

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

DR. KEITH F. BELL,)	
)	
Plaintiff,)	
)	Case No. 22-2135-TC-TJJ
v.)	
)	
BOARD OF EDUCATION, BASEHOR-)	
LINWOOD UNIFIED SCHOOL DISTRICT)	
NO. 458, et al.,)	
)	
Defendants.)	

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

I. Nature of the Matter. Defendants Board of Education, Basehor-Linwood Unified School District No. 458, Leavenworth County, Kansas (“U.S.D. 458”)¹, Susan Mayberry (“Mayberry”) and Scott Russell (“Russell”), by and through undersigned counsel, hereby request that the Court dismiss Plaintiff’s Complaint (ECF No. 1) for insufficient service of process pursuant to Fed. R. Civ. P. 12(b)(5) and/or for failure to state a claim upon which relief may be granted pursuant to Fed. R. Civ. P. 12(b)(6). In addition, Defendants seek recover of their reasonable attorneys’ fees and costs under 17 U.S.C. § 505 as well as Fed. R. Civ. P. 11(c) as the Complaint was not filed in good faith and was objectively unreasonable under prevailing principles of copyright law.

II. Statement of Facts. Because this matter is before the Court on a motion to dismiss, the facts are generally those alleged in Plaintiff’s Complaint (ECF No. 1) and other documents referenced or relied upon in his Complaint (ECF No. 1).² “Facts subject to judicial notice may be

¹ Pursuant to K.S.A. 72-1131, Defendant may only be sued as “Unified School District No. 512, Johnson County, Kansas.” Fed.R.Civ.P. 9(a).

² In considering a motion to dismiss, the court must accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff. *Jojoba v. Chavez*, 55 F.3d 488, 490 (10th Cir. 1995) (quotation omitted); *Pizza Management, Inc. v. Pizza Hut, Inc.*, 737 F.Supp. 1154, 1157 (D.Kan.). The court is generally limited to “assessing the legal sufficiency of the allegations contained within the four corners of the complaint,” *Jojoba*, 55 F.3d at 494, including documents incorporated into the pleadings. See *United States v. Wood*,

considered without converting a motion to dismiss into a motion for summary judgment At any stage of the proceedings the court may take judicial notice of a fact which is not subject to reasonable dispute, a requirement that is satisfied if the fact is ‘capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.’” JP Morgan Trust Co. Nat. Ass’n v. Mid-America Pipeline Co., 413 F.Supp.2d 1244, 1258 (D.Kan. 2006) (quoting Fed.R.Evid. 201(b)(2)); see also Bain v. Continental Title Holding Company, Inc., No. 16-2326-JWL, 2017 WL 264545, at *1 (D.Kan. Jan. 20, 2017) (citing Tal v. Hogan, 453 F.3d 1244, 1264-65, n.24 (10th Cir. 2006)). This is particularly true where the facts pertain to whether service has been made on Defendants.³ Facts material to this motion include:

1. On April 14, 2022, Plaintiff filed a Complaint *pro se* in the United States District Court for the District of Kansas, Case No. 22-2135-TC-TJJ (ECF No. 1).

2. U.S.D. No. 458, is a unified school district and governmental subdivision of the State of Kansas, duly organized and existing pursuant to Article 6, § 5 of the Constitution of the State of Kansas and K.S.A. 72-1131, *et seq.*, for the purposes of providing a public education for children of school age residing within the district. Fed.R.Evid. 201.

3. Russell is a teacher and coach employed by U.S.D. No. 458. Complaint (ECF No. 1), p. 1 ¶ 1.

925 F.2d 1580, 1582 (7th Cir. 1991). These facts are admitted solely for purposes of this motion and should not be deemed admissions for purposes of trial. Wright, Miller & Kane, Fed.Prac. & Proc. § 2722 at 48.

³ When reviewing a factual attack on subject matter jurisdiction, a district court may not presume the truthfulness of the complaint’s factual allegations. Schmidt v. Cline, 127 F. Supp. 2d 1169, 1175 (D. Kan. 2000). A court has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts. Schmidt, 127 F. Supp. 2d at 1175; see also Marcus v. Kansas, Department of Revenue, 980 F. Supp. 398, 400 (D. Kan. 1997), reversed on other grounds, 170 F.3d 1305 (10th Cir. 1999) (“In reviewing a factual attack on subject matter jurisdiction, a district court must go beyond the allegations and evaluate the evidence presented by the parties.”).

