COPYRIGHT CLAIMS BOARD

Docket number: 24-CCB-0031
July 21, 2025

Keith F. Bell	*v.*	Chris A Lewis
CLAIMANT		**RESPONDENT**

FINAL DETERMINATION

This matter has been fully submitted by the parties. For the reasons that follow, the Copyright Claims Board ("Board") finds in favor of Respondent Chris A. Lewis ("Lewis" or "Respondent") and dismisses the claim against Lewis with prejudice.

I. Procedural History

This claim was filed on February 5, 2024, by Keith F. Bell ("Bell" or "Claimant"). Claim (Dkt. 1). The Board found the Claim compliant and, on February 9, 2024, directed Bell to serve Lewis. (Dkt. 4). After service on Lewis, the Board did not receive an opt-out form from him.

On May 16, 2024, the Board notified the parties that the Claim had entered the "active phase" because Lewis did not opt out, ordered Bell to pay the second filing fee, and ordered Lewis to register for the Board's online docketing system (eCCB). (Dkt. 9). Lewis filed his Response on July 15, 2024. Lewis Response (Dkt. 14).

On November 20, 2024, the Board ordered the filing of written testimony. (Dkt. 19). For his written testimony, Bell filed evidence (Dkt. 20, Exhibits A-D) (Dkt. 24, Exhibits E-K) and an evidence list (Dkt. 23), as well as a Party Statement ("Bell Party Statement") (Dkt. 21), and his own witness statement ("Bell Decl.") (Dkt. 22). Lewis filed evidence (Dkt. 26-28, 31, 33) and an evidence list (Dkt. 32), as well as a Party Statement ("Lewis Party Statement") (Dkt. 29), and his own witness statement ("Lewis Decl.") (Dkt. 30). Bell filed a Reply Party Statement (Dkt. 37) on March 13, 2025. This case is now ready for final determination.

II. Factual History

a. Facts Related to This Particular Proceeding

The facts relevant to this Final Determination are largely uncontested.

Bell states, and Lewis does not dispute, that Bell, a resident of Texas, is the copyright owner of a 73-page book titled "Winning Isn't Normal" (the "Work"). Claimant Exhibit A; Bell Decl. ¶ 2. The Work was first published by Bell on February 3, 1982, and was registered by the U.S. Copyright Office with an effective date of registration of September 21, 1989 (Reg. No. TX002672644). Claimant Exhibit B. On its face, the Work is meant to be a self-help text on the sacrifices and mental state it takes to succeed in sports.

Bell does not attach Lewis's supposed infringement as part of his written testimony or describe it in his Declaration. He did, however, attach another person's repost of Lewis's LinkedIn post when Bell first filed his Claim. Claim at Exhibit 4. That exhibit shows that Lewis, also a resident of Texas, used seven short paragraphs (the "WIN Passage"), comprising about a page from the Work, as a post on his LinkedIn page. *Id.* It was Lewis's personal LinkedIn page and there is no indication that Lewis used the Work to sell anything, but rather as an inspirational post for the day. *Id.* Lewis, for his part, states that he did not know the passage, which had no attribution when he first saw it, was owned by anyone as opposed to being in the public domain. He posted it simply as an "old adage about plugging away, about not quitting, and about not being one of the crowd," and it seemed to him like the type of "antiquated" and "common" quote that people often post online. Lewis Decl. ¶ 9.

As Bell only attached someone else's repost to his claim, it is unclear how many comments or reactions Lewis received on his post. It appears from the exhibit that Lewis made his post in late 2021. Claimant Exhibit E; Bell Decl. ¶ 16. Bell discovered the alleged infringement on February 23, 2022, but waited until January 31, 2023 to send a cease-and-desist letter to Lewis with a demand for compensation in the amount of $150,000. Bell Decl. ¶ 16; Claimant Exhibit F. After receiving the cease-and-desist letter, Lewis immediately took down the post and also deactivated his LinkedIn account. Lewis Decl. ¶¶ 8, 18.

Bell gives no evidence as to any actual losses or effect on the market for the Work due to Lewis's use of the WIN Passage. Bell states, without any evidence, his belief that Lewis's post "produced a cascade of over 75,000

more posts of my work on the LinkedIn" and that, because Lewis's "profile was public," the Board should view Lewis as having displayed the WIN Passage to the "more than 5.3 billion people/entities that have access to the Internet." Bell Decl. ¶¶ 17-18.

In requesting damages, Bell states that he "firmly believes Lewis has engaged in acts that have damaged him in excess of the $30,000.00 Copyright Claims Board damages limit. However, because it is hard to quantify Lewis's commercial gains and Dr. Bell's commercial losses, he seeks the maximum in statutory damages available." Bell Party Statement at 5. The Board interprets that statement as a request for $15,000, the maximum statutory damages for the infringement of one Work in a proceeding before the Board.

