

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. 22-cv-01037-CMA-NRN

ERIC PICKERSGILL,

Plaintiff,

v.

THE EGOTIST, LLC dba THE DENVER EGOTIST,

Defendant.

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**REPORT AND RECOMMENDATION ON  
DEFENDANT'S MOTION TO DISMISS (Dkt. #21)**

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**N. REID NEUREITER**  
**United States Magistrate Judge**

**Introduction**

This is a copyright lawsuit brought by a photographer, Mr. Eric Pickersgill, against Defendant The Egotist, LLC d/b/a The Denver Egotist ("Defendant" or the "Egotist"). Mr. Pickersgill alleges that the Egotist's website (the "Website"), without permission or license, reprinted six of his copyrighted photographs in a web post. The Egotist, for its part, contends that the post, which included six large images from a larger collection of Mr. Pickersgill's photographic work, with a very small amount of accompanying text, was in fact an article describing the work itself, and therefore constitutes fair use of the images. The larger collection of Mr. Pickersgill's photographic work from which the images were copied is entitled "*Removed.*" The images show people, in various poses, as if engrossed in their electronic devices, but there is no

electronic device in any of the subjects' hands. Thus, the electronic devices or cellphones have been "removed."

This matter comes before the Court on Defendant's Motion to Dismiss. Dkt. #19. The Motion was referred by Judge Arguello on June 29, 2022. Dkt. #21. The case now has been reassigned to Judge Sweeney. Mr. Pickersgill filed an opposition. Dkt. #23. Defendant filed a reply. Dkt. #27. The Court heard argument on Defendant's Motion to Dismiss on August 17, 2022. Dkt. #37.

At the hearing on the Motion to Dismiss, Mr. Pickersgill's counsel suggested that certain aspects of the representations by Defendant in its motion to dismiss were false. Specifically, Pickersgill's counsel suggested that while Defendant claimed to have written the brief text accompanying the copyrighted images, in reality, the words had been copied verbatim from Mr. Pickersgill's own website describing his collection of images. Thus, the notion that the text somehow constituted an original article, entitled to the benefit of the fair use defense, was without merit. Based on Plaintiff's counsel's representation, I ordered defense counsel to inquire with his client as to the source of the text in the Website's posting about Mr. Pickersgill's images.

On August 18, 2022, Defendant filed a statement in response to my order. See Dkt. #37. In that statement, Defendant explained that the source of the text in the disputed posting was a written description from YouTube of the TEDx talk by Mr. Pickersgill himself about the *Removed* photographs. The person who created the posting for the Egotist did not know who had authored the text. The Egotist merely copied it from the YouTube page. Defendant disputes that the text was copied from Mr. Pickersgill's website, providing evidence from Internet Archives that the written text was

not on Mr. Pickersgill's website at the time of the Egotist post. See Dkt. #38 and associated exhibits.

### **Allegations of the Complaint**

Mr. Pickersgill is a full-time artist working in North Carolina. He received a Master of Fine Arts degree at The University of North Carolina at Chapel Hill in 2015. He received a Bachelor of Fine Arts degree with a concentration in Fine Art Photography from Columbia College Chicago in 2011. In his art, Mr. Pickersgill explores the psychological and social effects that cameras and their artifacts have on individuals and societies as a whole. He has exhibited and presented his work internationally at numerous institutions, galleries, and art fairs, including the North Carolina Museum of Art, Pantheon-Sorbonne University, the Ackland Art Museum, Rick Wester Fine Art, and the Pulse Art Fair Miami.

Two copyright registrations have been asserted by Mr. Pickersgill. Copies of a Certificate of Registration were attached as exhibits to the First Amended Complaint. See Dkt. #18-2. Both copyright registrations consist of a group or collection of photographs, with the online record stating that the 2018 *Removed* copyright consists of "61 photographs" published in October 2018.

On September 26, 2019, the Egotist posted about Mr. Pickersgill's *Removed* series of photographs. A copy of the posting is included as Exhibit 3 to the First Amended Complaint. Dkt. #18-3. The posting includes six images from Mr. Pickersgill's *Removed* series. The reproduced images are not thumbnails, but appear to be large, nearly full-screen size images, in high resolution. See *id.* ¶ 22.

The text accompanying the posting is extremely limited. There is a bold, capitalized, headline which reads, “PHOTOGRAPHER ERIC PICKERSGILL’S SERIES ‘REMOVED’ SHOWS US HOW OUR DEVICES DIVIDE US.” The post contains two sentences of text:

Artist Pickergill’s [sic] photography series, *Removed*, went viral and touched a collectively universal nerve. He makes visible what so many have tried to explain about the ways personal devices alter human behavior, helping us relearn how to be truly connected in our device-dominated age.

Dkt. #18-3. The post also included the link to the YouTube page for Mr. Pickersgill’s TEDx talk about his pictures.

As the Court can tell from reviewing the Egotist article, in terms of the relative space on the post occupied by the limited text, as compared to the copied *Removed* images, the area occupied by the images far eclipses the amount of space occupied by the text. A rough estimate would be that 95 percent of the post is Mr. Pickersgill’s copied images and only five percent (if that) is text. As noted above, Defendant acknowledges that the text was not even original to the Egotist, but instead was copied from the description of Mr. Pickersgill’s TEDx talk.

Mr. Pickersgill alleges that the post was not “posted for the purpose of criticism, comment, or news reporting of the copyrighted Works or Pickersgill, but instead to drive traffic to the Website.” Dkt. #18 ¶ 20. He also alleges that the copying and distribution of his images by the Egotist was done in connection with the Egotist’s business, for purposes of advertising and promoting Egotist’s business in the course and scope of advertising and selling products and services. The Egotist contains third-party commercial advertisements and Mr. Pickersgill alleges the Egotist copied and

distributed Pickersgill's copyrighted photographs in connection with displaying these third-party commercial advertisements. *Id.* ¶ 21.

Mr. Pickersgill brings only one claim: copyright infringement. He says he has a valid copyright in the images and that the Egotist copied, displayed, and distributed his images without authorization in violation of 17 U.S.C. § 501. He seeks actual or statutory damages, and attorney's fees and costs.

### **Defendant's Motion to Dismiss**

At this stage of the litigation, the Egotist does not dispute that Mr. Pickersgill has a valid copyright in the disputed images or that the Egotist used the images without authorization in its web posting. Instead, the Egotist argues that the Court need only examine the posting to conclude that this was a legitimate news article about the photographs themselves, making it entitled to claim the legal defense of "fair use." In the Egotist's view, the fair use defense is effectively established by the very allegation in the First Amended Complaint that the alleged infringement is based on "an article written by the Denver Egotist specifically about Pickersgill and the 'Removed' series of photographs." The Egotist argues that because it is publishing a legitimate news article about the photographs, and includes commentary about the photographs, it is entitled to use some of the photographs to provide context for the commentary. Such use, in the Egotist's view, is fair use as a matter of law.

### **Legal Standards**

#### **Rule 12(b)(6)**

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft*

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