

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION**

KEITH F. BELL, PH.D.,

Plaintiff

-v-

LIBERTY UNIVERSITY, INC.

Defendant

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Civil Action No. 6:20-cv-00001-NKM

PLAINTIFF’S RESPONSE TO DEFENDANT’S MOTION TO DISMISS

Plaintiff Keith F. Bell, PhD (“Dr. Bell” or “Plaintiff”), files this Response to Liberty University, Inc.’s (“Defendant”) Motion to Dismiss as follows:

I. Introduction

Plaintiff’s complaint is well-pleaded.

Plaintiff Dr. Keith F. Bell is an internationally recognized sports psychology and performance consultant. Dock. #1, Para. 7. He has coached, among other things, university and collegiate swimming teams. *Id.* at Para. 8. Dr. Bell has authored and has published 10 books and over 80 articles relating to sports psychology and sports performance. *Id.* at Para. 10. One of these books, namely, *Winning Isn’t Normal* and a particular passage therefrom (the “WIN Passage”), are the subjects of this lawsuit. *Id.* at Para. 14. Plaintiff’s book has enjoyed substantial acclaim, distribution and publicity. *Id.* at Para. 11. Due to the popularity of his book, Dr. Bell has been able to increase his international recognition as an authority in sports psychology and sports performance and has been asked to speak at conferences, symposia, and other engagements as a result. *Id.* at Para. 17.

Now of record is Defendant’s use of the entirety of Dr. Bell’s work to advertise a

“Sports Performance Roundtable” that asked, “Are you Normal?” and “How Can We Help You Win?” See Dock. #6-1. By Defendant’s own admission, this advertisement was directed to student-athletes. *Id.* Defendant used Dr. Bell’s work, without alteration, to advertise an event addressing the identical subject matter—an event at which, under other circumstances, Dr. Bell himself might have spoken—directed to those individuals who constitute the principal audience for Dr. Bell’s work. Notwithstanding, Defendant has the audacity to ask this court to rule that such use is fair as a matter of law. The Court should not countenance such a request, and should deny Defendant’s motion.

This case is readily distinguishable from *Bell v. Magna Times, LLC*, 2019 WL 1896579 at *1 (D. Utah Apr. 29, 2019). Plaintiff addresses this case at length *infra*.

II. Legal Standard

In order to survive a motion to dismiss pursuant to Rule 12(b)(6), a complaint must contain facts sufficient “to raise a right to relief above the speculative level” and “state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007). Plaintiff is not required to prove his case at the pleading stage, and the Court should not examine the merits of claims or weigh evidence when considering the Motion. *Twombly*, 550 U.S. at 556. This rule applies even when an allegation in a complaint “strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely.” *Id.*

The threshold Plaintiffs complaint must meet to survive a motion to dismiss is low. “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 v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). “A claim has facial plausibility when the

plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* “Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory.” *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). The Court must “accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party.” *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005).

Given the “fact sensitive nature of the [fair use] inquiry, courts generally do not address the fair use defense until the summary judgment phase.” *TCA Television Corp. v. McCollum*, 839 F.3d 168, 183 n.13 (2d Cir. 2016). *See also Philpot v. Alternet Media, Inc.*, No. 18-cv-04479-TSH, 2018 U.S. Dist. LEXIS 203500, at *7 (N.D. Cal. Nov. 30, 2018) (in the copyright context, “in light of a court’s narrow inquiry on a Rule 12(b)(6) motion and limited access to all potentially relevant and material facts needed to undertake the analysis, it is unusual for courts to analyze fair use on a 12(b)(6) motion,” citing *Four Navy Seals & Jane Doe v. AP*, 413 F. Supp. 2d 1136, 1148 (S.D. Cal. 2005); *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1403 (9th Cir. 1997).

It is customary in the Fourth Circuit for fair use to proceed at least to discovery before resolution. *See, e.g., Bouchat v. Baltimore Ravens Ltd. P’ship*, 737 F.3d 932, 936 (4th Cir. 2013), as amended (Jan. 14, 2014) (“Bouchat V”); *Vanderhye v. iParadigms, LLC*, 562 F.3d 630, 634 (4th Cir. 2009) (same); *Bouchat v. Baltimore Ravens Ltd. P’ship*, 619 F.3d 301, 307 (4th Cir. 2010) (“Bouchat IV”) (same, after bench trial). Indeed, Judge Moon has written, “[a]t bottom, the viability of the fair use defense turns on facts and inferences beyond the complaint.” *See Bigelow v. Garrett*, No. 6:18-CV-00039, 2018 WL 4102821, at *3 (W.D. Va.

