

**IN THE 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. 6:20CV00001

LIBERTY’S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS

Defendant Liberty University, Inc. (“Liberty”) respectfully submits this Reply Memorandum in Support of its Motion to Dismiss the Complaint of Plaintiff Keith F. Bell, Ph. D. (“Plaintiff”) for failure to state a claim upon which relief can be granted.

INTRODUCTION

In an attempt to avoid the inescapable conclusion that Liberty’s use of the WIN Passage is protected under the fair use doctrine, Plaintiff incredibly concludes that the Roundtable Invitation is a “commercial advertisement” without any “nonprofit educational purpose.” (Dkt. 8 at 5-9). The face of the Roundtable Invitation refutes Plaintiff’s conclusion and confirms its true nonprofit educational purpose of student and student-athlete “education [and] fellowship.” (Dkt. 6-1 at 2-3, 8-10). Nevertheless, Plaintiff argues the Roundtable Invitation is a “commercial advertisement” because Liberty put it on the internet and “should have known that many people viewing the infringing act would not attend the Roundtable” and “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.” (Dkt. 8 at 8). Plaintiff’s argument asks this Court to ignore not only the face of the Roundtable Invitation but also the limited audience to whom it was expressly directed and the very event to which it relates.

Plaintiff similarly concludes that the Roundtable Invitation caused “market harm” and had “an adverse effect on the potential market for Plaintiff’s work.” (Dkt. 8 at 13). The Complaint offers no facts that could be argued to support this conclusion. Nevertheless, Plaintiff argues the Roundtable Invitation must have caused a potential adverse market impact for his work because Roundtable attendees are “the principal audience for his work” and the Roundtable is “an event at which, under other circumstances, Dr. Bell himself might have spoken.” (Dkt. 8 at 2, 14-15). Plaintiff’s argument is entirely speculative, devoid of factual support and a logical fallacy.

Plaintiff’s efforts to circumvent the fair use doctrine are unavailing and his mutually inconsistent arguments confirm the implausibility of his claim. Plaintiff cannot have it both ways by: (1) claiming a commercial purpose based on Roundtable non-attendees who merely saw the Roundtable Invitation for a free event on the Internet (Dkt. 8 at 8); but then (2) claiming a potential adverse market impact based on Roundtable attendees who accepted the Roundtable Invitation and attended the event (*Id.* at 2, 14-15). Under Plaintiff’s own argument, the very group that allegedly creates the alleged commercial purpose (Roundtable non-attendees) confirms there is no adverse market impact and the very group that allegedly creates the alleged potential adverse market impact (Roundtable attendees) confirms the nonprofit educational purpose. Plaintiff has not plausibly alleged either a “commercial advertisement” or a “potential adverse market impact” and his arguments on these fair use factors are not only implausible but also refute each other.

Claims like this that defy logic and common sense are tailor made for dismissal under *Twombly* and *Iqbal*. Presumably for this very reason, other Courts have not hesitated to find fair use as a matter of law and granted Rule 12(b)(6) motions to dismiss Plaintiff’s claims based on comparable uses of the WIN Passage. *See, e.g., Bell v. Magna Times, LLC*, 2019 WL 1896579 at *1 (D. Utah Apr. 29, 2019).

Despite devoting a quarter of his brief to the exercise, Plaintiff fails to challenge or distinguish *Magna Times* and instead merely offers distinctions without a difference (Dkt. 8 at 15-20). *Magna Times* is in all meaningful respects the same case and Judge Kimball got it right in granting defendant's Rule 12(b)(6) motion to dismiss before everyone involved was forced to waste more time and resources addressing a fatally flawed claim. Here, as in *Magna Times*, Plaintiff has not and cannot plausibly allege that Liberty's "use of the [WIN Passage] was anything but fair use in the education of [its] student athletes." *Id.* at *4.

ARGUMENT & AUTHORITIES

I. Plaintiff Misapprehends the Standard for Dismissal of His Complaint

In his Opposition, Plaintiff admits that Liberty's alleged infringing use is "now of record" because "Defendant was able to 'reasonably identify and incorporate' into its motion" the Roundtable Invitation that is the alleged "infringing act" identified in the Complaint. (Dkt. 8 at 1) (citing Dkt. 6-1, the "Roundtable Invitation"); (Dkt. 8 at 4). Plaintiff, however, incorrectly concludes that his "complaint satisfie[s] *Twombly*'s standard of pleading *because Defendant was able to locate* [the alleged] infringing act." (*id.* at 4) (emphasis added). Plaintiff grossly misapprehends the plausibility standard in *Twombly* and his pleading obligation thereunder.

