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9 **UNITED STATES DISTRICT COURT**  
10 **CENTRAL DISTRICT OF CALIFORNIA**

11  
12 Dr. Elliot McGucken, an individual,

13 Plaintiff,

14 v.

15  
16 Pepperdine University, a California  
nonprofit corporation; and Does 1-10,  
17 inclusive,

18  
19 Defendants.  
20  
21

Case No.: 2:22-cv-02851-PD

PLAINTIFF'S FIRST AMENDED  
COMPLAINT FOR:

1. COPYRIGHT INFRINGEMENT
2. VICARIOUS AND/OR  
CONTRIBUTORY COPYRIGHT  
INFRINGEMENT
3. VIOLATIONS OF THE  
DIGITAL MILLENNIUM  
COPYRIGHT ACT  
(17 U.S.C. §1202)

Jury Trial Demanded

1 Plaintiff, Dr. Elliot McGucken (“McGucken”), by and through his undersigned  
2 attorneys, hereby prays to this honorable Court for relief based on the following:

3 **JURISDICTION AND VENUE**

4 1. This action arises under the Copyright Act of 1976, Title 17 U.S.C., § 101  
5 *et seq.*

6 2. This Court has federal question jurisdiction under 28 U.S.C. § 1331 and  
7 1338 (a)-(b).

8 3. Venue in this judicial district is proper under 28 U.S.C. § 1391(c) and  
9 1400(a) in that this is the judicial district in which a substantial part of the acts and  
10 omissions giving rise to the claims occurred.

11 **PARTIES**

12 4. Plaintiff McGucken is an individual residing in Los Angeles, California.

13 5. McGucken is informed and believes and thereon alleges that Defendant  
14 Pepperdine University (“Pepperdine”) is a California corporation doing business in  
15 and with the Los Angeles County, including through its principal place of business at  
16 24255 Pacific Coast Highway, Malibu, California 90263.

17 6. On information and belief, McGucken alleges that Defendants DOES 1  
18 through 10 (collectively, “DOE Defendants”) (altogether with Pepperdine,  
19 “Defendants”) are other parties not yet identified who have infringed McGucken’s  
20 copyrights, have contributed to the infringement of McGucken’s copyrights, or have  
21 engaged in one or more of the wrongful practices alleged herein. The true names,  
22 whether corporate, individual or otherwise, of DOE Defendants are presently  
23 unknown to McGucken, who therefore sues said DOE Defendants by such fictitious  
24 names, and will seek leave to amend this Complaint to show their true names and  
25 capacities when same have been ascertained.

26 7. On information and belief, McGucken alleges that at all times relevant  
27 hereto each of the Defendants was the agent, affiliate, officer, director, manager,  
28

principal, alter-ego, and/or employee of the remaining Defendants and was at all times acting within the scope of such agency, affiliation, alter-ego relationship and/or employment; and actively participated in or subsequently ratified and adopted, or both, each and all of the acts or conduct alleged, with full knowledge of all the facts and circumstances, including, but not limited to, full knowledge of each and every violation of McGucken's rights and the damages to McGucken proximately caused thereby.

### **CLAIMS RELATED TO MCGUCKEN'S PHOTOGRAPH**

8. McGucken is an acclaimed photographer who created and owns the original photograph depicted in **Exhibit A** attached hereto ("Subject Photograph").

9. McGucken is the sole and exclusive owner of all rights, title, interests, and privileges in and to the Subject Photograph.

10. Prior to the acts complained of herein, McGucken published and widely publicly displayed and disseminated the Subject Photograph including without limitation on McGucken's website and his *Flickr* account.

11. Prior to the acts complained of herein, McGucken registered the Subject Photograph with the U.S. Copyright Office, complying with all relevant formalities in doing so, and received Registration No. VA 2089200 for the Subject Photograph.

12. Following McGucken dissemination and display of the Subject Photograph, Defendants, and each of them, without Plaintiff's consent, copied and reproduced the Subject Photograph, created a derivative work from the Subject Photograph, and exploited the Subject Photograph on the cover of the official publication entitled, "The Orange Book: 2021 Academic Planning Guide" ("Infringing Work"), which was created, published, and distributed by the Pepperdine Caruso School of Law, a part of Pepperdine.

13. On information and belief it is alleged that the Infringing Work was made widely and publicly available at *community.pepperdine.edu*, which is owned and

1 operated by Pepperdine, and was actively distributed and made available by  
2 Pepperdine to current and potential students, in electronic, digital, and/or physical  
3 formats. True and correct screen captures of the Infringing Work, and its  
4 accompanying URL, are included in **Exhibit B** attached hereto.

