

1 UNITED STATES COURT OF APPEALS

2
3 FOR THE SECOND CIRCUIT

4
5 August Term, 2004

6
7 (Argued: October 27, 2004 Decided: March 4, 2005)

8
9 Docket Nos. 04-0263-cv(L), 04-0388-cv(CON), 04-0265-cv(CON), 04-
10 0475-cv(CON), 04-0318-cv(CON), 04-0481-cv(CON)

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14 DOUGLAS FAULKNER, LOUIS PSIHOYOS, MATRIX INTERNATIONAL, INC., as
15 agent for Roger Hutchings, Sarah Leen and Rick Rickman, SALLY
16 FAULKNER, DAVID HISER, DAVID G. ALLEN, as successor and interest
17 to Arthur Allen, RICHARD CONNIFF, JON KRAKAUER, JOHN KNOEBBER,
18 ELIZABETH ROYTE, JOE BARABAN, PAMELA WILSON SARTORELLI, DORANNE
19 JACOBSON, JEROME JACOBSON, DAVID ROBERT AUSTIN, and FRED WARD,
20
21 Plaintiffs-Appellants,

22
23 v.

24
25 MINDSCAPE INC., NATIONAL GEOGRAPHIC ENTERPRISES INC., DATAWARE
26 TECHNOLOGIES INC., NATIONAL GEOGRAPHIC SOCIETY, NATIONAL
27 GEOGRAPHIC INTERACTIVE, EASTMAN KODAK CO., and NATIONAL
28 GEOGRAPHIC HOLDINGS, INC., doing business as National Geographic
29 Interactive, doing business as National Geographic Enterprises
30 Inc.,
31 Defendants-Appellees.

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35 B e f o r e: WINTER, KATZMANN, AND RAGGI, Circuit Judges.

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37 Appeal from grant of summary judgment by the Southern
38 District of New York (Lewis A. Kaplan, Judge) dismissing claims
39 of copyright infringement involving CD-ROM collections of
40 National Geographic Magazine. We hold the CD-ROM versions to be
41 privileged "revisions" of the original collected works within the
42 meaning of Section 201(c) of the Copyright Act. We affirm except

1 for a small number of contributions to the original works as to
2 which we reverse because of express contractual provisions.

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14 et al.

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16
17 WINTER, Circuit Judge:

18 Appellants are freelance photographers and authors whose
19 photographs and/or written works were originally published in
20 various issues of the National Geographic Magazine. These
21 photographs and writings have now been published in "The Complete
22 National Geographic" ("CNG"), a digital collection of the past
23 issues of the Magazine that offers users various means of
24 searching, viewing, and displaying pages of these issues.
25 Appellants and their representatives brought copyright
26 infringement actions under the Copyright Act of 1976, as amended,
27 17 U.S.C. § 101 et seq. ("Act"), and the Copyright Act of 1909
28 ("1909 Act"), against various defendants listed in the margin.¹
29 The district court granted summary judgment in favor of
30 defendants.

31 Although a number of issues are raised and resolved on this
32 appeal, the principal questions are whether the district court

1 erred in not applying the doctrine of collateral estoppel to give
2 Greenberg v. National Geographic Society, 244 F.3d 1267 (11th
3 Cir. 2001), preclusive effect, and in finding the CNG to be a
4 privileged revision under Section 201(c) of the Copyright Act.
5 We agree with the district court. The decision in New York Times
6 Co. v. Tasini, 533 U.S. 483, 488 (2001), represented an
7 intervening (post-Greenberg) change in law precluding the
8 application of collateral estoppel, and the CNG is a revision for
9 Section 201(c) purposes. We also resolve the other issues
10 against appellants, and therefore affirm, except for issues
11 relating to seven photographs that were subject to express
12 contractual provisions preserving electronic rights in the
13 copyright owners. As to those, we reverse and remand.

14 BACKGROUND

15 National Geographic Magazine ("the Magazine") is the monthly
16 publication of the National Geographic Society ("NGS"). In
17 addition to being sold in single bound paper copies, it has been
18 sold in microform format for decades. At different times, NGS
19 has also sold compiled, bound, paper volumes containing multiple
20 issues of the Magazine. Since 1962, NGS has granted rights to
21 the Library of Congress to publish a Braille edition of the
22 Magazine. In 1996, NGS undertook a project to reproduce in CD-
23 ROM format all issues of the Magazine published from its founding
24 in 1888 to 1996. In 1997, NGS produced and began to sell the

1 product, "The Complete National Geographic: 108 Years of
2 National Geographic Magazine on CD-ROM." It was the first of
3 many iterations of the CNG sold.²

4 The CNG was produced through digital scanning. Each issue
5 of the magazine was scanned two pages at a time into a computer
6 system. As a result, the CNG user sees exactly what he or she
7 would see if viewing an open page of the paper version, including
8 the fold of the magazine. Because of some contractual
9 arrangements excluding electronic reproduction, approximately 60
10 out of 180,000 images have been blacked out in some iterations of
11 the CNG. None of these images are at issue in this case. Except
12 for the blacked-out images, there are no changes in the content,
13 format, or appearance of the issues of the magazine.³ The pages
14 appear as they do in the print version, including all text,
15 photographs, graphics, advertising, credits and attributions.
16 Issues of the Magazine appear chronologically with the first
17 issue published appearing at the beginning of the first disk and
18 the last appearing at the end of the last disk. The individual
19 images and texts are therefore viewed in a context almost
20 identical -- but for the use of a computer screen and the power
21 to move from one issue to another and find various items quickly
22 -- to that in which they were originally published.

23 Because the scanning process does not replicate the high
24 resolution found in the paper magazines, the digital images may

1 appear slightly fuzzy when compared to the high resolution of the
2 original. PicTools Development Kit ("PicTools"), an image
3 compression and decompression tool, compresses the scanned images
4 onto the disc for increased storage and expands them back to
5 their original size when the images are accessed on the CDs.
6 PicTools is a copyrighted storage mechanism. It does not add any
7 creative elements to the Magazines.