Bell does not attempt to give specifics in his papers or declaration as to any calculation of losses, such as lost license fees. He does, however, present a) what appears to be a reciprocal license where a company paid him $50,000 and he paid the company $50,000 (so it appears no money changed hands) for various rights, including use of the Work, and b) what appears to be a few settlement agreements with school districts for use of the Work (and which allow future use of the Work). Exhibit H.

b. *Very* Brief Litigation History Concerning the Work at Issue

Bell has sued many people and entities in federal court regarding the Work under circumstances almost identical to those in this proceeding: that is, like here, the defendants in those cases posted the WIN Passage simply as an inspirational message, not related to the sale of any product or service, but in a personal post on social media, whether Facebook, Twitter/X, LinkedIn, or otherwise. To say that Bell has been scolded by courts for bringing such claims (as he has racked up losses) would be an understatement. Recently, a court (within the same circuit as the claimant and respondent in this proceeding) said that Bell seems to have such an outlandish view of the Work that it had to "wonder whether it is dealing with a litigant whose feet are firmly planted on the ground." *Bell v. Kiffin*, No. 3:24-CV-231-MPM-RP, 2024 WL 5125159, at *3 (N.D. Miss. Dec. 16, 2024). In dismissing that case, the court noted its job to "prevent[] the federal courts from being used as a forum for abusive shakedown lawsuits [as] essential for the integrity of the federal judiciary," and suggested it was close to barring Bell from filing future lawsuits without prior judicial approval. *Id.* at *7. Another court said that, rather than taking actions in furtherance

of the purposes of the Copyright Act, Bell acts "akin to that of a copyright 'troll'" with a "practice of trawling the Internet in search of *de minimus* and harmless references to the WIN Passage." *Bell v. Milwaukee Board of School Directors*, No. 22-C-0227, 2022 WL 18276966, at *10 (E.D. Wis. Dec. 21, 2022). These and other courts have found that, where there are facts basically identical to those in this proceeding (the same use of the WIN Passage), the alleged infringement easily falls under the fair use doctrine.

Moreover, in addition to the *Kiffin* court, other courts, including the Fifth Circuit Court of Appeals ("Fifth Circuit")—a circuit where Bell has brought many of his cases and, again, where Bell and Lewis reside—have essentially implored Bell to stop filing these cases, calling them frivolous. Due to Bell's continuous lawsuits against defendants who are engaging in what the courts view as clear fair use without any harm to Bell, some of these courts have awarded attorneys' fees to defendants. For example, in 2022, the Fifth Circuit upheld the granting of a motion to dismiss and an award of attorneys' fees against Bell under facts very similar to those in this proceeding and where Bell made arguments in line with the ones he makes here. *See Bell v. Eagle Mountain Saginaw Independent School District*, 27 F.4th 313 (5th Cir. 2022). The court noted Bell's "long history" of suing over the WIN Passage, making him a "a serial litigant, who makes exorbitant demands for damages in hopes of extracting disproportionate settlements." *Id.* at 326. In his suit against Eagle Mountain, he sued even though, as here, he "was unable to identify any actual financial injury associated with [the WIN Passage's] use." *Id.* As described in *Kiffin*, any similar cases brought, at least within the Fifth Circuit, are to be dismissed under that "binding precedent." *Kiffin*, 2024 WL 5125159, at *7.

III. Defenses

To succeed on a claim for copyright infringement, a claimant must establish: "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." *Feist Publications, Inc. v. Rural Telephone Serv. Co.,* Inc., 499 U.S. 340, 361 (1991). Lewis contests neither Bell's ownership of the Work, as documented in the certificate of registration, nor that he copied the WIN Passage from the Work. However, like various successful defendants in Bell's federal court cases regarding the WIN Passage, Lewis claims that his use of the Work qualifies for the fair use defense. Because this case presents no reason to deviate from the analysis already performed by these other courts

related to the use of the WIN Passage with the same fact pattern, including the Fifth Circuit's "binding precedent" in *Eagle Mountain*, the Board will be relatively brief because it is also bound by such precedent.

As the proponent of the affirmative defense of fair use, Lewis has the burden of proof on this issue. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994); *Dr. Seuss Enterprises, L.P. v. ComicMix LLC*, 983 F.3d 443, 459 (9th Cir. 2020), *cert. den.*, 141 S. Ct. 2803 (2021).

Four non-exclusive factors are considered when analyzing a fair use defense: (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; *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1171 (9th Cir. 2012). Even if a fair use finding was not mandated by the clear instruction of the Fifth Circuit as well as various district courts to have considered this very fact pattern, it is clear from the evidence in the record before the Board that the weight of the factors leads to a finding of fair use.