To satisfy *Twombly*, Plaintiff's Complaint must do more than simply "give the defendant fair notice of what the ... claim is"—which is all Plaintiff has done. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957) which was abrogated by *Twombly*). Plaintiff must provide factual allegations "to raise a right to relief above the speculative level" and state a claim that is "plausible on its face"—which Plaintiff has not and cannot do. *Id.* at 555, 570.

As can be seen by the parties' briefs, there is no dispute about the essential and material facts which are "now of record," and both form the basis of Plaintiff's claim and establish Liberty's fair use of Plaintiff's work as a matter of law. Instead, the parties dispute only the conclusions to be drawn from those facts. Where, as here, the district court has before it "facts sufficient to evaluate each of the statutory [fair use] factors," fair use should be "decided by the court alone." *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 560 (1985); *Oracle Am., Inc. v. Google LLC*, 886 F.3d 1179, 1195-96 (Fed. Cir. 2018) (recognizing that a jury's "findings on fair use other than its implied finding of historical fact must...be viewed as advisory only." "Because, under *Harper & Row*, these [fair use] judgments are legal in nature."); *Fisher v. Dees*, 794 F.2d 432, 435-36 (9th Cir. 1986) (finding fair use where the operative facts were undisputed or assumed, and recognizing that the court is to make fair use judgments, which "are legal in nature"); see *Bell v. Magna Times, LLC*, 2019 WL 1896579 at *1 (D. Utah Apr. 29, 2019) (granting defendant's Rule 12(b)(6) Motion against Dr. Bell with prejudice).

Although Plaintiff cites the general proposition that discovery may be needed in circumstances where an analysis of the statutory fair use factors turns on facts and inferences beyond the complaint, (Dkt. 8 at 3), that general proposition is no obstacle to resolution of Liberty's Motion to Dismiss because this Court has sufficient facts to evaluate each of the fair use factors, and all fair use factors demonstrate that Plaintiff has not and cannot plausibly state a claim for relief. Thus, this Court should grant Liberty's Motion to Dismiss and dismiss Plaintiff's Complaint, with prejudice.

II. Liberty's Alleged Use of WIN Passage is Protected Fair Use as a Matter of Law

1. The Purpose and Character of the Use Supports a Finding of Fair Use

In his Opposition, Plaintiff draws the demonstrably false and unsupported conclusions that Liberty's Roundtable Invitation was a "commercial advertisement" and "not [for] a nonprofit educational purpose." (Dkt. 8 at 5). Plaintiff's conclusions, however, are directly contradicted by the allegations in his own Complaint and his conclusions are implausible on their face.

Plaintiff cannot dispute that the Roundtable Invitation was expressly intended *only* for students' and student-athletes' "education [and] fellowship," to "Learn[,], Share[, and] Grow" and the express purpose of the free event was "to establish a platform in which research, collaboration and innovative thought are encouraged to further develop the performance of [Liberty's] student-athletes... [and] to ensure that Liberty University continues to develop and implement strategies that seek to improve student-athletes in mind, body and soul." (Dkt. 6-1).

The face of the invitation, which Plaintiff admits is the alleged "infringing [use]" at issue, states:



...

SPORTS PERFORMANCE ROUNDTABLE

THE PSYCHOLOGICAL IMPACT OF SPORTS ON ATHLETES

...

MEET OUR EXPERT PANEL



Dr. Andy Bosak, EP-C, CSCS, *D
*Professor/Director:
M.S. in Exercise Science*



Shelton Stevens,
*Co-Director,
Olympic Sports*



Dr. Jeff Lowes, D.C., EP-C
Associate Professor



Dr. Jason Porter, Ed.D, ATC
*Associate Athletics Director
for Sports Medicine*



Kristie Bietz,
*Senior Associate Athletics Director,
Academic Affairs*



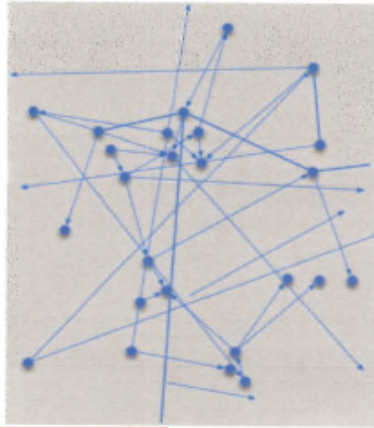
Jeff Thomas,
*Head Coach
Golf*

Look forward to an evening of education, fellowship and transparency.