8 Stories can be retrieved through the table of contents of
9 each magazine or by using an electronic search engine. The
10 search engine allows a user to find stories containing certain
11 words or phrases within the texts of articles; descriptions of
12 articles, including title, contributors, date, and major related
13 subjects; advertisements; cover and page images; and page maps.
14 To view a particular story, a user must insert the disk
15 containing the issue in which the story appeared.

16 Each iteration of the CNG contains introductory and
17 conclusory material. At the beginning of each disk of the first
18 iteration of the CNG, CD-ROM 108, a series of multimedia
19 sequences appears. It begins with a moving display of the NGS
20 logo followed by a Kodak advertisement, and then a sequence
21 depicting the digital transition of ten Magazine covers into each
22 other (the "Moving Cover Sequence"). These multimedia sequences
23 play the first time a user boots up the CNG and at the beginning
24 of each subsequent session. During subsequent sessions, however,

1 the user can skip the introductory sequence by clicking on it
2 with the mouse. A graphic display depicting moving spines of the
3 issues of the magazines (the "Moving Spines Sequence") followed
4 by credits is displayed when the CNG program is exited. The
5 subsequent iterations contain similar or identical multimedia
6 sequences. Additional multimedia tools such as the capability to
7 bookmark and rotate pages and darken text have been added to some
8 subsequent iterations.

9 NGS is a nonprofit organization that produces the Magazine.
10 The other defendants, see Note 1, supra, are sued as a result of
11 their relation both to NGS and the CNG. In 1995, NGS placed its
12 television division, and subsequently its interactive and a
13 portion of its cartography divisions, in taxable for-profit
14 wholly owned subsidiaries. Holdings, NGV, NGE, and Interactive
15 were such wholly-owned taxable subsidiaries. NGV, before its
16 dissolution, wholly owned NGE. Interactive was a division of
17 NGE.⁴ By a license agreement, NGS gave NGV non-exclusive rights
18 to its copyrights in the Magazine for the development and use in
19 "multimedia" products. The rights granted were for reproduction
20 only in archival form and without alteration. Other parties and
21 their relationship to the CNG are described in the margin.⁵

22 Eastman Kodak, a manufacturer and developer of film and
23 camera equipment, entered into an agreement to pay a fee to
24 Interactive. In return, Eastman Kodak obtained the right to

1 place a promotional message at the beginning of the CD-ROM Disks
2 as well as on the outside of the CNG product packaging. It also
3 received 5,000 complimentary units of CD-ROM 108.

4 In 1997, the CNG project was presented to and approved by
5 the Society's Board of Trustees. One trustee was former United
6 States Court of Appeals Judge Leon Higginbotham, now deceased.
7 He had at one time been a partner with Judge Kaplan in the New
8 York law firm of Paul, Weiss, Rifkin, and Garrison.

9 After gaining Board approval, NGS registered the CNG with
10 the Copyright office. Its registration form states that the CNG
11 is a "compilation of pre-existing material primarily pictorial"
12 and that additional material added to it is a "brief introductory
13 audiovisual montage."

14 The CNG was originally distributed and marketed as an
15 "unprecedented" collection. Some of the marketing materials urge
16 consumers to print "any article or photograph." In addition, in
17 some copies of the CNG marketed by Encore Software, an End User
18 License Agreement is included which states that, "[a]s a user of
19 this product, you are free to use, modify and publish the Images
20 as you wish" and "incorporate any Image(s) into your own original
21 work and publish, display and distribute your work in any media."

22 In response to the production and marketing of the CNG,
23 various contributors to the magazine or their representatives
24 filed actions against some or all of the following defendants:

1 NGS, NGE, Interactive, Mindscape, Kodak, and Dataware for
2 copyright infringement. Greenberg v. National Geographic Society
3 was filed on December 5, 1997 in the Southern District of
4 Florida. Faulkner v. National Geographic Society was filed on
5 December 19, 1997 in the Southern District of New York. Ward v.
6 National Geographic Society, was filed on December 27, 1999 in
7 the Southern District of New York. Hiser v. National Geographic
8 Society was filed on December 29, 1999 in the Southern District
9 of New York. Auscape v. National Geographic Society was filed on
10 January 31, 2002 in the Central District of California. It was
11 transferred to the Southern District of New York on August 2,
12 2002. Psihooyos v. National Geographic Society was filed on March
13 7, 2002 in the District of Colorado. It was transferred to the
14 Southern District of New York on August 9, 2002. All cases filed
15 in or transferred to the Southern District of New York were
16 assigned to Judge Kaplan.

17 Greenberg was the only case not filed in, or transferred to,
18 the Southern District of New York. On June 8, 1999, the Florida
19 district court granted summary judgment for defendants with
20 regard to the copyright claims. On March 22, 2001, the Eleventh
21 Circuit reversed. Greenberg v. Nat'l Geographic Soc'y, 244 F.3d
22 1267, 1268 (11th Cir. 2001). The Supreme Court denied certiorari
23 on October 12, 2001. Nat'l Geographic Soc'y v. Greenberg, 534
24 U.S. 951 (2001).

1 In the Southern District of New York, defendants filed
2 motions to dismiss and for summary judgment in Faulkner, Ward,
3 and Hiser in March, 2001. Ward cross-moved for summary judgment.
4 Judge Kaplan issued two opinions ("the 1909 Act Opinions") on
5 July 13, 2002. Ward v. Nat'l Geographic Soc'y, 208 F. Supp. 2d
6 429 (S.D.N.Y. 2002); Faulkner v. Nat'l Geographic Soc'y, 211 F.
7 Supp. 2d 450 (S.D.N.Y. 2002). The court held that issues of fact
8 precluded entry of summary judgment for defendants with regard to
9 some of the infringement claims. It also dismissed the claim
10 brought by some plaintiffs against Kodak for contributory
11 infringement. Id. at 473-75.

