

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MISSOURI**

<b>PERI HALL &amp; ASSOCIATES, INC., et al.,</b>	)	
	)	
<b>Plaintiffs,</b>	)	
	)	
<b>v.</b>	)	<b>Case No.: 4:06-00202-CV-W-GAF</b>
	)	
<b>ELLIOT INSTITUTE FOR SOCIAL SCIENCES RESEARCH, et al.,</b>	)	
	)	
<b>Defendants.</b>	)	

**DEFENDANT ELLIOT INSTITUTE FOR SOCIAL SCIENCES RESEARCH  
ANSWER TO COMPLAINT AND REQUEST FOR EXTENSION TO FILE A  
RESPONSE**

COMES NOW Defendant Elliot Institute for Social Sciences Research (hereinafter “Elliot Institute”) for answer to Plaintiff’s Complaint, states as follows:

1. Defendant Elliot Institute is either without sufficient information to admit or deny the allegations made in Paragraphs 1, 2, 10,13 -18, 21-23, 26 and 48 of Plaintiffs’ Complaint and, therefore, denies same.

2. Defendant Elliot Institute admits the allegations made in paragraphs 3-4, 19, 27, 30 and 59 in Plaintiffs’ Complaint.

3. Defendant Elliot Institute denies the allegations made in Paragraphs 5-9, 11-12,20 , 24-25, 28-29, 31-47,49 -58 and 60-79, and each and every other allegation not specifically admitted herein, as at the time Defendant created the elliotinstitute.org website, Plaintiffs did

not hold exclusive rights to use the three photos used in the banners of both web sites. In fact, Plaintiffs did not even attempt to secure exclusive rights to these photos until after Defendants' web site was created. In fact, the Plaintiffs purchased a limited license to only one of the three images on, March 7, 2006, the same day they served a cease and desist notice to Defendants implying they had exclusive license to all three images. They then purchased another limited license to a second image the same day as they filed their complaint. Both licenses include "use exclusivity" in the industry areas of "Politics/Government, Religion/Religious Services."

#### **AFFIRMATIVE DEFENSES**

4. Defendant Elliot Institute states that Plaintiffs' complaint and the allegations contained therein fail to state a claim upon which relief can be granted against this Defendant and do not state sufficient facts to constitute a cause of action against this Defendant.

5. Defendant Elliot Institute further states that Plaintiffs are barred by unclean hands, lack of standing, estoppel, fraud and all other affirmative defenses available under the law.

Further answering, Defendant Elliot Institute states:

6. Statements 20 and 35 in Plaintiff's complaint are misleading in that they imply that these exclusive licenses were purchased prior to creation of [elliotinstitute.org](http://elliotinstitute.org). In fact, they were purchased solely for the purpose of attempting to establish standing to sue Defendants on the same day they were purchased.

7. Statements 20 and 35 are misleading in that they imply Defendant has no right to use the three photos. In fact, Defendants have a license from Getty Images to use all three photos.

8. In fact, Plaintiffs have no standing to bring suit against Defendants for use of these images because for three reasons. First, Defendants have a license to use the photos. Secondly,

Plaintiffs have no standing to represent a copyright infringement claim on behalf of Getty Images, the owner of the images who licensed these images to Defendant. Thirdly, Plaintiffs have not provided evidence that these copyrighted images have in fact ever been registered. Without registration of the copyright have no standing to bring a suit on these grounds. Any complaint Plaintiffs may have about Defendant's use of these images should be made against Getty Images who licensed these works to Defendant.

9. Statement 24 implies that the "Terms and Conditions" page was always on the missouricures.org website. On information and belief, this was added only on March 7, 2006, after Plaintiffs became aware of the Elliot Institute's human engineering initiative and created a new edition of the missouricures.org website wherein the new edition included these additional pages.

10. Statement 25 implies that the copyright claim of Peri Hall & Associates was included in the html code since inception of the missouricures.org website. In fact, there was no notice of a copyright claim embedded in the code nor displayed on the web site until March 7, 2006, when Plaintiffs created a new edition of the missouricures.org website including these additional pages.

11. Statements 22 and 23 claim distinctive intellectual property rights to the code, belonging to Peri Hall, and the "graphic design, look and feel" to which Missouri Coalition claims property rights. In fact, the code and graphic design are one in the same and reduced to the same medium. Indeed, the new edition of missouricures.org published on March 7 reveals two copyright claims, one for each Plaintiff, without any distinguishing between what each party claims. This conflict in copyright claims calls into question the status of the filing to register the March 7, 2005 edition of the missouricures web site with the copyright office.

12. Statement 50 is misleading in that it implies that the website code for their March 7 edition is in fact registered with the copyright office. In fact, the registration has not been completed, payment for registration has not been processed, and processing of a copyright registration may take as long as six months. As seen in Plaintiff's Exhibit 17, page two, the upper right corner of Form TX, the effective date of registration has not been completed or certified by the Copyright Office. Plaintiffs, therefore, lack standing to bring a lawsuit based on a claim of copyright infringement before the work is registered.

13. Statement 33 wrongly asserts that Defendants website "illegally uses, mimics and copies the look, feel, graphics, photos and coding of the missouricures.com website." In fact, as described earlier, Defendants hold a license to use the photos from Getty Images. In regard to the and fragments of code originally taken from the missouricures web site used to produce a similar "look and feel", the use of these fragments is legal as provided by Title 17, Chapter 1, § 107. Limitations on exclusive rights: Fair use.

