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6 Attorneys for Defendant,  
Pepperdine University  
7

8 **UNITED STATES DISTRICT COURT**  
9 **CENTRAL DISTRICT OF CALIFORNIA**  
10 **WESTERN DIVISION**

11  
12 Dr. Elliot McGucken, an individual,

13 Plaintiff,

14 v.

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

17  
18 Defendants.  
19  
20

) CASE NO. 2:22-cv-02851 GW(JCx)

) [Hon. George H. Wu]

) **PEPPERDINE UNIVERSITY'S**  
) **ANSWER AND AFFIRMATIVE**  
) **DEFENSES TO PLAINTIFF'S**  
) **FIRST AMENDED COMPLAINT**

1 Defendant Pepperdine University (“Pepperdine”), by and through its  
2 counsel, and for itself alone, hereby answers the First Amended Complaint of  
3 Plaintiff Elliot McGucken (“McGucken”) dated May 18, 2022, as follows:  
4

5 **NATURE OF THE ACTION**

6 1. Pepperdine admits that Plaintiff premises that this action arises  
7 under the Copyright Act of 1976, Title 17 U.S.C., § 101 *et seq.*, and nothing  
8 more.  
9

10 2. Pepperdine admits that Plaintiff premises that this Court has  
11 federal question jurisdiction under 28 U.S.C. § 1331 and 1338 (a)-(b), and  
12 nothing more.  
13

14 3. Pepperdine admits that Plaintiff premises that venue in this  
15 judicial district is proper under 28 U.S.C. § 1391(c) and 1400(a) on the  
16 grounds that this is the judicial district in which a substantial part of the  
17 acts and omissions giving rise to the claims allegedly occurred, and nothing  
18 more.  
19

20 4. Pepperdine presently lacks sufficient information to admit or deny the  
21 allegations of paragraph 4 of the First Amended Complaint, and, therefore, on  
22 that basis, denies each allegation contained therein.  
23

24 5. Pepperdine admits that is a California Non-Profit corporation  
25 doing business in Los Angeles County and has a principal place of business at  
26 24255 Pacific Coast Highway, Malibu, California 90263, and nothing more.  
27

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1 6. Pepperdine presently lacks sufficient information to admit or deny the  
2 allegations of paragraph 6 of the First Amended Complaint, and, therefore, on  
3 that basis, denies each allegation contained therein.  
4

5 7. Pepperdine presently lacks sufficient information to admit or deny the  
6 allegations of paragraph 7 of the First Amended Complaint, and, therefore, on  
7 that basis, denies each allegation contained therein.  
8

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

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11 8. Pepperdine presently lacks sufficient information to admit or deny the  
12 allegations of paragraph 8 of the First Amended Complaint, and, therefore, on  
13 that basis, denies each allegation contained therein.  
14

15 9. Pepperdine presently lacks sufficient information to admit or deny the  
16 allegations of paragraph 9 of the First Amended Complaint, and, therefore, on  
17 that basis, denies each allegation contained therein.  
18

19 10. Pepperdine presently lacks sufficient information to admit or deny the  
20 allegations of paragraph 10 of the First Amended Complaint, and, therefore, on  
21 that basis, denies each allegation contained therein.  
22

23 11. Pepperdine presently lacks sufficient information to admit or deny the  
24 allegations of paragraph 11 of the First Amended Complaint, and, therefore, on  
25 that basis, denies each allegation contained therein. Pepperdine notes that U.S.  
26 Copyright Registration No. VA 2089200 is for a group work comprising 43,600  
27 photographs. Plaintiff provides no evidence that the photograph depicted in  
28 Exhibit A to the First Amended Complaint is one of the 43,600 photographs

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1 allegedly contained in the deposit sample for the subject copyright registration.  
2 Plaintiff has been asked to provide proof that Exhibit A is part of the deposit  
3 sample for the registration on multiple occasions and has willfully and in bad  
4 faith, refused to do so.  
5

6 12. Pepperdine admits that it published a work entitled "The Orange  
7 Book: 2021 Academic Planning Guide." Pepperdine admits the planning guide  
8 was distributed to law students during the academic year 2021. Pepperdine  
9 presently lacks sufficient information to admit or deny the remaining allegations  
10 of paragraph 12 of the First Amended Complaint, and, therefore, on that basis,  
11 denies each allegation contained therein.  
12

13 13. Pepperdine presently lacks sufficient information to admit or deny the  
14 allegations of paragraph 13 of the First Amended Complaint, and specifically  
15 whether Exhibit B is an accurate photograph of the 2021 Academic Planning  
16 Guide, and therefore, on that basis, denies each allegation contained therein.  
17

18 14. Pepperdine presently lacks sufficient information to admit or deny the  
19 allegations of paragraph 14 of the First Amended Complaint, and, therefore, on  
20 that basis, denies each allegation contained therein.  
21