JOIN US TO...

CONNECT the

.....



Learn. Share. Grow.

...

The purpose of the Liberty Sports Performance team is to establish a platform in which research, collaboration and innovative thought are encouraged to further develop the performance of our student-athletes. This integrated team exists to ensure that Liberty University continues to develop and implement strategies that seek to improve student-athletes in mind, body and soul.



Look forward to seeing you there!

(Dkt. 6-1 at 2-3, 8-10) (red emphasis added). This invitation included the WIN Passage. (*Id.* at 7).

Although unnecessary, this Court can take judicial notice of the fact that DeMoss Hall, the place where the one-hour “Roundtable” was scheduled, is “Liberty’s flagship academic facility.”¹ In any event, there is no question that Liberty is a nonprofit educational institution. Despite these facts and the undisputed fact that the Roundtable Invitation was used to “invite” only “students and student-athletes,” for the noncommercial and nonprofit educational purposes identified therein (“such as criticism, comment, . . . teaching . . . , scholarship, or research,” 17 U.S.C. § 107), Plaintiff nonetheless concludes that the Roundtable Invitation was an “advertisement” that is “inherently commercial.” (Dkt. 8 at 7). Plaintiff is mistaken.

To reach his unfounded conclusion, Plaintiff ignores words like “YOU’RE INVITED” and “JOIN US” and asserts that the term “invitation” is a “euphemis[m]” and “the truth of the matter is that this was an advertisement for the Roundtable, [and] [a]s such, it is inherently commercial.” *Id.* Plaintiff’s conclusion is nothing more than a string of fallacies that cannot withstand scrutiny. First, “invitation” was not a “euphemism”; it was exactly what it purported to be: a request for the presence of *only* “students and student-athletes” for a free, one-hour, academic and scholarly “roundtable” discussion with professors and Liberty athletic staff, on campus, in Liberty’s “flagship academic facility,” solely for nonprofit educational purposes. *See* (Dkt. 6-1). Second, Plaintiff appears to conflate “invitation” with “advertisement,” and then “advertisement” with “commercial purpose” to reach a conclusion that the Roundtable Invitation was “inherently commercial.” There is no basis for any such conclusion. Plaintiff merely slips down the slope from invitation, to advertisement to commercial to “inherently commercial,” without any reasoned basis for his descent.

¹ https://www.liberty.edu/media/1251/35289_CFAW%20Visitor%20Guide%20and%20Maps.pdf at 4 (Liberty University’s Visitor Guide Facility Map).

It appears that Plaintiff mistakenly believes that owing a copyright that includes the WIN Passage confers upon him the attendant and exclusive right to speak on the subject of sports psychology and the topic of “how to help you win.” Indeed, Plaintiff alleges in brief that this Court should reject the conclusion that the Roundtable was “for nonprofit educational purposes [because] Plaintiff himself provides this service for profit.” (Dkt. 8 at 8); *see also* (Dkt. 8 at 2) (stating “Dr. Bell himself might have spoken [at the event].”). This argument is equally fallacious.

First, Liberty was not providing any for-profit service, and it matters not that Plaintiff provides such “services” for profit because any such “service” is not what his copyright protects. The Supreme Court has admonished that “[t]he primary objective of copyright is not to reward the labor of authors, but ‘to promote the Progress of Science and useful Arts.’ To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work.” *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994) (quoting *Feist Publ'ns, Inc. v. Rural Tele. Serv. Co.*, 499 U.S. 340, 349–50 (1991)); *see also Dr. Seuss Enterprises, L.P. v. ComicMix LLC*, 372 F. Supp. 3d 1101, 1124 (S.D. Cal. 2019).