14. Statement 33 fails, as it alleges an illegal act while failing to note that the fragments of code used comprise less than one-thousandth of one percent of the work known as the missouricures.org website(§ 107 (3)), are used by a non-profit organization for the purpose of education (§ 107 (1)), are used in a transformative manner for the purpose of creating a basis to comment upon, criticize, and parody the clone-and-kill initiative sponsored by the missouricures.org website, and the nature of the use of these fragments of code have no effect on the potential market or value of the missouricures.org website(§ 107 (4)), all of which demonstrate that Defendants were acting legally in using the fragments of code which served to advance these fair use rights.

15. Statements 48 and 49 include admissions that Plaintiffs have created only “substantial portions” of the materials made available through their website. In information and belief, portions of their website include the copyrighted materials of others which are being employed under the fair use provisions.

16. Statement 28 characterizes the Elliot Institute as an “anti-abortion group.” In fact the Elliot Institute was organized for the purpose of engaging in research and education in the areas of population control, eugenics, abortion, sexual attitudes and practices. The purpose of characterization is unclear since spokespersons for the Plaintiff in numerous paid advertisements have asserted that they are “pro-life.”

17. Statement 29 asserts that the Elliot Institute’s supported initiative is “directly opposed to the stem cell policy goals of the Missouri Coalition.” If this is true, it contradicts the publicly stated policy goals of the Missouri Coalition and can only refer to policy goals of individuals leading the coalition and not to its many members. The initiative supported by the Elliot Institute in fact creates no obstacles to stem cell research where stem cells are extracted in a fashion that is not lethal to human life, a position held by many Missouri Coalition members and supporters, including Missouri Governor Matt Blunt.

18. Statement 29 is misleading in that there is no inherent conflict between the two initiatives as many people may support both (1) restricting legislative efforts to regulate stem cell research while (2) reserving to voters the right to regulate bioengineering of human gametes and human life. If the Missouri Coalition is truly a member based organization, the Plaintiffs should be required to show that their complaint is supported by the majority of their members, or alternatively, required to stop representing itself as a coalition of members.

19. Statement 9, in combination with Statement 29, is misleading in that it implies that the individual members and organizations endorsing the cures initiative have a meaningful membership in the Coalition and a say in the “policy goals promoted by the Missouri Coalition.” On information and belief, the policy and goals of the Coalition are totally dictated by a self-selecting board of less than ten individuals. Moreover, in the testimony and deposition of Bradley Ketcher, Mr. Ketcher refused to identify if any of the board members had been consulted or had given approval for the decision to bring a suite against Defendants in less than 24 hours of learning of Defendants initiative petition and how it was determined that Defendant’s initiative was in fact against the “policy goals” of the Missouri Coalition.

20. Statement 31 falsely alleges that the Elliot Institute sponsored initiative seeks to prohibit “cures.” The human engineering initiative actually makes clear allowances for the use of stem cells, including human embryonic stem cells, for proven therapies provided there is a minimal risk of fatal complications.

21. Statement 32 falsely characterizes the Elliot Institute sponsored initiative as anti-stem cell, anti-genetic research. In fact, the Elliot Institute initiative encourages both stem cell and genetic research and only seeks to require voter approval before techniques used on animals are used to alter the genetic or cellular makeup of human beings.

22. Statement 33 is false in many regards. The Elliot Institute website is clearly and distinctly different in its domain name, color, and boldly displayed Elliot Institute logo. Moreover, all the displayed content, except for three images, is entirely different and the underlying html markup language is entirely different. The Plaintiffs do not own a copyright on HTML code used to produce the Elliot Institute’s website. That code is in the public domain.

23. Statement 35 is misleading in that prior to the date of filing their complaint Plaintiffs did not have an exclusive license to any of the photos used did not even have a valid non-exclusive license to display Getty Images' GI 10178712 and GI 354136 064. The third image is a royalty free image that Elliot Institute has a right to license but is being blocked from using by this unjustified suit.

24. Statements 38 and 39 are false in that both the code and clearly the displayed text in each page of the Elliot Institute is distinct from the code and text used by missouricures.org and is the intellectual product and property of the Elliot Institute to the degree that any page constructed with public domain HTML codes can be.

25. Statement 46 is misleading in that the demand to cease and desist was delivered to Defendants less than 24 hours prior to filing of this suit, did not provide any documentation of the fact that Plaintiffs were in the process of securing a license to two of the photos contested which would preclude future use of these images by Defendants, nor did Plaintiffs provide Defendants sufficient time for counsel to examine the Plaintiff's allegations, to find legal counsel.

26. Statement 46, 54 are misleading in that they assert that Defendants were unwilling to modify their website in light of Plaintiff's complaints. In fact, immediately upon receiving the cease and desist order, Plaintiff began to remove the fragments of code, even though used within the exceptions for fair use, to remove the use of the trademarked names in the metatags, even though their use is permissible under the precedent of Playboy Enterprises v. Welles, No. 98-CV-0413-K JFS (SD CA, April 22, 1998). And moreover, Defendants have always been willing to license the images used and to refrain from use once their license to use the contested images expires. On information and belief, Plaintiffs were not interested in working with

Defendant to arrive at an equitable agreement regarding Defendant's license to use the images, or to examine the fair use questions raised or to negotiate the replacement of the fragments of code used within fair use with dissimilar equivalents. Instead, Plaintiffs only interest appeared to be to rush to shut down Defendant's website and to harass Defendants because of Plaintiffs political opposition to Defendant's initiative.

