The Honorable Ronald B. Leighton

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

NATIONAL FOOTBALL SCOUTING, INC., Plaintiff, vs. ROB RANG, an individual; and THE SPORTS XCHANGE, INC., a California corporation, Defendants.	No. 3:11-CV-05762-RBL **DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** ORAL ARGUMENT REQUESTED Noted: October 5, 2012.

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I. INTRODUCTION

Defendant Rob Rang ("Rang"), a full-time high school teacher who moonlights as a sportswriter, published eight articles on defendant The Sports Exchange Inc.'s ("TSX") website about players eligible for the upcoming NFL Draft. Among these several paragraphs and hundreds of words of original text, Rang made passing references to some of the two-digit numerical grades that plaintiff National Football Scouting, Inc. ("National") uses to rank prospective draftees. Rang's disclosure of these grades was minimal and newsworthy, revealing over two years the grades of only a handful of players in a sport that is the subject of widespread fascination, and Rang obtained the grades from confidential sources with access to them, all without any misconduct on his own. National has lost not a single customer, nor can it point to any damage from these articles. Nevertheless, it brings this action against Rang and TSX (collectively "Rang") for copyright infringement and misappropriation of trade secrets. These claims fail when applied to the undisputed facts here. Rang therefore respectfully moves for summary judgment and asks the Court to dismiss National's lawsuit against both defendants.

II. UNDISPUTED FACTS

A. THE NFL AND ITS ANNUAL DRAFT CAPTIVATE THE NATION.

Baseball may be America's pastime, but football is its modern obsession. The National Football League ("NFL"), comprised of thirty-two franchise teams, is the most popular professional sports league in the country. (Declaration of Frank Cooney, "Cooney Decl.", ¶7). It is also the most profitable. The 2011 season saw the NFL's revenue topping $9.5 billion, exclusive of the many ancillary industries the league supports like cable channels, radio shows, sports magazines, and Internet blogs. (*Id.* ¶8). All told, over 200 million people watched an NFL game in 2011, and the league's games accounted for twenty-three of that year's top twenty-five most watched television programs. (*Id.*, Exh. A).

To satisfy the public's insatiable appetite for fresh talent on the field, the NFL holds an event each April where its teams fill their rosters with that year's top college players—the "NFL

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Draft." Spanning three days and composed of seven rounds wherein each team holds one selection, the Draft has over time morphed from a backroom meeting into a standalone public spectacle. Two different national cable networks broadcasted the 2012 NFL Draft live, drawing over 25 million viewers its first night, and fans unable to watch live could stay up-to-date through news outlets and other programming, like ESPN's SportsCenter. (*Id*. ¶9, Exh. B). In addition to regional media coverage of local teams, national newspapers like USA Today run entire sections devoted to pre- and post-Draft coverage, and the event adorns the covers of popular sports magazines. (*Id*. ¶10). Tech-savvy fans can follow the Draft-day destinies of their favorite college players and NFL teams through Internet websites, discussion boards, social media and podcasts. (*Id*.). In short, the NFL and the Draft are more popular and widely-followed than ever before.

B. ROB RANG AND THE SPORTS XCHANGE.

Although he never professionally trained as a journalist, Rob Rang ("Rang") always harbored an interest in the sporting world. The full-time high school teacher began his hobby as a sportswriter in 1999, initially self-publishing a small website and then writing for SportsTalk.com and WestCoastDraft.com. (Declaration of Rob Rang, "Rang Decl.", ¶¶3-4). Rang refined his craft over the next decade, and now his scouting expertise is acknowledged by many—he is regularly interviewed by newspaper reporters, television sportscasters, and radio hosts. He contributes to the *Tacoma News Tribune*'s NFL coverage and has hosted a weekly sports radio show. (*Id*. ¶¶17-18). But despite all his success, Rang continues to teach English full-time at Mount Tahoma High School in Tacoma, Washington. (*Id*. ¶2).

