

Winning Isn't Normal author is a loser in court



Strictly Legal

Jack Greiner
Guest columnist

Dan Bell, the author of the book "Winning Isn't Normal" recently lost a copyright battle with the Eagle Mountain Saginaw Independent School District.

Bell argued that the district infringed his copyright by tweeting a passage from his book on its social media sites.

Bell refers to the passage used as the "WIN Passage" and he has copyrighted the passage separately from the book.

In 2017, a high school softball and color guard team in the district posted the WIN passage to their Twitter accounts without Bell's permission. Bell, who apparently aggressively litigates the use of his works, waited nearly a year, but eventually sued for copyright infringement.

The district argued that their use of the passage qualified as a fair use. The trial court agreed, and dismissed Bell's case. Bell appealed to the United States Court of Appeal for the Fifth Circuit. That court affirmed the trial court's decision.

The district successfully defended its use of the passage as a fair use. When a defendant asserts a fair use defense, the court applies a four-factor test to determine the validity of the defense. The four factors are:

1. The purpose and character of the allegedly infringing use.
2. The nature of the copyrighted work.
3. The amount used in relation to the copyrighted work as a whole.
4. The effect of the use on the potential market for the copyrighted work.

On factor one, the court found it significant that the district did not use the WIN passage for any commercial purpose. It was strictly used to motivate the teams. And the district acted in

good faith. It took the posts down as soon as Bell complained. For these reasons, the court found that factor one favored the District.

Factor two looks at the amount of creativity that goes into a work. A work of fiction, for example, is more likely to receive protection than a compilation of facts. Here, the court determined that "Winning Isn't Normal" had just enough creative elements such that factor two favored Bell. But just barely.

Dan Bell, who has previously filed 26 infringement suits and settled with at least 90 infringers, will have to move on to the next fight.

The court concluded that factor 3 was neutral. On the one hand, the WIN passage was just one page from a 72-page book. In that respect, the use was minimal. But Bell argued that the WIN passage was the essence of the book. The court found this element significant, but ultimately concluded that because Bell made the WIN passage freely available on his own website, his interest was diminished.

The court was not neutral on item four. It found that the tweets did not diminish the potential market for Bell's work and if anything, likely enhanced interest in the book and the merchandise that Bell offered in connection with the book.

All in all, the fair use scorecard came out 2-1-1 in favor of the district. Bell, who has previously filed 26 infringement suits and settled with at least 90 infringers, will have to move on to the next fight. But this decision may make that next one a little tougher.

Jack Greiner is a partner at the Graydon law firm in Cincinnati. He represents Enquirer Media in First Amendment and media issues.