5 14. On information and belief it is alleged that Pepperdine made an  
6 unauthorized copy of the Subject Photograph and then cropped and edited that work  
7 before adding its own name and coloration to the work and publishing same under its  
8 own name and with its own copyright notice.

9 15. McGucken has not in any way authorized Defendants, or any of them, to  
10 copy, reproduce, display, distribute, create derivative works of, or otherwise use the  
11 Subject Photograph.

12 16. On February 15, 2022, McGucken, through his undersigned attorneys,  
13 served Defendants a letter demanding that Defendants cease and desist all infringing  
14 uses of McGucken's copyrighted work and reasonably resolve the action. In  
15 responding to the letter, Defendants made a settlement proposal of \$500.00, which  
16 does not reasonably reflect damages for the willful infringement at issue. Given this  
17 position McGucken was forced to file this action.

18 **FIRST CLAIM FOR RELIEF**

19 **(For Copyright Infringement – Against all Defendants, and Each)**

20 17. McGucken repeats, re-alleges, and incorporates herein by reference as  
21 though fully set forth, the allegations contained in the preceding paragraphs of this  
22 Complaint.

23 18. On information and belief, McGucken alleges that Defendants, and each  
24 of them, had access to the Subject Photograph, including, without limitation, through  
25 viewing the Subject Photograph on McGucken's website and/or *Flickr* account, or  
26 elsewhere online. Access is further evidenced by the Subject Photograph's exact  
27 reproduction in the Infringing Work.



1           25. On information and belief, McGucken alleges that Defendants knowingly  
2 induced, participated in, aided and abetted in and profited from the illegal  
3 reproduction and distribution of the Subject Photograph as alleged hereinabove. Such  
4 conduct included, without limitation, publishing photographs obtained from third  
5 parties that Defendants knew, or should have known, were not authorized to be  
6 published by Defendants.

7           26. On information and belief, McGucken alleges that Defendants, and each  
8 of them, are vicariously liable for the infringement alleged herein because they had  
9 the right and ability to supervise the infringing conduct and because they had a direct  
10 financial interest in the infringing conduct. Specifically, Defendants, and each of  
11 them, profited in connection with the Infringing Work, and were able to supervise the  
12 distribution, broadcast, and publication of the Infringing Work.

13           27. By reason of the Defendants', and each of their, acts of contributory and  
14 vicarious infringement as alleged above, McGucken has suffered general and special  
15 damages in an amount to be established at trial.

16           28. Due to Defendants' acts of copyright infringement as alleged herein,  
17 Defendants, and each of them, have obtained direct and indirect profits they would  
18 not otherwise have realized but for their infringement of McGucken's rights in the  
19 Subject Photograph. As such, McGucken is entitled to disgorgement of Defendants'  
20 profits directly and indirectly attributable to Defendants' infringement of  
21 McGucken's rights in the Subject Photograph, in an amount to be established at trial.

22           29. On information and belief, McGucken alleges that Defendants, and each  
23 of them, have committed acts of copyright infringement, as alleged above, which  
24 were willful, intentional and malicious, which further subjects Defendants, and each  
25 of them, to liability for statutory damages under Section 504(c)(2) of the Copyright  
26 Act in the sum of up to \$150,000.00 per infringement and/or a preclusion from  
27 asserting certain equitable and other defenses.