Rang began writing for The Sports Xchange ("TSX," both defendants collectively "Rang") in 2005. (*Id*. ¶5). TSX, a media company, compiles the talents of nearly 400 independent writers to cover all four major U.S. professional sports leagues (including the NFL), college sports, and NASCAR. (Cooney Decl. ¶2). Its writers follow daily beats, analyze players and games, and produce color commentary, content much of which is syndicated in national

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media and publications, but TSX also hosts its own Internet websites. One such property is NFLDraftScout.com, which capitalizes on the intense public interest in the NFL Draft and carries year-round coverage of the event. (*Id*. ¶3). The website boasts such a large audience that it is now published under the CBS Sports brand. (*Id*. ¶4). Rang is currently a senior analyst for NFLDraftScout.com, where he writes blogs, columns, and articles about the NFL Draft and college players who are potential draftees. (*Id*. ¶5; Rang Decl. ¶5).

C. NATIONAL FOOTBALL SCOUTING, INC., THE SCOUTING REPORTS, AND THE PLAYER GRADES.

Plaintiff National Football Scouting ("National") is an independent, for-profit corporation whose only shareholders are nineteen NFL franchise teams. National employs talent scouts who attend college games during the season and evaluate the players who might enter the NFL Draft the following year. National also coordinates "combines"—private work-outs after the college football season, but before the Draft—at which prospective draftees participate in a series of skill and other physical tests. Like the Draft itself, these combines attract significant public fanfare, and Jeff Foster, National's president, has commented that National strives to make the combines "media friendly." (Declaration of Kellen A. Hade, "Hade Decl.", Exh. B, at 2). Ultimately National uses the information its scouts gather during the year and at the combines to create a database containing statistics for hundreds of protective draftees (the "Scouting Reports"). (Complaint ¶15). National then analyzes this data to rate and grade prospective draftees, assigning each player a two-digit numerical grade (the "Player Grade") that purports to represent a player's likelihood of success in the NFL. (*Id*.). For example, a grade of "6.7" suggests a player should be taken in the first round; a "5.0" represents a fourth- to seventh-round selection.

Consisting of sixteen columns, the Scouting Reports actually contain very little content original to National. They display the player's name; his school and position; his physical characteristics like height, weight, and speed; and the National scout assigned to him. The Player Grade is listed in the Scouting Reports' final column. The following is the complete, heavily-

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redacted entry in the Scouting Reports for Prince Amukamara, a player drafted in the 2011 NFL Draft.

(Hade Decl., Exh. A, at 1).[1] The categories of information in Amukamara's entry are representative of the Scouting Report entry for every other player National scouts during the collegiate football season. National purportedly registered the Scouting Reports with the Copyright Office as unpublished works in July 2010 and 2011. (Complaint ¶17).

D. RANG PUBLISHES PLAYER GRADES IN THE TEXT OF EIGHT ORIGINAL ARTICLES.

Over the years of covering the NFL Draft, Rang developed relationships with individuals within the football industry. These contacts include players themselves and their families; college coaches; agents; NFL scouts; and team officials—some of whom have access to National's Scouting Reports and Player Grades. (Rang Decl. ¶7). Rang has never facilitated, encouraged, or assisted anyone obtain the Scouting Reports or the information contained therein. (*Id*.). But occasionally these sources provide Rang with information in the Scouting Reports, including Player Grades, for a few specific players. Because of the intense public interest in and demand for articles about the NFL Draft and prospective draftees, Rang has used the Player Grades as a platform for news reporting and sports commentary. (*Id.* ¶8).

Between 2010 and 2011, Rang published a series of articles on NFLDraftScout.com discussing collegiate players eligible for the upcoming NFL Draft. (*Id*. ¶¶9-16). The articles, which are each several paragraphs long and include both commentary original to Rang and also information within the public domain, also make passing references to the Player Grades of a handful of prospective draftees. (*Id.*, Exhs. A-H). A few of the articles explicitly disclose the

[1] The extensive redactions in the Scouting Reports that National disclosed are the subject of Rang's Motion to Compel (ECF No. 26). Rang will supplement this argument with unredacted copies if the Court compels their production.

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two-digit grade within Rang's original analysis; for example, a portion of Rang's June 9, 2011, article reads:

> The most interesting news is that Arizona quarterback Nick Foles received a 5.0. A 5.0 is quite low considering that Foles has widely been speculated by the media as a potential first-round prospect in 2012. . . A low National grade in the preseason does not necessarily mean a player won't spring up draft boards with a big senior season.

