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9 ATTORNEYS FOR PLAINTIFF
10 DR. TAMARA EICHELBERGER, PhD.

11 **UNITED STATES DISTRICT COURT**
12 **CENTRAL DISTRICT OF CALIFORNIA**

13 DR. TAMARA EICHELBERGER,
14
15 PhD.,

16 Plaintiff,

17 v.

18
19 DR. MARY HUDSON-MCKINNEY;
20 WESTERN UNIVERSITY OF
21 HEALTH SCIENCES; DOES 1 – 10,
22 Inclusive,

23 Defendants.

Case No.2:22-cv-00663-MCS-SK
Hon. Mark C. Scarsi

**PLAINTIFF’S OPPOSITION TO
MOTION TO DISMISS
COMPLAINT FOR FAILURE TO
STATE A CLAIM FOR RELIEF**

Date: June 27, 2022

Time: 9:00 a.m.

Ctrm: 7C

Complaint filed: 1/31/2022

Trial date: Not set

1 Plaintiff Dr. Tamara Eichelberger, PhD. (“Plaintiff” or “Dr. Eichelberger”),
2 by and through her attorneys, Karish & Bjorgum, PC, hereby submits its
3 Opposition to Defendant Dr. Mary Hudson-McKinney’s Motion to Dismiss
4 Complaint for Failure to State a Claim for Relief as follow:

5
6 **MEMORANDUM OF POINTS AND AUTHORITIES**

7 **I. INTRODUCTION**

8 Defendant’s Motion to Dismiss should be denied. Plaintiff has more than
9 met the standard of showing a claim that is “plausible on its face” as required by
10 the *Iqbal* case. Plaintiff has alleged that she created a set of materials with
11 reference to a textbook and that she had permission to do so. In fact, in the meet
12 and confer process, Plaintiff’s counsel forwarded the permission letter to
13 Defendants’ counsel. She has also alleged that Defendants copied these materials
14 without permission, and that she was damaged.

15 Ostensibly recognizing this, Western University has already answered the
16 Complaint. Yet Defendant Mary Hudson-McKinney (who did the actual copying)
17 brings this motion, which should be denied for several more reasons. First, to win
18 that statute of limitations argument, Hudson-McKinney must go against Ninth
19 Circuit precedent (which recognizes the “discovery rule” for delay purposes), and
20 she must also ignore that some of the infringement took place in 2020, well with in
21 the statute of limitations.

22 Defendant makes similar overly technical arguments regarding damages,
23 injunctive relief and copyright validity. None of these are availing. This is a
24 simple notice pleading case: Plaintiff created something, and it was later infringed
25 and also registered with the Copyright Office. The bases for these conclusions are
26
27
28

1 clear in the Complaint. And to the extent the Court does not agree, Plaintiff
2 requests leave to amend.¹

3 4 **II. LEGAL STANDARD**

5 Federal Rule of Civil Procedure 12(b)(6) allows an attack on the pleadings
6 for "failure to state a claim upon which relief can be granted." "To survive a
7 motion to dismiss, a complaint must contain sufficient factual matter, accepted as
8 true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556
9 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp.*
10 *v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). "A
11 claim has facial plausibility when the plaintiff pleads factual content that allows
12 the court to draw the reasonable inference that the defendant is liable for the
13 misconduct alleged." *Iqbal*, 556 U.S. at 678.

14 The determination of whether a complaint satisfies the plausibility standard
15 is a "context-specific task that requires the reviewing court to draw on its judicial
16 experience and common sense." *Id.* at 679. Generally, a court must accept the
17 factual allegations in the pleadings as true and view them in the light most
18 favorable to the plaintiff. *Park v. Thompson*, 851 F.3d 910, 918 (9th Cir. 2017);
19 *Lee v. City of Los Angeles*, 250 F.3d 668, 679 (9th Cir. 2001). But a court is "not
20 bound to accept as true a legal conclusion couched as a factual allegation." *Iqbal*,
21 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555).

22 To state a copyright claim, a plaintiff must allege "(1) ownership of the
23 allegedly infringed work and (2) copying of the protected elements of the work by
24 the defendant." *Unicolors, Inc. v. Urban Outfitters, Inc.*, 853 F.3d 980, 984 (9th
25

26
27
28 ¹ The parties discussed an amended Complaint during the meet and confer session on this motion, but for some unknown reason, Defendant decided to file these papers instead.

