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Respondent's Written Testimony in Defense of Fair Use

Case: Russell v. JessTalk Speaking Services, LLC | Case No. 24-CCB-0049
Respondent: JessTalk Speaking Services, LLC

Introduction:

I, Jesse Ferrell, Manager for JessTalk Speaking Services, LLC ("JessTalk"), submit this Written Testimony in response to Michael Russell's copyright infringement claim concerning my use of his photograph of downtown Vancouver in a personal, non-commercial video titled *Mastering the Art of Living* posted on my personal, private Vimeo account. I respectfully present my defense based on the legal principle of Fair Use as defined under U.S. Copyright Law.

Purpose and Character of the Use

The purpose of the one hour and two minute video was entirely personal and non-commercial. It was created as a reflective, motivational piece to inspire and enhance my personal growth as a speaker. The video was not used to promote JessTalk Speaking Services or any other commercial endeavor, nor was it shared on any commercial platforms or ever publicized or distributed with a commercial intent. The following link provides access to **this video** on my private Google Drive account so that the Board may view the video for itself (the photo at issue appears at the 3:01 mark through 3:09 mark).

Contrary to the Claimant's assertion, the video was never used for business promotion. The use of the photograph was not intended to serve as a marketing tool but rather as a momentary visual complement within a personal, non-commercial narrative. The video remained on my private Vimeo and was not readily accessible to the public or prospective clients. JessTalk's primary commercial platforms for attracting clients include the following:

1. **Business website**: www.jesstalk.com
2. **YouTube Channel**: https://www.youtube.com/user/jesslisten
3. **LinkedIn Profile**: https://www.linkedin.com/in/jesseferrellspeakerlifecoach
4. **Facebook Page**: https://www.facebook.com/jesstalkinspires

The platforms mentioned above, and not Vimeo, are the primary channels through which JessTalk promotes professional speaking services. The Vimeo account is for personal videos and universal video storage backup, particularly for content not intended for public or commercial distribution. This difference in purpose and platform underscores the personal, non-commercial nature of the video.

The personal, non-commercial nature of such video is underscored by a review of other short videos on YouTube that represent how JessTalk promotes its professional speaking services:

1. **INSPIRING GROWTH & DEVELOPMENT-** https://www.youtube.com/watch?v=honOWDUMqn4
2. **C.O.P.S. - G.R.A.S.P. The Connection -** https://www.youtube.com/watch?v=yGvPTV0NVC4
3. **US ECOLOGY TESTIMONIALS -** https://www.youtube.com/watch?v=WVvFARtDcWE
4. **Bill Wright Sr. VP Jesse Ferrell Testimonial -** https://www.youtube.com/watch?v=ob-7MxMD1G0

You will find countless other videos on our YouTube, LinkedIn, and Facebook pages, ranging from one to five minutes, none of which are an hour long like the self-inspiring, noncommercial *Mastering The Art of Living* video that was uploaded to my private Vimeo account.

Professional Inspirational Speakers & Personal & Professional Success Coaches do not attract business from strangers or prospects watching a one hour video like the *Mastering The Art of Living* video. The video reflects events that are personal to me, and thus have inspiration meaning to me, but from an outsider's perspective reflects nothing more than a series of random events.

The following is the typical process followed by professional speakers and success coaches within any marketing or promotional pieces in order to earn clients:

1. **Develop a Strong Personal Brand –** materials touting the topics, experiences, or perspectives set you apart from other speakers or coaches, citing taglines or mission statements that capture the essence of your message and speaks to the needs of your target audience, and including brand identifiers such as logos, websites, and social media.
2. **Promote Your Online Presence –** professional websites and social media accounts.
3. **High-Quality Marketing Materials –** professional videos showcasing snippets of past speaking engagements, including a variety of clips that highlight speaking style, audience engagement, and message. Such videos are generally 1-3 minutes long as anything longer loses the attention span of most viewers who are looking for quick insight into whether to hire such speaker. Also, professional photos, speaker kits, and newsletters.

In other words, the above reflect the marketing materials that professional speakers and life coaches actually use to successfully market and attract paying clients. The video at issue is clearly not anything like the above, which underscores that the video has not and is not used by JessTalk to promote its speaking services.

Transformative Use

The transformative nature of my use is fundamental to this Fair Use defense. The original purpose of Mr. Russell's photograph was to showcase Vancouver, Canada in a creative, standalone image. In contrast, my use of the image was a non-connected cover and brief background visual that appeared for only eight seconds within an hour-long private video focused on self-motivation and personal reflection.

The image's role was incidental and served to go along with the mood of the broader video theme rather than to function as a central, standalone work of art.

The nature of my use adds a new context and meaning to the image, aligning it with themes of self-reflection rather than its original purpose as a landscape photograph. This transformation distinguishes my use from its original intent and does not compete with or replace the original image.

Nature of the Copyrighted Work

While I acknowledge that the photograph is a creative work, my limited, *de minimus* use of it within a private, personal, reflective context does not detract from or exploit the artistic essence of the original work. The image's use was minimal, momentary (eight seconds amongst a one hour and two minute video), and used solely as a supplemental visual within a more extensive, non-commercial private video. The video was not designed to showcase or draw attention to the photograph but to illustrate a personal message. It was structured around my personal narrative, and the photograph's brief appearance was incidental.

Amount and Substantiality of the Portion Used

The amount and substantiality of the work used are also minimal and *de minimus*. The photograph appeared as a cover image and for a mere eight seconds in a one-hour and two-minute video, accounting for less than 0.2% of the total content and being insubstantial. The brief, incidental, and *de minimus* nature of its use shows that it was not central to the video. Additionally, the image was not modified or highlighted to emphasize it as a focal point; it served as a passive, non-essential element within the broader narrative. The fleeting use of the photograph as a background image within a lengthy, personal video does not meet the threshold for substantial use.