(*Id*., Exh. E). Other articles merely allude to a player's relative ranking among his peers:

> In earning the top grade from National scouts, Nebraska cornerback Prince Amukamara certainly has created a name for himself. Iowa defensive end Adrian Clayborn, Boston College outside linebacker Mark Herzlich and Washington quarterback Jake Locker—all graded as potential first round picks—have as well.

(*Id*., Exh. B).

No matter what the format, Rang's discussion of the Player Grades served only as a springboard for his deeper, original NFL Draft commentary. But despite the newsworthiness of Rang's *de minimis* disclosure of National's Player Grades, National brings this lawsuit based on these eight articles. (Complaint ¶23). They are each before the Court, giving it a complete and undisputed record on which to adjudge this motion.

III. ARGUMENT

National asserts two causes of action here: First, that Rang infringed National's copyright of the Scouting Reports by publishing the Player Grades of a dozen players over two years, and second, that Rang's disclosure of those Player Grades is a misappropriation of trade secrets. This case is ideally suited for summary judgment. The allegedly offending articles and Scouting Reports are memorialized in print and accessible to the Court; their authorship is undisputed. A trial would not elicit contradictory oral testimony or inconsistent documentary evidence to which a jury must assign credibility. There are simply no material factual disputes here, and for the reasons below, both of National's claims fail as a matter of law. The Court should grant Rang summary judgment and dismiss this lawsuit.

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A. NATIONAL'S COPYRIGHT CLAIM FAILS BECAUSE RANG'S LIMITED PUBLICATION OF THE PLAYER GRADES IS A FAIR USE.

To prevail on its claim of copyright infringement, National carries the burden of showing (1) that it owns valid copyrights; (2) that Rang copied original elements of the work; and (3) that no affirmative defenses, like fair use, preclude liability for infringement. *Feist Pub., Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361 (1991). Even assuming National could make out a prima facie case on the first two elements,[2] Rang's publication of the Player Grades is a fair use. The law has long recognized that a copyright does not grant its holder absolute control over the use of his work. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 432 (1984). Congress codified the common law doctrine into Section 107 of the Copyright Act, which explains that "the fair use of a copyrighted work . . . for purposes such as criticism, comment, [or] news reporting . . . is not an infringement of copyright." 17 U.S.C. § 107 (emphasis added). Thus, the fair use doctrine equates to "a limited privilege . . . to use the copyrighted material in a reasonable manner without the owner's consent." *Fisher v. Dees*, 794 F.2d 432, 435 (9th Cir. 1986) (affirming trial court's grant of summary judgment on the basis of fair use). This is particularly important in cases involving journalists, like Rang, since "First Amendment concerns in copyright are allayed by the presence of the fair use doctrine." *A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1028 (9th Cir. 2001).

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[2] Rang assumes that National could establish a prima facie case of infringement only for the purposes of this motion. But the Player Grades, which consist solely of two digits, are not likely copyrightable at all. A copyrightable expression must possess a modicum of "originality." *Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 345 (1991) ("The *sine qua non* of copyright is originality."). *Feist* held that ten-digit telephone numbers lacked the originality needed for copyright protection even though, as National argues it did to create the Player Grades, the author of the telephone directory spent much effort compiling the data. (Complaint ¶15). In so doing, the Court expressly rejected the "sweat of the brow" theory of original expression. *Id.* at 352.

And in a similar case, the Third Circuit held that nine-digit product numbers lacked the originality requisite for copyright protection. *Southco, Inc. v. Kanebridge Corp.*, 390 F.3d 276, 279 (3d. Cir. 2004) (Alito, J.) (holding that reproduction of individual numbers derived from a copyrighted system was not infringement, noting that "[f]or purposes of copyright law, . . . [the] numbering system and the actual numbers produced by the system are two very different works and that [the infringement] claim was based exclusively on the actual numbers and not on the system."). As in *Southco* and *Feist*, the two-digit Player Grades in isolation lack the creativity required to render them protectable under the Copyright Act.

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Section 107 provides the Court with four non-exhaustive favors to consider when applying the fair use doctrine: (1) the purpose and character of the allegedly infringing use; (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(1)-(4). But these factors merely guide the Court's analysis. The doctrine is not malleable into a set of bright line rules, and each fair use claim is to be analyzed on a "case-by-case" basis. *Id.*; *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).

