

**McGucken v. Pub. Ocean Ltd.**  
**42 F.4th 1149 (9th Cir. 2022)**

Year	2022
Court	United States Court of Appeals for the Ninth Circuit
Key Facts	Plaintiff Elliot McGucken photographed an ephemeral lake in Death Valley and posted the pictures to Instagram (the “Photographs”). He licensed the Photographs to several websites that included them in articles about the lake. On April 15, 2019, Defendant Pub Ocean Limited (“Pub Ocean”), a digital publisher, posted an article titled “A Massive Lake Has Just Materialized in the Middle of One of the Hottest Places on Earth” on five of its websites. The article focused on the lake, using twelve of the Photographs to illustrate the text, while also discussing related topics—facts about Death Valley, deserts, and other ephemeral lakes—that were accompanied by twenty-eight photographs from other sources. The article earned Pub Ocean \$6,815.66 from advertising in one year. McGucken brought an action for copyright infringement and moved for summary judgment, asserting Pub Ocean’s use did not constitute fair use. The district court denied the motion and <i>sua sponte</i> granted summary judgment for Pub Ocean, finding fair use as a matter of law.
Issue	Whether using photographs posted on social media to illustrate a news article about the subject of the photographs is fair use.
Holding	On appeal, the panel held that the first factor, the purpose and character of the use, weighed against fair use because Pub Ocean’s use of the Photographs was commercial and non-transformative. The use was not transformative because the article used the Photographs for the same purpose for which they were taken: to depict the ephemeral lake. The court explained that the article merely embedded the Photographs within the text and did not “directly describe or engage with” the works such that the use amounted to “[e]xploiting the beauty and intrigue of [the Photographs] . . . without adding anything new.” Further, the court noted that simply arranging the Photographs into a “montage” or placing them in a “wider context” does not make a use transformative where the purpose and character of the use does not differ from that of the original. In addition, while the article could be considered “news reporting,” the court noted “that label alone” is insufficient to favor fair use. The court held the second factor, the nature of the work, weighed against fair use because McGucken’s works, although previously published and factual, were the creative “product of many technical and artistic decisions.” The court found the third factor, the amount and substantiality of the portion of the work used, weighed against fair use because “Pub Ocean copied extensively without justification.” The panel found a “total” taking of the Photographs as they were used with “negligible cropping” and the article took “the heart” of each. The fourth factor, the effect of the use upon the potential market for or value of the works, also weighed against fair use because Pub Ocean’s article was a “ready market substitute” for the Photographs and the same conduct, if widespread, would “destroy McGucken’s licensing market.” Because all four factors weighed against fair use, the court reversed the district court’s grant of summary judgment and directed it to grant partial summary judgment to McGucken on the fair use issue.
Tags	Internet/Digitization; News Reporting; Photograph
Outcome	Fair use not found

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