to Plaintiffs' Motion For Permanent Injunctive Relief.

INTRODUCTION

Plaintiffs' motion should be denied.³ The Eleventh Circuit's opinion specifically
"urges" this Court to seek alternatives to permanent injunctive relief, such as "mandatory license
fees," recognizing that injunctive relief is particularly inappropriate in this case. Greenberg v.
National Geographic Society, 244 F.3d 1267, 1276 (11th Cir. March 22, 2001), cert. denied, 122
S. Ct. 347, 151 L. Ed. 2d 262 (Oct. 9, 2001). Moreover, an award of injunctive relief, an
equitable remedy, would be highly inequitable here because, although the Eleventh Circuit found
Defendants liable for copyright infringement, the Society never had the opportunity to assert its
contractual right to include Greenberg's photographs in "The Complete National Geographic"
(the "CNG"). The entry of permanent injunctive relief is also especially inappropriate because
Plaintiffs are not irreparably harmed since they have an adequate remedy at law. They are
seeking statutory damages, and among the factors to be considered in setting statutory damages
is Plaintiffs' lost licensing fees. Thus, the award of statutory damages is, in effect, a mandatory
licensing fee - the very alternative suggested by the Eleventh Circuit. In addition, the harm that

¹ National Geographic Enterprises is incorporated under the name National Geographic
Holdings, Inc. ("Holdings").

² Mindscape, Inc. has been dissolved and no longer exists. Its interests are now being
represented in this lawsuit by its former parent corporation, GTE/Wizard LLC.

³ Plaintiffs' motion and this opposition are filed pursuant to Judge Lenard's Order of Reference
dated November 13, 2001, attached as Exhibit A to the Declaration of Naomi Jane Gray filed
herewith, Judge Lenard's Order of Magistrate Reassignment dated April 5, 2002, attached as
Exhibit B to the Declaration of Naomi Jane Gray filed herewith, and Magistrate Rule 1(d) of the
Local Rules For the Southern District of Florida, pursuant to which this Court may submit a
report and recommendation to Judge Lenard regarding disposition of pre-trial motions for
permanent injunctive relief. Local Magistrate Rule For the S.D. Fla. 1(d).

would be suffered by Defendants should an injunction issue far outweighs any harm to Plaintiffs by the continued inclusion of Greenberg's photographs in the CNG. The injunctive relief Plaintiffs seek would require the Society to remove the product, of which Plaintiffs' works are only a small part, from the market – a result which would have significant financial consequences. Plaintiffs, on the other hand, who will receive a statutory damages award, will suffer no harm. Finally, the Eleventh Circuit opinion urged this Court to consider alternatives to injunctive relief because it recognized the value to the public of the CNG. Greenberg, 244 F.3d at 1276.

Moreover, Plaintiffs come to this Court to seek injunctive relief with unclean hands. Jerry Greenberg has acknowledged in writing that the Society has a right to include his images in the Society's publications such as the CNG as provided in the contracts. (Exh. 4). And, Plaintiffs are also guilty of laches. While Plaintiffs requested injunctive relief in the complaint, they did not move for injunctive relief when the case was before Judge Lenard prior to Plaintiffs' appeal to the Eleventh Circuit, and waited over a year and a half since the Eleventh Circuit's opinion to file their motion for permanent injunctive relief – a delay which shows that Plaintiffs have not suffered irreparable injury as a result of continued inclusion of Greenberg's photographs in the CNG.