As to the first factor, there is no evidence that Lewis used the WIN Passage in a commercial manner, either to sell the WIN Passage or the Work or to help sell a product (or to avoid a customary payment for this type of use of the Work). Bell, who is represented by counsel, only argues that because LinkedIn can be considered a networking platform, Lewis was helping his "professional profile," Reply Party Statement at 2, and building his "personal brand." Bell Party Statement at 5 & 8. That seems to be a fancy way of claiming that even clearly noncommercial uses become commercial if the use puts the person using a work in a good light or bolsters his reputation. This argument, for which Bell offers no meaningful support, has no merit. In fact, Bell has made this very argument previously for the same use of this same Work and has been told this theory has no merit. *See, e.g.*, *Eagle Mountain*, 27 F.4th at 322-323 (an argument that the posting of the WIN Passage bolstered the "professional reputation" of the school's athletic programs had no merit, and factor one favored the school despite the lack of any transformative use). *See also Kiffin*, 2024 WL 5125159 at *6 (rejecting Bell's "expedient" way of alleging defendant's personal liability and stating that the argument would lead itself "to skepticism in any case, but [is] particularly

damaging in the context of a plaintiff whose good faith leading into this lawsuit was already in very serious doubt"). *Cf. Bell v. Worthington City Sch. Dist.*, No. 2:18-CV-961, 2020 WL 2905803, at *7 (S.D. Ohio June 2, 2020) (providing information on its website about fundraisers did not make the school a "commercial endeavor" or the use of the WIN Passage commercial).

While Bell's purpose in creating the Work was to sell it as a book, Lewis's purpose in using the short portion that makes up the WIN Passage was to put an inspirational statement that he believed to be a summary of old adages about not giving up on his personal LinkedIn page. Lewis Decl. ¶ 9. The use was therefore different even if not purely transformative. Moreover, as the Supreme Court has stated, and as various courts have reiterated, while a transformative use can make a commercial use fair, the inverse analysis is not needed as the noncommercial nature of a use will usually tip the first factor towards fair use. *See Google LLC v. Oracle America, Inc.*, 593 U.S. 1, 32 (2021) ("There is no doubt that a finding that copying was not commercial in nature tips the scales in favor of fair use."); *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 449-51 (1984) (finding a "presumption" of fairness for noncommercial activity as to factor one and, for factor four, that a likelihood of market harm may be presumed for commercial uses, but must be demonstrated for noncommercial uses). *See also Eagle Mountain*, 27 F.4th at 323 (citing *Campbell*, 510 U.S. at 579-80) (rejecting Bell's argument that transformative use was mandatory for factor one to tilt towards fair use, stating that, even though defendant's use was not transformative, transformative use "just strengthens the claim to fairness" and, in its absence, "other factors, like the extent of its commerciality, loom larger"); *Jackson v. Aswell*, 4:23-CV-02341, 2024 WL 5256504, at *3 (S.D. Tex. Nov. 14, 2024) (quoting *Google* and finding for defendant on factor one because even though it was "evident the reproductions were not transformative . . . given the noncommercial nature of Defendant's conduct, the Court concludes the first factor favors Defendant"); *Bell v. Milwaukee Bd.*, 2022 WL 18276966, at *4-*5 (finding that "defendants do not claim that [the] retweet added anything new to the work. Indeed, the retweet simply reproduced the WIN passage verbatim," but the fact that it was noncommercial "clearly favors defendants" and makes it so that factor one points to fair use); *Sedlik v. Von Drachenberg*, CV 21-1102 DSF, 2024 WL 4327404, at *4-5 (C.D. Cal. May 3, 2024) (upholding jury finding of fair use and stating, regarding factor one, that "even if the jury found that the social media posts were not

transformative, they still could have found that evidence of non-commerciality tipped the first factor (and perhaps all the factors) towards fair use"; also citing *Google* for the premise that "there is no doubt" that finding a use "was not commercial in nature tips the scales in favor of fair use"); *Divine Dharma Meditation Int'l Inc. v. Inst. of Latent Energy Studies*, SA CV 16-00226-DFM, 2019 WL 13036416, at *3, 5 (C.D. Cal. Mar. 1, 2019) (upholding jury finding of fair use and stating that "the jury could have reasonably found that while Defendant's use was not transformative," as it merely superseded the original image, "it was outweighed by its noncommercial use"). *Cf. Hannley v. Mann*, 2:21-cv-02043-JLS, 2023 WL 3407183, at *3 (C.D. Cal. Mar. 8, 2023) (citing *Sony* for the proposition that "[n]oncommercial or nonprofit use of a copyrighted work is presumptively fair"); *On Davis v. The Gap, Inc.*, 246 F.3d 152, 174-75 (2d Cir. 2001) (citing *Sony* to say that when a secondary use is not transformative, the important question, and the one which "saved" the use in *Sony,* is whether the new use is commercial or not); *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 532-33 (2023) (stating that the first factor will likely weigh against fair use where a secondary use is both not transformative "*and* the secondary use is of a commercial nature") (emphasis added); *Bouchat v. Baltimore Ravens Ltd. Partnership*, 737 F.3d 932, 941-42 (4th Cir. 2013) ("The commerciality inquiry is most significant when the allegedly infringing use acts as a direct substitute for the copyrighted work."); *Larson v. Dorland*, 693 F. Supp.3d 59, 80 (D. Mass. 2023) (quoting *Google* and *Warhol* for the proposition that "while a finding that copying was not commercial in nature tips the scales in favor of fair use, the inverse is not necessarily true" as making a commercial use "is not dispositive").[1]