27. On February 18, 2006 Defendants began the process of developing a website to promote its petition initiative to create a preemptive ban on human engineering and human-animal crossbreeding reserving to the voters the right to make additional exceptions beyond those already commonly accepted by the average citizen, hereafter referred to as the "human engineering initiative."

28. Like the declared purpose of the initiative sponsored by the Coalition for Life Saving Cures, hereinafter "the cures initiative," the human engineering initiative is designed to prohibit cloning of human beings and the creation of human life solely for the purpose of destructive experiments.

29. The human engineering initiative does not directly address somatic cell nuclear transfer (SCNT). There are many ways in which SCNT can be used without creating a human life. The human engineering initiative only impacts the use of SCNT if the process was intentionally used in a fashion that created a human life. As scientists engaging in SCNT and proponents of the cures initiative have consistently testified that SCNT does not create a human life, it therefore is unlikely that passage of both initiatives would impact SCNT unless it was used in a fashion intended to create a human life.

30. The human engineering initiative specifically allows for the use of human stem cells in cures and therapies, including both adult and embryonic stem cells.



31. The human engineering initiative addresses concerns regarding genetic alteration of human beings and the mixing of human and animal chromosomes, which may increase the rate of crossover of animal viruses to humans. Examples of viruses that have migrated from animals to humans include avian flu, and possibly HIV. These concerns are not addressed by the cures initiative and may be shared by the majority of people who support the cures initiative once educated about these risks.

32. The human engineering initiative addresses concerns regarding the creation of excess human embryos during in vitro fertilization. The practice creates ethical and legal problems. Custody battles over frozen human embryos are not uncommon. There are also unsettled and disturbing questions about whether the frozen embryos can be destroyed or used for experiment, and whether one or both parents must consent to destruction or experimental use. These concerns are not addressed by the cures initiative and may be shared by the majority of people who support the cures initiative once educated about these concerns.

33. The human engineering initiative addresses the concern that advances in biotechnology may outpace the ability of the public to respond to technologies, such as genetically enhanced babies, that may produce profound cultural changes. For example, it is widely admitted by proponents of eugenics and transhumanism that we will soon be entering into a time when the wealthy will elect to have genetically enhanced children while the poor will be left with “gene poor” children. This will likely result in both an increasing financial and genetic gap between the rich and the poor. These predictions by leading scientists and scholars, including those who advocate getting to that future as soon as possible, are not addressed by the cures initiative and may be shared by the majority of people who support the cures initiative once educated about these concerns.

34. The Defendants' coalition building seeks to address different concerns raised by unregulated human engineering with a single solution that will appeal to people from all walks of life: conservative or liberal, rich or poor, devout or indifferent, theist or atheist. Many support this coalition from a religious belief that human life belongs to God and should not be genetically altered by scientific means. Others are chiefly concerned about the threats to public health, the environment, or the economic and social consequences of unregulated human engineering. Many secular supporters of the Defendants' coalition building effort may even be willing to accept some modification of the human genome, once it is proven to be safe. It is the Defendants' goal to elicit the support of any individual or group which simply believes that voters, not just biotech entrepreneurs and eugenic utopians, should have a say about if and when we enter into the "Brave New World" of genetically altered human beings. The concerns of this audience are not addressed by the cures initiative and may be shared by the majority of people who support the cures initiative once educated about these concerns.

35. With Missouri voters beginning to focus on the issues of stem cells and cloning in light of the cures initiative, Defendant concluded on February 17, 2006 that now was a great time for voters to start grappling with the larger picture of how unregulated human engineering may negatively affect society as outlined above. On February 18, 2006 Defendant began to prepare the human engineering initiative to file with the Secretary of State's office and to create a website promoting the initiative that would be hosted at [www.elliottinstitute.org](http://www.elliottinstitute.org).

36. The graphic design of [www.elliottinstitute.org](http://www.elliottinstitute.org) was carefully considered to represent the idea that the human engineering initiative and the cures initiative, promoted through [www.missouricures.org](http://www.missouricures.org), share commonalities yet were also distinctly different. Both are concerned about outlawing cloning and ensuring the availability of cures from properly tested

stem cell research. But the human engineering initiative is also distinctly different, focusing on the threat of unregulated human engineering and human-animal hybrids.

37. The decision to employ graphic similarities with the missouricures.org website also provided a sense of irony and humor since the issue of hman cloning (which all experts agree would produce a person who would be similar to the original but mostly different) could be graphically represented in a “cloned style” which had similarities to the original website but was clearly different. This decision was also made with foreknowledge that irony and humor are protected forms of speech and broaden the fair use doctrine under copyright law.

38. In web design courses and web design textbooks it is commonly taught that designers should use an existing web site, not designed by the designer, as the starting point for creating their own web site. By modifying elements to customize the graphic design and by replacing the visible text with one’s own material, a new web site is developed that is distinct from but hung upon at least a few graphic elements that remain from the original template. Among web designers, it is generally taught and believed that this practice is not a violation of copyright law provided the fragments of code remaining are an insubstantial portion of the entire website and are therefore covered under the fair use exceptions of copyright law.

39. The practice of modifying an existing web site to create something new is analogous to attorneys using the structure of a preexisting contract, user agreement, brief or pleading to create a new legal document suited to one’s particular needs that is distinctly different than the original but shares similarities. Among attorneys, it is generally taught and believed that this practice is not a violation of copyright law.