ARGUMENT

To obtain injunctive relief in the Eleventh Circuit, a movant must show: (1) likely or actual success on the merits of his claim; (2) irreparable injury unless the injunction issues; (3) that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) that the injunction, if issued, would not be adverse to the public interest. Zardui-Quintana v. Richard, 768 F.2d 1213, 1216 (11th Cir. 1985); Sierra Club

v. U.S. Army Corps of Engineers, 935 F. Supp. 1556, 1570 (S.D. Ala. 1996) (standard for permanent injunction and preliminary injunction essentially the same except for requirement of actual success on merits as opposed to likely success on merits); accord In re Griner, 240 B.R. 432, 434 (S.D. Ala. 1999). An injunction is a "harsh and drastic" discretionary remedy and is never an absolute right; the movant must carry the burden as to the four prerequisites. Zardui-Quintana, 768 F.2d at 1216; Abend v. MCA, Inc., 863 F.2d 1465, 1479 (9th Cir. 1988), aff'd sub nom., Stewart v. Abend, 495 U.S. 207, 110 S. Ct. 1750, 109 L. Ed. 2d 184 (1990). While Plaintiffs have succeeded on their claim for copyright infringement, they have met none of the other prerequisites for injunctive relief, come to this court to seek injunctive relief with unclean hands and are guilty of laches.

A. PLAINTIFFS HAVE NOT SHOWN ACTUAL SUCCESS ON THE MERITS BECAUSE THE SOCIETY HAS A RIGHT TO INCLUDE GREENBERG'S PHOTOGRAPHS IN THE CNG AS A MATTER OF CONTRACT LAW.

Plaintiffs have not shown actual success on the merits in this case because the Society has a right to include Greenberg's photographs in the CNG as a matter of contract law. As Plaintiffs' papers make clear, all the Eleventh Circuit held was that Defendants were liable for copyright infringement. (Pl. Mem. at 3). The Court never considered, much less decided, Defendants' contractual claims.

The respective rights of the Society and Jerry Greenberg are governed not only by the copyright law, but by the agreements pursuant to which Greenberg's photographs were published in the National Geographic Magazine (the "Magazine"). (See e.g. Exhs. 1, 2). Based on those contracts, Defendants had the right to publish Greenberg's photographs in the Magazine and have a contractual right to include them in the CNG. The Eleventh Circuit was not presented

with this issue, and thus did not reach it, nor has this Court decided the issue. The Plaintiffs are therefore asking this Court to award extraordinary relief when the Society has never had the opportunity to establish that Greenberg's contracts, as he acknowledged in a letter he wrote to the Society when he requested reassignment of this copyright, allow the Society to republish his photographs.

The plain language of the Society's contracts with Greenberg give it the right to include Greenberg's works in the CNG. For example, the agreement for the "Buck Island" story provides that, "[a]s agreed, the National Geographic Society will retain those photographs from this assignment that are published in the magazine for all other publications and purposes related to the Society's objectives. No additional payment for reuse of these pictures will be made." (Exh. 1). The agreement for the "Key Largo" story provides that, "[a]ll pictures used in the story plus a few file selects would become the property of the National Geographic Magazine. After publication in the Magazine all rights on those pictures not held by us would be yours to sell." (Exh. 2). A letter enclosing payment for Greenberg's work on the "Key Largo" story and reimbursement for expenses incurred clearly states that Greenberg was being paid "for the pictures used in the Magazine, for the Society's publications, and for other purposes related to its objectives..." (Exh. 3).

In a November 15, 1985 letter to the Society, in which he requested that he be assigned the copyright in his photographs, Greenberg himself acknowledged that the assignment of copyright would not affect the Society's right to use the photographs since that would be governed by the agreements, stating, "[t]his re-assignment would have no effect on the Society's reuse of this material as this provision was covered in the original contracts for each assignment." (Exh. 4). Therefore, the assertion in Plaintiffs' motion that the Society has no

authority to use Greenberg's photographs is flatly contradicted by Jerry Greenberg's own words. (Pl. Mem. at 5).

Plaintiffs' request highlights the inequity of Defendants' inability to assert its contractual defenses. As Plaintiffs' papers make clear, all the Eleventh Circuit held was that Defendants were liable for copyright infringement under § 201(c) of the Copyright Act of 1976. The Court never considered, much less decided, Defendants' contractual claims.

Thus, at the very least, this Court should deny Plaintiffs' request for injunctive relief. We also request that the Court reconsider its prior decision to preclude Defendants from relying on contractual defenses which would preclude a finding of liability.