12 On April 11, 2002, defendants again filed motions to dismiss
13 and for summary judgment in Ward, Faulkner and Hiser; the
14 plaintiffs in those actions also moved for summary judgment.
15 Defendants filed a motion to dismiss and for summary judgment in
16 Psihoyos on May 20, 2003. The district court granted defendants'
17 motions for summary judgment in Ward, Faulkner, Hiser, and
18 Psihoyos on December 11, 2003 under Rule 54(b). Faulkner v.
19 Nat'l Geographic Soc'y, 294 F. Supp. 2d 523 (S.D.N.Y. 2003). It
20 held that the CNG was a privileged revision under Section 201(c),
21 and, therefore, defendants did not infringe plaintiffs' copyright
22 in publishing their underlying works in the CNG. Id. at 543.

23 The Faulkner and Hiser plaintiffs moved for reconsideration
24 on the grounds that the Court erred as a matter of law and should

1 have recused itself. The recusal motion was based on: (i) Judge
2 Kaplan's disclosure to the litigants, in a letter dated November
3 24, 2003, that he had just discovered Judge Higginbotham's role
4 in NGS; and (ii) the subsequent discovery that while in private
5 practice, Judge Kaplan had represented a subsidiary of defendant
6 Eastman Kodak. The motion was denied on December 23, 2003,
7 Faulkner v. Nat'l Geographic Soc'y, 296 F. Supp. 2d 488 (S.D.N.Y.
8 2003) ("Recusal Order"), and a final judgment entered. The
9 Auscape suit remains pending.

10 At issue on this appeal are the judgments entered against
11 the Faulkner, Ward, Hiser, and Psihoyos plaintiffs. Plaintiffs
12 from Faulkner and Hiser, ("Faulkner appellants") appeal the final
13 orders in: (i) Faulkner v. National Geographic Society, 211 F.
14 Supp. 2d 450 (S.D.N.Y. July 13, 2002); (ii) Faulkner v. National
15 Geographic Society, 220 F. Supp. 2d 237 (S.D.N.Y. September 4,
16 2002); (iii) Faulkner v. National Geographic Society, 294 F.
17 Supp. 2d 523 (S.D.N.Y. December 11, 2003); and (iv) Faulkner v.
18 National Geographic Society, 296 F. Supp. 2d 488 (S.D.N.Y.
19 December 23, 2003). Fred Ward appeals only the December 11, 2004
20 order's grant of summary judgment to defendants dismissing all of
21 his copyright claims. Plaintiffs from Psihoyos ("Psihoyos
22 appellants") also appeal only the December 11, 2004 order's grant
23 of summary judgment to defendants dismissing all of their
24 copyright claims.

1 DISCUSSION

2 We review a district court's grant or denial of summary
3 judgment de novo, viewing the evidence in the light most
4 favorable to the non-moving party. United States v. Collado, 348
5 F.3d 323, 326-27 (2d Cir. 2003). Summary judgment is only
6 appropriate if, based on the pleadings and evidentiary
7 submissions, there is no genuine material issue of fact and the
8 moving party is entitled to judgment as a matter of law. Celotex
9 Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). We review a
10 district court's decision regarding offensive non-mutual
11 collateral estoppel de novo. S.E.C. v. Monarch Funding Corp.,
12 192 F.3d 295, 303 (2d Cir. 1999). We review the denial of a
13 motion to recuse under 28 U.S.C. § 455 for abuse of discretion.
14 In re Aguinda, 241 F.3d 194, 200 (2d Cir. 2001).

15 a) Legal Background

16 Copyright subsists in "original works of authorship." 17
17 U.S.C. § 102(a). Copyright in a work vests initially in the
18 author or authors of the work. Id. § 201(a). A compilation is
19 an original work formed by selecting, coordinating, and arranging
20 preexisting materials. Id. § 101. A compilation includes
21 collective works, which are defined as "work[s], such as a
22 periodical issue, anthology, or encyclopedia in which a number of
23 contributions, constituting separate and independent works in
24 themselves, are assembled into a collective whole." Id. The

1 copyright in a compilation or derivative work extends only to
2 materials contributed by the compiling author. Id. § 103(b). A
3 copyright in a compilation or derivative work does not include an
4 exclusive right in the preexisting material. Id. § 103(b).

5 Section 201(c) of Title 17 provides:

6 Copyright in each separate contribution to a
7 collective work is distinct from copyright in
8 the collective work as a whole, and vests
9 initially in the author of the contribution.
10 In the absence of an express transfer of the
11 copyright or of any rights under it, the
12 owner of copyright in the collective work is
13 presumed to have acquired only the privilege
14 of reproducing and distributing the
15 contribution as part of that particular
16 collective work, any revision of that
17 collective work, and any later collective
18 work in the same series.

19
20 Id. § 201(c). With regard to Section 201(c), the pertinent House
21 Report noted:

22 Under the language of this clause a
23 publishing company could reprint a
24 contribution from one issue in a later issue
25 of its magazine, and could reprint an article
26 from a 1980 edition of an encyclopedia in a
27 1990 revision of it; the . . . publisher
28 could not revise the contribution itself or
29 include it in a new anthology or an entirely
30 different . . . magazine or other collective
31 work.

32
33 H.R. Rep. No. 94-1476, at 122-123 (1976), reprinted in 1976

34 U.S.C.A.A.N. 5659, 5738.

35 "The unauthorized reproduction and distribution of a
36 copyrighted work generally infringes the copyright unless such
37 use is specifically protected by the Act." Tasini v. New York

1 Times Co., 206 F.3d 161, 165 (2d Cir. 2000). In the instant
2 matter, appellants created individual works that they submitted
3 to NGS for use in the Magazine, a collected work. In their view,
4 CNG's inclusion of their individual contributions infringes their
5 copyright. Appellees believe that such use was specifically
6 protected by the Act as a revision of the Magazine under 17
7 U.S.C. § 201(c).

8 Three decisions interpreting Section 201(c) are of paramount
9 importance to the resolution of the issue. They are Tasini v.
10 New York Times Co., 206 F.3d 161 (2d Cir. 2000); its affirmance
11 in New York Times Co. v. Tasini, 533 U.S. 483 (2001); and, of
12 course, Greenberg v. National Geographic Society, 244 F.3d 1267
13 (11th Cir. 2001), a decision involving the CNG itself. We now
14 address those decisions in some detail.