In other words, the fact that Plaintiff has a copyright over the expression in the WIN Passage gives him absolutely no attendant and exclusive right over the ideas expressed therein, or the exclusive right to speak on those ideas. *See, e.g., Baker v. Selden*, 101 U.S. 99, 103 (1879) (“By publishing the book, without getting a patent for the art, the latter is given to the public.... The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains. But this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book. And where the art it teaches cannot be used without employing the methods ... or such as are similar to them, such methods ... are to be considered as necessary incidents to the art, and given therewith to the public.”).

Plaintiff also engages in an equally unsuccessful circular argument that because “Dr. Bell’s work relate[s] to sports psychology,” and the invitation relates to the same field, “the context of the uses are identical,” and because Dr. Bell’s use is commercial, Liberty’s use should also be viewed a commercial. (Dkt. 8 at 7); *cf. Dr. Seuss Enterprises, L.P. v. ComicMix LLC*, 372 F. Supp. 3d 1101, 1124 (S.D. Cal. 2019) (“Plaintiff’s argument ‘risks circular reasoning,’ in that ‘it is a given in every fair use case that plaintiff suffers a loss of a *potential* market *if* that potential is defined as the theoretical market for licensing the very use at bar.”) (quoting 4 Nimmer on Copyright § 13.05 (2018); *Equals Three, LLC v. Jukin Media, Inc.*, 139 F. Supp. 3d 1094, 1107 (C.D. Cal. 2015) (second emphasis added)). Simply stated, the use is not identical merely because it happens to relate to the same field in which Plaintiff earns a profit from speaking, presenting or selling his work, and Plaintiff cannot rely on this argument to draw his conclusion that Liberty’s inherently educational use is somehow converted to inherently commercial use simply because that is the use Plaintiff (not Liberty) engages in.

Finally, Plaintiff spends a considerable amount of effort arguing that Liberty’s use is not transformative. A transformative use, however, is not necessary to for a finding of fair use. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). “Indeed, the Supreme Court has recognized in dicta that nonprofit educational use may weigh in favor of a finding of fair use under the first factor, even when nontransformative.” *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1263–64 (11th Cir. 2014) (citing *Campbell*). As this Court has recognized, the protection for transformative use simply “reflects the considerable latitude for *scholarship* and *comment*’ secured by the fair use doctrine, in order to protect [] the core value of free expression from excessive litigation and undue restriction.” *Caner v. Autry*, 16 F. Supp. 3d 689, 709–10 (W.D. Va. 2014) (emphasis added).

Further, the “central purpose of [the first factor] is to see, in Justice Story's words, whether the new work merely ‘supersede[s] the objects’ of the original creation.” *Campbell*, 510 U.S. at 579. This is often framed in terms of “commercial exploitation,” and

[While] courts will be less likely to sustain the fair use defense for secondary uses that represent commercial exploitation.... “courts are more willing to find a secondary use fair when it produces a value that benefits the broader public interest. The greater the private economic rewards reaped by the secondary user (to the exclusion of broader public benefits), the more likely the first factor will favor the copyright holder and the less likely the use will be considered fair.”

Cambridge Univ. Press v. Patton, 769 F.3d 1232, 1266 (11th Cir. 2014) (quoting *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 922 (2d Cir. 1994)).

Here, there is absolutely no commercial exploitation by Liberty. Plaintiff claims that he exploits the WIN Passage by selling his book, and “posters and t-shirts that display the WIN Passage” (Dkt. 8 at 12). Liberty’s use, however, in no way supplants or supersedes Plaintiff’s commercial use. Liberty did not make, create or sell posters or t-shirts and did not use the WIN Passage in any way that would reduce or supplant Plaintiff’s commercial use.

Although Plaintiff argues that the Roundtable Invitation “was on the Internet” and others, who are not intended recipients of the Roundtable Invitation, may view the WIN Passage therein (Dkt. 8 at 8), this likewise does not supplant Plaintiff’s commercial use. If anything, it would serve to enhance Plaintiff’s commercial use by increasing exposure among (unintended) recipients who discover his work therein and subsequently wish to purchase a poster, a t-shirt or his book (which Liberty did not provide). *Cf. Magna Times, LLC*, 2019 WL 1896579 at *5 (“If anything, the small portion of the book quoted in the article acted as an advertisement of Bell’s full-length work.”). It is simply inconceivable (and implausible) that a consumer wishing to buy Plaintiff’s book or t-shirt or poster with the WIN Passage would elect not to do so because they happened to see the WIN Passage, attributed to Plaintiff, in the Roundtable Invitation.