Aug. 28, 2018).

III. Plaintiff's Complaint is well-pleaded

Throughout its supporting memorandum, Defendant labels Plaintiff's allegations as "bare-bones", "thread-bare" and "fatally vague". However, Defendant's motion is scant on critical analysis of the allegations actually made in the Complaint.

Plaintiff alleges that, "Defendant, sometimes trading as Liberty Sports Performance, posted Plaintiff's WIN Passage on or about January 14, 2017," "Defendant's copying of Plaintiff's WIN Passage has been copied by at least one or more coaches in the employ of Defendant," and "On information and belief, Defendant copied Plaintiff's WIN Passage on a website and/or social media accounts associated with Defendant, including those of Liberty Sports Performance." Dock. #1-1, Para. 20-22. Based on these allegations, Defendant was able to "reasonably identify and incorporate" into its motion at least one (1) of Defendant's uses of Plaintiff's work.¹ It stands to reason that Plaintiff's complaint satisfied *Twombly*'s standard of pleading because Defendant was able to locate an infringing act.

Defendant states that, "Plaintiff attempts to allege, in a conclusory fashion, that his short, 24 sentence WIN Passage is the "heart" of his 72 page book, without any factual allegations to plausibly support such a conclusion. (Dkt. 1 at ¶ 14)." Dock. #6, Pg. 4. But the remainder of this allegation reads, "Plaintiff creates, markets, and sells works derivative of *Winning Isn't Normal*, such as posters and t-shirts that display a particular passage from *Winning Isn't Normal* (separately referred to as the WIN passage . . .) [t]he WIN Passage is viewed by Dr. Bell and others as the heart of Dr. Bell's literary work *Winning Isn't Normal*."

Defendant states that, "Plaintiff does not does not allege that Liberty's use had any

¹ It is this use Plaintiff's work by Defendant that Plaintiff will address in this response. However, Plaintiff does not concede that this is the only infringing use of Plaintiff's work by Defendant.

impact on the potential market for or value of the copyrighted work or that Plaintiff suffered any decline in sales, licenses or assignments as a result of Liberty's use of the WIN Passage in the Roundtable Invitation." Dock. #6, Pg. 13. However, since such an allegation addresses Defendant's affirmative defense of fair use, it is unnecessary for Plaintiff to have done so. *See, e.g., Bigelow v. Garrett*, 2018 WL 4102821 (W.D. Va.) (addressing the fourth fair use factor, Judge Moon wrote, " . . . plaintiffs generally avoid pleading the defense's case for it.

IV. Liberty's use of the Plaintiff's works is not fair use as a matter of law

In evaluating fair use, the Court analyses four factors: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. 17 U.S.C. § 107. On balance, these factors weigh against a finding of fair use.

A. The Purpose and Character of the Use

This factor weighs against a finding of fair use because Defendant's use was not transformative, and was of a commercial nature and not a nonprofit educational purpose.

When assessing this factor, the primary inquiry is whether the use communicates something new and different from the original or otherwise expands its utility, i.e., whether the use is "transformative." *See, e.g., Brammer v. Violent Hues Productions, LLC*, 922 F. 3d 255, 262 (4th Cir. 2019) (quoting *Fox News Network, LLC v. Tveyes, Inc.*, 883 F.3d 169, 176 (2d Cir. 2018) and *Authors Guild v. Google, Inc.*, 804 F.3d 202, 214 (2d Cir. 2015). *See also Cariou v. Prince*, describing the "transformativeness" factor as the "heart" of the fair use inquiry. 714 F.3d 694 (2d Cir. 2013). *See also Bell v. Pacific Ridge Builders, Inc.*, Case No.

19-cv-01307 (N.D. Ca. 2019) (denying defendant's motion to dismiss, finding against fair use, and stating that, "because [Defendant's principal's post was, at most, minimally transformative, whether the post was commercial is entitled to less weight in the analysis."]") This decision is attached hereto as Exhibit A.