B. PLAINTIFFS HAVE NOT SHOWN IRREPARABLE INJURY AND HAVE AN ADEQUATE REMEDY AT LAW.

The Eleventh Circuit remanded this action to this Court for a determination of damages "as well as any injunctive relief that may be appropriate." Greenberg, 244 F.3d at 1276. In its opinion, the Eleventh Circuit stated that, "[i]n assessing the appropriateness of any injunctive relief, we *urge* the court to *consider alternatives*, such as mandatory license fees, in lieu of foreclosing the public's computer-aided access to this educational and entertaining work." Id. (emphases added). Thus, the court implicitly realized, as have many other courts, that in certain circumstances mandatory or compulsory licenses fully compensate Plaintiffs for copyright infringement without the need to resort to injunctive relief. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 494, 104 S. Ct. 774, 815, 78 L. Ed. 2d 574 (1984); Universal City Studios, Inc. v. Sony Corp. of Am., 659 F.2d 963, 976 n.18 (9th Cir. 1981), rev'd on other grounds, 464 U.S. 417, 104 S. Ct. 774, 78 L. Ed. 2d 574 (1984); see also Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 n.10, 114 S. Ct. 1164 n.10, 127 L. Ed. 2d 500 (1994);

Abend v. MCA, Inc., 863 F.2d 1465, 1479 (9th Cir. 1988), aff'd sub nom., Stewart v. Abend, 495 U.S. 207, 110 S. Ct. 1750, 109 L. Ed. 2d 184 (1990). This is such a case.

While correctly pointing out that permanent injunctions are often appropriate in cases where liability for infringement has been determined, (Pl. Mem. at 4), Plaintiffs ignore the Eleventh Circuit's guidance and other cases in which courts have found damages in the form of mandatory licensing fees or compulsory licenses to be more appropriate than injunctive relief. See Universal City Studios, Inc. v. Sony Corp. of Am., 659 F.2d 963, 976 n.18 (9th Cir. 1981), rev'd on other grounds, 464 U.S. 417, 104 S. Ct. 774, 78 L. Ed. 2d 574 (1984); Abend v. MCA, Inc., 863 F.2d 1465, 1479 (9th Cir. 1988). The statutory damages award that Plaintiffs seek is tantamount to the "mandatory license fee" specifically mentioned in the Eleventh Circuit's opinion since one of the factors to be taken into account in the calculation of statutory damages is the Plaintiffs' lost revenue. Thus, such licensing revenue, if any, will be recovered by Plaintiffs, thereby fully satisfying the "urgings" of the Eleventh Circuit and giving Plaintiffs an adequate remedy at law.

Moreover, Plaintiffs' papers point to no irreparable injury and are completely devoid of any suggestion that Plaintiffs could not be fully compensated by an award of statutory damages – including a mandatory licensing fee for future sales of the CNG. Indeed, the significant delay in seeking injunctive relief – five years from the commencement of the litigation and one and one half years after the Eleventh Circuit opinion – makes it quite clear that Plaintiffs have not suffered irreparable harm.

C. THE DAMAGE WHICH THE PROPOSED INJUNCTION WOULD CAUSE DEFENDANTS FAR OUTWEIGHS THE THREATENED INJURY TO PLAINTIFFS.

The damages to Defendants should an injunction issue would far outweigh any threatened injury to Plaintiffs. Entry of an injunction preventing "further use...[including]... copying, distribution and sale in any format," (Pl. Mem. at 5), would have significant economic consequences for Defendants. Defendants could not ship additional copies of the CNG and the current iteration of the CNG would have to be pulled from the shelves of National Geographic's store. And, at the present time, there are 10,539 copies of CNG in inventory, none of which could be shipped (Declaration of Terrie Clifford ("Clifford Decl.") at ¶ 7). Nor, as a practical matter, could the Society manufacture any additional copies. The CNG is produced from a "gold master." (Id. at ¶ 3). The "gold master" for the current iteration of the CNG was produced in October 2002. (Id. at ¶ 5). Copies are made from the "gold master" and are then packed, shipped and placed in the marketplace. (Id. at ¶ 4). Thus, at this time, The Society could not black-out Greenberg's images unless it created a new "gold master" at a cost of \$12,320.⁴ (Id. at ¶ 10). Moreover, because it is more economical to manufacture product for the quarter at once, and because the projected sales for a single quarter is approximately 70,000 units, if an injunction were to issue at the end of a production cycle but prior to shipping, the value of