40. On February 18, 2006, Defendant followed standard web development protocols and examined the underlying code at [missouricures.org](http://missouricures.org) to start the process of constructing a unique template for [www.elliottinstitute.org](http://www.elliottinstitute.org).

41. In the course of this examination, it was observed that there was no copyright statement posted in the text of the [www.missouricures.org](http://www.missouricures.org) website or embedded in the code.

42. Copyright claims and terms of use were posted on the [www.missouricures.org](http://www.missouricures.org) website at some time after March 6, 2006, apparently after Plaintiffs began to prepare a complaint against Defendants.

43. A web search also revealed that the three images used in the top banner were stock photos that were not unique to [www.missouricures.org](http://www.missouricures.org).

44. On February 18<sup>th</sup>, Defendants correctly concluded that these stock images were not the property of Plaintiffs. At that time, furthermore, Defendants assumed the three photos they desired to use were either in the public domain or would be available for licensing as soon as the original source of the stock photos could be located. Defendant was prepared to pay stock photo license fees as soon as the source could be located or if approached by the stock photo company that owns the photos. It was subsequently learned that the photos are the property of Getty Images.

45. Due to the ease with which images are found on the Internet, it is a common practice for web developers to use stock photos or presumed public domain images before identifying the original source with the understanding that they will pay license fees when and if the source is subsequently identified.

46. It is a standard practice for stock photo providers to allow those who are discovered to have been using unauthorized stock photos to pay unpaid royalties or license fees back to the date of first use once one or the other party identifies the source of the photos or the unauthorized use.

47. In implementing Defendants' plan to have a "cloned" look while also being clearly distinctive and different, on February 18 Defendants began working from the template to create [www.elliotinstitute.org](http://www.elliotinstitute.org).

48. To ensure there was no risk confusion by web users with missouricures.org, the first major change, besides stripping out all the text content, was to dramatically change the color scheme and to prominently display the Elliot Institute logo. These strong changes in graphical design, combined with the new content discussing human engineering and the human engineering initiative, assured that no viewer of the two sites could ever be confused about which site they were viewing. In addition, the Internet address was chosen to be completely dissimilar.

49. While Defendants began the process of creating their website using a template constructed from the missouricures.com website, a recommended and legal act, the complete revision of content, style sheets, and layout have eliminated virtually every trace of the original template to produce a new and copyrightable work.

50. On February 27, 2006 the Defendants filed the human engineering initiative with the Secretary of State.

51. On March 1 and March 7, 2006, the Defendants issued news releases regarding the filed initiative and referred interested parties to [www.elliotinstitute.org](http://www.elliotinstitute.org).

52. At some time between March 6 and March 7, Plaintiffs altered their missouricures.org web site to include copyright notices and terms of use.

53. At 4:32 pm of March 7, 2006, Plaintiffs emailed to Defendants a cease and desist notice warning that the website should be removed by noon of the next day or they would file a suit against Plaintiffs.

54. While style sheets comprise from one percent to as little as 0.0001 percent a typical copyrighted website, it is normally well within copy right fair use provisions to base a style sheet on a previously published style sheet. But once faced with the cease and desist order, Defendants began to modify the style sheet on March 8 and completed the process on March 9 in order to more fully guarantee that the underlying graphic design code was not duplicated or infringed upon

55. In the late afternoon of March 8, 2006, Defendants received notice that Plaintiffs had filed their 17 page Complaint in federal court.

56. Only after Plaintiffs became aware that Defendant was using the images did Plaintiffs contact Getty images to secure a license. At that time, to gain a competitive advantage, they also secured a license granting exclusivity in the fields of politics/government and religion/religious service in an effort to deprive Defendants the opportunity to license these images.

57. On March 8, 2006, at a cost of \$4,125, Peri Hall and Associates purchased from Getty Images a limited license from Getty Images granting them limited exclusive rights for a period of one year in the industry areas "Politics/Government, Religion/Religious Service" to use the Getty Images photo 354136 064 (Rights managed) Title: Male doctor examining elderly patient with stethoscope, hereafter GI 354136-064

58. From the period between January 1, 2006 and March 7, 2006, Peri Hall and Associates was using GI 354136 064 at missouricures.org without payment of the required license for that period of time

59. On March 7, 2006, at a cost of \$ ,005, Peri Hall and Associates purchased from Getty Images a limited license from Getty Images granting them limited exclusive rights for a period of one year in the industry areas “Politics/Government, Religion/Religious Service” to use the Getty Images photo 10178712 (Rights-managed) Title: Granddaughter & Grandma in hospital, hereinafter GI 10178712, agreeing to have the one year license back-dated to Dec 1, 2005 to cover at least a portion of the time of unauthorized use.

60. From the period between January 1, 2006 and March 6, 2006, Peri Hall and Associates was using GI 10178712 at missouricures.org without payment of the required license for that period of time.

61. As part of the limited license agreement, Peri Hall was required to backdate the licenses to December 1, 2005 to cover at least a portion of the time of unauthorized use.

62. From February 18 thru March 6, Defendant and Plaintiffs were both using unlicensed images from Getty Images. The only difference is that Plaintiffs knew who the owner of these images was while Defendant was still searching to discover the source in order to obtain a license.

63. Getty Image number LS011942 Title: Mother Consoling Daughter, hereinafter GI LS011942, is a royalty free image available for a one-time fee of \$85 that cannot be purchased with exclusive rights. This image remains available to Defendants from Getty Images but under the temporary restraining order issued may not be used by Defendants.