The central purpose of the transformativeness inquiry is to determine whether the new work merely supersedes the objects of the original creation. *Brammer*, 922 F. 3d at 262-63. To be transformative, a use must do something more than repackage or republish the original copyrighted work. *Id.* at 263. The more transformative the new work, the less will be the significance of other factors that may weigh against a finding of fair use. *Id.* But if the copying is done to avoid the drudgery in working up something fresh, then the claim to fairness in borrowing from another's work diminishes accordingly (if it does not vanish). *Id.*

The transformation inquiry is largely objective. *Id.* Often the only two pieces of evidence that are needed to decide the question of fair use are the original version and the secondary use at issue. *Id.* What is critical is how the work in question appears to the reasonable observer, not simply what an artist might say about a particular piece or body of work. *Id.*

In an examination of Dr. Bell's original WIN Passage and Defendant's secondary use of the work side-by-side, it is clear that there was virtually no transformation. *See* Dock. #1-2 and Dock. #6-1. Indeed, it is telling that Defendant's motion papers do not even contain the word "transformative," let alone address this significant subfactor of the fair use inquiry. Defendant's use merely adds the rhetorical question, "Are you Normal?" which makes the point that there is a difference between winning (not normal) and not winning (normal). *See* Dock. #6-1. This is precisely the point that the WIN Passage makes, albeit in far more

eloquent terms. *See* Dock. #1-1. Nor can Defendant's use be said to place the WIN Passage in a different context to serve a different purpose, since it advertises a "Sports Performance Roundtable" that asks, "How Can We Help You Win?" *See* Dock. #6-1. Dr. Bell's works relate to sports psychology and sports performance, and Dr. Bell is an internationally recognized sports psychology and performance consultant. Accordingly, the contexts of the uses are identical, and they both serve identical purposes. In sum, Defendant used the WIN Passage simply because of its content. This weighs against a finding of fair use.

A court also asks whether the "use is of a commercial nature or is for nonprofit educational purposes." *Brammer*, 922 F. 3d at 262. Defendant concludes that the purpose and character of the use here is non-commercial and educational. Dock #6, Pg. 11. However, this is not supported by the facts. Rather, Defendant resorts to semantic tricks and other subterfuge to hide the true nature of its infringement. "Even where a nonprofit corporation is making clearly educational use of copyrighted works, this has not in and of itself been sufficient to sustain a fair use defense." *Ass'n of Am. Med. Colls. v. Mikaelian*, 571 F. Supp. 144, 153 (E.D. Pa. 1983) citing *Encyclopedia Britannica Educational Corp. v. Crooks*, 447 F. Supp. 243 (W.D. N.Y. 1978).

Defendant describes its use of Dr. Bell's work as an "invitation to "students and student-athletes" for a "Sports Performance Roundtable" in conjunction with the Liberty Psychology Department for "Sports Psych Night" to discuss "The Psychological Impact of Sports on Athletes" from 6:30 pm to 7:30pm on January 24, 2017 (the "Roundtable Invitation")."² Defendant uses the term "invitation" euphemistically; the truth of the matter is that this was an advertisement for the Roundtable. As such, it is inherently commercial.

² The "Roundtable Invitation" is the only use of Plaintiff's work by Defendant currently of record. *See supra* at III.

Defendant intentionally conflates the “Roundtable Invitation”—the only use of Plaintiff’s work on record—with the “Roundtable”—which is not of record. The Roundtable, the composition of the Roundtable, the purpose of the Liberty Sports Performance team, and certainly any descriptions of the Roundtable contained in other publications such as Defendant’s website (Dock. #6-2) are entirely irrelevant in this fair use analysis. A cursory glance of the Roundtable Invitation shows there is virtually no educational content, except of course Plaintiff’s work. To the extent that Defendant used the WIN Passage in the Roundtable, separate and apart from the Roundtable Invitation, such uses are the subject of further discovery. Regardless, these other uses should not be used to camouflage the act of infringement alleged in Plaintiff’s complaint.

Defendant states that the Roundtable Invitation was expressly intended for students’ and student-athletes’ “education [and] fellowship.” Dock. #6, Pg. 10. However, Defendant’s use of Plaintiff’s work was on the Internet, and Defendant knew or should have known that many people viewing the infringing act would not attend the Roundtable. That is, for many, the verbatim copying of the WIN passage was the only thing viewed. For those who only viewed the infringing act and did not attend the Roundtable, the event is clearly irrelevant, whatever its merit as serving a nonprofit educational purpose.