⁴ In addition, the delay in fulfilling orders based on the need to recast the gold master would have significant negative impact on the relationship with retailers and the ability to place the CNG product in stores in the future. (Clifford Decl. at ¶ 10). While a DVD-ROM version of the CNG is not currently being produced or distributed, Holdings would like to consider manufacturing a DVD-ROM in 2003. (Id. at ¶ 13). If it were to be produced, there also would be an additional cost associated with editing the DVD version to exclude Greenberg's photographs. (Id. at ¶ 13).

inventory which would have to be destroyed is likely to be approximately \$1,260,000. (*Id.* at ¶ 9).

These significant economic consequences make clear that injunctive relief is not appropriate. *Abend*, 863 F.2d at 1479 (injunction inappropriate because film resulted from collaborative effort of many contributors other than author of underlying story; “injunction would also effectively foreclose defendants from enjoying legitimate profits derived from the exploitation of the ‘new matter’ comprising the derivative work which is given express copyright protection by section 7 of the 1909 Act.”). As Plaintiffs themselves point out, injunctive relief must be narrowly tailored. (Pl. Mem. at 4); *see also Cumulus Media, Inc. v. Clear Channel Communications, Inc.*, 304 F.3d 1167, 1178 (11th Cir. 2002); *Valley v. Rapides Parish School Board*, 646 F.2d 925, 942 (5th Cir. May 18, 1981). As Plaintiffs also correctly point out, injunctive relief is more appropriate where “the infringing portion of defendant’s work can be removed, without destroying the usefulness of the remainder of the work.” (Pl. Mem. at 4) (citing *Breffort v. I Had A Ball Co.*, 271 F. Supp. 623 (S.D.N.Y. 1967); *see also Abend*, 863 F.2d at 1479 (“Since defendants could not possibly separate out the ‘new matter’ from the underlying work, their right to enjoy the renewal copyright in the derivative work would be rendered meaningless by the grant of an injunction.”) (emphasis in original); *New Era Publications Int’l v. Henry Hold and Co., Inc.*, 873 F.2d 576, 584 (2d Cir. 1989) (permanent injunction would result in total destruction of work because it would not be economically feasible to reprint book after deleting infringing material).

Thus, the harm to Defendants as outlined above far outweighs any harm to the Plaintiffs of inclusion of their photographs in the CNG.⁵

D. THE ELEVENTH CIRCUIT RECOGNIZED THAT PERMANENT INJUNCTIVE RELIEF IN THIS CASE WOULD NOT BE IN THE PUBLIC INTEREST.

In its opinion, the Eleventh Circuit stated: “[i]n assessing the appropriateness of any injunctive relief, we urge the court to consider alternatives, such as mandatory license fees, in lieu of *foreclosing the public’s computer-aided access to this educational and entertaining work.*” *Greenberg*, 244 F.3d at 1276 (emphasis added). Thus, the Court explicitly recognized that enjoining future distribution of CNG would be inimical to the public interest.

The Eleventh’s Circuit’s urging to consider alternatives to injunctive relief is in keeping with the refusal of other courts to enter injunctions in cases where doing so would preclude the public from gaining access to certain important works. *Abend*, 863 F.2d at 1479 (injunction inappropriate because “injunction could cause public injury by denying the public the opportunity to view a classic film for many years to come.”); *see New York Times Co., Inc. v. Tasini*, 533 U.S. 483, 504-05, 121 S. Ct. 2381, 2392 (Court dismissed publishers’ warning that ruling for authors in that case would have “devastating” consequences because it would punch “gaping holes in the electronic record of history” by noting that “it hardly follows from today’s decision that an injunction against the inclusion of these Articles in the Databases...must issue” and that licensing based alternatives are available) (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 n. 10, 114 S. Ct. 1164 (1994) (goals of copyright law are “not always best served by automatically granting injunctive relief”); 3 Melville and David Nimmer, *Nimmer on*

⁵ In fact, Plaintiffs point to no such harm in their moving papers, stating only that an injunction is proper because it, “would not work a severe hardship on the defendants.” (Pl. Mem. at 5).

