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7 **UNITED STATES DISTRICT COURT**
8 **CENTRAL DISTRICT OF CALIFORNIA**
9 **WESTERN DIVISION—FIRST STREET COURTHOUSE**

10
11 **TAMARA EICHELBERGER,**
12 **Plaintiff,**

13 **v.**

14 **MARY HUDSON-MCKINNEY,**
15 **WESTERN UNIVERSITY OF HEALTH**
SCIENCES, and DOES 1 - 10, inclusive,
16 **Defendants.**

Case No. 2:22-cv-00663-MCS-SK
Hon. Mark C. Scarsi, Ctrm. 7C

**REPLY MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF MOTION TO
DISMISS COMPLAINT FOR
FAILURE TO STATE A CLAIM
FOR RELIEF**

[Fed.R.Civ.Proc. 12(b)(6)]

Date: June 27, 2022
Time: 9:00 a.m.
Ctrm: 7C

Complaint filed: 1/31/2022
Trial date: Not set

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MEMORANDUM OF POINTS AND AUTHORITIES

1. INTRODUCTION

The allegations and judicially noticed facts demonstrate that Plaintiff Tamara Eichelberger (“Eichelberger”) does not own a valid copyright, an essential element to any infringement claim. Eichelberger alleges that she used a well-known textbook to create “a unique arrangement of video slides, outlines and graphics” to teach a class. However, the new material in the copyright registration covers text, not a unique arrangement or “compilation” of video slides and graphics. Moreover, the certificate of registration omits any reference to the preexisting work. Thus, Eichelberger misled the Copyright Office into believing that she created original text when, in fact, she merely rearranged or modified another’s copyrighted work.

Despite her failure to disclose the preexisting work, Eichelberger alleges that she “had permission to create these [derivative] materials.” The law is clear that the owner of a copyright has the exclusive right to prepare derivative works. 17 U.S.C. § 106(2). Plaintiff must allege facts that would allow this Court to draw a reasonable inference that the copyright owner granted permission to create a derivative work. But here, Eichelberger fails to allege who granted the permission, when the grant was given, and the nature and scope of the permission.

In opposition, Eichelberger claims that during the meet and confer process, she forwarded to counsel the “permission letter.” Defendant does not object to consideration of this letter, and requests this motion be treated as one for summary judgment pursuant to Rule 12(d). Copies of two permission letters shared by counsel are attached. The publisher granted permission to “reproduce the materials” for use in the course, “but not for any other use or distribution.” Consent was given to make copies, but not to create derivative works. Eichelberger thus violated the publisher’s copyright in the textbook and defrauded the Copyright Office.

1 To compound matters, Eichelberger threatens to expose an internal
2 investigation by Azusa Pacific University (AP) if this matter proceeds any further.
3 McKinney will not be intimidated. At Eichelberger’s invitation, the Court should
4 consider matters outside the pleadings and treat this motion as one for summary
5 judgment under Rule 56. All parties should be given a reasonable opportunity to
6 present material pertinent to the motion. At the end of the day, Eichelberger will not
7 prevail. Plaintiff did not obtain a valid copyright: she failed to disclose the
8 preexisting work and she lacked permission to create a derivative work.

9 The remaining defenses also merit attention. Eichelberger never alleged that
10 acts of infringement occurred after 2018, only that she became aware of the prior
11 use in 2019 when she was teaching at AP. An intervening Supreme Court decision
12 effectively overrules the circuit court’s use of the discovery rule for copyright
13 infringement cases. Since the acts of alleged infringement occurred over three years
14 before suit was filed, the claim is time-barred.

15 Eichelberger cannot obtain statutory damages because she did not secure a
16 copyright registration prior to the alleged infringement. Eichelberg fails to allege
17 any factual basis for an award of actual damages or injunctive relief. Lastly, the
18 Lanham Act claim is barred since it directly conflicts with the Copyright Act.

19 **2. ARGUMENT**

20 **A. No Valid Copyright Ownership**

21 Eichelberger invites this Court to consider matters outside the pleadings in
22 order to establish that she owns a valid copyright. McKinney agrees and has
23 provided copies of the permission letters referenced in the opposition. See Decl. of
24 S. Krongold, Ex. 1. Under Rule 12(d), the Court can convert this motion as one for
25 summary judgment. “If, on a motion under Rule 12(b)(6) or 12(c), matters outside
26 the pleadings are presented to and not excluded by the court, the motion must be
27 treated as one for summary judgment under Rule 56. All parties must be given a
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1 reasonable opportunity to present all the material that is pertinent to the motion.”
2 Fed. R. Civ. Proc. 12(d).

