IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KEITH F. BELL, Ph.D.,	)	
	)	
Plaintiff,	)	
	)	Case No. 19-cv-2386
v.	)	
	)	Judge Robert M. Dow, Jr.
CHICAGO CUBS BASEBALL CLUB, LLC and JOSHUA LIFRAK,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Plaintiff Keith F. Bell, Ph.D. ("Plaintiff") brings suit against Defendants the Chicago Cubs Baseball Club (the "Cubs") and Joshua Lifrak ("Lifrak") (collectively, "Defendants") for copyright infringement. Currently before the Court is Defendants' motion to dismiss the governing amended complaint. See [21]. For the following reasons, Defendants' motion to dismiss [21] is granted in part and denied in part. The claim for contributory copyright infringement and the claim for direct copyright infringement as to the Cubs only are dismissed. The claim for vicarious copyright infringement and the claim for direct copyright infringement against Lifrak will be allowed to proceed. This case is set for status hearing on February 20, 2020 at 9:00 a.m.

I. Background[1]

According to the amended complaint, Plaintiff is an accomplished athlete and coach and "an internationally-recognized sports psychology and performance consultant" who has worked with hundreds of sports teams and spoken at "national and international coaching symposia." [18]

[1] For purposes of Defendants' motion to dismiss, the Court assumes as true all well-pled allegations set forth in Plaintiff's amended complaint. See [18]; *Calderon-Ramirez v. McCament*, 877 F.3d 272, 275 (7th Cir. 2017).

at 2-3. Plaintiff has also "authored and had published 10 books and over 80 articles relating to sports psychology and sports performance" and written columns for various sports periodicals. *Id*. at 3. At issue in this case is Plaintiff's book entitled "Winning Isn't Normal." *Id*. Plaintiff wrote the book in 1981 and it was first published in 1982. According to Plaintiff, "[t]he book has enjoyed substantial acclaim, distribution, and publicity." *Id*. Plaintiff is the sole author of the book and continues to own all rights in the work.

Plaintiff holds a copyright registration for "Winning Isn't Normal," which was issued by the U.S. Copyright Office on September 21, 1989 (registration number TX-0002-6726-44). Since Plaintiff published the book, "he has and continues to promote, distribute, offer for sale, and sell numerous copies of the work." [18] at 3. As part of these efforts, Plaintiff creates, markets, and sells works derivative of "Winning Isn't Normal," such as posters and t-shirts that display the following passage from the book, which Plaintiff labels the "WIN Passage":

> Winning isn't normal. That doesn't mean there's anything wrong with winning. It just isn't the norm. It's highly unusual.
>
> Every race only has one winner. No matter how many people are entered (not to mention all those w o [sic] tried and failed to make cuts), only one person (or one relay) wins each event.
>
> Winning is unusual. As such, it requires unusual action.
>
> In order to win, you must do extraordinary things. You can't just be one of the crowd. The crowd doesn't win. You have to be willing to stand out and act differently.
>
> Your actions need to reflect unusual values and priorities. You have to value success more than others do. You have to want it more. (Now, take note! Wanting it more is a decision you make and act upon - not some inherent quality or burning inner drive or inspiration!) And you have to make that value a priority.
>
> You can't train like everyone else. You have to train more and train better.
>
> You can't talk like everyone else. You can't think like everyone else. You can't be too willing to join the crowd, to do what is expected, to act in a socially accepted

> manner, to do what's "in." You need to be willing to stand out in the crowd and consistently take exceptional action. If you want to win, you need to accept the risks and perhaps the loneliness ... because winning isn't normal!!

[18-2] at 2. According to Plaintiff, the WIN Passage is viewed by him "and others as the heart of [his] literary work" "Winning Isn't Normal." *Id*. at 4. Plaintiff obtained a separate copyright registration for the WIN Passage (registration no. TX 8-503-571).

Plaintiff also owns the domain winningisntnormal.com, which points to a website where Plaintiff offers the book and derivative works for sale. Further, Plaintiff obtained a trademark registration for "Winning Isn't Normal" for "[p]rinted matter, namely, non-fiction publications, *** books, booklets, pamphlets, articles, manuals and posters in the field of sports, fitness, and competitive performance and psychology" (registration no. 4,630,749). [18] at 5. Plaintiff alleges that the mark "Winning Isn't Normal" "has become widely associated" with him and his printed materials and related goods and that the mark "is indicative to consumers that printed material and related items bearing" the mark "originate from or are affiliated with, sponsored, or approved" by Plaintiff. *Id*.