Finally, Plaintiff urges the court to reject Defendants’ claim that a “Sports Performance Roundtable” that purports to answer the question, “How Can We Help You Win?” is for nonprofit educational purposes. Plaintiff himself provides this service for a profit. There is also increasing recognition among lawmakers that colleges reap billions from student-athletes’ performance. States like California have enacted laws that effectively allow college athletes in the state to earn compensation for the use of their likeness, sign endorsement deals and hire

agents to represent them, namely, the Fair Play to Pay Act. Presumably, the better a student athlete performs, the more profit the college (and the student-athlete, at least in California) makes.

This factor weighs heavily against a finding of fair use.

B. The Nature of the Copyrighted Work

Plaintiff's WIN Passage is a highly creative and original work. This factor weighs against a finding of fair use. The Supreme Court has stated that "[w]orks that are creative in nature are 'closer to the core of intended copyright protection' than are more fact-based works." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586. "The scope of fair use is greater when 'informational' as opposed to more 'creative' works are involved." *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1153–54 (quoting *Harper & Row*, 471 U.S. at 563 (1985), as saying "The law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy.").

Defendant states, "Plaintiff's WIN Passage purports to be a truthful, accurate and factual summary of psychological principles in the field of sports psychology." Dock. # 6, Pg. 11. There is nothing on the record to support this statement. Regardless, it is simply inaccurate. The WIN Passage clearly is not a mere recitation of facts and/or psychological principles. Although it is based on psychological principles derived by Dr. Bell from a lifetime of experience and study in the field, the WIN Passage is a creative and artistic articulation of these principles presented in a condensed, sticky, and consumable form. This likely is the reason why Defendant chose to copy the WIN Passage.

In an examination of Dr. Bell's original WIN Passage and Defendant's secondary use of the work side-by-side, it is clear that there was virtually no transformation. *See supra* at IV.A.

Instead, Defendant used the WIN Passage simply because of its content. *Id.* In this critical respect, the instant case differs markedly from the use at issue in *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630 (4th Cir. 2009). In that case, the Fourth Circuit found no fault in the District Court’s application of the second fair use factor. The District Court concluded that, even if the plaintiffs’ works were highly creative in nature, the defendant’s use of the works, “was not related to the creative core of the works.” *Id.* at 641. Defendant’s, “use of the works in the case—as part of a digitized database from which to compare the similarity of typewritten characters used in other student works—is likewise unrelated to any creative component.” *Id.* at 641-42. By contrast, in this case, Defendant’s use of Plaintiff’s work was directly related to the creative component of Plaintiff’s work.

C. Amount and Substantiality of the Portion Used

Defendant used the entirety of the WIN Passage and the heart of Plaintiff’s book *Winning Isn’t Normal*. This factor weighs against a finding of fair use.

The key question under this factor is “whether ‘no more was taken than necessary’ ” to accomplish the secondary user’s purpose. *Authors Guild v. HathiTrust*, 755 F.3d 87, 98 (quoting *Campbell*, 510 U.S. at 589). “The extent of permissible copying varies with the purpose and character of the use.” *Sundeman v. The Seajay Soc’y, Inc.*, 142 F.3d 194, 205–06. “Unless the use is transformative, the use of a copyrighted work in its entirety will normally weigh against a finding of fair use.” *Bouchat IV*, 619 F.3d at 311.

In an examination of Dr. Bell’s original WIN Passage and Defendant’s secondary use of the work side-by-side, it is clear that there was virtually no transformation. *See supra* at IV.A. Defendant used the WIN Passage simply because of its content. *Id.* This is akin to the facts in *Brammer*, where the Fourth Circuit determined that, “[g]iven that [the defendant’s] use was

non-transformative, this considerable taking was not justified . . . [the defendant] could just as easily have accomplished its goal . . . by taking its own photograph or finding an image under free license. The third factor thus weighs against fair use.” In the instant case, Defendant could have accomplished its goal of attracting attendees to its Roundtable by creating its own text. Instead, Defendant copied Plaintiff’s work verbatim.