15 In Tasini, we held that electronic and CD-ROM databases
16 containing individual articles from multiple editions of various
17 periodicals did not constitute "revisions" of individual
18 periodical issues within the meaning of Section 201(c). 206 F.3d
19 at 168. Crucial to our decision was the fact that each article
20 had to be retrieved individually from the particular database and
21 made "available without any material from the rest of the
22 periodical in which it first appeared." Id. at 164. We also
23 noted that "[t]he aspects of a collective work that make it 'an
24 original work of authorship' are the selection, coordination, and

1 arrangement of the preexisting materials," and that the means of
2 retrieval employed by the databases did "almost nothing to
3 preserve the copyrightable aspects of the Publishers' collective
4 works, 'as distinguished from the preexisting material employed
5 in the work.'" Id. at 168 (quoting 17 U.S.C. § 101 and 17 U.S.C.
6 § 103(b)).

7 The Supreme Court affirmed Tasini, holding,

8 [i]n agreement with the Second Circuit, . . .
9 that § 201(c) does not authorize the copying
10 at issue here. The publishers are not
11 sheltered by § 201(c), we conclude, because
12 the databases reproduce and distribute
13 articles standing alone and not in context,
14 not "as part of that particular collective
15 work" to which the author contributed, "as
16 part of . . . any revision" thereof, or "as
17 part of . . . any later collective work in
18 the same series."

19
20 New York Times Co. v. Tasini, 533 U.S. at 488 (alterations in
21 original). The Supreme Court stressed that in enacting the 1976
22 revision, Congress "rejected the doctrine of indivisibility,
23 recasting the copyright as a bundle of discrete 'exclusive
24 rights,' 17 U.S.C. § 106 (1994 ed. and Supp. V), each of which
25 'may be transferred . . . and owned separately,' § 201(d)(2)."
26 Id. at 495-96 (footnotes omitted). It explained:

27 Copyright in the separate contribution "vests
28 initially in the author of the contribution"
29 (here, the freelancer). Copyright in the
30 collective work vests in the collective
31 author (here, the newspaper or magazine
32 publisher) and extends only to the creative
33 material contributed by that author, not to
34 "the preexisting material employed in the

1 work."

2
3 Id. at 494 (quoting 17 U.S.C. §§ 201(c), 103(b)). Accordingly,
4 the Court held that just as the author's copyright as
5 contemplated by Congress would not be preserved by allowing a
6 publisher "to reproduce or distribute copies of the author's
7 contribution in isolation or within new collective works," it
8 would not be preserved by allowing publishers to do so in
9 electronic databases. Id. at 497.

10 Importantly, the Court gave tacit approval to microfilm and
11 microfiche as permissible Section 201(c) revisions, by
12 contrasting that method of reproduction with the databases. It
13 stated that "unlike microforms, the Databases do not perceptibly
14 reproduce articles as part of the collective work to which the
15 author contributed or as part of any 'revision' thereof." Id. at
16 501-02. It pointed out that microforms "represent a mere
17 conversion of intact periodicals (or revisions of periodicals)
18 from one medium to another," whereas the Databases offered users
19 articles in isolation absent their context in intact collective
20 works. Id. at 502.

21 The Supreme Court failed to adopt only one of the
22 conclusions we reached in Tasini. It declined to pass on whether
23 NEXIS, one of the databases at issue, "was infringing partly
24 because [it] did 'almost nothing to preserve the copyrightable
25 aspects of the [Print] Publishers' collective works,' i.e., their

1 original 'selection, coordination, and arrangement.'" Id. at 502
2 n.10 (quoting Tasini, 206 F.3d at 168). Instead the Court stated
3 that "[i]t suffices to hold that the Databases do not contain
4 'revisions' of the Print Publishers' works 'as part of' which the
5 Articles are reproduced and distributed." Id.

6 After our opinion in Tasini, but before the Supreme Court's
7 affirmance, the Eleventh Circuit decided Greenberg. That
8 decision addressed the application of Section 201(c) to a case
9 virtually identical on the facts and law to the instant matter.
10 Jerry Greenberg, a freelance photographer who had completed four
11 assignments for NGS over 30 years, sued NGS, NGE, and Mindscape
12 for copyright infringement. Greenberg, 244 F.3d at 1269-70. His
13 suit was based on the use of his photos in the CNG as well as the
14 use of one in the Moving Cover Sequence. Id. at 1269. The
15 copyrights in the pictures, once held by NGS, had been returned
16 to Greenberg in 1985 and 1990. Id.

17 Greenberg did not utilize the Tasini analysis in determining
18 whether the CNG was a "revision" under Section 201(c). It did
19 not discuss whether the articles were presented in the context of
20 the previous collected works or mention our discussion in Tasini.
21 Rather, Greenberg focused on a description of the CNG as
22 consisting of three components, the moving cover sequence (the
23 "Sequence"); the digitally reproduced issues of the Magazine (the
24 "Replica"); and the computer program that stored and retrieved

1 the images (the "Program"). Id. For the Greenberg court, the
2 key issue was what had been added to the digital reproductions of
3 the Magazine. In that regard, it stated:

4 Assuming arguendo, but expressly not
5 deciding, that 201(c)'s revision privilege
6 embraces the entirety of the Replica portion
7 of the CNG (the 1,200 issues, as opposed to
8 each separate issue of the Magazine), we are
9 unable to stretch the phrase "that particular
10 collective work" to encompass the Sequence
11 and Program elements as well.

12
13 . . . [T]he CNG is an "other collective
14 work" composed of the Sequence, the Replica,
15 and the Program. . . . [T]he Society, in
16 collaboration with Mindscape, has created a
17 new product ("an original work of
18 authorship"), in a new medium, for a new
19 market that far transcends any privilege of
20 revision or other mere reproduction
21 envisioned in § 201(c).

22
23 Id. at 1272-73 (footnote omitted). Because each of the three
24 components identified by the Greenberg court as comprising the
25 CNG -- the Sequence, the Replica, and the Program -- were
26 themselves copyrightable, that court concluded that NGS had
27 created a new work in the CNG. Id. at 1273-74. Accordingly it
28 reversed the district court's entry of summary judgment in favor
29 of defendants. Id. at 1275-76. While declining to address
30 whether adding only the Program would result in the creation of a
31 new collective work, Greenberg noted that the existence of the
32 Program differentiated the CNG from microfilm. Id. at 1273 n.12.