3 The permission letters are highly relevant. Eichelberger is not entitled to a
4 presumption of validity since her certificate of registration was for an unpublished
5 work. 17 U.S.C. § 410(c). The certificate of registration contains a section, entitled
6 “Completion/Publication.” Eichelberger’s certificate merely identifies the year of
7 completion; there is no date of publication. If the work was in fact published, the
8 application—and the certificate—would identify the date and nation of first
9 publication. 17 U.S.C. § 409(8). The absence of a publication date on the certificate
10 means that Eichelberger attempted to register an unpublished work.

11 Eichelberger argues that despite the absence of publication in the certificate,
12 this Court should nonetheless conclude there was publication by implication.
13 Eichelberg alleged that a student at AU commented that he was able to study with a
14 friend from Western because they had the same class notes. (Compl., ¶ 16.)
15 According to Eichelberger, when “a student realized the two set of notes were
16 identical or nearly identical,” this implies “that copies [of the work] were
17 distributed.” (Opp. at pg. 7, lines 12-14.) This is sheer conjecture.

18 Eichelberger agrees that the Copyright Act defines “publication” as the
19 “distribution of copies or phonorecords of a work to the public by sale or other
20 transfer of ownership, or by rental, lease, or lending.” 17 U.S.C. § 101. Further, the
21 mere “public performance or display of a work does not of itself constitute
22 publication.” *Id.*

23 There was no allegation of publication, as that term is defined in the
24 Copyright Act, and there was no statement of publication in the Certificate of
25 Registration. Therefore, as a matter of law, Eichelberger is not entitled to a
26 presumption of validity.

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1 The registration is for original text, but Eichelberger admits that she used
2 preexisting material, a well-known textbook authored by Hal Blumenfeld, MD,
3 PhD. Eichelberger was required to disclose to the Copyright Office the existence of
4 the preexisting work. 17 U.S.C. § 409(9) [application for copyright registration shall
5 include “in the case of a compilation or derivative work, an identification of any
6 preexisting work or works that it is based on or incorporates, and a brief, general
7 statement of the additional material covered by the copyright claim being
8 registered.”].

9 Having the deprived the Copyright Office of the opportunity to evaluate
10 originality, and unable to rely on the presumption of validity, Eichelberger must
11 allege facts to establish valid ownership of the copyright in the subject material.
12 “Ownership of the copyright is . . . always a threshold question.” *Lamps Plus, Inc. v.*
13 *Seattle Lighting Fixture Co.*, 345 F.3d 1140, 1144 (9th Cir. 2003).

14 *Lamps Plus* noted that the “statutory presumption of validity can be rebutted
15 if the alleged infringer demonstrates that the plaintiff’s work is not original but
16 copied from another’s work.” *Id.* at 1145-46. Eichelberger all but admits that she
17 copied the Blumenfeld textbook to create a derivative work. The materials “were
18 developed over years of working with one of the top texts in the area of neurology;”
19 “Eichelberger had permission to create these materials;” “Eichelberger took the text
20 of the book and distilled it down” to what became the Work; “Eichelberger created
21 the Work after years of teaching us the textbook.” (Compl., ¶¶ 10-12).

22 Eichelberger recognizes that the owner of a copyright has the exclusive right
23 to prepare derivative works, 17 U.S.C. § 106(2), and to grant or withhold permission
24 to create such works. The Copyright Act defines “derivative work” as “a work based
25 upon one or more preexisting works, such as a translation . . . abridgment,
26 condensation, or any other form in which a work may be recast, transformed, or
27 adapted. A work consisting of editorial revisions, annotations, elaborations, or other
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1 modifications which, as a whole, represent an original work of authorship, is a
2 derivative work.” 17 U.S.C. § 101.

3 Eichelberger claims she had permission to create a derivative work. (Compl.,
4 ¶ 10.) To satisfy this permission requirement, Eichelberger alludes to a “permission
5 letter” shared with counsel. (Opp. at pg. 2, lines 10-13.) However, the letter only
6 grants permission to “reproduce the materials” for use in the course, “but not for any
7 other use or distribution.” (Krongold Decl., Ex. 1.) In other words, Eichelberger was
8 granted a limited license only to one of the exclusive rights of copyright owners: the
9 “right to reproduce the copyrighted work in copies.” 17 U.S.C. § 106(1). There was
10 no permission “to prepare derivative works based upon the copyrighted work.” *Id.*, §
11 106(2). Eichelberger thus violated the publisher’s copyright in the textbook and
12 defrauded the Copyright Office. Eichelberger therefore does not own a valid
13 copyright and her claim must be dismissed.

14 **B. Statute of Limitations Bars Copyright Claim**

15 Eichelberger concedes that no plausible claim of infringement was alleged to
16 have occurred in 2019: “it may not be immediately apparent from the wording of the
17 Complaint [that] Dr. Eichelberg’s materials were also used by Hudson-McKinney in
18 2019 at APU.” (Opp. at pg. 5, lines 6-8.) Since the only acts of alleged infringement
19 took place in 2017 and 2018, the complaint is time-barred since it was filed on
20 January 31, 2022. *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 671
21 (2014) (“copyright infringement is actionable within three years, and only three
22 years, of its occurrence”).