Because Liberty's use was clearly and undeniably noncommercial and for nonprofit, educational purposes, "such as criticism, comment, ... teaching . . . , scholarship, or research," Liberty's use is "not an infringement of copyright" as a matter of law. 17 U.S.C. § 107. Plaintiff has no credible or plausible argument to the contrary. Accordingly, the first factor weighs heavily in favor of fair use.

2. The Nature of the Copyrighted Work Supports a Finding of Fair Use

The second factor, the nature of the copyrighted work likewise favors a finding of fair use. In his Opposition, Plaintiff alleges that the WIN Passage "is based on psychological principles derived by Dr. Bell from a lifetime of experience and study in the field...and [is] an artistic articulation of these principles." (Dkt. 8 at 9). Try as he might, Plaintiff cannot escape the conclusion that the WIN Passage is more fact than fantasy. *See Caner*, 16 F. Supp. 3d at 712 (recognizing that "[t]he law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy."). Indeed, Plaintiff cannot and does not argue that his work is either "fiction or fantasy." Accordingly, as this Court recognized in *Caner*, Plaintiff's work is "entitled to less protection[, and] [t]his factor weighs in favor of finding fair use." *Id.* at 713; *see also Magna Times, LLC*, 2019 WL 1896579 at *5.

3. The Amount and Substantiality of the Portion Used Supports a Finding of Fair Use

In his Opposition, Plaintiff challenges Liberty's conclusion that the "work at issue is the entirety of [Plaintiff's] book *Winning Isn't Normal*." (Dkt. 8 at 11). Plaintiff bases his challenge on the fact that he has a second registration "which he pleaded" in the Complaint and attached thereto. (*Id.*; *see also* Compl. at Ex. C). Plaintiff, however, conveniently ignores the undisputed facts set forth in Liberty's opening brief, which demonstrate that Plaintiff's second registration is not, in fact, a registration for the WIN Passage in its entirety; it is merely a

registration for *new text* added to the WIN Passage since his book was initially registered in 1989. (See Dkt. 6 at 3-4). Even now, Plaintiff has elected not to identify what “new text” is covered by his second registration.

Instead, Plaintiff breezes past his registrations to argue that “[r]egardless, Plaintiff’s registrations are not dispositive” because the Copyright Act protects compilations, and the WIN Passage should be viewed an independent poem in a compilation. (Dkt. 8 at 11). Again, Plaintiff misses the mark. The Copyright Act specifically defines a “compilation” as “a work formed by the collection and assembling of *preexisting materials or of data* that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.” 17 U.S.C.A. § 101 (emphasis added). Plaintiff, of course, does not and cannot allege in his Complaint that his book, *Winning Isn’t Normal*, is a “compilation” of preexisting material, nor is it registered as a compilation or collective work. See, e.g. (Dkt. 1-1 at 2) (failing to identify the work as a compilation). Plaintiff’s efforts to reframe the portion used by focusing only on the WIN Passage, ignoring the substance of his registrations, and ignoring the entirety of his 72 page book, are, therefore, unavailing.

Indeed, “[t]he third factor asks whether ‘the amount and substantiality of the portion used *in relation to the copyrighted work as a whole* ... are reasonable *in relation to the purpose* of the copying.’” See *Campbell*, 510 U.S. at 586; cf. *Dr. Seuss Enterprises, L.P.*, 372 F. Supp. 3d at 1117 (recognizing plaintiffs will always argue “defendant could have used less—otherwise the case would not be in litigation. [Thus,] [t]he pertinent question is whether Defendant[] ‘only copied as much as was necessary for their intended use.’”). This inquiry, therefore, “will harken back to the first of the statutory factors ... [because] the extent of permissible copying varies with the purpose and character of the use.” *Id.* at 586-87.

As discussed above, there is no genuine dispute that Liberty's purpose was anything other than noncommercial, nonprofit and educational, and Liberty in no way exploited the commercial market for Plaintiff's work. Accordingly, Liberty "did not exceed the amount necessary to accomplish [its] legitimate purposes." *See, e.g., Sundeman v. Seajay Soc'y, Inc.*, 142 F.3d 194, 205-06 (4th Cir. 1998) (finding an entire work copied for nonprofit, scholarly purposes "did not exceed the amount necessary to accomplish these legitimate purposes"); *Magna Times, LLC*, 2019 WL 1896579 at *5 (finding defendant's use of the same WIN Passage was "only a small section of a much larger book"). Thus, as in *Magna Times* and *Sundeman*, this factor too supports a finding of fair use.

