UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 97-3924-CIV-LENARD/SIMONTON
CONSENT CASE

JERRY GREENBERG,

Plaintiff,

v.

NATIONAL GEOGRAPHIC SOCIETY,
NATIONAL GEOGRAPHIC ENTERPRISES,
INC., and MINDSCAPE, INC.,

Defendants.
_____/

ORDER DENYING MOTION TO AMEND FINAL JUDGMENT

Presently pending before this Court is Plaintiff's Motion to Amend Final Judgment (DE # 322). After reviewing the record as a whole, including all the applicable pleadings (DE ## 324, 330, 334) and case law, this motion is denied.

Plaintiff, Jerry Greenberg, moves to amend the final judgment to include prejudgment interest claiming that, although the Copyright Act is silent as to the availability of prejudgment interest for a prevailing plaintiff, in this case, consistent with several circuit court decisions, prejudgment interest is warranted. Plaintiff cites to cases where courts have analyzed the congressional silence, historical changes from the 1909 Copyright Act to the 1976 Copyright Act, and the statutory purpose of the Act. Plaintiff also provides a formula and interest calculation.

In response, Defendants argue that prejudgment interest is not available as a matter of law, however, in the alternative, if this Court should find that it is available, prejudgment interest should not be granted on equitable grounds. Defendants contrast the Copyright Act, which is silent on prejudgment interest, with the Patent Act, which

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expressly authorizes prejudgment interest. Defendants also cite a variety of cases that illustrate the split in the circuits between whether prejudgment interest is allowed under the Copyright Act, is not allowed, or is discretionary.

The Eleventh Circuit has not yet addressed the issue of awarding prejudgment interest under the 1976 Copyright Act. Some courts have chosen not to award prejudgment interest in federal copyright infringement actions holding that it is not authorized under the statute. *Baldwin Cooke Co. v. Keith Clark, Inc.*, 420 F. Supp. 404, 409 (N.D. Ill.1976); *Broadcast Music, Inc. v. Golden Horse Inn Corp.*, 709 F. Supp. 580, 581 (E.D. Pa.1989); *Aitken, Hazen, Hoffman, Miller, P.C. v. Empire Constr. Co.*, 542 F. Supp. 252 (D. Neb. 1982) . Other courts have allowed prejudgment interest holding that it is an available remedy under the Copyright Act. *Kleier Advertising, Inc. v. Premier Pontiac, Inc.*, 921 F.2d 1036, 1040-1042 (10th Cir. 1990). But the most common approach is to leave the decision to the discretion of the trial court. *Polar Bear Productions, Inc. v. Timex Corp.*, 384 F.3d 700, 716-718 (9th Cir. 2004); *John G. Danielson, Inc. v. Winchester-Contant Properties, Inc.*, 322 F.3d 26, 51 (1st Cir. 2003); *McRoberts Software, Inc., v. Media 100, Inc.*, 329 F.3d 557, 572-573 (7th Cir. 2003); *Robert R. Jones Associates, Inc., v. Nino Homes*, 858 F.2d 274, 282 (6th Cir. 1988).

The undersigned finds persuasive the line of authority holding that the granting of prejudgment interest is discretionary. For example, in *Polar Bear Productions, Inc.*, the district court concluded that prejudgment interest was not allowed under the 1976 Copyright Act. The Ninth Circuit, reviewing this issue of first impression, reversed and remanded stating: "Because prejudgment interest may be necessary at times to effectuate the legislative purpose of making copyright holders whole and removing incentives for copyright infringement, we hold that the district court erred in concluding

that prejudgment interest is unavailable under the Copyright Act of 1976, and we remand for further consideration." 384 F.3d at 718. After analyzing the history of the Copyright Act, other courts' interpretations, and legislative intent, the Ninth Circuit held that "prejudgment interest is a generally available remedy, and its application in a particular case hinges on whether such an award would further the statute's purpose. This interpretation is also in keeping with the principle that, even in absence of legislative direction, a court may, in its discretion, award interest if necessary to effectuate legislative intent." *Id.* The Court also examined the legislative intent, "the purpose of § 504(b) is to compensate fully a copyright owner for the misappropriated value of its property and to avoid unjust enrichment by defendants, who would otherwise benefit from this component of profit through their unlawful use of another's work." *Id.* (internal quotations omitted, *citing TVT Records v. Island Def Jam Music Group*, 279 F. Supp.2d 366, 410 (S.D.N.Y. 2003)).

In *John G. Danielson, Inc.*, the First Circuit affirmed the trial court's denial of prejudgment interest holding that it was not an abuse of discretion because "the entire damages award was composed of disgorged profits from an infringer, because, unlike actual damages, the plaintiff never had those funds and so deserved no compensation for the lost use of the money while the case was pending." 322 F.3d at 51.

In the Seventh Circuit, prejudgment interest may be awarded if it is necessary to make the plaintiff whole, discourage delay by the defendant, or for willful violations of federal law. *McRoberts Software, Inc.*, 329 F.3d at 572-573. In *Robert R. Jones Associates, Inc.*, the Sixth Circuit vacated the district court's decision to award prejudgment interest because the damages awarded were sufficient to promote innovation and deter unauthorized exploitation of someone else's creative expressions.

868 F.2d at 282.

Under the circumstances of this case, the undersigned finds that prejudgment interest is not warranted. The damages awarded were sufficient to compensate Plaintiff. Plaintiff sought and received the maximum statutory damages (he did not even seek actual damages). Plaintiff did not lose the use of any money that would have been his had Defendant not infringed on his copyrighted material. Finally, the legislative purpose of the Copyright Act would not be furthered by awarding prejudgment interest in this case. In reaching this result, the undersigned has carefully considered all of the circumstances of this case, including the procedural history of this case, the evidence regarding the value of the photographs at issue, and the evidence of wilfulness. Therefore, prejudgement interest will not be awarded.

ORDERED AND ADJUDGED that Plaintiff's Motion to Amend Final Judgment is **DENIED.**

DONE AND ORDERED in Miami, Florida, this 14th day of April, 2006.

ANDREA M. SIMONTON
UNITED STATES MAGISTRATE JUDGE

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