Copyright § 14.06[B] at 14-55 (1988) (“[W]here great public injury would be worked by an injunction, the courts might...award damages or a continuing royalty instead of an injunction in such special circumstances.”). Plainly, the Eleventh Circuit realized that this was such a case when it specifically urged this Court to consider alternatives to an injunction.

E. PLAINTIFFS COME TO SEEK INJUNCTIVE RELIEF WITH UNCLEAN HANDS.

It is beyond dispute that injunctive relief is equitable and that a plaintiff seeking such relief must come with clean hands. Carmen v. Fox Film Corp., 269 F. 928, 931-32 (2d Cir. 1920); 11A Wright, Miller & Kane, Federal Practice and Procedure, Civ. 2d § 2946 at 108 (“he who comes into equity must enter with clean hands”). Here, injunctive relief is not equitable and Plaintiffs do not have clean hands.⁶

As discussed *supra*, the respective rights of the Society and Jerry Greenberg are governed not only by the copyright law, but by the agreements pursuant to which Greenberg’s photographs were published in the Magazine. Greenberg acknowledged that his contracts allow the Society to republish his photographs in a letter he wrote to the Society when he requested reassignment of this copyright in his photographs. (Exh. 4). Having acknowledged the Society’s right to republish his material in accordance with the agreements, he cannot now claim to be entitled to injunctive relief. That is the essence of unclean hands.

⁶ As demonstrated *infra*, Defendants satisfy the Eleventh Circuit’s requirements for invoking unclean hands defense because: (1) they can demonstrate that the Plaintiffs’ wrongdoing – seeking injunctive relief with the knowledge that Defendants have a contractual right to include Greenberg’s photographs in the CNG – is directly related to the claim against which the laches defense is asserted; and (2) Defendants have been injured by Plaintiffs’ conduct. Monsanto Co. v. Campuzano, 206 F. Supp. 2d 1252, 1263 (S.D. Fla. May 2, 2002).

F. GREENBERG IS GUILTY OF LACHES.

Plaintiffs’ request for permanent injunctive relief should also be denied because Plaintiffs are guilty of laches. Saxlehner v. Eisner & Mendelson Co., 179 U.S. 19 (1900) (a plaintiff who is guilty of laches will be denied injunctive relief); Sierra Club v. U.S. Army Corps of Engineers, 295 F.3d 1209, 1218-19 (11th Cir. 2002); *see also* 11A Wright, Miller & Kane, Federal Practice and Procedure, Civ. 2d § 2946 at 113-14. Plaintiffs filed their motion for permanent injunctive relief on November 4, 2002, more than five years after filing the complaint and one and one half years after the 11th Circuit issued its opinion on March 22, 2001. If Plaintiffs sincerely believed that the continued inclusion of Greenberg’s photographs in the CNG would cause injuries for which there is no adequate remedy at law, they certainly would have filed their motion for injunctive relief shortly after filing their complaint, within the context of Judge Lenard’s initial consideration of Defendants’ motion to dismiss which she granted as a summary judgment, or at least as soon as they learned of the Eleventh Circuit decision. Greenberg v. National Geographic Society, 1999 WL 737890 (S.D. Fla. 1999) *rev’d by* Greenberg v. National Geographic Society, 244 F.3d 1267 (11th Cir. March 22, 2001), *cert. denied*, 122 S. Ct. 347, 151 L. Ed. 2d 262 (Oct. 9, 2001); (Plaintiff’s Mem. at 2);⁷ *see also* Birnbaum, 546 F. Supp. at 1367-68 (movants for preliminary injunction guilty of laches because they waited four months after they learned of adverse administration hearing decision and therefore the “unexplained lapse of time fosters significant doubt that any irreparable injury will occur here.”).