4. Effect on the Potential Market (the "Market Effect" Factor) Supports a Finding of Fair Use

"This last factor is undoubtedly the single most important element of fair use." *Harper & Row*, 471 U.S. at 566. "Fair use, when properly applied, is limited to copying by others which does not materially impair the marketability of the work which is copied." *Id.* (quoting Nimmer § 1.10[D], at 1-87). As discussed above, Plaintiff has no credible argument that Liberty's use materially impaired the marketability of Plaintiff's work.

When addressing this factor in his Opposition, Plaintiff merely repeats his bald and unsupported conclusion that Liberty made a "commercial use of the WIN Passage." (Dkt. 8 at 14). It bears repeating, however, that Liberty's use cannot plausibly or conceivably have had any material, negative impact on sales of either Plaintiff's book, or Plaintiff's posters and t-shirts with the WIN Passage because Liberty's use in no way supplants or supersedes Plaintiff's commercial use. Indeed, Liberty did not make, create or sell Plaintiff's book, posters or t-shirts and did not use the WIN Passage in any way that would reduce or supplant Plaintiff's commercial use.

As to the Liberty students and student-athletes, the WIN Passage was merely used for an “invitation” to a one-hour academic discussion. If anything, such use would pique students’ interest in the topic and make it *more*, not less likely that they would purchase Plaintiff’s work or derivative copies thereof—particularly since Plaintiff received attribution for his work in the invitation itself. Plaintiff half-heartedly argues that if similar use became widespread it “might well ...dampen[]” Plaintiff’s licensing market. This conclusion too is unfounded. If similar noncommercial, nonprofit, educational use became widespread it would further enhance, not depress, the market for Plaintiff’s work for the reasons stated above. *See Magna Times*, 2019 WL 1896579 at *5 (“If anything, the small portion of the book quoted in the article acted as an advertisement of Bell’s full-length work.”).

In addition, Plaintiff’s half-hearted argument wrongly presupposes there is some licensing market for noncommercial, nonprofit, educational use. Similar use by similar educational institutions to promote noncommercial, nonprofit, academic discussions (through the internet or otherwise) would not negatively affect his licensing because such use in no way supersedes the uses Plaintiff licenses. Fair use never requires a license so the supposed market for such use never existed. *See Dr. Seuss*, 372 F. Supp. 3d at 1124 (“Lost licensing revenue counts under Factor Four only when the use serves as a substitute for the original.”); *Castle Rock Entm’t, Inc. v. Carol Pub. Grp.*, 150 F.3d 132, 145 n.11 (2nd Cir. 1998) (“[B]y developing or licensing a market for parody, news reporting, educational or other transformative uses of its own creative work, a copyright owner plainly cannot prevent others from entering those fair use markets.”); 4 Nimmer on Copyright § 13.05 (2018) (Plaintiff’s argument “risks circular reasoning,” in that “it is a given in every fair use case that plaintiff suffers a loss of a *potential* market if that potential is defined as the theoretical market for licensing the very use at bar.”).

5. Fair Use Conclusion

This Court has everything it needs to make a fair use determination that Liberty's use of the WIN Passage (a small portion of a factual work) for the nonprofit educational purpose of student and student-athlete "education [and] fellowship" (Dkt. 6-1 at 2-3, 8-10) was non-commercial, and had no effect on the market value for the work. Because all factors support a finding of fair use, and the Court has sufficient facts to evaluate each of the fair use factors, this Court should grant Liberty's motion and dismiss Plaintiff's Complaint, with prejudice.

III. Plaintiff's Efforts to Distinguish *Bell v. Magna Times, LLC* Are Unavailing

Plaintiff has good reason for suggesting this Court "not address the fair use defense until the summary judgment phase" (Dkt. 8 at 3): he already has lost on this same issue at this same Rule 12(b)(6) motion to dismiss phase based on a comparable use of the WIN Passage. *See Magna Times*, 2019 WL 1896579 at *1. Where, as here, and in *Magna Times*, sufficient facts are present to make a fair use determination, a fair use defense may be applied on a Rule 12(b)(6) motion to dismiss. *Id.* The Fourth Circuit recognizes this. *See Bouchat v. Baltimore Ravens Ltd. P'ship*, 619 F.3d 301, 307 (4th Cir. 2010); *Goodman v. Praxair, Inc.*, 494 F.3d 458, 464 (4th Cir. 2007).