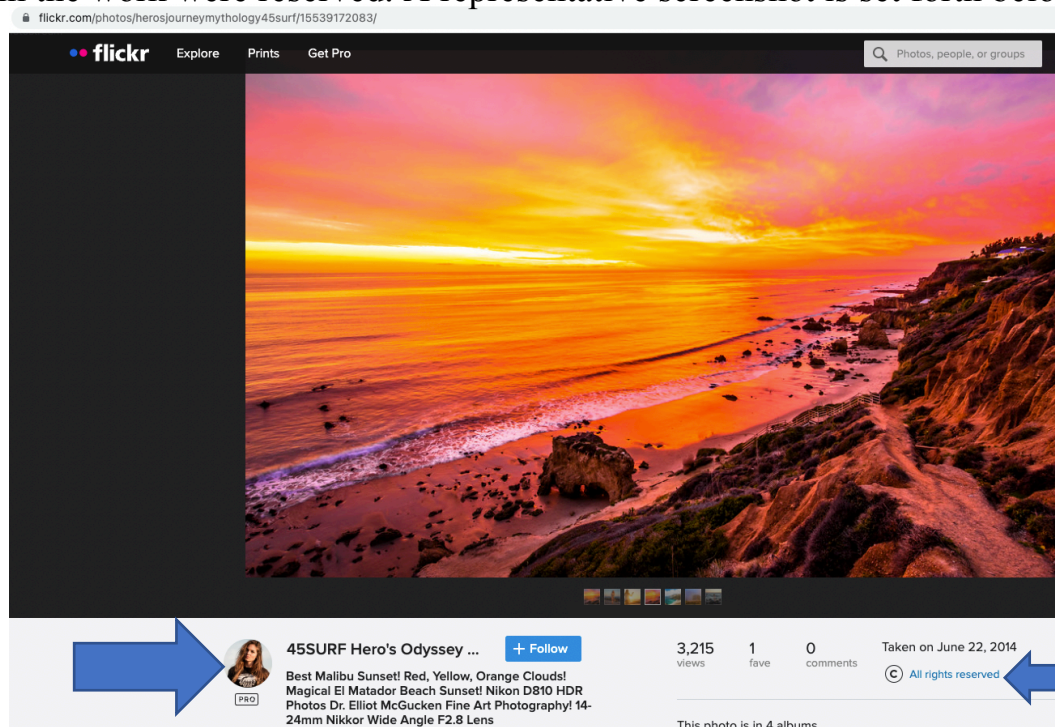
### **THIRD CLAIM FOR RELIEF**

#### **(For Violations of the Digital Millennium Copyright Act (17 U.S.C. §1202 – Against all Defendants, and Each)**

30. McGucken repeats, re-alleges, and incorporates herein by reference as though fully set forth, the allegations contained in the preceding paragraphs of this Complaint.

31. McGucken regularly published the Subject Photograph with copyright management information (“CMI”), as that phrase is used in 17 USC § 1202. McGucken’s CMI included, without limitation, his name, company name, copyright notice, metadata, and other identifying information. The CMI was prominently displayed and would be viewed by visitors to McGucken’s website and online profiles.

32. McGucken published the Subject Photograph on his Flickr account, along with his CMI, which included, without limitation, an identification of McGucken as the author of the Subject Photograph, a copyright notice, and a statement that all rights in the work were reserved. A representative screenshot is set forth below:



1           33. On information and belief, McGucken alleges that Defendants, and each  
2 of them, copied the Subject Photograph from McGucken's page or account and  
3 intentionally removed and altered McGucken's violated 17 U.S.C. §1202(b) before  
4 copying, reproducing, distributing, and displaying the Subject Photograph.

5           34. On information and belief, McGucken alleges that Defendants, and each  
6 of them, did distribute or import for distribution copyright management information  
7 knowing that the CMI has been removed or altered without authority of McGucken  
8 or the law.

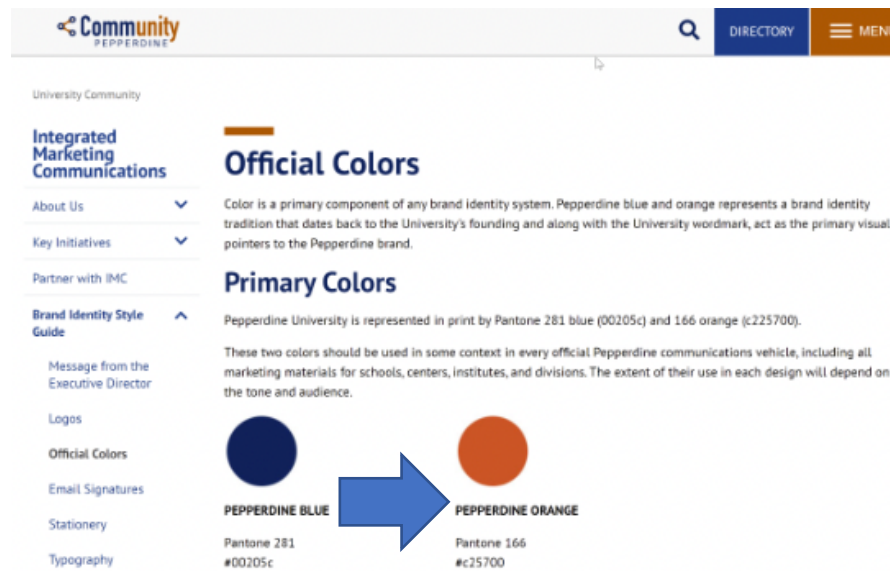
9           35. On information and belief, McGucken alleges that Defendants, and each  
10 of them, did distribute and publicly display works and copies of works knowing that  
11 copyright management information has been removed or altered without authority of  
12 McGucken or the law, knowing, or, with respect to civil remedies under 17 USC §  
13 1203, having reasonable grounds to know, that it will induce, enable, facilitate, or  
14 conceal an infringement of any right under this title.