4. Mayberry is a teacher and coach employed by U.S.D. No. 458. Complaint (ECF No. 1), p. 1 ¶ 1.

5. On or about May 16, 2022, an envelope containing three documents labeled as Summons in A Civil Action addressed to U.S.D. 458 Basehor-Linwood Board of Education c/o Dayna Miller, President, Susan Mayberry and Scott Russell were left with Sherry McKinley regarding the above-referenced matter. See the Affidavit of Sherry McKinley, attached as Exhibit 1.

6. At all relevant times herein, Sherry McKinley has not been the Clerk or Secretary for the Board of Education of Defendant USD No. 458 or otherwise authorized to accept service of process of documents brought against USD No. 458. Exhibit 1.

7. At all relevant times herein, Sherry McKinley has not been authorized to accept service of process in any civil actions brought against USD No. 458 or any other official or other employee of U.S.D. 458. Exhibit 1.

III. Questions Presented.

A. Whether Plaintiff's Complaint (ECF No. 1) should be dismissed for insufficient service of process pursuant to Fed. R. Civ. P. 12(b)(5)?

B. Whether Plaintiff's Complaint (ECF No. 1) should be dismissed for failure to state a claim upon which relief may be granted pursuant to Fed. R. Civ. P. 12(b)(6)?

C. Whether Defendants should be awarded attorneys' fees?

IV. Argument and Authorities.

A. **Legal Standards Applicable to a Motion to Dismiss.** To survive a motion to dismiss, a plaintiff must have pleaded "facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 547 (2007). "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.” Ashcroft v. Iqbal, 556, U.S. 662, 677 (2009) (citing Twombly, 550 U.S. at 556). “The complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims.” Carter v. U.S., 667 F. Supp.2d 1259, 1262 (D.Kan. 2009) (quoting Ridge at Red Hawk, LLC v. Schneider, 493 F.3d 1174, 1177 (10th Cir. 2007)).

When considering a motion to dismiss, the court assumes the complaint’s factual allegations are true, but is not required to accept mere legal conclusions as true. Id. at 1263. “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements” are not sufficient to state a claim for relief. Iqbal, 556 U.S. at 678. A court may not presume facts not alleged. Gallardo v. Board of County Commissioners, 857 F.Supp. 783, 786 (D.Kan. 1994). Instead, the court is limited to “assessing the legal sufficiency of the allegations contained within the four corners of the complaint,” Jojola v. Chavez, 55 F.3d 488, 494 (10th Cir. 1995), *including documents incorporated into the pleadings*. See United States v. Wood, 925 F.2d 1580, 1582 (7th Cir. 1991).

B. Plaintiff’s Attempted Service of his Complaint was Insufficient. In order for a federal court to obtain personal jurisdiction over a named Defendant, the plaintiff must properly serve a summons and the Complaint on the Defendant as set out in Fed. R. Civ. P. 4. See Omni Capital Int’l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 104 (1987); Oltremari v. Kan. Soc. & Rehab. Serv., 871 F. Supp. 1331, 1348 (D. Kan. 1994). If proper service is not properly made, the action against that Defendant must be dismissed.

Plaintiff filed his Complaint with the Court on April 14, 2022. (ECF No. 1). On May 16, 2022, copies of Plaintiff’s Complaint and summonses were handed to Ms. Sherry McKinley, a

secretary at Basehor-Linwood High School at 2108 N. 155th St., Basehor, Kansas. Affidavit of Sherry McKinley, ¶¶ 2, 9, 10, attached hereto as Exhibit 1. One summons was addressed to the Board of Education of U.S.D. 458, c/o President Miller, one was addressed to Ms. Mayberry at the address of Basehor High School, and one was addressed to Mr. Russell at Basehor Middle School. (ECF Nos. 9-10). As a secretary at Basehor High School, Ms. McKinley is not authorized the Board of Education of U.S.D. 458 to accept service of process on behalf of the Board, its President—Ms. Danya Miller—or its Superintendent, Mr. Doug Powers. (Exhibit 1, Affidavit of Sherry McKinley, ¶¶ 5-6). Likewise, Ms. McKinley has not been authorized by Ms. Mayberry or Mr. Russell or any other teacher in U.S.D. 458 to accept service of process on their behalf in any matter. (Exhibit 1, Affidavit of Sherry McKinley, ¶¶ 7-8).

