

McGucken v. Pub Ocean Ltd.
2:20-cv-01923-RGK-AS, 2021 U.S. Dist. LEXIS 153361 (C.D. Cal. July 27, 2021)

Year	2021
Court	United States District Court for the Central District of California
Key Facts	Plaintiff Elliot McGucken photographs landscapes and seascapes, which he posts to his public Instagram account. Twelve of McGucken’s Instagram posts depict photographs he took of an ephemeral lake in Death Valley (the “Photographs”). On April 15, 2019, Defendant Pub Ocean Limited (“Pub Ocean”) published McGucken’s Photographs to five websites owned by Pub Ocean as part of an article written by a freelance writer titled “A Massive Lake Has Just Materialized in the Middle of One of the Hottest Places on Earth.” The article contained ten of the Photographs, with credit to McGucken and a link to his Instagram page, as well as several photos that were not McGucken’s and commentary on the conditions in Death Valley, the Sahara, and other natural phenomenon. McGucken brought an action for copyright infringement and moved for summary judgment, asserting Pub Ocean’s use did not constitute fair use.
Issue	Whether including photographs posted on social media in a news article to illustrate the subject of the photograph is fair use when accompanied by commentary.
Holding	The court concluded that Pub Ocean’s use of McGucken’s Photographs was fair use. The first factor, the purpose and character of the use, favored fair use because Pub Ocean’s use of the Photographs was transformative because the article included discussion of facts and commentary that provided context for the Photographs and included other photographs as well. The transformative nature of the use reduced the importance of the commercial purpose factor. The court held the second factor, the nature of the work, disfavored fair use as McGucken’s works, although previously published, are highly creative. The court found the third factor, the amount and substantiality of the work used, favored fair use. The court concluded that, despite displaying the “heart” of the Photographs, the article expressed ideas “beyond what Plaintiff expressed in his photographs,” rendering the amount of McGucken’s copyrighted images “insubstantial in context.” The fourth factor, the effect of the use upon the potential market for or value of the work, favored fair use because Pub Ocean’s transformative use “mut[ed] the degree of market substitution.” The court also noted that McGucken licensed the Photographs to other publications after Pub Ocean published its article, which indicated that Pub Ocean’s use did not usurp or destroy the market for the Photographs.
Tags	Internet/Digitization; News Reporting; Photograph
Outcome	Fair use found

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