64. The complaint specifies not only concerns about violation of exclusive rights purchased on the same day the complaint was filed but also alleges that the human engineering initiative is opposed by Missouri Coalition for Lifesaving Cures because it would interfere with the “policy goals” of at least those members of this broad coalition who are making that organization’s day to day decisions.

65. Because Defendants’ license to use the two rights managed images expires on March 19, 2007, Defendant will cease using those images after that date in accordance with the provisions of those licenses.

66. On March 10, 2006 Plaintiffs showed evidence to the court at the TRO hearing proclaiming that these pages proved that they had an exclusive license to use these images. The evidence shown indicated that this right to exclusive use was from December 1, 2005 through December 1 2006.

67. Defendants were not given an opportunity to view the evidence at the TRO hearing since counsel was only present by phone.

68. The evidence shown at the TRO hearing were not shared with Defendants until March 13, 2006, after the Defendants web site had been shut down. This was the first time Plaintiffs presented any evidence to Defendants that they even had a limited license with some terms of exclusivity.

69. At this time it was immediately noted that only incomplete copies of the invoice receipts from Getty Images web site had been shown to the court, and in particular the date of the invoice receipts March 7 and March 8 had been carefully shifted to be on a page not shown to the court, which on evidence and belief, Defendant believes was deliberately done in order to give the court the false impression that these licenses were issued on December 1, 2005, when



in fact they had been backdated to that date when purchased, as is seen in Plaintiff's on March 8, the same day the suit was filed.

70. Defendants requested complete copies of the complete email receipt for these images from Plaintiffs. This request was never complied with. However a more complete, but newly redacted copy of the licenses were delivered on March 16, 2006, see Plaintiffs Exhibits 9 and 10.

71. The second pages of Plaintiffs Exhibits 9 and 10 do not match the pages shown to the court at the TRO hearing.

72. On March 15<sup>th</sup>, Defendants contacted Getty Images and obtained a backdated license to use all three images. Rights to use the royalty free image are perpetual. The right to use the GI 10178712 and GI 354136-064 extends from February 19<sup>th</sup> through March 19<sup>th</sup>, 2006.

73. At the TRO hearing it was Defendants understanding that the court intended to only order that the contested images, metatags, and any copied code must be removed from the website.

74. The draft order submitted by Plaintiffs at around 3:53 pm that Friday included the above provision plus a clause requiring that the domain name [www.elliottinstitute.org](http://www.elliottinstitute.org) must be made "inaccessible to internet users." To someone not technically informed, the order appears to just require removal of the offending items listed in the second part of the sentence, but the clause "inaccessible to internet users" makes the second clause moot as it requires a complete blocking of the web site.

75. Defendants complained to Plaintiffs as soon as this draconian wording was discovered, but to no effect.

76. Plaintiffs delivered the signed order to Wild West Domains, Inc. and by virtue of the order completely shut down the elliotinstitute.org site and deprived Defendants any means to communicate its initiative through the internet.

77. Plaintiffs used their success in steam rolling this TRO through for the purpose of spreading false and misleading statements about the Elliot Institute and the initiative promoted through Defendants' web site.

78. Immediately following their TRO victory, Plaintiff's chairman Donn Rubin told Kelly Wiese with the Associated Press. The: "When the judge looked at the evidence and saw how blatant the stem cell opponents were in stealing the codes and information from our Web site, he said that it was an obvious and intentional attempt to confuse the public." In fact, there is no evidence in the record that Judge Whipple made such a statement.

79. Furthermore, after successfully contriving to create a federal case out of similarities between the web site, Rubin sought to defame defendants by stating by falsely characterizing Defendants as "stem cell opponents...willing to use every tool of deception and disinformation to accomplish their goals." In fact, it is the Plaintiffs who have attempted to deceive this court with assertions implying that they had exclusive rights to the images contested at the time the elliotinstitute.org site was created.

80. This fraud upon the court resulted in a complete shut down of Defendants web site, the only means with which they can communicate with the public about an initiative for which they must collect 150,000 signatures by May 9<sup>th</sup>, and disrupted the business of the Defendants.

81. Plaintiffs describe that their interest in blocking the website is at least partially motivated by a political interest in opposing the initiative sponsored by the Elliot Institute.

82. The rush to purchase a limited exclusive license to use the Getty Image photos, to alter the missouricures.org website, and to rush toward an temporary injunction illustrates that political opposition to the human engineering initiative and an attempt to stifle free speech under the guise of a copyright infringement claim.

83. Defendants are exercising their right to free speech through a web site that by a graphic analogy suggests that the two initiatives are similar but still distinctly different. Whether this is interpreted as symbolic of similarities and differences, satire, flattery by imitation, or a political “in your face” attitude is irrelevant. All of these interpretations are protected forms of free speech.

#### **COUNT I – COPYRIGHT INFRINGEMENT**

84. The Plaintiffs’ website and code did not carry any copyright notice until after March 6, 2006 and Defendants certainly had no reason to believe Plaintiffs were asserting a copyright claim to the “look and feel” of their column spacing and menu structure. Moreover, at least one of the pictures used – royalty free image GI 10178712 – was used on a government web site and appeared to be in the public domain.

85. In good faith, Defendants followed the standard practice of web developers of creating a new template for elliotinstutite.org from an old template drawn from missouricures.org, Defendants spent over thirty hours replacing the original coding with new coding, the original text with new text, and in making other alterations that eliminated any significant amount of material from the original template.