The only recognized methods for serving process are set out in Rule 4 of the Federal Rules of Civil Procedure. Plaintiff alleges in his Complaint that U.S.D. 458 is a public school district organized under the laws of the State of Kansas and is considered a governmental entity. (ECF No. 1 at ¶¶ 10-11). Consequently, service of process can only properly be made on U.S.D. 458 by delivering a copy of the summons and complaint on the government entity's chief executive officer. Fed. R. Civ. P. 4(j)(2)(A). Mr. Doug Powers is the Superintendent of Schools and Ms. Danya Miller is the President of the Board of Education of U.S.D. 458. Neither was properly served with the Complaint or summons.

Alternatively, service may be made on U.S.D. 458 as provided under state law. Fed. R. Civ. P. 4(j)(2)(B). Kansas statute requires that service made on a governmental entity may only be made by serving the clerk or secretary of that entity, or any officer, director, or manager of that body. K.S.A. 2021 Supp. 60-304(d). Ms. McKinley, a secretary at the high school, does qualify as a proper recipient for service on the District or the Board of Education. *See Young v. Turner*

Unified School District No. 202, Case No. 108,376, 2013 WL 518315, at *2 (Kan. App. Feb. 8, 2013) (service of employee at school district’s administrative office was no sufficient when employee was not hold a position identified in the state statute).

“Requiring service on the statutorily designated representatives of governmental entities promotes orderly progression of civil litigation by [e]nsuring that a responsible, ranking official receives process and by avoiding collateral disputes over whether service on some other employee imparted actual notice.” Young v. Turner Unified Sch. Dist. No. 202, 2013 WL 518315 at *2.

Plaintiff’s attempted service by leaving the summons and Complaint with Ms. McKinley is inadequate to comply with Rule 4 or Kansas law for lawful adequate service on U.S.D. 458. Consequently, Plaintiff’s claims against the District must be dismissed pursuant to Fed. R. Civ. P. 12(b)(5).

Similarly, Plaintiff’s attempt to serve the individual Defendants, Ms. Mayberry and Mr. Russell, also failed to comply with constitutional and statutory requirements. Under the federal rules, service on individuals may be accomplished as provided by state law or by (1) delivering a copy of the summons and complaint on the individual personally; (2) leaving a copy of the same at the individual’s usual place of abode with an appropriate person residing there; or (3) delivering a copy of the same to an agent authorized to receive process on behalf of the named individual. Fed. R. Civ. P. 4(e). Ms. McKinley, the only person who personally received the summonses and Complaints, is not authorized to receive service on behalf of Ms. Mayberry or Mr. Russell. Plaintiff have not filed any return showing that service was made on these Defendants as required by law.

Plaintiff’s only attempt to serve Ms. Mayberry or Mr. Russell was by leaving copies of the documents with Ms. McKinley, a secretary at the high school. While Ms. Mayberry is alleged to be a high school teacher and coach (Complaint, ECF No. 1 at ¶¶ 1,6), she never authorized Ms. McKinley to receive service of process on her behalf. (McKinley Affidavit, ¶ 7). Likewise, the

summons and Complaint addressed to Mr. Russell listed the Basehor-Linwood middle school address, not the high school. (ECF No. ¶ 10). Ms. McKinley was not authorized by Mr. Russell to accept service on his behalf in any civil proceeding. (McKinley Affidavit, ¶ 8).

Here, Plaintiff only known attempts at service of process on Ms. Mayberry and Mr. Russell were the documents left with Ms. McKinley. Such service is not proper under Rule 4(e) or Kansas law nor does it substantially comply with those requirements. Under the state statute, service on an individual defendant at his place of business—without first attempting to serve him at his dwelling place—does not constitute substantial compliance with Kansas law and is inadequate to provide the Court with jurisdiction over the individual. Wanjiku v. Johnson County, 173 F. Supp. 3d 1217, 1228 (D. Kan. 2016).

In the absence of proper service on any of the Defendants, Defendant ask the Court to dismiss Plaintiff’s Complaint under Fed. R. Civ. P. 12(b)(5) for lack of jurisdiction due to improper service of process.