The dissent attacks the majority opinion as not understanding the law. However, the dissent wrongly assumes that if one position is true, its inverse must also be true. As discussed above, in the vast majority of cases that focused on transformative use, the use *was commercial*, and the courts concluded that if a use *is transformative*, then the commercial nature of the use will not factor as heavily. That simply does not mean that if the use of work is *not commercial*, it still must be transformative to be a fair use (and that, as the dissent suggests, you can ignore the other factors). The case law is overwhelming on this point, including among the courts that have handled the same use of

[1] Cases are mixed as to whether the "good faith" of the alleged infringer can also tilt factor one. The Board declines to use good faith as an element here even though that would further help respondent who, in addition to there not being evidence of bad faith, took the WIN Passage down as soon as he was alerted to Bell's allegation of infringement.

the work at issue. The CCB's role is to apply the law and not use its determinations as an avenue to tell the courts that they are wrong.

As to the second factor, the Work is somewhat creative in nature. It is true that the Work is one of non-fiction and is filled with inspirational statements. However, even if much of the Work merely comprises restatements of well-worn platitudes about hard work, sacrifice, and commitment, that does not mean that, overall, the Work is not creative.

It is true that courts have found that when the original work is somewhat informational in nature, more leeway is given towards a finding of fair use. *See, e.g.*, *In re DMCA Section 512(h) Subpoena to YouTube,* 581 F. Supp.3d 509, 521-22 (S.D.N.Y. 2022); *Thiccc Boy Prods. Inc. v. Swindelles*, 22-cv-00090-MSM, 2024 WL 733425, at *3 (D.R.I. Feb. 22, 2024) (podcast discussing current events, popular culture and podcasters lives found to "fall closer to the factual end of the copyright spectrum than the creative end"). However, taking the Work (the full book registered and subject of this proceeding) as a whole, the Board finds that this factor slightly weighs against fair use. The Board notes that, even as the Fifth Circuit found fair use and upheld the award of attorneys' fees against Bell in *Eagle Mountain*, it also found that this factor weighed slightly against fair use and in favor of Bell (calling it a "meager victory"). *Eagle Mountain*, 27 F.4th at 323.

The third factor, which is the "amount and substantiality" factor is either neutral or weighs somewhat in favor of fair use.

Bell argues that what was taken was the "heart" of the work. Bell Party Statement at 8. This argument has the potential to ring somewhat true even though Bell offers no evidence to support it, other than saying that the WIN Passage encapsulates the Work's contents in a "brief mantra." *Id.* While the Board has little doubt that if other aspects of the Work were copied, Bell would sue on them as well, it is clear from so many prior cases brought by Bell that the WIN Passage is what has gained popularity and has seen widespread use around the Internet.

That being said, as has been stated by various courts, the WIN Passage is a very small part of the Work at issue—a single page in the Work, comprising only approximately 1.5% of it. Without anything more to support Bell's argument about the WIN Passage being the heart of the work, a single page in a book is hardly a substantial

amount.

Moreover, the WIN Passage has been found to have been widely disseminated by Bell freely for many years. *See, e.g.*, *Bell v. Magna Times, LLC*, No. 2:18CV497DAK, 2019 WL 1896579, at *5 (D. Utah Apr. 29, 2019). The Board notes, without giving much weight to it, the Fifth Circuit's holding within its analysis of factor three, that Bell himself makes the WIN Passage available on his own website free of charge, and if a use "enables a viewer to see such a work which he had been invited to witness in its entirety free of charge, the fact that [even if] the entire work is reproduced . . . does not have its ordinary effect of militating against a finding of fair use." *Eagle Mountain,* 27 F.4th at 324 (quoting *Sony Corp.*, 464 U.S. at 449-50). *See also Kiffin*, 2024 WL 5125159, at *11. Given these facts put together (and even if the Board does not weigh the free availability of the WIN Passage in factor three), the Board, like the court in *Eagle Mountain*, finds that this factor is neutral, and, if anything, slightly favors a finding of fair use. *See also Worthington City*, 2020 WL 2905803, at *8 (finding this factor neutral for the same reasons).