22 15. Pepperdine presently lacks sufficient information to admit or deny the  
23 allegations of paragraph 15 of the First Amended Complaint, and, therefore, on  
24 that basis, denies each allegation contained therein.  
25

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1 16. Pepperdine admits that it received a letter from Plaintiff’s counsel  
2 regarding the subject photograph. Pepperdine avers that it requested that Plaintiff  
3 provide proof that it had a copyright registration for the subject photograph.  
4 Plaintiff willfully and in bad faith refused to provide any such evidence. As of  
5 the date of this answer, Plaintiff has failed to provide any proof that the subject  
6 photograph is one of the 43,600 photographs that comprises Plaintiff’s Copyright  
7 Registration. As such, Plaintiff is prosecuting this action in bad faith.  
8 Pepperdine presently lacks sufficient information to admit or deny any of the  
9 remaining allegations of paragraph 16 of the First Amended Complaint, and,  
10 therefore, on that basis, denies each allegation contained therein.

11  
12 **FIRST CLAIM FOR RELIEF**

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

14  
15 17. In response to paragraph 17, Pepperdine restates and incorporates in  
16 their entirety its answers to paragraphs 1 through 16 above.

17  
18 18. Pepperdine presently lacks sufficient information to admit or deny the  
19 allegations of paragraph 18 of the First Amended Complaint, and, therefore, on  
20 that basis, denies each allegation contained therein.

21  
22 19. Pepperdine presently lacks sufficient information to admit or deny the  
23 allegations of paragraph 19 of the First Amended Complaint, and, therefore, on  
24 that basis, denies each allegation contained therein.

25  
26 20. Pepperdine presently lacks sufficient information to admit or deny the  
27 allegations of paragraph 20 of the First Amended Complaint, and, therefore, on  
28 that basis, denies each allegation contained therein.

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21. Pepperdine denies each and every allegation of paragraph 21 of the First Amended Complaint.

22. Pepperdine denies each and every allegation of paragraph 22 of the First Amended Complaint.

23. Pepperdine denies each and every allegation of paragraph 23 of the First Amended Complaint.

**SECOND CLAIM FOR RELIEF**  
**(For Vicarious and/or Contributory Copyright Infringement – Against all Defendants, and Each)**

24. In response to paragraph 24, Pepperdine restates and incorporates in their entirety its answers to paragraphs 1 through 23 above.

25. Pepperdine presently lacks sufficient information to admit or deny the allegations of paragraph 25 of the First Amended Complaint, and, therefore, on that basis, denies each allegation contained therein.

26. Pepperdine presently lacks sufficient information to admit or deny the allegations of paragraph 26 of the First Amended Complaint, and, therefore, on that basis, denies each allegation contained therein.

27. Pepperdine denies each and every allegation of paragraph 27 of the First Amended Complaint.

1 28. Pepperdine denies each and every allegation of paragraph 28 of the  
2 First Amended Complaint.

3  
4 29. Pepperdine denies each and every allegation of paragraph 29 of the  
5 First Amended Complaint.

6  
7 **THIRD CLAIM FOR RELIEF**

8 **(For Violations of the Digital Millennium Copyright Act – Against all**  
9 **Defendants, and Each)**

10  
11 30. In response to paragraph 30, Pepperdine restates and incorporates in  
12 their entirety its answers to paragraphs 1 through 29 above..

13  
14 31. Pepperdine presently lacks sufficient information to admit or deny the  
15 allegations of paragraph 31 of the First Amended Complaint, and, therefore, on  
16 that basis, denies each allegation contained therein.

17  
18 32. Pepperdine presently lacks sufficient information to admit or deny the  
19 allegations of paragraph 32 of the First Amended Complaint, and, therefore, on  
20 that basis, denies each allegation contained therein.

21  
22 33. Pepperdine presently lacks sufficient information to admit or deny the  
23 allegations of paragraph 32 of the First Amended Complaint, and, therefore, on  
24 that basis, denies each allegation contained therein.

25  
26 34. Pepperdine presently lacks sufficient information to admit or deny the  
27 allegations of paragraph 34 of the First Amended Complaint, and, therefore, on  
28 that basis, denies each allegation contained therein.