C. Plaintiff’s Complaint Fails to State a Claim for Relief. Defendants further request that the Court dismiss Plaintiff’s Complaint (ECF No. 1) for failure to state a claim upon which relief can be granted. There are two separate grounds that warrant dismissal of Plaintiff’s claims under Rule 12(b)(6). First, Plaintiff’s claims of copyright infringement in Count I and Count II, based on the face of the Complaint, are barred by the fair use doctrine set out in 17 U.S.C. § 107. In addition, Plaintiff’s claim under the Digital Millennium Copyright Act (DMCA), 17 U.S.C. § 1202(b), fails to allege sufficient facts to establish a plausible claim against these Defendants under the DCMA.

To defeat a motion to dismiss pursuant to Rule 12(b)(6), a plaintiff must plead “enough facts to state a claim to relief that is plausible on its face.” Bell Atlantic Corp. v. Twombly, 550

U.S. 554, 570 (2007). “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.” Ashcroft v. Iqbal, 556 U.S. 662, 663 (2009) (citing Twombly, 550 U.S. at 556). “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” Id. (quoting Twombly, 550 U.S. at 556). “Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of entitlement to relief.’” Id. (quoting Twombly, 550 U.S. at 557).

1. Counts I and Count II Fail to State a Claim for Relief.

“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.’” Iqbal, 556 U.S. at 678; see also Vreeland v. Wren, 702 F. App’x 676, 679 (10th Cir. 2017). Although the factual allegations need not be detailed, the claims must set forth entitlement to relief “through more than labels, conclusions and a formulaic recitation of the elements of a cause of action.” In re Motor Fuel Temperature Sales Practices Litig., 534 F. Supp. 2d 1214, 1216 (D. Kan. 2008). The allegations must contain facts sufficient to state a claim that is plausible, rather than merely conceivable. Advanced Baseball Acad., LLC v. Google, Inc., No. 14-2461-CM, 2015 WL 1440656, at *1 (D. Kan. Mar. 30, 2015)

The Complaint appears to set forth separate copyright claims against Defendants based contents of the *Winning Isn’t Normal* book published in 1982 (Count I) and what Plaintiff refers as “the Passage” (Count II) which he alleged is a separate copyrighted work. (Complaint, ECF 1, ¶¶ 29-43). Assuming for purposes of this Motion that Plaintiff has ownership rights to these

copyrights⁴ and they lawfully constitute separate copyrighted materials,⁵ the allegations of the Complaint are insufficient to establish that Defendants’ alleged acts were anything other than activity protected under the Fair Use Doctrine set forth in 17 U.S.C. §107.

The Copyright Act does not prohibit the “fair use” of copyrighted materials when that use is for purposes of “criticism, . . . teaching . . . , scholarship, or research.” 17 U.S.C. § 107. A Complaint alleging copyright infringement may be dismissed under Rule 12(b)(6) when it is apparent from Plaintiff’s own allegations that the use of copyrighted material falls within the fair use doctrine. Bell v. Eagle Mountain Saginaw Indep. School District, 27 F.4th 313, 320 (5th Cir. 2022) (upholding granting of Rule 12(b)(6) motion filed by public school district based on the same copyrighted materials at issue in the case); Shell v DeVries, 2007 WL 4269047, at *1 (10th Cir. Dec. 6, 2007) (upholding dismissal of copyright claims under Rule 12(b)(6) based on fair use doctrine). See also Leadsinger, Inv. v. BMG Music Publishing, 512 F.3d 522, 530 (9th Cir. 2008) (assertion of fair use defense may be considered at 12(b)(6) stage based on the allegations of the complaint); Marano v. Metro. Museum of Art, 472 F. Supp. 3d 76, 82 (S.D.N.Y. 2020), *aff’d* 844

⁴ Exhibit 1 to Plaintiff’s Complaint indicates that the Book was created in 1981 (Complaint, Exhibit 1), although the Complaint alleges that the Book was first published in 1982. (Complaint, ECF No. 1, at ¶ 17). “A Copyright Office Certificate of Registration obtained within five years of first publication is ‘prima facie evidence of the validity of the copyright and of the facts stated in the certificate.’” Tomelleri v. Zazzle, Inc., Case No. 13-CV-02576-EFM-TJJ, 2015 WL 8375083, at *15 (D. Kan. Dec. 9, 2015). It is not clear from the face of the Complaint that Plaintiff registered the Book within five (5) years of its publication as required by 17 U.S.C. § 410(c). Thus, Defendants do not concede, at this stage, the validity of Plaintiff’s claims of copyright ownership. Likewise, Plaintiff’s alleged copyright registration of the Passage, assuming it has any effect, was not effective until November 6, 2017 (ECF No. 1, Complaint, Exhibit 3), *after* the first of Defendants’ alleged violations occurred, and again apparently outside of the 5 year period following the 2010 “publication” of the Passage.