33 Three weeks after the Greenberg decision, the Supreme Court
34 affirmed our Tasini ruling. It subsequently denied the petition

1 for a writ of certiorari filed by the defendants in Greenberg.
2 Nat'l Geographic Soc'y v. Greenberg, 534 U.S. 951 (2001).

3 b) Greenberg and Collateral Estoppel

4 In the district court, appellants claimed that offensive
5 collateral estoppel precluded appellees from litigating their
6 Section 201(c) argument. The district court held that, because
7 the Supreme Court's decision in Tasini determined that the key to
8 whether a collective work is a revision is how the articles are
9 "presented to, and perceptible by, the user of the Databases,"
10 that decision so altered the legal environment that a fresh look
11 at the Section 201(c) revision issue was appropriate in the
12 instant matter. Faulkner, 294 F. Supp. 2d at 534, 538 (quoting
13 Tasini, 533 U.S. at 499). We agree.

14 Under the doctrine of offensive collateral estoppel, a
15 plaintiff may preclude a defendant from relitigating an issue the
16 defendant has previously litigated and lost to another plaintiff.
17 Parklane Hosiery Co. v. Shore, 439 U.S. 322, 329 (1979). In
18 order for a plaintiff to bar a defendant from litigating an issue
19 on collateral estoppel grounds: "(1) the issues in both
20 proceedings must be identical, (2) the issue in the prior
21 proceeding must have been actually litigated and actually
22 decided, (3) there must have been a full and fair opportunity for
23 litigation in the prior proceeding, and (4) the issue previously
24 litigated must have been necessary to support a valid and final

1 judgment on the merits." Gelb v. Royal Globe Ins. Co., 798 F.2d
2 38, 44 (2d Cir. 1986). Use of collateral estoppel "must be
3 confined to situations where the matter raised in the second suit
4 is identical in all respects with that decided in the first
5 proceeding and where the controlling facts and applicable legal
6 rules remain unchanged." Commissioner v. Sunnen, 333 U.S. 591,
7 599-600 (1948).

8 Therefore, even where the specified elements of collateral
9 estoppel are present, reexamination of a legal issue is
10 appropriate where there has been a change in the legal landscape
11 after the decision claimed to have preclusive effect.
12 Restatement (Second) of Judgments § 28 (cmt. c). This is
13 particularly so "when the application of the rule of issue
14 preclusion would impose on one of the parties a significant
15 disadvantage, or confer on him a significant benefit, with
16 respect to his competitors because the essential problem
17 is that there has been change in the law but not the facts." Id.
18 Accordingly, in some situations, "a judicial declaration
19 intervening between the two proceedings may so change the legal
20 atmosphere as to render the rule of collateral estoppel
21 inapplicable." Sunnen, 333 U.S. at 600 (footnote omitted).

22 As noted, Greenberg held that if a subsequent work contains
23 independently copyrightable elements not present in the original
24 collected work, it cannot be a revision privileged by Section

1 201(c). Several months later, however, the Supreme Court held in
2 Tasini that the critical analysis focused on whether the
3 underlying works were presented by the particular database in the
4 context of the original works. For example, in a straightforward
5 application of that analysis, it also strongly implied, by
6 contrasting the database to microfilm, that microfilm would
7 constitute a privileged revision. 533 U.S. at 501. In our view,
8 the Tasini approach so substantially departs from the Greenberg
9 analysis that it represents an intervening change in law
10 rendering application of collateral estoppel inappropriate. Our
11 analysis is, of course, not affected by the Supreme Court's
12 declination of certiorari in Greenberg. See United States v.
13 Carver, 260 U.S. 482, 490 (1923) (denial of certiorari "imports
14 no expression of opinion upon the merits" of any given case).

15 c) Section 201(c) and Tasini

16 Turning to the merits, we hold that, because the original
17 context of the Magazines is omnipresent in the CNG and because it
18 is a new version of the Magazine, the CNG is a privileged
19 revision.

20 "'Revision' denotes a new 'version,' and a version is, in
21 this setting, a "'distinct form of something regarded by its
22 creator or others as one work.'" Tasini, 533 U.S. at 500
23 (quoting Webster's Third New International Dictionary 1944, 2545
24 (1976)). "In determining whether the [underlying works] have

1 been reproduced and distributed 'as part of' a 'revision' of the
2 collective works in issue, we focus on the [underlying works] as
3 presented to, and perceptible by, the user of the [CNG]." Id. at
4 499 (citations omitted). The CNG presents the underlying works
5 to users in the same context as they were presented to the users
6 in the original versions of the Magazine. The CNG uses the
7 almost identical "selection, coordination, and arrangement" of
8 the underlying works as used in the original collective works.
9 Tasini, 206 F.3d at 168. The CNG presents an electronic replica
10 of the pages of the Magazine. Pages are presented two at a time,
11 with the gutter (that is, the Magazine fold) in the middle, and
12 with the page numbers in the lower outside corners, just as they
13 are presented in the written format. In addition, the contents
14 of the CNG, including the authors' contributions, are in the same
15 positions relative to the other contributions in the Magazine.
16 To be sure, a CNG user can focus on particular pages or parts of
17 pages. However, a user of a microfilm of a collective work can
18 do the same thing, see Tasini, 533 U.S. at 501, as, indeed can a
19 reader of an original magazine by opening to a particular page.
20 In contrast, the databases at issue in Tasini precluded readers
21 from viewing the underlying works in their original context. Id.
22 at 501-02.

23 Moreover, because the Section 201(c) privilege of
24 reproduction and distribution extends to that collective work and

1 any revision of that collective work, a permissible revision may
2 contain elements not found in the original -- for example, a
3 collection of bound volumes of past issues with a copyrightable
4 index to the entire collection. See Tasini, 206 F.3d at 167
5 (Section 201(c) "protects the use of an individual contribution
6 in a collective work that is somewhat altered."). Tasini is in
7 that regard contrary to Greenberg. In the case of the CNG, some
8 images found in the original version of the Magazines are blacked
9 out, and it contains additional elements such as, among other
10 things, the Moving Cover Sequence. However, these changes do not
11 substantially alter the original context which, unlike that of
12 the works at issue in Tasini, is immediately recognizable. The
13 presentation does not, therefore, affect the CNG's status as a
14 revision.