Concerning the market for the work, "[t]his last factor is undoubtedly the single most important element of fair use." *Eagle Mountain*, 27 F.4th at 324 (quoting *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 566 (1985)). Here, this factor is not a close call.

As was the case in *Eagle Mountain*, there is no evidence that the use of the Work affected the market, potential market, or value of the Work, that is sales or licenses of the book "Winning Isn't Normal." There is also no evidence that the use of the WIN Passage affected the market or value of the WIN Passage itself, but the entire book is what is at issue here. Despite the widespread use of the WIN Passage on the Internet, Bell offers no licenses for use of the WIN Passage (or the Work) that were not tied to a settlement (other than one license where he and the other party agreed to pay each other the same amount), and he offers no testimony regarding licenses for the WIN Passage or the Work. He argues that he "does not need to show a diminished market," because that is not required for "statutory damages." Reply Party Statement at 5. But Bell's confusion between the standard regarding the amount of statutory damages and the standard for determining fair use puts the cart before the horse. *Cf. Sony Corp.*, 464 U.S. at 451 (with regards to factor four, where the use is noncommercial, the burden is on the plaintiff to demonstrate market harm).

There is no evidence of market harm and Bell gives no credible argument about how he might have been harmed. Furthermore, Bell has produced his Interrogatory Responses as evidence, and when describing his supposed harm, Bell gave a vague answer with no references to specifics or calculations. Interrogatory # 13, Exhibit K. Bell also admits in his papers that he "does not keep records of sales" of the Work, so he cannot determine if he lost any sales due to Lewis's use. Bell Party Statement at 3. When arguing damages in his papers, Bell makes the ludicrous argument that he should get the maximum in statutory damages in part because, by posting the WIN Passage on the Internet, Lewis made the WIN Passage available to "more than 5.3 billion persons." *Id.* at 4. There is absolutely no evidence that anywhere near 5.3 billion people saw the posting at issue here.

Bell's broad theories, which are not supported by any evidence, do nothing to suggest that Lewis's posting of the WIN Passage replaced Bell's market for his book, and thus acted "as a substitute for the original." *See SOFA Ent., Inc. v. Dodger Prods., Inc.*, 709 F.3d 1273, 1280 (9th Cir. 2013) ("Where the secondary use is not a substitute for the original and does not deprive the copyright holder of a derivative use, the fourth factor weighs in favor of fair use."); *Brown v. Netflix*, 855 Fed. App'x. 61, 64 (2d Cir. 2021) ("[T]he intended audience for the Song would be unlikely to purchase the Film in preference to the original.") (citations omitted). Quite to the contrary, the use of a captivating blurb to market a longer work is commonplace, and Bell appears to disseminate this very WIN Passage freely for that purpose. *See Eagle Mountain*, 27 F.4th at 325. In sum, again as stated in *Eagle Mountain* under similar circumstances, there is no "plausible" situation where an individual would pay Bell to post the WIN Passage on his personal LinkedIn page, making any lost market or potential market "purely speculative." *Id. See also Kiffin*, 2024 WL 5125159, at *8 ("It is simply not plausible to this court that because of that tweet, even a single individual who might have otherwise purchased plaintiff's book decided not to do so."). There is also no evidence that any consumer would have foregone buying the entire Work just because they could read a tiny portion of it—the WIN passage, which Bell already distributes freely—on Respondent's LinkedIn page

Furthermore, as it has consistently done in other cases in the past,[2] the Board declines to use settlement

[2] While Board decisions are not precedential, 17 U.S.C. § 1507(a)(3), the Board typically attempts to be consistent in the manner in which it deals with evidence.

agreements as evidence of a willing buyer-willing seller license. *See, e.g.*, *Yue v. Chordiant Software, Inc.*, C08-00019 JW, 2010 WL 11575579, at *3-4 (N.D. Cal. Apr. 22, 2010) (finding evidence of "settlements and licenses negotiated after the commencement of litigation are not relevant to what a willing buyer would have been reasonably required to pay a willing seller of plaintiff's work"); *Attachmate Corp. v. Sentry Insurance*, C08-1035RAJ, 2009 WL 10676462, at *3 (W.D. Wash. Jan. 15, 2009) (denying discovery motion given "no authority for the proposition that the price paid in a settlement of an infringement action or breach of license action is relevant to determining copyright infringement damages"); *Attachmate Corp. v. Health Net, Inc.*, C09-1161 MJP, 2010 WL 11561518, at *1 (W.D. Wash. June 18, 2010) (rejecting the assertion that third-party settlements "are relevant to determining the fair market value of licenses"). *See also Eagle Mountain*, 27 F.4th, at 325 ("Despite being embroiled in litigation for years, Bell is unable to allege that anyone has ever purchased a license before posting the WIN Passage on social media.").