86. On information and belief, the body of copyrighted work known as the missouricures.org web site consists of at least 100 megabytes of information of which the

fragments of code remaining after transformation into Defendant's website would account for less than one thousandth of one percent of Plaintiff's original work. The fair use of these fragments of code is exempt from claims of copyright infringement because (1) they represent a miniscule portion of the original work, (2) their use serves an educational purpose for a non-profit organization, (3) their use for the purpose of a graphical look that comments upon the and satirizes the missouricures website is protected speech, and (4) the use of these code fragments does not have any significant impact on the commercial value of the missouricures.org website.

87. In following the recommended practice for web development, Defendants began the process of developing a new template by examining the code for a single html page of missouricures.org and a cascading style sheet of 1197 words. After stripping out the body of the text, redesigning of the menu structure, major editing of the style sheet and other editing changes, Defendants produced a unique template for [www.elliottinstitute.org](http://www.elliottinstitute.org).

88. Comparison of the text files for the template and style sheets reveals that there is virtually no remaining overlap between the templates and style sheets used for Plaintiffs' website and Defendants' website. Furthermore, most of the remaining overlap is due to the non copyrightable HTML command strings such as "<h1>" and "font=". Any remaining overlap is clearly allowed under fair use exceptions to copyright infringement, particularly in comparison to the hundreds of megabytes of data that comprise the missouricures.org website.

89. The general layout involving a banner with logo across the top and a navigation menu on the left side in a colored bar is a standard format that is used on millions of web sites and does not constitute a unique look and feel that is proprietary to Plaintiffs.

90. Plaintiffs are claiming that any web page with basic layout like theirs is a violation of their copyright, regardless of the coding used to create that structure. By analogy, this is like

the author of a haiku poem (first and third lines with five syllables, the second with seven) claiming that any three lined poem with the same distribution of syllables violates his copyright to that structure, even if the words are all different, much less if one or two are the same. To even entertain this argument chills freedom of expression.

91. While the Defendants began the process of creating their web site using the missouricures.org template as a starting point, in the course of creating the site all the displayed text, the style sheet, and associated code has been altered so as to remove any material that may have been covered under Plaintiff's copyright.

92. A text string comparison of any two pages between the two web sites will reveal less than a two percent overlap in html code. Such an overlap will occur with any web site that includes tabs such as "Who We Are", "Donate", "Join Us", et cetera. Any similarity in layout would clearly be covered by fair use exceptions to the copyright law.

93. Peri Hall's deposition is vague regarding the question of whether he himself followed the customary web designer practice of using a third party template to set up the columns, menu structure and general color scheme. If he did, any similarity in the layouts of elliotinstitute.org and missouricures.org is most likely due to the third party template. In other words, if Peri Hall's work is derived or based on any other templates, Plaintiffs have no claim against Defendants. By extension of the previous analogy, if Peri Hall learned the "haiku" structure from another he has no right to prevent others from imitating that structure.

94. Plaintiffs have failed to provide any legal references to support their claim that they are entitled to a copyright over the "look and feel" of their web site. In fact, there have been no firm legal pronouncements in the U.S. that the "look and feel" of a web site is fully copyrightable.

95. The prominent display of the Elliot Institute logo, completely different color scheme, and completely different web address name ensures that viewers will not be confused.

96. The only claim that Plaintiffs have made which has substance is that they have purchased a limited license including exclusivity of use rights to Getty Images GI10178712 and GI 354136 064 and therefore Defendants are no longer able to obtain a license to use these images. This fact is mitigated by the second fact that Plaintiffs' did not actually purchase this exclusive license from Getty Images until March 8, 2006, at the very time they were filing this suit to suppress the Defendants' website. Moreover, Plaintiffs chose not to provide any evidence to Defendants that they had obtained these licenses until March 13, 2006, three days after the TRO hearing at which Defendants were only represented by counsel by phone, who was deprived of the opportunity to view the incomplete evidence (page 2's only) which were presented to the Court.

97. In light of the fact that Defendants are unable to extend their licenses for GI10178712 and GI 354136-064 beyond March 19, 2006, Defendants will not display the images on the web site once the license with Getty Images expires, or until it can be subsequently renewed.

98. Plaintiffs lack standing to bring a copyright suit in regard to the images used. The Getty Images license agreement does not grant licensees the authority to bring suit for copyright infringement. Licensees are expected and instructed to contact Getty Images regarding any unlicensed use so the matter may be handled by their legal department.

99. Plaintiffs have no standing to sue for violation of their own claimed copyrights because Plaintiffs have not produced documentation that any portion of their code or website has been submitted for copyright registration. Without registration for a copyright, Plaintiffs

have no standing to sue. Only after registration may a copyright owner bring suit in a federal court. In Plaintiffs rush to get a TRO, they ignored a fundamental requirement for filing a copyright infringement claim.

100. Defendants' decision to have a similar look to that of the missiouriscures.com website is a good faith effort to call attention to the similarity and differences in the two proposed initiatives and is a form of graphic communication covered by free speech rights that expand fair use provisions, such as those that apply to satire and political criticism.

101. The graphic design similarities between the sites are no more striking than the "look-alike but not quite identical" images and "Popsi Soda" cans used in commercial advertising when advertisers or humorists allude to a trademarked product using graphic similarities. Plaintiffs are seeking a stricter standard be applied against Defendants than against commercial advertisers only because they perceive the human engineering initiative to be contrary to their own "policy goals."