15 d) Transferability of the Section 201(c) Privilege

16 Appellants argue that the revision privilege is available
17 only to NGS, as owner of the copyright in the original collective
18 work, and that NGS cannot transfer its privilege. We disagree.⁶

19 Prior to the Copyright Act of 1976, authors risked losing
20 all rights in their underlying works when they allowed such works
21 to be used in a collective work. Tasini, 206 F.3d at 168. To
22 address this concern, the 1976 Act contained Section 201(c) and,
23 in other provisions, "expressly permitted the transfer of less
24 than the entire copyright, see 17 U.S.C. § 201(d), in effect

1 replacing the notion of a single 'copyright' with that of
2 'exclusive rights' under a copyright." Id. To that end, Section
3 201(d) provides:

4 (1) The ownership of a copyright may be transferred in
5 whole or in part by any means of conveyance or by
6 operation of law, and may be bequeathed by will or pass
7 as personal property by the applicable laws of
8 intestate succession.

9 (2) Any of the exclusive rights comprised in a copyright,
10 including any subdivision of any of the rights
11 specified by section 106, may be transferred as
12 provided by clause (1) and owned separately. The owner
13 of any particular exclusive right is entitled, to the
14 extent of that right, to all of the protection and
15 remedies accorded to the copyright owner by this title.

16
17 17 U.S.C. § 201(d). The drafters intended that the Copyright Act
18 of 1976 do "nothing to change the rights of the owner of
19 copyright in a collective work" but that it merely clarify and
20 improve an unfair legal situation by preserving an author's
21 copyright in a contribution. H.R. Rep. No. 94-1476, at 122
22 (1976), reprinted in 1976 U.S.C.A.A.N. 5659, 5738. Given that
23 intention, it is more than reasonable to read Section 201(c) and
24 201(d) together to render the publisher's limited privilege under
25 Section 201(c) to be transferrable under Section 201(d).

26 Section 201(c) transfers some of the copyright in a
27 contribution to publishers in the form of a limited privilege.
28 Section 201(d) (1) by its terms allows for a transfer of a
29 copyright "in whole or in part." Section 201(d) (2) authorizes
30 owners of "[a]ny of the . . . rights . . . in a copyright" to
31 transfer such rights. Therefore, publishers may transfer any

1 subdivision of a copyright that they acquire. See Tasini, 972 F.
2 Supp. 804, 815-16 (S.D.N.Y. 1997) (holding subdivisions of
3 copyrights transferable), rev'd on other grounds, 206 F.3d 161
4 (2d Cir. 2000). This result in no way undermines Section
5 201(c)'s goal of remedying the unfairness of indivisibility. It
6 simply recognizes the quite natural implications of divisibility.

7 e) Section 201(c) and the Pre-1978 Works

8 The applicability of the revision privilege to the
9 reproduction of works in the CNG must be addressed with regard to
10 all the underlying works, including those originally published
11 before 1978, when Section 201(c) went into effect. After some
12 early wrestling with the issue of who owned the underlying
13 copyrights in the pre-1978 works, the district court finally
14 concluded that such ownership was irrelevant. In the final
15 summary judgment order, it held that, because "at all relevant
16 times [NGS] owned the copyrights in issues of the Magazine
17 published before and after January 1, 1978 the privileges
18 conferred upon it by Section 201(c) as the holder of those
19 copyrights govern regardless of when they were published."
20 Faulkner, 294 F. Supp. 2d at 543. The district court pointed out
21 that the parties agreed that the extent of protection provided by
22 Section 201(c) to publication of the CNG was the same whether NGS
23 or the plaintiffs owned the underlying copyrights. Id.
24 Accordingly, Section 201(c) privileged NGS to publish the CNG

1 regardless of when or who owned the copyrights in the underlying
2 works. Id. We agree and affirm.

3 f) The Effect of Contractual Agreements Between the Parties

4 The district court determined that in all but a few
5 circumstances none of the contractual agreements between the
6 parties overrode application of Section 201(c)'s default
7 provisions. The Faulkner appellants argue that their contracts
8 were "intended to grant NGS limited publication rights in paper
9 format only," and accordingly the Section 201(c) privilege is not
10 applicable. We again disagree.

11 The Faulkner appellants' first argument in this regard is
12 based on the language of Section 201(c). That provision extends
13 to publishers the privilege of reproducing and distributing
14 underlying works as part of certain collective works "[i]n the
15 absence of an express transfer of the copyright or of any rights
16 under it" in the underlying work itself. 17 U.S.C. § 201(c).
17 Most of the plaintiffs have written contracts with NGS, and the
18 Faulkner appellants make the odd argument that, under the quoted
19 language, the very existence of such contracts renders Section
20 201(c) inapplicable. However, the plain effect of the quoted
21 language is only to establish the minimum rights acquired by
22 publishers absent contractual provisions expressly overriding
23 Section 201(c). In short, in the absence of a contract stating
24 otherwise, publishers acquire "only the privilege of reproducing

1 and distributing the contribution as part of that particular
2 collective work, any revision of that collective work, and any
3 later collective work in the same series." Id. (emphasis
4 added). The mere existence of contracts does not, therefore,
5 render Section 201(c) inapplicable.

6 Moreover, the contracts of the Faulkner appellants do not
7 purport to alter the effect of Section 201(c). Nevertheless,
8 these appellants argue that the contracts were intended to limit
9 publication rights to a non-digital format. The argument is
10 unpersuasive. The transfer of a work from one media to another
11 generally does not alter its character for copyright purposes.
12 See 17 U.S.C. § 102(a) (copyright protection subsists in original
13 works "fixed in any tangible medium of expression"); Tasini, 533
14 U.S. at 502 (describing "concept of 'media neutrality'").
15 Therefore, even if the Faulkner appellants harbored an intent to
16 limit publication rights to a non-digital format, their failure
17 to negotiate for pertinent contractual provisions or even to
18 communicate these intentions to NGS is fatal to their claim.
19 Accordingly, the contracts in question do not bar defendants from
20 exercising their Section 201(c) privilege.