⁷ At the very least, they could have filed it when the United States Supreme Court denied Defendants’ petition for certiorari on October 9, 2001, still more than a year ago. National Geographic Society v. Greenberg, 122 S. Ct. 347, 151 L. Ed. 2d 262 (Oct. 9 2001).

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During the Plaintiffs' significant delay, the Society's distributor has continued producing copies of the CNG.⁸ Many of those copies currently in inventory, including the 10,539 copies currently in inventory, would have to be destroyed. (Id. at ¶ 7).⁹ Had Plaintiffs acted expeditiously, the Society would not be faced with such a significant economic loss. New Era Publications, 873 F.2d at 584 (court denied permanent injunctive relief on laches grounds because the fact that Plaintiff waited to apply for a TRO until after 12,000 copies of book there at issue had been printed, packed and shipped and a second print run was planned would have catastrophic economic consequences); Kay v. Austin, 621 F.2d 809, 813 (6th Cir. 1980) (candidate for president barred by laches from obtaining injunction requiring that his name be placed on presidential primary ballot where candidate did not inquire whether name had been placed on ballot until nearly two weeks after he knew choice of candidates had been made and state had spent \$200-300,000 on election preparations).

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny Plaintiffs' motion for permanent injunctive relief.

⁸ Sales of the CNG are approximately 70,000 units per quarter. (Clifford Decl. at ¶ 9).

⁹ Moreover, there would be costs associated with removing Greenberg's photographs from the next iteration of the CNG. (Clifford Decl. at ¶ 12).

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Respectfully submitted,

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Of Counsel

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National Geographic Magazine

WASHINGTON, D. C. 20036

GILBERT M. GROSVENOR
VICE PRESIDENT AND
ASSOCIATE EDITOR

Mr. Jerry Greenberg
6840 S. W. 92nd Street
Miami, Florida 33156



This is to confirm your assignment to do a story on the Buck Island Reef National Monument for publication in the National Geographic magazine.

As Mr. Garrett outlined in his letter of June 30, we want a 12-16 page picture essay with text blocks to accompany the photographs. We will pay you \$3,500 for publishable pictures and text information. If for any reason the story is unacceptable we will guarantee payment in the amount of \$1,500 for this work. In addition, we will pay expenses involved with this assignment including transportation to and from St. Croix and your home. Enclosed is an expense advance in the amount of \$1,000 which you and Mrs. Greenberg may use for your planned trip to the park at the end of this month to make contacts and do preliminary photography and research. You will be expected to account for these funds in the enclosed expense account booklets. If needed, additional expense money will be made available for the major part of the assignment which you will undertake next summer.

As agreed, the National Geographic Society will retain those photographs from this assignment that are published in the magazine for all other publications and purposes related to the Society's objectives. No additional payment for reuse of these pictures will be made. Also, we will retain one-time publication rights to those pictures published in the article which were picked from your files and not produced while on this assignment for the Society.

We will send you film and process it here. Please advise Mr. Gilka the types and quantity of film needed. Shipping cartons and caption booklets will be sent with the film. Should you need to borrow any equipment for use on this assignment I'm sure this can be worked out with Mr. Gilka.

KI

Mr. Jerry Greenberg

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For the record, it should be understood that the Society cannot be responsible for your safety or for the safety of anyone working with you on this assignment. Please sign the copy of this letter that we enclose and return it to me.

As soon as we receive any material from the Department of the Interior for your use on this assignment we will forward it to you.

We offer our very best wishes for a successful assignment and look forward to the publication of your story in the National Geographic magazine.