Plaintiff claims that "the facts in the present case are different in significant respects" and "the *Magna Times* decision is flawed" (Dkt. 8 at 15). Neither of these is true. First, the present case is substantially equivalent to *Magna Times* and involves a comparable use of the WIN Passage. Plaintiff merely offers distinctions without a difference, including that "in *Magna Times*, Plaintiff, for whatever reason, did not name [the football coach] Coach Smith as a defendant" (Doc 8 at 16-17). This is irrelevant. Although Coach Smith was not a named defendant in *Magna Times*, the Court still fully assessed his use as part of its fair use analysis. The Court discussed Coach Smith's use and the fact that he (comparable to Liberty in this case) was merely using a small excerpt of Plaintiff's work at a banquet as a team theme.

In *Magna Times*, the defendants argued successfully “that the fair use doctrine precludes a finding of infringement because the article was merely reporting on a football team banquet and included a quote from the local high school coach, who was using Mr. Bell's work as the team theme.” *Magna Times*, 2019 WL 1896579 at *3. In granting the defendants’ Rule 12(b)(6) motion to dismiss, Judge Kimball emphasized the importance of the context of Coach Smith’s use of the WIN Passage, recognizing that: “the football coach was using the quote as a theme for the football team's next season. 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.” *Id.* at *4. The same is true of Liberty’s alleged use of the WIN Passage in this case.

Plaintiff attempts to disparage Judge Kimball’s analysis claiming that his “*Magna Times* decision is flawed,” he “dwelled on the portion of the material taken,” he “muddled the second fair use factor,” and he “erroneously ignored the pleadings completely.” (Dkt. 8 at 15-20). None of this is true. This Court should disregard Plaintiff’s self-serving revisionist history which amounts to mere sour grapes. Judge Kimball got it right. Had Judge Kimball committed these alleged errors, Plaintiff presumably would have appealed and won. None of this happened. Try as he might, Plaintiff simply cannot challenge or distinguish *Magna Times*. It remains the blueprint for this case and the same result is appropriate here.

In contrast to Liberty’s reliance on the substantially equivalent *Magna Times* case, Plaintiff relies on and attaches to his response brief another of his cases in which he managed to survive a Rule 12(b)(6) motion to dismiss: *Bell v. Pacific Ridge Builders*, 3:19-cv-01307-JST (N.D. Cal. 2019) (Dkt. 8 at 6, Ex. A). Unlike *Magna Times*, *Pacific Ridge* is nothing like this case. In *Pacific Ridge*, the individual defendant was the CEO of the company who posted the WIN Passage on his LinkedIn account page (Dkt. 8, Ex. A at 7). The California court

focused on whether the defendants stood to profit from the posting as a for-profit company. The court noted that LinkedIn is a professional networking platform where the individual defendant was clearly identified as the CEO of the company and found that the WIN Passage may have been used for marketing purposes (Dkt. 8, Ex. A at 9). Nothing like this is alleged here.

A review of *Magna Times* and *Pacific Ridge* tells the story and confirms three undeniable truths: (1) this case is substantially equivalent to *Magna Times* and radically different from *Pacific Ridge*; (2) both *Magna Times* and *Pacific Ridge* are correctly decided; and (3) this case, like *Magna Times*, should be dismissed with prejudice. In contrast to Liberty's reliance on *Magna Times* to support dismissal with prejudice, Plaintiff fails to offer an even remotely similar case in which he survived a Rule 12(b)(6) motion. The fact that *Pacific Ridge* is the best Plaintiff can come up with speaks volumes and should be outcome determinative.

CONCLUSION

For the forgoing reasons and those set forth in its supporting memorandum, Liberty respectfully requests that the Court grant Liberty's Motion to Dismiss, dismiss Plaintiff's Complaint with prejudice, and award Liberty such other relief as is just and proper.

Dated: February 20, 2020

Respectfully Submitted,

LIBERTY UNIVERSITY, INC.

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CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2020, a true and correct copy of the above and foregoing was filed with the CM/ECF system which shall send a copy of these pleadings to all counsel of record.

/s/ Joshua F. P. Long