102. The Elliot Institute is a non-profit 501(c)3 in good standing, and David C. Reardon is an employee of the Elliot Institute. Both have acted and continue to act in good faith, following the standard practices of web development and design, in order to avoid any violation of copyright law.

103. As the coding of the pages used eliminated any possible claim of copyright violation, the only unintended violation of copyright law which may have occurred would have been between February 7 and February 9, after Plaintiffs had purchased temporary exclusive rights to Getty Images' GI 10178712 and GI 354136-064 and before Plaintiffs had shown any evidence to Defendants that they had actually obtained exclusive rights to these images.

104. Because of the Defendants' non-profit status and good faith efforts to comply with the fair use standards of 17 USC 107, Plaintiff may not recover any statutory damages from this complaint [17 USC 504(c)(2)(ii)].

105. Plaintiffs have not documented any actual damages from the claimed infringement. Any financial loss claimed would certainly pale against the estimated \$8,130 Plaintiff spent to acquire exclusive rights to the Getty images precisely to deny Defendant the opportunity to obtain non-exclusive licenses to these pictures.

106. In the short time the web site was up, between February 20 and March 9, Defendant did not receive any donations through the elliotinstitute.org web site.

107. As there are no statutory damages that can be recovered, no actual damages, and no profits that were unfairly obtained, this suit is clearly an exercise in suppression of speech rather than recovery of damages.

**COUNT II – TRADEMARK AND TRADE DRESS INFRINGEMENT/UNFAIR  
COMPETITION**

108. While the Plaintiffs have filed for trademark protection for the names MISSOURI COALITION FOR LIFESAVING CURES and MISSOURI CURE, these trademarks have not issued and there is no guarantee that they will be issued.

109. Plaintiffs are seeking to create new law in the field of trademark infringement by asking this court to block Defendant from using the words MISSOURI COALITION FOR LIFESAVING CURES, MISSOURI CURE, and STOWERS INSTITUTE in metatags used to help search engines classify websites.



110. These are the public names of institutions that are subject to much public discussion and critique.

111. The use of trademarked names in the metatags is permissible under the precedent of *Playboy Enterprises v. Welles*, No. 98-CV-0413-K JFS (SD CA, April 22, 1998).

112. Newspapers may use the terms MISSOURI COALITION FOR LIFESAVING CURES and MISSOURI CURE in their articles and as metatags for articles posted on their websites.

113. Numerous web sites include in their metatags the trademarked names of companies or products discussed on their pages.

114. Any court order prohibiting the use of MISSOURI COALITION FOR LIFESAVING CURES and MISSOURI CURE in the metatags of [elliotinstitute.org](http://elliotinstitute.org) should include a prohibition of the use of these trademarked names at every website other than [missouricures.org](http://missouricures.org) and should further require all web developers to remove any trademark names not owned by the web sponsor from their metatags.

115. Plaintiff is hypocritically raising this complaint solely to advance its own political agenda, as is made clear by the fact that Plaintiffs include in their own [missouricures.org](http://missouricures.org) metatags the keywords “Bartle bill cloning” and “Bartle bill stem cell.” The reference is to legislation introduced by Missouri state Senator Matt Bartle to ban “therapeutic cloning,” legislation which the Missouri Coalition opposed.

116. In light of the political opposition between Senator Bartle and the Coalition, it is unlikely that the Coalition requested or received Senator Bartle’s permission to use his

name in their metatags. It is pure hypocrisy for them to claim that others must have their permission to use their names in search engine metatags.

117. Now that the Plaintiffs using these names have sued the Elliot Institute, should the Elliot Institute be denied the ability to identify them in its defense and in press releases related to this suit? The complaint that the Elliot Institute should be barred from using these names in its metatags is simply absurd.

118. Plaintiffs are seeking to create new law regarding a claim of proprietary rights to all of the words used in its metatags.

119. The metatags used by the Elliot Institute include some key words used by the coalition in addition to other keywords, such as “eugenics”, “transhumanism” and other words.

120. Metatag keywords no longer have any significant value. Defendant will present evidence that metatag keywords are not relied upon or important to search engine indexing.

121. The Plaintiffs have not produced any evidence that anyone viewing the two sites has in fact been confused about who is sponsoring which.

122. Plaintiffs have not produced any evidence of lost income or other actual damages.

123. In light of Plaintiff’s objection to Defendants’ use of these two names for which Plaintiffs have applied for trademark, Defendants are willing to refrain from using these two terms as metatag keywords, even though Defendants maintain that they have a right to use these names in order to criticize Plaintiffs initiative and to discuss differences and similarities of the two initiatives. But the value of using these terms in the keywords is so low, that Defendants

readily agree to refrain from the use of these phrases for the purpose of eliminating unnecessary conflict.

**THIS COMPLAINT IS A BASELESS ATTEMPT TO HARRASS DEFENDANT  
AND INFRINGE ON THE DEFENDANT’S FREE SPEECH AND PLAINTIFFS SHOULD  
BE REBUKED AND SANCTIONED**

124. Defendants adopt and incorporate by reference each and every claim and fact set forth in numbered paragraphs 1 through and including 83 above and make the same a part hereof as if fully set forth herein.

125. The temporary restraining order crafted by Plaintiffs and signed by Judge Whipple went beyond the understanding agreed to during the hearing with Defendants’ counsel in that it did not simply require removal of the images, or even a change in the layout, but required that Defendants make their entire website “inaccessible to internet users.” By this means, Plaintiffs succeeded in their goal of suppressing the free speech of Defendants and their ability to promote the human engineering initiative opposed by Plaintiffs.