In its analysis of the third factor, Defendant assumes that the work at issue is the entirety of the book *Winning Isn’t Normal*. Dock. #6, Pg. 11-13. This assumption apparently is premised on Defendant’s belief that Plaintiff, “does not have a second registration,” for the WIN Passage. This is at least an impossible position to take, considering that the registration for the WIN Passage was pleaded in Plaintiff’s complaint and attached thereto. *See* Dock. Nos. #1 and 1-2. Clearly, Plaintiff has a registration for the WIN Passage.

Regardless, Plaintiff’s registrations are not dispositive in determining the work at issue for purposes of analysis in the third fair use factor. For example, Section 103(b) of Copyright Act states that copyright in compilations, “is independent of, and does not affect or enlarge the scope of . . . copyright protection.” *See, e.g., American Geophysical Union v. Texaco Inc.*, 802 F. Supp. 1 (S.D. N.Y. 1992) (“[i]t does not follow from the manner of registration with the Copyright Office that the “copyrighted work” for the purposes of fair use analysis consists of the entire issue rather than the separate creations of the separate authors. Plaintiffs win the third factor.”) *Accord Religious Technology Center v. Lerma*, 1996 WL 633131 (E.D. Va. 1996) (adopting the approach that components of a “collection” constitute single works for fair use purposes). The WIN Passage is akin to a single poem in a book of poetry or a single short story in a collection thereof.

Even if the work at issue is the book *Winning Isn’t Normal*, it is well settled that, “no

plagiarist can excuse the wrong by showing how much of the work he did not pirate.” *Id.* at 565 (quoting *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56 (2d Cir. 1936)) (Learned Hand, J.). More recent case law echoes this wisdom holding: “copying even a small portion of a copyrighted work may exceed the boundaries of fair use if the material taken is the ‘heart’ of the work.”” *L.A. News Serv. v. Tullio*, 973 F.2d 791, 798 (9th Cir. 1992) citing *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564-65 (1985) (while words quoted by copyright infringers were “an insubstantial portion” of President Ford’s unpublished memoirs, they were the “heart of the book” in that they were among the most “interesting,” “moving” and “powerful” passages).

It stands to reason that a passage sharing the title of the book in which the passage appears is the heart of the book. Also supporting Plaintiff’s contention that the WIN Passage is the heart of the *Winning Isn’t Normal* book are the allegations that “Plaintiff creates, markets, and sells works derivative of *Winning Isn’t Normal*, such as posters and t-shirts that display [the WIN Passage] . . . [t]he WIN Passage is viewed by Dr. Bell and others as the heart of Dr. Bell’s literary work *Winning Isn’t Normal*,” (Dock. #1, Para. 14), Plaintiff sells posters and t-shirts displaying the WIN Passage at the domain name *winningisntnormal.com* (Para. 16) and, “Dr. Bell has offered and continues to offer licenses at fair and reasonable rates to others who wish to publish or otherwise use the popular WIN Passage,” (Para. 18).

After giving lip service to the proposition that, “[t]here are no absolute rules as to how much of a copyrighted work may be copied and still be considered a fair use” (quoting *Sundeman*, 142 F.3d at 205), Defendant engages in an inappropriate mathematical formula. “Even if we assume the WIN Passage consumed a full page of *Winning Isn’t Normal*, those 24 sentences would be merely 1.3% of the work. A page or less of a 72 page sports psychology

book is thus an insubstantial portion.” Dock. #6, Pg. 13.

Defendant also makes the apparently contradictory statement that the WIN Passage, “reads more like the jacket-summary for the book, designed to entice the reader to purchase the full-length book, rather than the “heart” of the book, or the reason the book would be purchased in the first place.”³ If the WIN Passage entices the reader to purchase the full-length book, is this not the reason the book would be purchased in the first place? Defendant alternatively likens the WIN Passage to a movie trailer. Even if this is the case, Plaintiff submits that movie trailers often assemble the most interesting, moving and powerful parts of a movie into a flashy clip reel. They are also highly creative. In fact, there is even an awards show for film trailers, namely, the Golden Trailer Awards (the “Oscars” of promotional clips). Defendant appears to want Plaintiff’s work to be factual in nature for purposes of the second fair use factor (the nature of the copyrighted work) and enticing for purposes of the third fair use factor (the amount an substantiality of the portion used).