This case involves Defendant Lifrak's "retweet" of the WIN passage on Twitter. Lifrak is employed by the Cubs as the director of its Mental Skills Program. Lifrak's job responsibilities "include issues that generally fall within sports psychology." [18] at 5. At the time relevant to this action, Lifrak maintained an active Twitter account and had more than 1,000 "followers." Around May 2016, Lifrak allegedly posted an exact copy of the WIN passage on his Twitter account. The print-out from Lifrak's Twitter account, which Plaintiff attached as Exhibit C to the amended complaint, shows that Lifrak's tweet was a "retweet" of a tweet from Moawad

Consulting. [18-3].[2] The printout shows that the tweet did not attribute the WIN passage to Plaintiff. See *id*. Lifrak's retweet was "liked" at least 14 times and "retweeted" at least 9 times. [18] at 7. According to Plaintiff, Lifrak's retweet "was an act of copying by Defendants under applicable law *** because actual copies of 'Winning Isn't Normal' were made, which existed on servers, devices, and computer systems owned or controlled by Defendants." *Id*. at 6-7.

According to Plaintiff, the Cubs are responsible for Lifrak's Twitter activity. Plaintiff alleges that Lifrak maintains the Twitter account "in the course and scope of his employment with [the] Cubs and his followers include many players and coaches" within the Cubs organization. [18] at 6. Plaintiff further alleges that at all relevant times, the Cubs "possessed the right and ability to supervise [Lifrak's] infringing activity," had "a direct financial interest in [Lifrak's] infringing activities," and can and should have "exercised its right and ability to supervise the activities" of Lifrak on Twitter. *Id*. Plaintiff elaborates that the Cubs "knew that individuals associated with its organization" follow Lifrak on Twitter and that Lifrak's infringing behavior "concerned the same subject matter that *** Lifrak is paid to work on as part of his employment" with the Cubs. *Id*. Plaintiff alleges on information and belief that the Cubs knowingly "induced, caused, and materially contributed to" Lifrak's allegedly infringing activity, because the Cubs "know[] about, encourage[], and contribute[] to the exact activity *** that is at issue in this case." *Id*. In addition, Plaintiff alleges, "Defendants' infringements of [his] copyrighted works were commercial in nature as they were meant to publicize and promote Defendants, and to carry out the purposes of Defendant Lifrak's job with Defendant Cubs for which he is compensated because he brings economic benefit to Defendant Cubs and himself." *Id*. at 7. Plaintiff further alleges that

[2] According to Defendant, Plaintiff also sued Moawad for copyright infringement for the original tweet; that case was eventually settled. See [22] at 7 (citing *Bell v. Moawad Group LLC, et al.*, No. 17-cv-02109 (D. Ariz. 2018)).

"Defendants' infringement profoundly effects the market for [his] work because people will not have to purchase his book and his other materials that incorporate the WIN passage on his web site." *Id.*

Based on these allegations, Plaintiff asserts three claims: (1) a claim for direct copyright infringement against both Defendants; (2) a claim for vicarious copyright infringement against the Cubs; and (3) a claim for contributory copyright infringement against the Cubs. Currently before the Court is Defendants' motion to dismiss the amended complaint for failure to state a claim.

II. Legal Standard

A Rule 12(b)(6) motion challenges the legal sufficiency of the complaint. For purposes of a motion to dismiss under Rule 12(b)(6), the Court "'accept[s] as true all of the well-pleaded facts in the complaint and draw all reasonable inferences in favor of the plaintiff.'" *Calderon-Ramirez*, 877 F.3d at 275 (quoting *Kubiak v. City of Chicago*, 810 F.3d 476, 480-81 (7th Cir. 2016)). To survive a motion to dismiss under Rule 12(b)(6), a plaintiff's complaint must allege facts which, when taken as true, "'plausibly suggest that the plaintiff has a right to relief, raising that possibility above a speculative level.'" *Cochran v. Illinois State Toll Highway Auth.*, 828 F.3d 597, 599 (7th Cir. 2016) (quoting *EEOC v. Concentra Health Servs.*, 496 F.3d 773, 776 (7th Cir. 2007)). The Court reads the amended complaint and assesses its plausibility as a whole. See *Atkins v. City of Chicago*, 631 F.3d 823, 832 (7th Cir. 2011). In addition, it is proper for the Court to "consider, in addition to the allegations set forth in the complaint itself, documents that are attached to the complaint, documents that are central to the complaint and are referred to in it, and information that is properly subject to judicial notice." *Williamson v. Curran*, 714 F.3d 432, 436 (7th Cir. 2013) (citing *Geinosky v. City of Chicago*, 675 F.3d 743, 745 n.1 (7th Cir.2012)); see also Fed. R. Civ. P. 10(c).

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