21 g) Contributory Infringement Claims

22 In one of its 1909 Act Opinions, the district court granted
23 summary judgment to Kodak and dismissed the contributory
24 infringement claim brought against it by some of the plaintiffs.

1 Faulkner, 211 F. Supp. 2d at 475. On appeal, the Faulkner
2 appellants argue that this was error.

3 "[O]ne who, with knowledge of the infringing activity,
4 induces, causes or materially contributes to the infringing
5 conduct of another, may be held liable as a 'contributory'
6 infringer." Gershwin Publ'g Corp. v. Columbia Artists Mgmt.,
7 Inc., 443 F.2d 1159, 1162 (2d Cir. 1971) (footnote omitted); see
8 also Matthew Bender & Co. v. West Publ'g Co., 158 F.3d 693, 706
9 (2d Cir. 1998). Because Section 201(c) precludes a finding of
10 copyright infringement, and because there can be no contributory
11 infringement absent actual infringement, id., dismissal of the
12 claim against Kodak is affirmed.

13 h) Individual Works by Ward and Psihoyos

14 Appellants make some additional arguments about specific
15 works. Ward argues that he owns the underlying copyrights for
16 certain articles -- "Jade," "Computer Graphics," "Emeralds,"
17 "Coral Reefs," and "Rubies" -- and for certain photographs or
18 sets of photographs -- "Fiber Optics," the "Pearls Stock Photo,"
19 the "Emeralds stock photo," and the "Kennedy photograph."⁷
20 Because appellees were privileged under Section 201(c) to include
21 contributions to which individuals owned underlying copyrights in
22 the CNG, we affirm the district court's holding with respect to
23 the specific works for which Ward argues he holds the underlying
24 copyright.

1 Two photographs taken by plaintiff Psihoyos, the "Paul
2 Sereno" and "Ford Styrofoam" images, were excepted from the
3 district court's ruling due to contractual language expressly
4 denying NGS any electronic rights and defendants' withdrawal of
5 their motion to dismiss regarding those photographs. Faulkner,
6 294 F. Supp. 2d at 531 n.30, 549. In their brief, the Psihoyos
7 appellants contend that factually there were a total of seven
8 such photographs, four more taken by plaintiff Psihoyos --
9 "Michael Novacek," "Information Technology," "T-Rex," and a photo
10 appearing in the Geographica section of the magazine -- and one
11 by plaintiff Rickman -- "Belly Flop". They request that we
12 correct what must have been an inadvertent error by the district
13 court.

14 Defendants respond that they do not object to excluding from
15 the grant of summary judgment two of the five additional
16 photographs, "Michael Novacek" and "Information Technology," both
17 of which were identified in the papers submitted below. They
18 oppose the exception of plaintiff Rickman's "Belly Flop"
19 photograph because it was not previously identified to the
20 district court. Presumably they also oppose exception of
21 plaintiff Psihoyos's T-Rex photograph and his photograph that
22 appeared in the Geographica section of the Magazine.⁸ Because,
23 in the declarations of Louis Psihoyos and Rick Rickman in support
24 of plaintiffs' memorandum of law in opposition to defendants'

1 motion to dismiss and for summary judgment, all of the above
2 discussed photographs were identified as granting only limited
3 use licenses to NGS, we find that they were properly identified.
4 Accordingly, with respect to the "Michael Novacek," "Information
5 Technology," "T-Rex," and "Belly Flop" photographs, as well as
6 the photograph that appeared in the Geographica section of the
7 Magazine,⁹ we reverse.

8 h) Recusal

9 The Faulkner plaintiffs made a recusal motion based on Judge
10 Kaplan's having practiced law with Judge Higginbotham, his
11 hostility toward the Faulkner plaintiffs and their attorneys, and
12 his past representation of a subsidiary of defendant Kodak.
13 Judge Kaplan held that because movants raised the recusal issue
14 only after he had ruled against them, they failed to raise the
15 first two issues in a timely fashion and therefore waived any
16 objection. Faulkner, 296 F. Supp. 2d at 490. Nevertheless,
17 Judge Kaplan addressed the merits of each basis for the motion
18 and found recusal inappropriate because: (i) there was no
19 suggestion that Judge Higginbotham served as a lawyer for the NGS
20 while he and Judge Kaplan were in practice, but only served as a
21 trustee; (ii) Judge Higginbotham could not have acted "concerning
22 the matter" during the period when he and Judge Kaplan were in
23 practice together because Judge Kaplan left the firm in August
24 1994, "well before the 1996 genesis of the [CNG]"; (iii) no

1 affidavit, declaration, or deposition testimony given by Judge
2 Higginbotham was part of the case, he never testified before
3 Judge Kaplan, and his death precludes the possibility of any such
4 occurrence in the future; and (iv) because he stopped practicing
5 with Judge Higginbotham before the latter could have witnessed
6 anything regarding the CNG, no knowledge he might have obtained
7 could be imputed to Judge Kaplan. Id. at 490-91. Moreover,
8 Judge Kaplan reasoned, even assuming that his representation of
9 Sterling Drug, a Kodak subsidiary, was equivalent to representing
10 Kodak, his representation of them in trademark litigation did not
11 concern the matters at issue in this case. Id. at 491. Judge
12 Kaplan also rejected plaintiffs' claim of hostility and bias
13 because it was based only on his denial of their motion for class
14 certification based on the Judge's view that they and their
15 counsel could not adequately represent the class. Id. at 492-94.
16 These Faulkner appellants appeal Judge Kaplan's denial of their
17 recusal motion. We affirm.¹⁰

18 28 U.S.C. § 455(b)(2) provides that a judge shall disqualify
19 himself "[w]here in private practice he served as lawyer in the
20 matter in controversy, or a lawyer with whom he previously
21 practiced law served during such association as a lawyer
22 concerning the matter, or the judge or such lawyer has been a
23 material witness concerning it." Judge Higginbotham did not
24 serve as a lawyer or a material witness concerning the matter in

1 issue. Judge Kaplan's representation of the Kodak subsidiary did
2 not concern the matter in issue.