⁵ Plaintiff appears to claim that Defendants have violated two separate copyrighted materials: a book published in 1982 (ECF No. 1 at ¶¶ 16-17) as well as what he refers to as “the Passage,” which he asserts is used to market derivative works such as posters and t-shirts. Id. at ¶ 18. Plaintiff alleged the social media postings allegedly made by Defendants violated a textual representation of page 8 of the Book as well as the Passage. However, Plaintiff’s attached Certificate of Registration for the Passage dated November 6, 2017, specifically *excludes* the text previously registered for the Book. Id. The U.S. Copyright Office does not knowingly issue more than one basic registration for the same work. 37 C.F.R. § 202.3(b)(11); COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES, § 619.11 (3d Ed. 2021). If, as alleged in paragraphs 23-26 of the Complaint, the social media posts in question contain a textual representation of page 8 of the Book, the copyright registration for “the Passage” does not cover the same posts.

F. App'x 436 (2d Cir. 2021) (dismissal of a copyright infringement claim is warranted where fair use is clearly established on the face of the complaint).

When applying the fair-use doctrine, Congress has directed that four factors should be weighed:

- “(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. The fair use doctrine “permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.” Evolution, Inc. v. SunTrust Bank, 342 F. Supp. 2d 943, 955 (D. Kan. 2004) (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994)). All these factors clearly establish that the alleged actions of the Defendants—as alleged in the Complaint—fall squarely within the fair-use doctrine.

As for the first factor—the purpose and character of the use—the allegations of the Complaint and exhibits attached show that any use of the works were part of a nonprofit educational purpose—websites encouraging student athletes and their teams. *Cf. Bell v. Worthington City School Dist.*, Case No. 2:18-cv-961, 2020 WL 2905803, *8 (S.D. Ohio June 2, 2020) (finding that fair use doctrine applied to retweeting of “Winning Isn’t Normal” passage by high school coach fell within fair use doctrine). Nothing connected with the Defendants’ alleged publications show any commercial purpose in the social media posts and Plaintiff does not allege any facts plausibly alleging any commercial purpose by the Defendants.

Plaintiff's Complaint also fails to allege any facts to overcome the clear "fair use" protection based on the second and third factors under Section 107. As to the nature of the copyrighted work, the book is a nonfictional study of athleticism that was published more than 40 years ago. See Bell v. Eagle Mountain Saginaw Indep. School Dist., 27 F.4th at 323. Plaintiff alleges that the book has been widely distributed and significant publicity since it was first published in 1982 (Complaint, ECF No. 1, ¶ 17), long before Defendants' alleged actions. This factor weighs in favor of finding that the fair use doctrine applies. Bell v. Worthington City School Dist., 2020 WL 2905803, *8 Similarly, as to the third factor, Plaintiff alleges that the publications involve text from one page of a 72-page book (Complaint, ECF No. 1, at ¶¶ 23-24), which itself establishes that Defendants' actions did use a substantial portion of Plaintiff's book. Moreover, it appears the Passage is merely a copy of the same words from page 8 of the Book; however, the certificate of registration for the "Passage" excludes text material registered in connection with the Book. (Complaint, ECF No. 1 at Exhibit 3).

The final "fair use" factor—the extent of market harm—has been found to be the single most important element of fair use. See Harper & Row, Publishers v. Nation Enters., 471 U.S. 539, 560 (1985). Plaintiff asserts no facts involving these Defendants that plausibly establish any impact on the potential market value of the work. He alleges no facts that the challenged social media posts impacted or impaired his ability to market his Book or any related derivative works. No does he allege any facts plausibly establishing that the posts were broadly disseminated to raise any inference of a market impact.