Effect of the Use on the Market for the Original Work

Moreover, the photo's brief use within a long-form, non-commercial video is unlikely to affect its value or intended impact as an artistic work. My use's impact on the original work's market value is nonexistent. The video was private and never intended for public or commercial consumption, and thus did not serve as a substitute or competition for the original work. This use did not impact Mr. Russell's ability to license or market the photograph, as the video was not monetized, advertised, or used in any way that could detract from the photograph's licensing potential.

Additionally, prospective clients in the market for inspirational speaking or coaching services are unlikely to purchase services based on a lengthy, unlisted video on Vimeo. Research shows that commercials intended to entice buyers are typically fifteen to sixty seconds long, strategically designed to engage viewers quickly and inspire them to request speaker sizzle reels. For instance:

1. 15-Second Ads: Quick, attention-grabbing visuals for digital platforms.
2. 30-Second Ads: Ideal for concise storytelling with emotional appeal.
3. 60-Second Ads: Longer for storytelling but still brief enough to hold attention.
4. 6-Second Bumper Ads: Used for rapid brand recognition.

These data points confirm that promotional materials targeting potential clients are brief and direct. In contrast, as stated earlier, this one-hour video on my private Vimeo account was not designed to serve as a commercial promotion, nor was it suited to attract or retain paying clients. JessTalk's primary commercial materials are hosted on popular platforms like YouTube, LinkedIn, and our business website, which are much more accessible for client engagement than an unlisted Vimeo video.

Damages

Alternatively, should the Board find that the above described use was not fair use, then any award of damages, even statutory, should account for the fact that the use at issue was solely in connection with a private, personal, non-public, non-commercial video when considering the appropriate award of damages to Mr. Russell, especially given the lack of evidence by Claimant regarding what the proper damages in such circumstances should be.

This is about a single private personal video that was used for personal, non-commercial purposes, and not in any way used to promote JessTalk's speaking services, and Claimant has provided no evidence to the contrary beyond his own personal belief and speculation that the video was for promotional purposes and that the extent of JessTalk's infringement is far greater than what Claimant discovered.

Contrary to Claimant's assertions, there is no "extra need" for deterrence in this case. There is not a case involving a person who was cavalier about copyright rights or who "has a history of prevarications." Indeed, JessTalk recognizes the importance of respecting copyright laws and has treated this matter seriously by being upfront and cooperative regarding the usage of the photo at issue and participating in this proceeding before the Copyright Claim Board

Regarding Claimant's assertions about "several other untruths" relating to JessTalk's knowledge of this dispute and proceeding, JessTalk provides the following details in response to such assertions.

First, with respect to the letter sent by Claimant's attorney in October 2023, it was sent to the address for JessTalk's registered business address (UPS Store at 11035 Lavender Hill Dr., Las Vegas Nevada). Even though we had cancelled the UPS Store as our business address for JessTalk, the manager contacted

JessTalk about the letter received, which based on the exorbitant monetary demand and aggressive threatening nature left us with the impression that it was a scam letter and illegitimate as it was demanding that we pay $22,500 for copyright abuse that we were not familiar with or aware of, thus not meriting a response. Claimant's attorney also claims to have sent emails and received no response, but no such emails were ever received, thus explaining why no response.

Second, on June 7, 2024, I noticed an email from the Copyright Claims Board dated May 29, 2024, that I initially believed to be spam because I had never heard of the Copyright Claims Board. It noted a copy of the Order was going to be mailed to our registered agent address.

However, we never received notice of proof of service from our registered agent for JessTalk, only to find out that they were actually served March 27, 2024. It took extensive investigation on our part (eight phone calls) to determine if my registered agent BizFilings (701 Carson St #200 in Carson City, Nevada) had received proof of service on March 27, 2024. Our registered agent failed to notify us that JessTalk was served. Upon this discovery I began to understand the reality and nature of the dispute and formal proceeding. I then began actively participating with the Copyright Control Board.

Without compelling evidence to the contrary to suggest otherwise, Claimant's unsupported, conclusory statements about JessTalk designed to be a basis for a higher amount of damages in this case should be disregarded by the Board.

Conclusion

In conclusion, my use of Michael Russell's photograph in this private, personal, non-public, non-commercial video meets the Fair Use criteria under U.S. copyright law. I assert that:

- The purpose was personal, non-commercial, and transformative. The video I created was only viewed by me to inspire me to continue growing my speaking skills. It was never used to market JessTalk's services to a single prospect or client.
- The image was used incidentally and minimally, which does not impact the photograph's market value or licensing potential.
- The photograph's presence had zero effect on its potential market, as the video was not marketed, pushed publicly, or intended to generate revenue.
- The video was never shared on noted commercial websites like YouTube, LinkedIn, or our business website (www.JessTalk.com) nor was any revenue earned from this video (much less Claimant's photo appearing therein for eight seconds) either directly or indirectly.

This incidental, *de minimus*, fleeting appearance is consistent with Fair Use, particularly given that the work was not exploited in a manner that would draw undue attention or emphasis. Given the video's transformative nature, limited use, and non-commercial context, I respectfully request that the Copyright Claims Board recognize this as a legitimate case of Fair Use and dismiss Claimant's claim of copyright infringement. Alternatively, should the Board find that Fair Use is not applicable, then a minimal award of damages is appropriate under the circumstances.

Jesse Ferrell



November 22, 2024

Signature **Date**

Proof of Delivery

I hereby certify that on Friday, November 22, 2024, I provided a true and correct copy of the Written Testimony In Defense of Fair Use to the following:

Michael Russell, represented by Leslie Burns, served via ESERVICE at leslie@burnstheattorney.com

Signed: /s/ Jesse Ferrell