In sum, the weight of the fair use factors clearly favors a finding fair use in this case. Accordingly, the Board dismisses the claim against Lewis with prejudice.

IV. Attorneys' Fees

Lewis asks the Board to sanction Bell, including an award of attorneys' fees, presumably due to a finding of bad faith under the Board's regulations. Lewis Party Statement at 11. One could argue that Bell, having hit a wall in the federal courts and facing awards of fees against him there, simply moved his filings to the Board, hoping that it would not treat his cases as harshly. *See Kiffin*, 2024 WL 5125159, at *3 ("Following the Fifth Circuit's decision in *Eagle Mountain*, plaintiff appears to have simply shrugged his shoulders, loaded his covered wagon and taken his traveling litigation show to the next courthouse."). That would support a finding of bad faith. However, given that this is the Board's first final determination in one of Bell's cases—and, in fact, as there is a dissent to the majority opinion—the Board declines to make a bad faith finding and award fees here.

However, while it is not necessarily the case that every one of the proceedings that Bell has filed before the Board has the same fact pattern, Bell should consider himself on notice based on this opinion that moving forward with claims regarding the same WIN Passage and the same or very similar fact patterns could amount to pursuing a claim for a "harassing or other improper purpose, or without a reasonable basis in law or fact" under 37 U.S.C. §

220.1(c), resulting in a finding of bad faith and a potential award of costs and fees.

V. Conclusion

The Board dismisses the claim against Chris A Lewis with prejudice.

Copyright Claims Board

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Dissent by Copyright Claims Officer David Carson

This is the first time in the history of the Copyright Claims Board that a member of the Board has filed a separate statement dissenting from the Board's determination, and I do not do so lightly. However, while I acknowledge that the question is a close one, I conclude that Lewis has not met his burden of proof on the affirmative defense of fair use and that there is insufficient evidence in the record to carry the day on that issue. Because I cannot join my colleagues in concluding that Lewis's use was fair, I must respectfully dissent.

My disagreement focuses on the first fair use factor – "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes." 17 U.S.C. § 107(1). I agree that Lewis's use was not commercial. On the other hand, it was not for a nonprofit educational purpose. In any event, the first fair use factor is not principally about commerciality or teaching, although they certainly can play a role in the analysis.

Let's start with the language of the first sentence of the Copyright Act's fair use provision: "Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright." 17 U.S.C. § 107. While a use may be fair even if it is not for one of the purposes referred to in that sentence, the Supreme Court has taught us that the enquiry "may be guided by the examples

given in the preamble to § 107, looking to whether the use is for criticism, or comment, or news reporting, and the like." *Campbell v. Acuff-Rose Music, Inc.,* 510 U.S. 569, 578–79 (1994). Whatever Lewis's purpose in posting the WIN Passage may have been, it clearly was not among or similar to those enumerated in section 107.

The problem in analyzing the first fair use factor in this case is that the Lewis tells us nothing about what his purpose was when he decided to post the WIN Passage verbatim. When we cannot even determine what the alleged infringer's purpose was, how can we conclude that a factor that focuses on the purpose of the use favors a finding of fair use?

Instead, my colleagues focus on whether Lewis's use was commercial or noncommercial. Concluding that "there is no evidence that Lewis used the Clip in a commercial manner," they leapfrog over the obstacle that Lewis has failed to convey what his purpose was, letting the noncommercial tail wag the purposeless dog.

Assuming that Lewis's use was noncommercial – and the record tells us nothing about whether it was although his party statement asserts that it was – that is not a sufficient basis to conclude that the first fair use factor favors a finding of fair use. As the Supreme Court recently observed,

> The commercial nature of a use is relevant, but not dispositive. It is to be weighed against the degree to which the use has a further purpose or different character. Second, the first factor relates to the justification for the use. In a broad sense, a use that has a distinct purpose is justified because it furthers the goal of copyright, namely, to promote the progress of science and the arts, without diminishing the incentive to create. In a narrower sense, a use may be justified because copying is reasonably necessary to achieve the user's new purpose.

Andy Warhol Foundation for Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 510-511 (2023) (*"Warhol"*) (Emphasis added.). As the Supreme Court recognized, the fact that a use is noncommercial is not a justification for the use (although it carries some weight in the first factor analysis).[3] Rather, it is another aspect of the defendant's use that is to be considered when analyzing the first factor. However, the more important consideration under the first factor is whether the use was justified – *i.e.,* whether it had a distinct purpose, different in character from the

[3] My colleagues' attempt to enlist *Warhol* in support of a finding of fair use is unpersuasive. The fact that the Court recognized that if "an original work and a secondary use share the same or highly similar purposes, and the secondary use is of a commercial nature, the first factor is likely to weigh against fair use," 598 U.S. 508, 532-33, does not begin to suggest that fair use is favored when the secondary use is *not* commercial.

plaintiff's purpose, that furthers the goal of copyright. "[T]he first factor asks "whether *and to what extent*" the use at issue has a purpose or character different from the original." *Id.* at 510 (emphasis in original). No such purpose has been offered by Lewis.