23 Even if Eichelberger is granted leave to amend in order to allege infringement
24 in 2019, this would not salvage the time-barred claims as to the acts in 2017 and
25 2018. The same material was allegedly used at a different university to a different
26 set of students on a separate occasion. Under *Petrella*, where discrete infringing acts
27 are alleged, the copyright holder’s suit is “untimely with respect to prior acts of the
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1 same or similar kind.” *Id.* at 672. Eichelberger recognizes the “separate accrual rule”
2 would apply. See Opp. at pg. 4, lines 26-28.

3 Eichelberger concedes the 2017-2018 acts of alleged infringement are time-
4 barred unless the discovery rule applies. McKinney cited a number of intervening
5 Supreme Court decisions that have effectively overruled the Ninth Circuit’s decision
6 in *Polar Bear* which applied the discovery rule to copyright infringement claims.
7 Eichelberger ignores this analysis, making no attempt to discuss the cases cited, i.e.,
8 *TRW Inc. v. Andrews*, 534 U.S. 19 (2001), *Gabelli v. SEC*, 568 U.S. 442 (2013) and
9 *Rotkiske v. Klemm*, 140 S.Ct. 355 (2019). Defendant will not repeat the analysis
10 here.

11 Eichelberger criticizes as “convoluted” the argument against applying the
12 stare decisis doctrine. (Opp. at pg. 4, lines 9-10.) But Eichelberger again fails to
13 address the cases cited in the moving papers, particularly, *Galbraith v. County of*
14 *Santa Clara*, 307 F.3d 1119 (9th Cir. 2002) and *Miller v. Gammie*, 335 F.3d 889
15 (9th Cir. 2003), both of which apply a flexible approach to stare decisis.

16 In light of recent Supreme Court precedent, the delayed discovery rule in
17 copyright infringement cases is a dead letter and should not be followed.

18 **C. Plaintiff Fails to Allege Basis For Copyright Remedy**

19 Eichelberger has not alleged a plausible basis for causation of damages. She
20 theorizes that because McKinney received a salary (paid in part by tuition), she
21 profited from use of the work. This theory is based on rank speculation. No facts
22 suggest the school paid McKinney because she was allegedly using Eichelberger’s
23 work. No facts suggest the school received tuition because students relied on
24 McKinney’s alleged use of Eichelberger’s work. There is simply no basis to allege
25 unjust enrichment or profits *attributable* to the infringement.

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1 Eichelberger has not alleged a factual basis for any reduction in the fair
2 market value of the copyrighted work. She has not even alleged the work had fair
3 market value since it was never sold, licensed or distributed, or even offered for
4 sale, license or distribution.

5 In terms of injunctive relief, Eichelberger relies on McKinney’s “staunch
6 denial” of wrongdoing as evidence that “she may copy again.” (Opp. at pg. 6, line
7 27 to pg. 7, line 1.) Eichelberger ignores the plain requirement of factual allegations
8 of continued infringement or imminent threats of infringement that will result in
9 irreparable harm. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).
10 Eichelberger filed suit in January 2022 and could not allege one other act of
11 infringement after 2018. Vigorous denials of wrongdoing—and protestations of
12 innocence—do not make a case for injunctive relief.

13 **D. No Plausible Lanham Act Claim**

14 The reverse palming off claim fails to state a claim for relief under Section
15 43(a) of the Lanham Act, 15 U.S.C. § 1125(a). Eichelberger fails to address, much
16 less attempt to distinguish, the holding in *Dastar* that reading Section 43(a) as
17 creating a federal cause of action for plagiarism would (a) render superfluous other
18 sections of the Copyright Act concerning lack of attribution for works of visual art
19 and (b) undermine decisions that required a showing of “secondary meaning.”
20 Eichelberger glosses over the *Dastar* discussion and simply alludes to the fact
21 McKinney placed her name on the some of the materials circulated to students.
22 Eichelberger has not—and cannot—allege that her work acquired “secondary
23 meaning” under the Lanham Act.

24 Moreover, Eichelberger fails to allege use of interstate commerce to confuse
25 or deceive consumers. 15 U.S.C. § 1127. Eichelberger does not have standing to sue
26 since she did not use the work in commerce.

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3. CONCLUSION

The time has come to end this frivolous lawsuit. Eichelberger defrauded the Copyright Office and infringed the publisher’s copyright in a well-known textbook. She waited 5 years to apply for registration and then used her invalid registration to shakedown a fellow professor who did nothing more than use the textbook material to teach a class. For all the reasons set forth above, McKinney respectfully requests that the Court grant this motion and dismiss the complaint for failing to state a claim for relief.

Dated: 6/08/2022

KRONGOLD LAW CORP., P.C.

/s/ Steven L. Krongold
By: _____
Steven L. Krongold
Attorney for Defendant
MARY HUDSON-MCKINNEY