3 28 U.S.C. § 455(a) provides that "[a]ny justice, judge, or
4 magistrate judge of the United States shall disqualify himself in
5 any proceeding in which his impartiality might reasonably be
6 questioned." With the exception of the written order denying
7 class certification because Faulkner's counsel did not satisfy
8 Federal Rule of Civil Procedure 23(a)'s requirement of adequate
9 representation, plaintiffs have not offered specific allegations
10 of hostility, let alone bias. This ruling alone does not mandate
11 recusal. See Liteky v. United States, 510 U.S. 540, 555 (1994)
12 ("[J]udicial rulings alone almost never constitute a valid basis
13 for a bias or partiality motion" under Section 455(a).).

14 CONCLUSION

15 With the exception of the specifically discussed works made
16 by Psihoyos and Rickman, we affirm.

1
2

FOOTNOTES

1. These defendants are: the National Geographic Society ("NGS"); National Geographic Holdings, Inc. ("Holdings"); National Geographic Ventures ("NGV"), National Geographic Interactive ("Interactive"); National Geographic Enterprises, Inc. ("NGE"); Mindscape, Inc. ("Mindscape"); Dataware Technologies, Inc. ("Dataware"); and Eastman Kodak Company ("Kodak").

2. The Society has published the following additional CNG products: "The Complete National Geographic: 109 Years of National Geographic Magazine on CD-ROM"; "The Complete National Geographic: 109 Years of National Geographic Magazine on DVD"; "The Complete National Geographic: 110 Years of National Geographic Magazine on CD-ROM"; "The Complete National Geographic: 110 Years of National Geographic Magazine on DVD"; "The Complete National Geographic: 111 Years of National Geographic Magazine on CD-ROM"; "The Complete National Geographic: 112 Years of National Geographic Magazine on CD-ROM"; decade sets of the CNG containing issues of the Magazine from various decades in its history in CD-ROM format; a 30 year set containing 30 years of Magazine issues; a Curriculum Supplement including a CNG CD-ROM disk for 1997, a teacher's

guide, and instructional materials; and individual CD-ROM discs sold with the intent of allowing users of earlier iterations of the CNG to add subsequently published issues of the Magazine as they became available.

3. It should be noted that during some time periods of its publication, for each issue of the Magazine, regional issues were published containing somewhat different advertising. The CNG contains only one of each issue, not all of the regional issues.

4. Holdings, Interactive, and NGE are now the same wholly-owned subsidiary of NGS, incorporated as NGHT, Inc.

5. Mindscape was a computer software publisher and distributor that entered into an agreement with NGE to manufacture, market, and distribute the CNG. NGE's division, Interactive, authorized Mindscape to manufacture, market and distribute the CNG, subject to Interactive's approval, in return for the receipt of royalties from the sale of the CNG. The agreement did not grant Mindscape any rights in the individual works of photographers and authors. It did, however, authorize Mindscape to sub-license the CNG to multiple tiers of sublicensees. Mindscape mass-marketed the CNG through retail outlets and internet websites. It has also contracted with original equipment manufacturers to bundle the

CNG with their computer hardware and sell the products as a single unit. Mindscape has been dissolved and no longer exists. In 2001, Encore Software succeeded Mindscape as the distributor of the CNG.

Dataware was a developer of interactive software designed for information retrieval and electronic publishing applications. Dataware entered into an agreement with Interactive to participate in the design and to manage development of the CNG. Dataware is in bankruptcy and accordingly this action is stayed as against it. See Faulkner v. Nat'l Geographic Soc'y, 294 F. Supp. 2d 523, 526 n.9 (S.D.N.Y. 2003).

6. Because Tasini held that the publishers had no Section 201(c) privilege, the transferability issue was not addressed.

7. The court previously granted Ward summary judgment as to the "Kennedy" photograph in one of the 1909 Act Opinions. Ward, 208 F. Supp. 2d at 448-49. It later withdrew summary judgment after holding that defendants were privileged to include the photograph in the CNG under Section 201(c). Faulkner, 294 F. Supp. 2d at 543 n.97.

8. Appellants do not specifically identify the contributions that they believe should be excepted. We infer that they want us

to except these two photographs because they were identified in the declarations submitted to the district court as having contractual language limiting reproduction to paper use only.

9. The license for the Geographica photograph conferred "one-time reproduction rights" rather than denying electronic rights, but appellees have not argued that this distinction is legally relevant.

10. Given our disposition of the Faulkner appellants' claims, Judge Kaplan's denial of the recusal motion was at most harmless error as to them. See Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 862, 864 (1988) (harmless error review applies to 28 U.S.C. § 455(a) violations; in determining whether judgment should be vacated on failure to recuse grounds, appellate court should consider (1) risk of injustice to parties in the particular case; (2) risk that denial of relief will produce injustice in other cases; and (3) risk of undermining public's confidence in the judicial process); Parker v. Connors Steel Co., 855 F.2d 1510, 1526-27 (11th Cir. 1988) (Liljeberg test applies on direct appeal to alleged Section 455(a) and (b) violations; failure to recuse harmless error where appellate court exercising plenary review concludes that district court's dismissal of case based on grant of summary judgment was proper);

Camacho v. Autoridad de Telefonos de Puerto Rico, 868 F.2d 482, 490 (1st Cir. 1989) (where appellate court independently confirmed correctness of lower court's decision, judge's refusal to recuse himself was harmless and moot, if error, but recusal addressed in order to explain that there was no error at all). We address the issue of recusal on the merits because we are remanding the case for further proceedings. Although the plaintiffs who are beneficiaries of the remand have not raised recusal as an issue, we believe it appropriate to erase all doubt as to the propriety of Judge Kaplan's continuing to preside over this matter. See Liljeberg, 486 U.S. at 864 (public confidence in the judicial process a factor in review of a failure to recuse).