126. This complaint is fundamentally unfair. If at any time between December 1, 2005 and March 6 Defendant had chosen to purchase exclusive web use right to use the rights managed images, and then sued Plaintiffs for copyright infringement on the same day that purchase was made, Plaintiffs would have complained against this unreasonable act. Their outrage would have been even greater if, following their example, Defendants (in their hypothetical lawsuit) had obtained a temporary restraining order shutting down missouricures.org.

127. It may be good business practice to pay several thousand of dollars for desired images in order to prevent future use by a competitor, but it is fundamentally unfair to use the purchase as a means of shutting down a competitor's website through a misleading presentation of evidence at a TRO hearing.

128. On March 8, 2006, the day Plaintiffs filed their complaint, they retroactively purchasing limited exclusive use rights to use the contested images, backdating the rights to December 1, 2005 in an effort to develop a claim against Defendants for conduct prior to March 8. They did not even include Getty Images in the complaint, but instead essentially tried to purchase from Getty Images the right to sue Defendants for unauthorized use of the images in question. The fact that Getty Images willingly and gladly gave a license to Defendants demonstrates that in selling the license with exclusivity to Plaintiffs, Getty Images was not transferring the right of legal standing for prosecuting copyright infringement to Plaintiffs.

129. Given all the factors outlined in this response, and Defendants' stated intention to not use 10178712 and GI 354136 064 after expiration of Defendant's license to use these images on March 19, the claim that there is a copyright infringement and the claim that there is a violation of trademark violation should be rejected out of hand and the case dismissed with prejudice.

130. Moreover, Defendants ask this court to rebuke Plaintiffs for abusing the judicial process to suppress Defendants' website. The fact that Plaintiffs did not even have a license to use the contested images from February 18 through March 7, and then spent an \$8130 to purchase limited exclusivity rights for use of these images (when similar royalty free images are available from the same company for \$85) solely to bolster an otherwise weak claim of copyright infringement, is an abuse of the judicial system.

131. Defendants believe Plaintiffs committed fraud on the court ([Pfizer, Inc. v. International Rectifier Corp.](#), 538 F.2d 180190 U.S.P.Q. (BNA) 273 (8th Cir. 1976) ) in filing a complaint and presenting evidence at the TRO consciously altered to make it appear that Plaintiffs had a totally exclusive license to use of the images in question that was issued on December 1, 2005, when in fact they acquired a limited license with exclusivity in regards to certain uses and markets which was purchased on the same day they filed the suit and backdated to December 1, 2005 because Plaintiffs themselves had previously been using the images without authorization or license. This fraud upon the court resulted in a complete shut down of Defendants web site, the only means with which they can communicate with the public about an initiative for which they must collect 150,000 signatures by May 9<sup>th</sup>, and disrupted the business of the Defendants and imposed legal costs upon them. In reparation for this fraud, Defendants ask the court to award attorney fees, costs, reimbursement for the Defendants' license fee because they were deprived the use of their licensed images due to the fraudulently obtained TRO, and any other suitable relief deemed appropriate by the court.

132. Plaintiffs should also be rebuked for the waste of so much money on images that are not uniquely beneficial to the cause promoted by the hundreds of organizations and thousands of individuals who are members of the Missouri Coalition for Lifesaving Cures and the waste of attorney fees and other costs in this matter demonstrate a shameful lack of fiscal responsibility toward the resources coalition members have donated to the Plaintiffs. Similar royalty free images are available from the Getty Images for only \$85, but Plaintiffs spent ten times that amount simply to create a cause of action to bring this suit against an organization sponsoring a petition that many of their coalition members would likely support.

WHEREFORE, Defendant Elliot Institute prays the court for a dismissal of Plaintiffs' complaint with prejudice at Plaintiffs' cost, or in the alternative the court should err on the side of protecting freedom of speech and lift the temporary injunction, provided Defendant does not use the two rights managed licensed images acquired by both Plaintiffs and Defendants from Getty Images once the license to Defendants expires and for such other and further relief as the court deems just and proper.

**REQUEST FOR AN EXTENSION OF TIME TO FILE A RESPONSE ON BEHALF  
OF THE ELLIOT INSTITUTE**

133. Defendants have in good faith attempted to address all of the concerns raised by Plaintiffs, eliminating images, code and metatags objected to by Plaintiffs in an effort to bring an end to this lawsuit. It had been Defendants understanding that Plaintiffs were prepared to enter into a settlement and therefore an attorney to represent the Elliot Institute has not been retained. As this has not been finalized, however, by the time a response is due, the director of the Elliot Institute is filing this provisional response and requesting an extension of 30 days to file a formal response through an attorney if a settlement is not reached prior to that date.

WHEREFORE, Defendant Elliot Institute prays the court to either accept this response as responsive for the Elliot Institute or to grant a 30 day extension for filing an answer to the complaint through counsel.

Respectfully submitted,

David C. Reardon, Director  
Elliot Institute  
PO Box 7348  
Springfield, IL 62791  
(636) 447-1982

**Certificate of Service**

The undersigned hereby certifies that a true and correct copy of this document was served by mail  
27<sup>th</sup> day of March 2006, to:

Cathy J. Dean and Robert J. Edwards  
700 West 47<sup>th</sup> Street, Suite 1000  
Kansas City, MO 64112

SIGNED  
DAVID C. REARDON, DIRECTOR  
ELLIOT INSTITUTE FOR SOCIAL SCIENCES RESEARCH  
(636) 447-1982