D. Effect of the Use Upon the Potential Market

Defendant made a commercial use of Plaintiff’s work. Plaintiff’s allegations would show market harm by Defendant’s actions and an adverse effect on the potential market for Plaintiff’s work. This factor weighs against a finding of fair use.

This factor requires the Court to consider “not only the extent of market harm caused by the particular actions of the alleged infringer, but also whether unrestricted and widespread conduct of the sort engaged in by the defendant would result in a substantially adverse impact on the potential market for the original.” *Campbell*, 510 U.S. at 590; *accord Bouchat IV*, 619 F.3d at 312 (“[O]ne need only show that if the challenged use should become widespread, it

³ The book *Winning Isn’t Normal* is not currently of record. Accordingly, Defendant’s analogies to a “jacket-summary” for the book or a “movie trailer” for a full-length film are at best inappropriate in this motion to dismiss.

would adversely affect the potential market for the copyrighted work.” (quoting *Harper & Row*, 471 U.S. at 568)). A “common sense” presumption of cognizable market harm exists when a commercial use is not transformative but instead “amounts to mere duplication of the entirety of an original.” *Campbell*, 510 U.S. at 591. Other courts have found that, even if a defendant’s use is not purely commercial, such use can weigh decisively against a finding of fair use when it wholly supersedes one of the principal objects of the plaintiff’s work, thereby displacing a key market for those works. *See, e.g., Images Audio Visual Productions, Inc. v. Perini Bldg. Co., Inc.*, 91 F. Supp. 2d 1075, 1086 (E.D. Mich. 2000).

The presumption of cognizable market harm applies here. Defendant made commercial use of the WIN Passage and duplicated the heart of the work by copying it verbatim. *See supra* at IV.A, IV.C. Plaintiff thus need not demonstrate that the market for his works would be depressed should Defendant’s behavior become widespread. *See, e.g., Brammer*, 922 F. 3d at 268.

Nevertheless, Plaintiff’s well-pleaded complaint contains allegations that would demonstrate actual market harm caused by Defendant’s actions. Plaintiff continues to promote, distribute, offer for sale, and sell numerous copies of the book *Winning Isn’t Normal*. Dock. #1, Para. 13. Dr. Bell also creates, markets, and sells works derivative of *Winning Isn’t Normal*, such as posters and t-shirts that display the WIN Passage. *Id.* at Para. 14. If there is any market for Plaintiff’s works, it is in connection with a “Sports Performance Roundtable” that asks, “Are you Normal?” and “How Can we help you Win?” directed to student-athletes, since this is the subject of Plaintiff’s work, his area of expertise and the individuals who constitute the principal audience for his work.

Plaintiff’s complaint also alleges a substantially adverse impact on the potential market

for the original. Dr. Bell offers licenses at fair and reasonable rates to others who wish to publish or otherwise use the popular WIN Passage. *Id.* at Para. 18. If these potential licensees act as Defendant has, Plaintiff would not receive a licensing fee. Indeed, if Defendant's behavior became common and acceptable, the licensing market for Plaintiff's work specifically, and literary works more broadly, might well be dampened. *See, e.g., Brammer*, 922 F. 3d at 268. Defendant's infringement is particularly damaging because use on the Internet is so easily re-distributed. To wit, Defendant's copying of Plaintiff's WIN passage has been copied by at least one or more coaches in the employ of Defendant. Dock. #1, Para. 21.⁴

V. *Bell v. Magna Times, LLC*, 2019 WL 1896579 at *1 (D. Utah Apr. 29, 2019)

Defendant's reliance on *Magna Times* is misplaced. First, the facts in the present case are different in significant respects. Second, the reasoning in the *Magna Times* decision is flawed.

In *Magna Times*, the piece alleged to infringe was news reporting. The two defendants who moved to dismiss the complaint,⁵ were the reporter Elliot and the newspaper Magna Times LLC. The reporter reported on a speech by a high school football coach, identified only as Coach Smith. This Coach at an awards banquet quoted Plaintiff's WIN Passage, and the reporter also included Plaintiff's work in his article covering the event.