Dismissing a copyright claim via the fair use doctrine is entirely appropriate on a motion for summary judgment, *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 800 (9th Cir. 2003), and the Court should do so here. Though he is not required to do so to take advantage of the defense, Rang meets each of Section 107's four factors, compelling the application of the fair use doctrine's "limited privilege" as protection against National's copyright infringement claim.

a) Purpose and Character of Rang's Use of the Scouting Reports.

The first element of the fair use analysis requires the Court to consider "the purpose and character" of Rang's use of the Scouting Reports. 17 U.S.C. § 107(1). The inquiry is guided by the examples in the statute itself—*i.e.*, whether the use is for criticism, comment, or news reporting. *Id*. Although the commercial nature of a work is one consideration, that is not dispositive, since nearly all the activities that Congress identifies by the Act as types of fair uses "are generally conducted for profit in this country." *Harper & Row Publish. Inc. v. Nations Enterprises*, 471 U.S. 569, 592 (1994); *see also Campbell*, 510 U.S. at 585 (rejecting an interpretation that *Sony* creates a *per se* rule against commercial works as fair uses). Instead, the touchstone of this initial inquiry is whether, regardless of its commercial nature, the allegedly infringing use is "transformative." *Campbell*, 510 U.S. at 584 (emphasis added). Works that "ad[d] something new, with a further purpose or different character" exemplify fair uses. *Id*; *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007).

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Far from regurgitating the Player Grades wholesale, Rang selected a few to use as small components in his larger articles about the NFL Draft. The Player Grades actually comprise a minority of the content in each of the eight articles, and the grades are heavily supplemented by non-copyrightable facts, items within the public domain, and Rang's own original commentary. The minimal influence the Player Grades have in Rang's articles is best illustrated by example. In the June 11, 2010 article, "Huskers' Amukamara Faces Challenge Living Up to Draft Grade," for instance, National complains that Rang revealed that it gave its highest grade in the 2011 Draft to Prince Amukamara, a defensive cornerback. Nowhere does Rang reveal the actual grade National gave to Amukamara, only his relative position amongst other draftees. Instead, Rang's article is something entirely new. After liberally citing Amukamara's height, weight, and college statistics (information within the public domain), Rang opines that:

> Amukamara possesses rare size for the position and scouts love his athleticism. The former proper running back has good straight-line speed, fluid hips for coverage and showed uncommon physicality and ball skills for a player with his limited experience at the position.

He concludes that National's grade "is not a surprise considering [Amukamara's] rapid ascension as one of the country's best pass defenders." (Rang Decl., Exh. A).

Likewise, Rang adds insightful analysis in an article about Arizona quarterback Nick Foles' 5.0 grade:

> The primary concern scouts (and I) have about Foles is questionable accuracy and arm strength for a more traditional pro-style offense. Considering he is 6-feet-5, 245 pounds, Foles would appear to have the physical characteristics teams are looking for at the position, but he obviously has some work to do if he is to improve his standing with scouts.

(*Id*., Exh. E). The following table reveals that Rang similarly transformed the Player Grades in each of the his articles into new, original works.

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Article Complained Of	National's Material	Rang's Contributions
"Huskers' Amukamara Faces Challenge Living Up to Draft Grade," June 11, 2010 (Rang Decl., Exh. A)	• Player earned National's top grade	• Original commentary • Player's college statistics • Players' physical characteristics
"DE Moch Steals Amukama's Buzz in 4.25 Seconds," June 12, 2010 (Rang Decl., Exh. B)	• Player earned National's top grade • Three players graded as first round picks	• Results of a player's 40-yard dash time • Speculation that player will move positions in the NFL • Player's college statistics and honors • Information about player's injury • Original commentary
"Locker, Ponder Tie Atop National's QB Grades," June 22, 2010 (Rang Decl., Exh. C)	• Two players received a 6.7 grade	• Analysis about why player did not leave college the year before • Results from Rang's own mock draft • Player's college statistics • Information about a player's injury • Original commentary
"Locker, Ponder Bring Plenty to the Table for NFL Scouts," June 28, 2010 (Rang Decl., Exh. D)	• Two players received a 6.7 grade	• Speculation about player's draft status • Quotations directly from scouts, not National • Summary of player's senior year at college • Information about player's health • Player's college statistics • Information about coach's prior drafted players • Coach's quotations
"Arizona QB Foles Gets 7th RD-UFA Preseason Grade," June 9, 2011 (Rang Decl., Exh. E)	• Player received 5.0 • Two players received 6.7 grades prior year	• Historical draft information • Original analysis of player's strengths and weaknesses • Player's physical characteristics • Results from Rang's own mock draft