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1           35.    Pepperdine presently lacks sufficient information to admit or deny the  
2 allegations of paragraph 35 of the First Amended Complaint, and, therefore, on  
3 that basis, denies each allegation contained therein.  
4

5           36.    Pepperdine presently lacks sufficient information to admit or deny the  
6 allegations of paragraph 36 of the First Amended Complaint, and, therefore, on  
7 that basis, denies each allegation contained therein.  
8

9           37.    Pepperdine presently lacks sufficient information to admit or deny the  
10 allegations of paragraph 37 of the First Amended Complaint, and, therefore, on  
11 that basis, denies each allegation contained therein.  
12

13           38.    Pepperdine presently lacks sufficient information to admit or deny the  
14 allegations of paragraph 38 of the First Amended Complaint, and, therefore, on  
15 that basis, denies each allegation contained therein.  
16

17           39.    Pepperdine presently lacks sufficient information to admit or deny the  
18 allegations of paragraph 39 of the First Amended Complaint, and, therefore, on  
19 that basis, denies each allegation contained therein.  
20

21           40.    Pepperdine denies each and every allegation of paragraph 40 of the  
22 First Amended Complaint.  
23

24           41.    Pepperdine denies each and every allegation of paragraph 41 of the  
25 First Amended Complaint.  
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**PRAYER FOR RELIEF**

Pepperdine denies that Plaintiff is entitled to any of the relief sought.

**AFFIRMATIVE DEFENSES**

As separate and distinct defenses to each of the claims set forth in the First Amended Complaint , Pepperdine sets forth the following and asserts that each are at issue or will be at issue after an opportunity to conduct discovery.

**FIRST AFFIRMATIVE DEFENSE**

(Innocent Infringement and Good Faith)

1. As a first and separate affirmative defense to the First Amended Complaint, and to each cause of action therein, Pepperdine alleges that to the extent that Plaintiff’s work was infringed, Pepperdine acted in good faith, innocent of any knowledge or intent to infringe Plaintiff’s rights. If such good faith and lack of intent does not, as a matter of law, preclude a finding of liability, any general or statutory damages awarded to Plaintiff should be correspondingly reduced.

**SECOND AFFIRMATIVE DEFENSE**

(Fair Use)

2. As a second and separate affirmative defense to the First Amended Complaint, and to each cause of action therein, Pepperdine alleges that to the extent, if any, that Pepperdine used the subject photograph, such use was a fair use as the photograph was used for nonprofit and educational purposes only and such use had no material impact on the market value, if any, for the photograph.

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1 evidence. Pepperdine has requested that the U.S. Copyright Office provide the  
2 deposit sample for Plaintiff’s claimed registration. However, even when  
3 received, Pepperdine is aware of no practical way in which to determine whether  
4 the allegedly infringed image forms part of the deposit sample. In the absence of  
5 proof by Plaintiff that the allegedly infringed image is copyrighted, this case  
6 should be dismissed and Pepperdine should be awarded its fees and costs.

7  
8 **SIXTH AFFIRMATIVE DEFENSE**

9 (Speculative Damages)

10 6. As a sixth and separate affirmative defense to the First Amended  
11 Complaint, and to each cause of action therein, to the extent Plaintiff has suffered  
12 any damages, which is denied, any such damages are speculative and uncertain.

13  
14 **PRAYER FOR RELIEF**

15 WHEREFORE, Pepperdine prays for judgment against Plaintiff as follows:

- 16 1. That Plaintiff take nothing by reason of its First Amended Complaint;  
17 2. That Plaintiff’s First Amended Complaint be summarily dismissed  
18 with prejudice;  
19 3. That Pepperdine be awarded its costs of suit herein;

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- 4. That Pepperdine be awarded its attorneys’ fees incurred defending this action; and
- 5. That Pepperdine be awarded such other and further relief as the Court may deem just and proper.

Respectfully submitted,

CISLO & THOMAS LLP

Dated: July 13, 2021

By: /s/Daniel Cislo  
Daniel M. Cislo, Esq.  
David B. Sandelands, Esq.

Attorneys for Defendant  
PEPPERDINE UNIVERSITY

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**PROOF OF SERVICE**

I am over the age of eighteen (18) years, employed in the County of Los Angeles, and not a party to the above-entitled action. My business address is 12100 Wilshire Blvd., Suite 1700, Los Angeles, CA 90025-7103.

On July 13, 2022, I served the following document:

**PEPPERDINE UNIVERSITY’S ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFF’S FIRST AMENDED COMPLAINT**

- BY SERVICE PROVIDER:** I caused a copy of such document to be sent via electronic service to the addressee(s) shown below using a service provider, such as Express Networks, and:
- BY ELECTRONIC MAIL:** I caused a copy of such document to be sent via the Court’s electronic filing system:

Scott Alan Burroughs, Esq.  
Trevor W. Barrett, Esq.  
Frank R. Treschsel, Esq.  
DONIGER / BURROUGHS  
603 Rose Avenue  
Venice, California 90291  
scott@donigerlawfirm.com;  
tbarrett@donigerlawfirm.com;  
ftreschsel@donigerlawfirm.com

I declare, under penalty of perjury under the laws of the United States that the foregoing is true and that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

Executed on July 13, 2022 at Los Angeles, California.

/s/Christopher Eckart  
Christopher Eckart