Here, Defendant is not in the business of news reporting. News reporting, even for a humble awards banquet, occupies a special place in fair use analysis. *See Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 556 (1985) (referring to news as *publici juris*) (citing *Int'l News Service v. Associated Press*, 248 U.S. 215, 234 (1918)). Moreover,

⁴ Defendant labels Plaintiff a "troll" who uses a "shakedown litigation strategy." Plaintiff will not address such aspersions except to state that they are totally untrue and irrelevant to the fair use analysis.

⁵ Two defendants did not move to dismiss the case, and the case thus continued after the court's ruling.

Defendant's use of Plaintiff's WIN Passage was simply for advertising purposes, not news reporting. Defendant merely sought to promote its upcoming campus event.

The reasoning in the *Magna Times* decision is flawed in four respects. Before considering those flaws, a preliminary note of fairness to the *Magna Times* court compels consideration of its statement: "Because Bell considers the motion to dismiss an improper motion for summary judgment, *he fails to address any of the factors of the fair use doctrine* raised by Defendants' motion to dismiss." 2019 WL 1896579 at *4 (emphasis added). Thus, the court did not receive the beneficial effect of the advocacy system.⁶

The court first considered the first statutory fair use factor—the purpose and character of the use. In its analysis, the court concluded:

There is no allegation that the football coach's use of the quote was anything but fair use in the education of his student athletes. The news reporting of that fair use was similarly not attempting to capitalize on the quote.

2019 WL 1896579 at *4. Defendant here relies on the first sentence above for support (Dock #1, Pg. 2, 10). That first sentence, however, is irrelevant. The football coach (Coach Smith) was not named as a defendant. *See* Amended Complaint, Exhibit B hereto (naming four defendants, but not Coach Smith). In *Magna Times*, Plaintiff, for whatever reason, did not name Coach Smith as a defendant, and therefore there was no reason to include an allegation that the coach's use of the WIN Passage was an infringement. There are numerous, valid reasons for not including one actor as a defendant even though that actor's action was relevant to the alleged infringement of a named defendant; for instance, personal jurisdiction may be lacking as to the un-named actor. Moreover, any plaintiff is free to name, or not name, as a defendant any actor that violates the

⁶ In the instant case, Bell is represented by new counsel.

rights accorded a copyright owner under 17 U.S.C. § 106. This is true even if the possible defendants acted separately or in concert.

The court in *Magna Times* erroneously drew a conclusion as to the named defendants (reporter and newspaper) based on an erroneous conclusion that Coach Smith did not infringe, when no such allegation was required. At a minimum, the court should have permitted leave for Plaintiff to amend his complaint, as applicable, to allege infringement relevant to Coach Smith, rather than dismissing with prejudice.

The court next considered the nature of the copyrighted work. The court, however, failed to really address this factor. The court instead dwelled on the portion of the material taken (which is the third fair use factor) and concluded: “it [the quotation] is just a small portion of a much more substantial work that has been widely published for over thirty-five years.” 2019 WL 1896579 at *5. The court frequently referred to Plaintiff’s WIN Passage as a poem (*see id.* at *1) and noted that defendants’ article also referred to it as a poem (*see id.* at *5). This conclusion then—that the work was a poem—should have been weighed as the nature of the copyrighted work, and as such—as a creative work—this would have weighed against a finding of fair use. “The law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy.” *Harper & Row*, 471 U.S. at 563.

The court further muddled this second fair use factor by referring to its published status for over thirty-five years. The court was aware, from *Harper & Row* (*see id.* at 551), that the unpublished status of a work imported a significant factor into negating a fair use. But, conversely, publication does not thereby open the door to an ever-enlarging permissible form of fair use as time passes. Whether a work has been published for 1 day, 10,000 days, or 35 years has no bearing on the fair use analysis. The term of copyright protection is the life of the author

plus 70 years. 17 U.S.C. § 302(a). This protection must not dwindle with each passing year as claims of fair use cut away from the scope of the work and its deserved protection.

Overwhelmingly, the public is only accustomed to seeing published works since unpublished works are, by their nature, unseen. Publication does not thereby diminish the rights in all that the public reasonably understands as being protected by copyright.

In *Harper & Row*, the U.S. Supreme Court in weighing the nature of the copyrighted work took into account its factual nature as news, as well as its unpublished status. *Id.* at 563-64. In *Magna Times*, the court did not weigh the nature of the work as a poem, and failed to understand that the work's published status did not weigh in favor of fair use. That status simply removed the special significance accorded to an unpublished work, *Id.* at 564.