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"Scouts Grade WR Criner a Bit Higher than Foles," June 21, 2011 (Rang Decl., Exh. F)	• Players received 5.0 and 5.3 grades, respectively.	• Historical draft information • Players' physical characteristics • Player's college statistics • Results from Rang's mock draft • Original commentary
"Luck's Top WR Owusu Highly Rated by Scouts," June 20, 2011 (Rang Decl., Exh. G)	• Player received 5.9 grade • Grades given to past players in same position	• Players' physical characteristics • Original analysis of players' strengths and weaknesses • Player's college statistics
"Pryor Gets Late Round Grades from BLESTO, National," June 21, 2011 (Rang Decl., Exh. H)	• Player received 5.1 grade	• Information about player's draft eligibility • Quotations from NFL scouts and agent • Original commentary

The transformative nature of Rang's articles is striking. By supplementing the Player Grades with original contributions and information in the public domain, Rang transformed the cold, numerical rankings that National designed for NFL executives into vivid narratives that the average sports fan can understand. This epitomizes a fair use. *See, e.g., Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 819 (9th Cir. 2003) (holding a use of copyrighted information to be transformative, and thus fair, where the new use "serves a different function" than the original work); *L.A. News Service v. CBS Broadcasting, Inc.*, 305 F.3d 924, 938 (9th Cir. 2002) (holding the incorporation of copyrighted material into part of a broader work is a fair use).

b) Nature of the Scouting Reports.

The second fair use factor, to the extent it is relevant at all,[3] asks the Court to consider the nature of the copyrighted work. 17 U.S.C. § 107(2). Though a bit nebulous, this factor recognizes that some works inherently deserve more copyright protection than others. A work that is primarily fact-based, as opposed to creative efforts, deserves less copyright protection than its more imaginative counterparts. *Campbell*, 510 U.S. at 586; *Hustler*, 796 F.2d at 1153-54. Here, National's Scouting Reports, consisting primarily of numerical data, are properly

[3] The Ninth Circuit suggests that this second inquiry is largely superfluous when the Court finds a work to be transformative under the first. *Mattel*, 353 F.3d at 803 (holding pictures of copyrighted doll in parody work were transformative and constituted a fair use).

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categorized as informative works. *Cf. Kelly*, 336 F.3d at 820 (finding photographs a creative work); *Dr. Seuss Enter., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1402 (9th Cir. 1997) (finding *The Cat in the Hat* a creative work). Comprised entirely by two digits, the grades lack anything more than a smidgen of creativity and equate to a simple rating on a modified one-to-eight scale. The grades serve only to express National's opinion about a player's talent and are fatally susceptible to the fair use defense.

Importantly, the unpublished nature of the Scouting Reports is not a categorical bar to a fair use. Courts have no trouble finding the use of an unpublished work is fair where it takes only a few "portions [that] are short and insignificant, . . . *de minimis* and beyond the protection of the Copyright Act." *Wright v. Warner Books, Inc.*, 953 F.3d 731, 740 (2d. Cir. 1991) (affirming district court's finding that a biographic review of author's unpublished journal entries was a fair use). Here, Rang disclosed an insignificant portion of National's unpublished work: the Player Grades constitute only seven percent of the information in the Scouting Reports, and of those, Rang published only a handful. This minimal use, even of an unpublished work, is fair.

c) Amount and substantiality of Rang's use of the Player Grades in relation to the Scouting Reports as a whole.