Best regards,

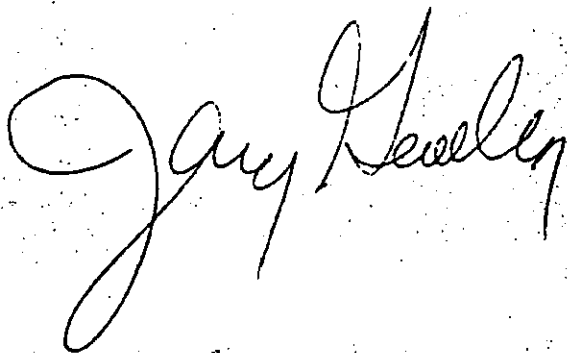


Gilbert M. Grosvenor
Vice President and Associate Editor

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Enclosures

THANKS Gil



G.M.G.
HAS SEEN

2

June 27, 1960

Mr. Jerry Greenberg
6940 S. W. 92nd Street
Miami 56, Florida

By now you know the good news that the Editor has approved the assignment on Key Largo for you. I have received your list of expenses and gone over them. In view of the unusual problems of working underwater I feel this is reasonable even though it adds up to over a hundred dollars a day.

We will pay a premium of double the normal page rate because of the difficulty of the job. This would amount to \$200.00 a page or \$100.00 minimum per picture used in color. Considering a minimum size of 8 color pages we would guarantee you \$1,600.00 for the job. I would estimate that a successful job would occupy no less than 16 color pages, and as high as 24.

All pictures used in the story plus a few for file selects would become the property of the National Geographic Magazine. After publication in the Magazine all rights on those pictures not held by us would be yours to sell.

Insofar as The Society is concerned, you will undertake this assignment as a free lance agent and independent contractor, and not in any sense of the word as a person employed by the Society, directly or indirectly. Further, acceptance of financial and other considerations outlined in this letter shall constitute an absolute release to the National Geographic Society of all responsibility for personal injury, and/or death, which may arise out of or result from this assignment.

Enclosed is a check for \$1,500.00 as an advance towards expenses on the assignment. Please keep records for our Auditing Division. The enclosed daily expense slips are used by the staff, and do have the advantage of providing a system. Use them if you like. As this money is used notify us and we will try to guess how much more, if any, will be needed within reason to produce a top story. If you have any questions on large expenses that you are in doubt about call me and I will advise you.

Mr. Jerry Greenberg

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Your sketches on the potential pictures for the story make very good sense. As you know from our conversations the key picture will be a superwide shot. This may be two VeriWide shots side-by-side or even three or four. I would like to be there to work with you on it, but I'm not counting on it.

The night shot with the lanterns lends itself to a dramatic picture, but it has to be more than just the lantern and man. In other words, it must be obvious that it is part of a reef story and not in a pool.

The brain coral looks promising.

The sled picture is excellent. It indicates possibilities for recreational use of the area. In this same category would be the picture of the diver using your Rollei housing with the ring light on the front.

For a model be on the lookout for a full-breasted mermaid.

Let's plan to do a spread with 8 to 12 different types of coral that are most common or most interesting. If you do not know which to select let me know and I will talk to a coral expert and make suggestions. This would be in the nature of a catalogue of coral. Those represented in other large pictures in the series should be left from this collection.

Try getting on top of one of the lighthouses and shooting down into the water. This is just a wild idea, but you might try a Panon or wide angle that would cover from the horizon (with a freighter moving across a sunset or sunrise) to the base of the light scaffold looking straight down onto a shallow reef. If you look down into the water (calm night) from this perch would you be able to see a model lighted by a flash or torch underwater? If so, this would make quite a shot. Perhaps having a small boat in the middleground and a diver on the bottom lighted with flash would be successful. This may all be impossible. Even if the diver were only 5 feet below the effect would be there.

If there is anything to be shown do not hesitate to rent a plane for an aerial of the reef.

I'm going to see a park service man here who is well-informed about this park and will pass on any ideas that come from him.

I'll try to answer your questions. We cannot restrict use of your films, but would expect that you not produce a story on the reefs for another magazine.

The proposed author for the article is Mr. Charles Brockfield. We will see that you two get together as soon as his assignment is firm.