While the concept of justification as a key to fair use analysis is not a new one, *see Campbell v. Acuff-Rose Music, Inc.,* 510 U.S. 569, 581, 586 (1994), *Warhol* gave it greater emphasis, which has continued in cases and commentary following *Warhol.* Drawing from Warhol, the Second Circuit recently elaborated that the Supreme Court has insisted "that there must be *justification* for copying, which, but for the finding of fair use, would likely infringe the exclusive rights of the rights holder." *Romanova v. Amilus Inc.,* 138 F.4th 104, 119 (2d Cir. 2025) (emphasis in original). *See also Markos v. BBG, Inc.,* No. 3:23-CV-02125-X, 2024 WL 3504546, at *2 (N.D. Tex. July 22, 2024) (citing *Warhol*). *Romanova* discussed "the need for justification," citing to Shyamkrishna Balganesh & Peter S. Menell, *Going "Beyond" Mere Transformation: Warhol and Reconciliation of the Derivative Work Right and Fair Use,* 47 Colum. J. L. & Arts 413, 436 (2024) for the proposition that "The key to operationalizing the first fair use factor ... lies in examining the justification offered by the copier for the use." Romanova, 138 F.4th at 112 (emphasis in original). Balganesh & Menell elaborate that "justification means the reason offered by the copier for its use that "targets" the protected work. It asks, in other words: What was the reason for the copying of the protected work? This search for an independent justification embodies three interrelated aspects: (1) whether there is an independent rationale beyond convenience or free riding; (2) consideration of the necessity of targeting the work; and (3) assessment of whether the use was compelling." 47 Colum. J. L. & Arts at 436. Lewis has not offered a justification that answers any of those questions.

But in the view of my colleagues, the conclusion that Lewis's use was noncommercial is dispositive on the first factor, without giving any consideration to whether Lewis's use had any further purpose or different character beyond Bell's and notwithstanding *Warhol*'s warning that the "commercial nature of a use is … not dispositive." Such flawed reasoning was rejected in *Hachette Book Group v. Internet Archive,* 115 F.4th 163 (2d Cir. 2024), where the court of appeals concluded "that IA's use of the Works is not commercial in nature" but noted that "the nonprofit character of IA's use is not conclusive, *Sony,* 464 U.S. at 448, and transformativeness remains the 'central' focus of

the first factor, *Warhol II,* 598 U.S. at 542. Thus, because IA's use of the Works is not transformative, the first fair use factor favors Publishers." *Id.* at 185, 186. In *Hachette,* the court found that the Internet Archive's noncommercial use was not fair.

Indeed, it makes no sense to put much weight on the noncommercial nature of an alleged infringer's activity when evaluating whether that activity falls within the scope of fair use. If Lewis operated a noncommercial website similar to the Pirate Bay, offering a panoply of first run motion pictures and popular sound recordings without authorization, the fact that the operation was noncommercial would carry little weight in a fair use analysis (even if Lewis offered only motion pictures and sound recordings that he wished to share because they were "inspirational").

The Fifth Circuit itself has recently noted, in a post-*Warhol* (and post-*Eagle Mountain*) opinion, that "the *central question* of the first factor, the purpose and character of the use, is whether the new work merely supersede[s] the objects of the original creation … (supplanting the original), or instead adds something new, with a further purpose or different character. … A use that has a further purpose or different character is said to be transformative." *Keck v. Mix Creative Learning Ctr., L.L.C.,* 116 F.4th 448, 453 (5th Cir. 2024) (quoting *Warhol,* 598 U.S. at 527-528, 529)(emphasis added; internal quotation marks deleted).

The final determination does not suggest that Lewis's use was transformative. And clearly it was not. My colleagues suggest that Lewis's purpose was to convey an inspirational message – something that they infer from his statement that he occasionally "re-posted quotes that I believed were in the public domain, which were generally inspirational or aspirational quotes," Lewis Declaration ¶ 3, and his subsequent statement that he assumed the WIN Passage was a "public domain quote," an "old adage about plugging away, about not quitting, and about not being one of the crowd.." *Id.* ¶ 9. In other words, in conveying the same message conveyed by Bell in the WIN Passage by using the identical words used in the Passage, Lewis's purpose was somehow transformative. But transformative

use requires more than a mistaken belief that the expression one is copying is in the public domain, or a belief that the expression is inspirational.[4]

Presumably to make the case that Lewis's purpose differed from Bell's, my colleagues suggest that Bell's purpose was "to sell it as a book." If that is the case, then Gerald Ford's purpose in writing his memoirs was not to tell the story of the Watergate crisis and his presidency, *see Harper & Row v Nation Enterprises,* 471 U.S. 539 (1985), but simply to sell a book, and Roy Orbison's purpose in writing "Oh Pretty Woman" was not to write a song about "the romantic musings of a man whose fantasy comes true," *see Campbell v. Acuff-Rose Music, Inc.,* 510 U.S. 569, 583 (1994), but to "sell it as a song." Anybody who reads the WIN Passage cannot help but understand its purpose as being to convey an inspirational message to aspiring athletes and, by extension, to others, the same purpose that is served by Lewis's posting of the passage's exact words – and nothing more – on his LinkedIn page. The purpose of Lewis's use was identical to the purpose of Bell's use.