As he is well aware, Courts across the country have found similar or identical claims asserted by Plaintiff against public schools, public school coaches, and non-profit student athletic programs failed under the fair use doctrine. Bell v. v. Eagle Mountain Saginaw Indep. School Dist.,

27 F.4th at 323 (affirming the district court decision found at 529 F. Supp. 3d 305); Bell v. Worthington City School Dist., Case No. 2:18-cv-961, 2020 WL 2905803, at 6-8 (S.D. Ohio, June 2, 2020); Bell v. Oakland Community Pools Project, Inc., Case No. 19-cv-01308-JST, 2020 WL 4458890 (N.D. Cal. May 4, 2020); Bell v Granite School Dist. Case No. 2:19-cv-00209-DBB (D. Utah 2019). See also Bell v. Magna Times, LLC, Case No. 2:18-cv-497-DKA, 2019 WL 1896570 (D. Utah April 29, 2019) (action against newspaper for article discussing public school team’s use of “Winning Isn’t Normal” theme for football season)

For all these reasons, Defendants respectfully request that the Court grant their Motion to Dismiss Counts I and II for failure to state a claim under the Copyright Act.

D. Count III Fails to State a Claim under the DMCA. In Count III, Plaintiff alleges U.S.D. 458⁶ violated the Digital Millennium Copyright Act, 17 U.S.C. §§ 1201 *et seq.* (“DMCA”). Specifically, Plaintiff alleges that the U.S.D. 458 allowed its employees to “publish infringing tweets” and displays of the text from the Book “stripped of any notice” of copyright or other information identifying the work or its author. (Complaint, ECF No. 1 ¶¶ 45). The DMCA prohibits the intentional falsification, removal, or alteration of “copyright management information” (“CMI”)—which includes the title and other information that identifies the work or its author—when a party knows or reasonably should know that it will facilitate infringement of that copyright. 17 U.S.C. § 1202(a), (b). The Act further prohibits the distribution of material when a party knows that its CMI has been altered or removed and knows or reasonably should know that the distribution will facilitate infringement of the copyright. 17 U.S.C. § 1202(c). Kuhmstedt v.

⁶ It is less than clear whether Count III attempts to assert a claim directly against Ms. Mayberry and Mr. Russell as the allegations only specifically refer to “BOE 458.” To the extent Count III may be read to assert a claim against them, Defendants Mayberry and Russell join in U.S.D. 458’s arguments that Plaintiff has failed to state a plausible claim against them for violation of the DMCA.

Enttech Media Grp., LLC, No. 2:21-cv-10032-SVW-JEM, 2022 WL 1769126, at *3 (C.D. Cal. Apr. 11, 2022).

The DMCA was enacted to adapt copyright laws to the digital age by protecting the integrity of copyright management information (“CMI”) such as the title, name of author and copyright owner connected with digital works. *See Comment, A Proposal in Hindsight: Restoring Copyright’s Delicate Balance By Reworking 17 U.S.C. § 1201*, 13 UCLA ENTERTAINMENT LAW REV. 263, 265-266 (2006). The DMCA prohibits the knowing *falsification* of CMI (17 U.S.C. § 1202(a)) as well of the intentional removal or alteration of CMI attached to copyrighted works. (17 U.S.C. § 1202(b)). Schiffer Publishing, Ltd. v. Chronicle Books, LLC, Civ. No. 03-4962, 2004 WL 2583817, at *13. (E.D. Pa. Nov. 12, 2004). *See also Faulkner Press, L.L.C. v. Class Notes, L.L.C.*, 756 F. Supp. 2d 1352, 1359 (N.D. Fla. 2010) (“[a]n action for removal of [CMI] requires the information to be removed from a plaintiff’s product or original work.”).

To state a claim under 17 U.S.C. § 1202(b)—the only section cited in Plaintiff’s Complaint—a plaintiff must allege “(1) the existence of CMI on the [work at issue]; (2) removal and/or alteration of that information; and (3) that the removal and/or alteration was done intentionally.” Fischer v. Forrest, 286 F. Supp. 3d 590, 608 (S.D.N.Y. 2018). In addition, the DMCA requires that CMI “be ‘conveyed’ with the copyrighted work.” 17 U.S.C. §1202(c)(2). Thus, to be actionable, a defendant “must remove the CMI from the ‘body’ or the ‘area around’ the copyrighted work” which has been claimed to be unlawfully published. GC2 Inc. v. Int’l Game Tech, PLC, 255 F. Supp. 3d 812, 821 (N.D. Ill. 2017). *See also* Murphy v. Millennium Radio Grp. LLC, 650 F.3d 295, 305 (3d Cir. 2011) (CMI for copyrighted image must be located near the image itself); Tomelleri v. Zazzle, Inc., No. 13-CV-02576-EFM-TJJ, 2015 WL 8375083, at *14 (D. Kan. Dec. 9, 2015) (to establish a DMCA claim in connection with illustrations, the Plaintiff must