15           36. On information and belief, McGucken alleges that Defendants, and each  
16 of them, in violation of 17 § USC 1202(a), knowingly and with the intent to induce,  
17 enable, facilitate, or conceal infringement provided false copyright management  
18 information when they added their own logos, names, bylines, and attribution to the  
19 Subject Photograph.

20           37. On information and belief, McGucken alleges that Defendants published,  
21 distributed, and displayed the Infringing Work after adding false CMI to the  
22 Infringing Work that stated: "© 2021 Pepperdine Caruso School of Law Office of the  
23 Academic Dean".

24           38. On information and belief, McGucken alleges that Defendants published,  
25 distributed, and displayed the Infringing Work after adding false CMI in the form of  
26 coloration of the Subject Photograph, apparently using Pantone 166 or "Pepperdine  
27 Orange," as referenced below, to color the Subject Photograph:





39. On information and belief, McGucken alleges that Defendants, and each of them knew, that they were adding false copyright management information to its copies of the Subject Photograph and distributing copyright management information that was false at the time it distributed its unauthorized copies of the Subject Photograph.

40. The above conduct violates the Digital Millennium Copyright Act and exposes Defendants, and each of them, to additional and enhanced common law and statutory damages, attorneys' fees, and penalties pursuant to 17 USC § 1203 and other applicable law.

41. On information and belief, McGucken alleges that Defendants, and each of their, conduct as alleged herein was willful, reckless, and/or with knowledge, and McGucken resultantly seeks enhanced damage and penalties.

### **PRAYER FOR RELIEF**

Wherefore, Plaintiff prays for judgment as follows:

#### **Against all Defendants, and Each with Respect to Each Claim for Relief:**

- a. That Defendants, and each of them, as well as their employees, agents, or anyone acting in concert with them, be enjoined from infringing

1 McGucken's copyrights in the Subject Photograph, including without  
2 limitation an order requiring Defendants, and each of them, to remove  
3 any content incorporating, in whole or in part, the Subject Photograph  
4 from any print, web, or other publication owned, operated, or controlled  
5 by any Defendant.

- 6 b. That McGucken be awarded all profits of Defendants, and each of them,  
7 plus all losses of McGucken, plus any other monetary advantage gained  
8 by the Defendants, and each of them, through their infringement, the  
9 exact sum to be proven at the time of trial, and, to the extent available,  
10 statutory damages as available under the 17 U.S.C. § 504, 17 U.S.C.  
11 §1203, and other applicable law.
- 12 c. That a constructive trust be entered over any revenues or other proceeds  
13 realized by Defendants, and each of them, through their infringement of  
14 McGucken's intellectual property rights;
- 15 d. That McGucken be awarded his attorneys' fees as available under the  
16 Copyright Act U.S.C. § 505 et seq.;
- 17 e. That McGucken be awarded his costs and fees under the above statutes;
- 18 f. That McGucken be awarded statutory and enhanced damages under the  
19 statutes set forth above;
- 20 g. That McGucken be awarded pre-judgment interest as allowed by law;
- 21 h. That McGucken be awarded the costs of this action; and
- 22 i. That McGucken be awarded such further legal and equitable relief as the  
23 Court deems proper.

24  
25 ///

26 ///

1 Plaintiff demands a jury trial on all issues so triable pursuant to Fed. R. Civ. P.  
2 38 and the 7<sup>th</sup> Amendment to the United States Constitution.

3 Respectfully submitted,

4  
5 Dated: May 18, 2022

DONIGER / BURROUGHS

6 By: /s/ Scott Alan Burroughs  
7 Scott Alan Burroughs, Esq.  
8 Trevor W. Barrett, Esq.  
9 Frank R. Trechsel, Esq.  
*Attorneys for Plaintiff*

**Exhibit A**

**Subject Photograph**



**Exhibit B**

**Infringing Work**

**Infringing Work URL:**

<https://community.pepperdine.edu/law/academics/content/orange-book-2021.pdf>