APR 30 8 00 AM '61

RECEIVED

Mr. Jerry Greenberg

-3-

Mr. Brookfield knows of a wreck or two in this area that might spice up the photographic coverage a bit. If there are any known wrecks in the area be sure to get coverage.

I agree it would be best to rent a compressor.

Regarding a model wouldn't it be easier, cheaper and safer to hire an assistant than to pay a daily rate for a model. This would give you an assistant and diving buddy as well as a model. You might look into the possibility.

If this letter raises any questions or leaves any of yours unanswered don't hesitate to ask me.

Please let me see your film as you go, rather than hold it all until the end. Let me know what film or equipment you might need that we can provide. As soon as the 120 size High-speed Ektachrome is available we will try to get it to you.

W. E. CARTER
ASSISTANT ILLUSTRATIONS EDITOR

WEG:CMH
Enclosures
Air Mail

MAY 30 1961

September 19, 1961

Mr. Jerry Greenberg
6340 S. W. 92nd Street
Miami 56, Florida

With pleasure I enclose this check for \$5,173.22 in payment for your work on the Key Largo Reef story. This is in addition to the \$2,201.78 already paid for pictures.

The breakdown is as follows:

\$3,473.22 for the pictures used in the Magazine, for the Society's
publications, and for other purposes related to its
objectives, plus -
500.00 bonus for outstanding job,
200.00 additional for one of the series which is also being
used on the cover,
1,000.00 for the manuscript and your help with text, legends, and
checking facts.

Your patience and perseverance on this project have been most appreciated. Not many photographers would strive so hard to do their best. I realize that every picture published represents many hours of boating to and from the reef and diving on the reef.

I will return your file pictures after we have completed plating and have had dupes made for our file. It has been a pleasure working with you.

W. E. GARRETT
ASSISTANT ILLUSTRATIONS EDITOR

WEG:SCM
ENC: 1 check

P. S. Send us one of your lights and bill us for it.

4

November 15, 1985

WE Garrett / Editor
NATIONAL GEOGRAPHIC MAGAZINE
Washington, D.C. 20036

Dear Bill:

Last July I was down in the Keys, finishing up Florida's Marine Wilderness for TRAVELER and I missed seeing you. Perhaps on your next trip into Miami for kudos or Mayans we will get together.

Because of your faith in me I produced three major assignments for the National Geographic Society. They were PENNEKAMP PARK (Jan.1962), SHARKS (Feb.1968 and BUCK ISLAND (May,1971). With this material available to us along with Idaz's art work, we have become successful mini-publishers.

I am concerned that photographs published in 1962, 1968 and 1971 will fall into public domain in 1990, 1996 and 1999. In order to protect my material used in our publications, I need to receive a re-assignment of copyright from the Society. With this document, I or my heirs will be able to re-copyright this photography (using the RE form) for an additional 28 years.

This re-assignment would have no effect on the Society's reuse of this material as this provision was covered in the original contracts for each assignment.

The material involved is:

January, 1962
Vol.121, No.1

photos on cover and
pages 58 thru 89

February, 1968
Vol.133, No.2

photos on cover and
pages 222-223, 225,
226-227, 238, 240-
241 and 251

May, 1971
Vol.137, No.5

photos on pages
674-675-676, 677,
678, 679, 680,
681, 682 and 683

Re-assignment of copyright should reflect the above material with appropriate date of copyright and registration number.

Thanks for any help in this matter.

BILL: THE OCTOBER ISSUE WITH
PANDORA, SOMOA AND THE
ABERCROMBIE WAS A GREAT
ISSUE. I JUST GOT THRU READING
IT WHEN YOUR STUNNING
EARLY NEW ISSUE CAME IN.
WITHOUT DOUBT, ITS ONE OF
THE HIGH MARKS IN THE
MAGAZINE'S HISTORY. KEEP
IT UP! JERRY G.

Warmest personal regards,

Jerry Greenberg
SEAHAWK PRESS
6840 SW 92nd Street
Miami, Florida 33156

JERRY G.

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