establish that CMI was attached to or near uploaded images, and therefore, knowingly removed by Defendant). See also SellPoolSuppliesOnline.com LLC v. Ugly Pools Ariz., Inc., 344 F. Supp. 3d 1075 (D. Ariz. 2018) ("if a general copyright notice appears on an entirely different webpage than the work at issue, then that CMI is not 'conveyed' with the work and no claim will lie under the DMCA."); Fischer v. Forrest, 286 F. Supp. 3d 590 (S.D.N.Y. 2018) (to be actionable under DMCA, CMI must be removed from or near the image or phrases copied).

Here, Plaintiff does not allege any facts that support a claim that USD 458 uploaded images or other copyrighted materials which, in its original form, had CMI information closely located near the text on which he bases his copyright claim. In fact, Plaintiff does not allege facts plausibly stating that *any* Defendant knowingly *removed* CMI information clearly conveyed with any digital image to which he claims copyright ownership. Plaintiff also does not allege that the social media posts were uploaded from his website or other digital files where the CMI was conveyed with the word or otherwise located to infer that Defendants knowingly removed the CMI. Instead, Plaintiff simply attempts to shove his copyright claims regarding certain words and passages from his book into a DMCA mold; however, the mold does not fit the only facts alleged in the Complaint. At best, Plaintiff is attempting to base a DMCA claim on the sharing of text from a text document which did not contain CMI "conveyed with" the information. A copyright notice at the beginning of a book does not attach to the entire Book for purposes of the DMCA. *Cf. Tomelleri v. Zazzle, Inc.*, 2015 WL 8375083, at *14.

For all these reasons, Count III of Plaintiff's Complaint must also be dismissed for failure to state a claim under the DMCA.

E. Defendants' Request for Attorneys' Fees and Costs. Pursuant to 17 U.S.C. § 505, a district court may award attorneys' fees to a prevailing party in a copyright action. As noted

by several Courts, Plaintiff has attempted to repeatedly use the rights conveyed under the Copyright Act as a sledgehammer in attempt to claim damages to avoid the fair use of any materials to which he may hold a copyright. This case is yet another example of this. Plaintiff has been objectively unreasonable in using copyright statutes to demand exorbitant sums from non-profit public schools when someone on their staff reposts widespread social media posts that contain his words. See Bell v. Eagle Mountain Saginaw Indep. School District, 529 F. Supp. 3d at 616-17 (finding Plaintiff was in “the business of litigation, not protecting [his] copyrights or ‘stimulat[ing] artistic creativity for the general public good.’”); Bell v. The Oakland Community Pools Project, Inc., Case No. 19-cv-01308-JST, Order Granting Motion for Attorney’s Fees, at 6 (C.D. Cal. October 14, 2020) (noting Plaintiff’s various effort to demand disproportionate settlements for release of untimely copyright claims reflecting that he is “in the business of litigation, not protecting [his] copyrights”).⁷

For these reasons, Defendants request that the Court award them their reasonable attorneys’ fees and costs incurred in defending this objectively unreasonable claim.

V. Conclusion. Plaintiff’s claims should be dismissed. Plaintiff has failed to sufficiently serve Defendants and has failed to state any viable claims. Additionally, Defendants should be awarded their reasonable attorneys’ fees incurred in defending against Plaintiff’s claims.

⁷ Last viewed on June 21, 2022, at <https://images.law.com/contrib/content/uploads/documents/403/55651/Bell-v.-OCPP.Tigar-fee-order-1.pdf>.

Respectfully submitted,

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Attorneys for Defendants Board of Education of Basehor-Linwood Unified School District No, 458, Leavenworth County, Kansas, Susan Mayberry and Scott Russell

CERTIFICATE OF SERVICE

I hereby certify that on the 21th day of June, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to the following:

Keith F. Bell



Plaintiff, *pro se*

/s/ Gregory P. Goheen