1 Cir. 2017) (quoting *Pasillas v. McDonald's Corp.*, 927 F.2d 440, 442 (9th Cir.
2 1991)).

3 4 **III. ARGUMENT**

5 **A. The Complaint Was Timely**

6 Defendant argues that the Complaint was not timely because the “discovery
7 rule” does not apply here and the case was not filed within three years of when the
8 first act of infringement occurred. To reach this point, Defendant puts forth a
9 convoluted argue that against *stare decisis* because the discovery rule has long
10 been the rule in the Ninth Circuit.

11 Defendant concedes that Plaintiff learned of the possible infringement in
12 2019. Specifically, and Plaintiff will amend if needed, she learned about it in July,
13 2019. After returning from a long break, Plaintiff reviewed an email from a
14 student noting that the materials circulated by Azusa Pacific University (“APU”)
15 were identical to those at Western University (where they had both previously
16 taught).

17 She then contacted Western University, who confirmed that the materials
18 were used by Hudson-McKinney in 2017 and 2018. Thus, in late 2019 was the
19 first time that Dr. Eichelberger had any certainty at all that there was infringement.
20

21 This case was brought on January 31, 2022. (D.N. 1.) The Ninth Circuit
22 follows the “discovery rule” when applying that statute of limitations in copyright
23 matters. *Polar Bear Prods. v. Timex Corp.*, 384 F.3d 700, 707. Under the
24 discovery rule, a copyright claim accrues "when a party discovers, or reasonably
25 should have discovered, the alleged infringement." *Media Rights Techs., Inc. v.*
26 *Microsoft Corp.*, 922 F.3d 1014, 1022 (9th Cir. 2019). In addition, under the
27 "separate-accrual rule," the statute of limitations runs separately from each instance
28 of copyright infringement. *Id.* at 1023. In case of continuous infringement, an

1 infringer commits a new wrong "[e]ach time an infringing work is reproduced or
2 distributed" and "[e]ach wrong gives rise to a discrete 'claim' that 'accrues at the
3 time the wrong occurs.'" *Id.* (quoting *Petrella v. MGM*, 572 U.S. 663, 671 (2014)).

4 Thus, because Plaintiff first learned of the infringement in July, 2019, the
5 filing date of January, 2022 is within the statute of limitations period.

6 Further, though it may not be immediately apparent from the wording of the
7 Complaint, Dr. Eichelberger's materials were also used by Hudson-McKinney in
8 2019 at APU. Thus, the complaint states:

9 16. [In 2019] Dr. Eichelberger was teaching at APU, as was
10 Hudson-McKinney. In 2019, a student commented that he was able to
11 study with his friend in the fall of 2018 from Western because they
12 had the same class notes from the professor for Clinical Neuroscience.
13 Soon thereafter Dr. Eichelberger learned that her materials had been
14 used (and possibly still were being used) at Western without her
15 permission.

16 17. Dr. Eichelberger contacted Western and Hudson-
17 McKinney. Hudson-McKinney denied any wrongdoing. Western
18 confirmed the materials had been used in 2017 and 2018, She also
19 contacted APU, who performed an investigation. Hudson-McKinney
20 no longer works at APU.

21 Construed liberally, as they must be, these allegations show that Dr.
22 Eichelberger's early 2022 filing was within the statute of limitations because she
23 contacted APU in 2019. APU actually conducted an investigation. It was hoped
24 that the messiness of discovery of this investigation at a school where both had
25 worked recently would be avoided, but if required, Plaintiff will begin that
26 discovery. Again, to the extent this is not clear, Dr. Eichelberger gladly amend her
27 Complaint. Further, if needed, Dr. Eichelberger will ask this Court to allow her to
28 seek discovery on APU to learn the results of investigation so that the statute of

1 limitation issue can be dealt with and this Court can have the benefit of the work
2 that was done.

3
4 **B. The Copyright Claim Sufficiently Alleges Damages**

5 Defendant argues the copyright claim fails because Eichelberger fails to
6 allege a “plausible basis” for damages. To support this, Defendant states:

7 Eichelberger cannot recover actual damages because she has not
8 alleged the Work was ever used commercially. 17 U.S.C. § 504.

9 Eichelberger did not license or sell the Work, and neither did
10 McKinney. There is no basis to recover the profits lost by the
11 copyright holder or the profits made by the infringer. *Frank Music*
12 *Corp v. Metro Goldwyn-Mayer, Inc.*, 772 F.2d 505, 512 (9th
13 Cir.1985).

