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Photographers Snap: File Complaints vs. National Geographic

(Folio: First Day) National Geographic Society has been added to a dubious list of publishers forced to lance in court with freelancers over electronic-usage rights. The Washington D.C.-based company is facing two lawsuits from photographers opposing the reuse of their work on a 30-disc CD-ROM that stores every issue of National Geographic. Both complaints charge National Geographic with copyright infringement in connection with its use of photographs in the archive, which is sold to schools and libraries and retails to the public for \$199.95.

Attorney Stephen Weingrad, who filed a complaint Dec. 19 in a federal court in New York on behalf of lead plaintiff Douglas Faulkner and three others, says, "Everybody respects National Geographic for what they do, but they shouldn't do these things without getting the rights first." The intellectual-property specialist at Manhattan-based Weingrad & Weingrad maintains that the CD-ROM -- which recreates pages exactly as they appeared in the magazine -- meets the definition of "enhanced product" because every disc is glitzed up with a search engine as well as a 50-second advertisement for sponsor Kodak (whose name is also displayed on the packaging) that features music and video elements. "They're utilizing my clients' images for their commercials," Weingrad argued.

That the CD-ROM is being marketed by National Geographic Interactive, a new for-profit arm of the nonprofit organization, only makes Weingrad angrier. The attorney believes his clients would have negotiated less charitably had they known their work would end up being used to turn a profit. "How would you feel," he asked, "if you donated some money to the Red Cross and you found out the president of the Red Cross took that money and bought a house?" Dan Carlinsky, VP for contracts with the New York-based American Society of Journalists and Authors, said the product is a clear case of "further editorial use." "Look at the packaging [of the CD-ROM]," he says. "They're trumpeting 'New! New! New!' This would be laughable if it weren't so sad."

Lawrence Savell, media-law expert for the Manhattan firm of Chadbourne & Park, finds National Geographic's use of the photographs perfectly within legal boundaries. "I think this is another lawsuit the publisher will win," he says. Savell cites as precedent the case of *Tasini v. The New York Times*, in which New York judge Sonya Sotomayor ruled that publishers can reprint works without securing additional rights as long as the new use is close to the original. That case is currently on appeal. "This strikes me as an even stronger case than the *Tasini* case," Savell explained, because the National Geographic CD-ROM even reproduces advertisements as they appeared on the pages.

No one from National Geographic would discuss the lawsuits, but in a letter sent to contributing photographers last May, Tom Stanton, director of CD-ROM Product Management, wrote: "The Society holds copyrights in the magazine issues as collective works, and we believe that the continuing copyrights permit the Society to republish its magazine archive in this CD-ROM delivery mechanism." A second copyright-infringement complaint was filed last month in a federal court in Miami by attorney Norman Davis on behalf of photographer Jerry Greenberg (and his wife), and Carlinsky told First Day that a third group of 16 photographers -- led by representative Jim Pickerell -- has hired a lawyer to consider their options regarding a similar suit. As of yet, no writers have taken action against the Society.

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