Bell v. Eagle Mountain Saginaw Independent School District, 27 F.4th 313 (5th Cir. 2022), does not require a different result. The Fifth Circuit's analysis of the first fair use factor did not rely solely on the noncommercial use of the defendant school district. The court concluded that "the tweets' only conceivable motivation was to inspire students to strive for success." 27 F.4th at 322. The court could have added that in that case (unlike this one), the school district's use was "for nonprofit educational purposes," which are expressly identified in section 107 as favored purposes. *See* 17 U.S.C. § 107(1). But Lewis is not an educator and he does not (and cannot) invoke that part of section 107.[5] The court in *Eagle Mountain* also relied heavily on the fact that the defendant's use was in good faith, a notion the relevance of which has twice been viewed skeptically by the Supreme Court. S*ee Google LLC v. Oracle Am., Inc.,* 593 U.S. 1, 32 (2021) (citing *Campbell,* 210 US at 585 n. 18).

Moreover, to the extent that *Eagle Mountain* might be read as suggesting that the first factor must favor a finding of fair use even when the use is not transformative so long as the use is also noncommercial, the Supreme Court

[4] *See* Pierre N. Leval, *Toward a Fair Use Standard,* 103 Harv. L. Rev. 1105, 1112 (1990) ("The biographers took dazzling passages of the original writing because they made good reading, not because such quotation was vital to demonstrate an objective of the biographers. These were takings of protected expression without sufficient transformative justification.").
[5] In other cases pending before the Board, the respondents may well be able to prevail on the ground that *their* allegedly infringing activity was for nonprofit educational purposes.

and the Fifth Circuit have, as discussed above, subsequently clarified that the principal issue in resolving the first factor is not whether or not the nature of the respondent's use is commercial, but whether that use is justified, for example because it had a transformative purpose. *See Warhol*, 598 U.S. at 510-511; *Keck,* 116 F.4th at 453-54.

Because, in my view, the first factor does not favor a finding of fair use, I find it difficult to conclude that Lewis's use was fair. I recognize that the first factor is only one of four factors, but it is also one of the two most important factors. *See* Barton Beebe, *An Empirical Study Of U.S. Copyright Fair Use Opinions Updated, 1978-2019,* 10 N.Y.U. J. of Intell. Prop. & Ent. Law 1, 25, 35 (2020); Neil Netanel, *Making Sense Of Fair Use,* 15 Lewis & Clark L. Rev. 715, 766 (2011).[6] Moreover, "[t]he four statutory factors 'do not represent a score card that promises victory to the winner of the majority.' Leval, 103 Harv. L. Rev. at 1110. Rather, each factor is 'to be explored, and the results weighed together, in light of the purposes of copyright.'" *Campbell,* 510 U.S. at 578, 114 S.Ct. 1164.

As Judge Leval has noted, "Factor One is the soul of fair use. A finding of justification under this factor seems indispensable to a fair use defense." Leval, 103 Harv.L.Rev. at 1116. *See also Id.* at 1111 ("Factor One's direction that we 'consider[] . . . the purpose and character of the use' raises the question of justification. Does the use fulfill the objective of copyright law to stimulate creativity for public illumination? This question is vitally important to the fair use inquiry, and lies at the heart of the fair user's case.").

Because the record provides no basis to conclude that the purpose of Lewis's use favors a finding of fair use, I would conclude that the use was not fair. While I would take no pleasure in ruling in favor of a claimant with such a chequered litigation history and a distorted view of the value of his work, our duty is to rule on the merits of the case regardless of who the claimant is.[7]

[6] I recognize that the Supreme Court has said that the fourth factor is "undoubtedly the single most important element of fair use." *Harper & Row Publishers, Inc. v. Nation Enterprises,* 471 U.S. 539, 566 (1985). And in most cases, the first and fourth factors end up on the same side of the fair use ledger. *See* Beebe, at 18. But as a matter of logic, a use of a work without any justification whatsoever cannot qualify as a fair use.

[7] I would also reluctantly award claimant the minimum allowable statutory damages award of $750, recognizing that claimant's proven actual damages are at best a tiny fraction of that amount.