14 This argument is nearly incomprehensible. Section 504 does not require that
15 a work be used “commercially” in order to state a claim for infringement. If it did,
16 all manner of infringement for facially non-commercial reasons would not be
17 actionable. Plaintiff is entitled to actual damages and Defendants’ profit
18 attributable to the infringement. Ninth Circuit Model Jury Inst. No. 17.32. “Actual
19 damages means the amount of money adequate to compensate the copyright owner
20 for the reduction of the fair market value of the copyrighted work caused by the
21 infringement.” *Id.*, Jury Inst. No. 17.33. Here, Dr. Eichelberger’s work was
22 copied, and the school charged tuition, which tuition was used to pay Defendant’s
23 salary. The work was copied multiple times. Damages have been sufficiently
24 alleged.

25 Plaintiff has also alleged sufficient grounds for an injunction if everything in
26 the complaint is credited. Hudson-McKinney denied any wrongdoing, but there is
27 little doubt she copied. In part because of her staunch denial under these clear
28 facts, it is plausible to assume that without a permanent injunction against her, she

1 may copy again. Whether to grant an injunction is up to the discretion of the
2 Court, and here it is simply too early to dismiss this case because an injunction
3 may not be in the offing. "Like the Patent Act, the Copyright Act provides that
4 courts may grant injunctive relief on such terms as it may deem reasonable to
5 prevent or restrain infringement of a copyright." *eBay Inc. v. MercExchange*
6 *L.L.C.*, 547 U.S. 388, 392 (2006).

7 8 **C. Plaintiff Has Shown a Valid Copyright**

9 Defendant next argues that Plaintiff is not entitled a presumption of
10 validity of her copyright because she has not shown publication. However,
11 as Defendant notes, publication occurs through the distribution of a copy "by
12 sale or other transfer of ownership." Motion at 11. Here, it alleged that a
13 student realized the two set of notes were identical or nearly identical, thus
14 implying that copies were distributed.

15 Further, the extent Plaintiff is required so show copyright validity, she
16 has done so. Validity requires showing that the plaintiff's work is original;
17 and the plaintiff is the author or, for example, received the right to make
18 derivative works. Ninth Circuit Civ. Jury Ins. 17.6.

19 Here, Plaintiff has alleged that she had permission to create the materials.
20 (Complaint at 4.) She also alleged that distilled the textbook to "a unique
21 arrangement of video slides, outlines and graphics." (Complaint at 4.) This is
22 sufficient to show in a complaint that Plaintiff is has shown validity.

23 24 **D. The Second Claim Is Not Barred by *Dastar***

25 Defendant argues that the second claim for relief is barred by *Dastar Corp.*
26 *v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003). That case was intended
27 to prevent copyright infringement from being overtaken by trademark law. That is
28 not the situation here. In *Dastar*, the Court held that "origin of goods" in the

1 Lanham Act § 43(a)(1)(A) did not refer to the author of any idea, concept, or
2 communication embodied in a good, but to the producer of the tangible good itself.
3 *Id.* at 37. *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1144 (9TH Cir.
4 2008). That is exactly the current situation: Hudson-McKinney was presenting the
5 misimpression that she was the origin of the actual notes.

6 Here, the complaint alleges that some of the materials circulated by
7 Defendant stated:

8 **PT 6008 Neuroscience**
9 **Chapter 2: Neuroanatomical Overview and Basic**
10 **Definitions**

11 **Mary Hudson-McKinney, PT, MS, DPT, NCS**

12 This implies the Defendant is “the producer of the tangible good. Itself.” It implies
13 that the physical copies of the notes *came from* Defendant. It does not imply
14 ownership of the intellectual property in the chapter. Rather, it implies that these
15 materials came from the Defendant.

16 **IV. CONCLUSION**

17 For the foregoing reasons, Plaintiff respectfully requests that this Court deny
18 Defendant Dr. Mary Hudson-McKinney’s Motion to Dismiss Complaint for
19 Failure to State a Claim for Relief. To the extent the Court is inclined to grant the
20 motion, Plaintiff would request leave to file a First Amended Complaint.

21
22 DATED: June 6, 2022

23 Respectfully submitted,
24 KARISH & BJORGUM, PC

25
26 By /s/ Eric Bjorgum
27 Eric Bjorgum
28 Attorneys for Plaintiff,
Dr. Tamara Eichelberger. PhD.