The court next considered the third fair use factor—the amount and substantiality of the portion used in relation to the copyrighted work as a whole. Here, the court made its clearest error by its reasoning as follows: “Bell does not allege that the poem-sized portion provided in the article is the heart of the book or qualitatively substantial.” 2019 WL 1896579 at *5. To the contrary, Plaintiff's pleaded exactly that the WIN Passage was the heart of the longer work. *See* Amended Complaint, Paras. 18, 37 and 40 at Exhibit B. The same is alleged by Plaintiff herein. *See* Dkt. # 1, Paras. 14, 29 and 32. This is not a mere bald conclusion; this Complaint (as well as the one in *Magna Times*) demonstrates that the “Winning Isn't Normal” passage is the title of a successful book, the subject of derivative works such as posters and t-shirts, a separate copyright registration, the title is a domain name for marketing the book, and Plaintiff offers licenses for use of the WIN Passage. Dkt. # 1, Paras. 11, 14-16 and 18. It is well established that a court, on a motion to dismiss, must accept the pleaded allegations as true. The court in *Magna Times* erroneously ignored the pleadings completely and thereby failed to accept them as true.

In *Harper & Row*, the U.S. Supreme Court examined this factor as not only a quantitative assessment, but included an “evaluation of the qualitative nature of the taking.” 471 U.S. at 565. The Court there agreed that the defendant took “essentially the heart of the book.” *Id.* Contrary to the reasoning of *Magna Times*, Plaintiff’s Complaint here—accepted as true—leaves no doubt that the Defendant has taken the heart of Plaintiff’s book for Defendant’s unauthorized use. The required analysis on this factor is not a mere number crunching of lines or words copied versus those not copied. “[N]o plagiarist can excuse the wrong by showing how much of the work he did not pirate.” *Id.* at 565 (quoting *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56 (2d Cir. 1936)) (Learned Hand, J.).

In analyzing the fourth fair use factor—the effect on the market—the decision in *Magna Times* again reflects flawed reasoning. The court concluded: “Defendants rightly argue in their motion to dismiss that Bell fails to allege that Defendants intended to cause Bell injury or that Bell even had an injury.” 2019 WL 1896579 at *5. However, it is well established that intent to infringe or intent to injure is not required to prove infringement, nor are these elements of intent part of the fair use analysis. *Harper & Row* sets forth the applicable analysis: “This inquiry must take into account not only harm to the original [work] but also harm to the market for derivative works.” 471 U.S. at 568. Here, Plaintiff specifically pleads the development of the WIN Passage as a derivative work. Dock. # 1, Para. 14. Plaintiff repeatedly alleges copying and public display of his work as a form of infringement by Defendant. *Id.* at Paras 28-33. These same allegations were made in *Magna Times* (Amended Complaint, Paras. 37-41 at Exhibit B), yet the court overlooked “that Bell even had an injury” as argued by the defendants.

In view of all of the foregoing, the decision in *Magna Times* should not be followed. Further, to whatever extent that decision was correct on its narrow facts, it has no applicability

here. Although the court in *Magna Times* did not rely on it, or even cite to it, the following from *Harper & Row* is relevant to those narrow facts: [E]ven substantial quotations might qualify as fair use in a review of a published work *or a news account of a speech that had been delivered to the public or disseminated to the press...*" 471 U.S. at 568 (emphasis added). Those facts, however, have no relevancy here to the actions of Defendant to copy and display the heart of Plaintiff's copyrighted, creative work.

VI. Conclusion

For the foregoing reasons, Plaintiff respectfully requests that the Court deny Defendant's Motion to Dismiss.

Dated: February 13, 2020 Respectfully submitted,

s/Adam Mandell

Adam D. Mandell (VA Bar # 68397)

Michael Culver (VA Bar # 31386)

Millen, White, Zelano & Branigan, P.C.

2200 Clarendon Blvd., Ste 1400

Arlington, Virginia 22201

Tel.: 703-243-6333

Fax: 703-243-6410

mandell@mwzb.com

culver@mwzb.com

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2020, a true and correct copy of the above and foregoing was filed with the CM/ECF system which will send notification of such filing to all counsel of record.

s/Adam D. Mandell