The third fair use factor tasks the Court with analyzing the amount and substantiality of the portion used in relation to the copyrighted work as a whole—in other words, how much of the Scouting Reports did Rang copy. 17 U.S.C. § 107(3). As above, this factor clearly favors Rang. Far from "wholesale copying" of the Scouting Reports, which even then would not preclude a fair use defense, *Hustler*, 796 F.2d at 1155, Rang merely selected a few Player Grades to include in his broader news stories about the NFL Draft landscape. The Player Grades are only one of the fourteen columns of data the Scouting Reports display about each player, and Rang mentioned less than a dozen of the many hundreds of grades National issued for the 2011 and 2012 draft years. The fraction of copyrighted material that Rang reproduced—as little as

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0.08 percent[4]—is far under that which typically precludes fair use. *See Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 611 (2d. Cir. 2006) (affirming district court's finding that reproduction of less than one percent of copyrighted work was fair); *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1263 (2d. Cir. 1986) (holding 4.3 percent a fair use); *compare with Princeton University Press v. Michigan Document Services, Inc.*, 99 F.3d 1381, 1389 (6th Cir. 1996) (holding use of thirty percent of copyrighted material not fair). The third factor scores in favor of Rang.

d) The effect on the market for National's Scouting Reports.

Finally, the fourth fair use factor requires the Court to analyze the effect Rang's articles have on the market for National's Scouting Reports. 17 U.S.C. § 107(4). The Supreme Court characterizes this factor as "the single most important element of fair use," since the doctrine itself contemplates that the copying will not materially impair the marketability of the original work. *Harper & Row*, 471 U.S. at 566-67. Importantly, the commercial nature of Rang's articles does not result in a presumption that they adversely impact the market for the National's material. *Campbell*, 510 U.S. at 591. Rather, to determine the market effects, the Court must first identify the relevant market and then decide whether Rang's articles act to supersede demand for the Scouting Reports. *Id*. at 590-91.

Here, the single most important element of fair use is also the single element weighing most heavily in Rang's favor, since the audiences for Rang's and National's works occupy separate markets. Distinct from how antitrust law defines a relevant market, which is linked to broader economic effects, the relevant market in the fair use analysis is the market for the holder's specific expression. *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195,

[4] This is another area where National's refusal to produce the Scouting Reports hinders Rang's defense, since he does not know how many players the reports include and cannot quantify the percentage of the copyrighted work that he published. But assuming that National scouts 500 players a year, then during 2010 and 2011, Rang published only 0.08 percent of the Scouting Reports (12 grades disclosed / 1000 total grades x 7 percent [ratio of grades to Scouting Reports as a whole]).

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1216-17 (9th Cir. 1997); *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 482 (2d Cir. 2004). In this case, the relevant market for National's Scouting Reports is exclusively NFL team executives. National does not publish the reports to the public, instead disclosing them only to nineteen teams for their internal use. (Complaint ¶6). In fact, National copyrighted the Scouting Reports as "unpublished works," which harshly contrasts from Rang, an author, who publishes sports information for public consumption. (Complaint ¶17; Cooney Dec. ¶¶2-4). Because Rang and National fail to occupy the same relevant market, there is no "harm of market substitution."[5] *Campbell*, 510 U.S. at 593.

Moreover, Rang's articles do not benefit NFL teams during the drafting process such that they supplant demand for the Scouting Reports even in their target market. The NFL Draft—for which every college senior, junior, and some sophomores are eligible—consists of seven rounds, each with thirty-two selections. So around 224 players will be drafted in any given year,[6] and many more are scouted but ultimately go undrafted. Yet Rang disclosed Player Grades for only twelve players in two years. Thus a team that elected to stop subscribing to National's reports and instead relied solely on Rang's articles would have data about only two percent of the players drafted in 2011, and just over one percent of those drafted in 2012.[7] No viable NFL franchise would enter the draft so unprepared.[8] Even National's expert concedes that the Scouting Reports offer teams information that "cannot be found in or derived from . . . Internet

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[5] The Supreme Court suggests that this analysis includes an inquiry into the effect on the market for derivatives of the copyrighted work. *Campbell*, 510 U.S. at 590. But such a foray is superfluous here. National has not indicated any desire to enter into the public sports commentary business, (Complaint ¶¶6-8; 10-14), and it cannot seriously do so while still maintaining its trade secret claim, which necessarily depends on the alleged non-disclosure of information. RCW 19.108.010(4)(b).

[6] The exact number varies by year, as teams can trade away picks to participate in the NFL's supplemental draft, or they can receive additional picks as compensation for prior trades.

[7] Teams drafted 254 and 253 players in the years 2011 and 2012, respectively. But NFL scouts analyze thousands of college players throughout the year. (Cooney Decl. ¶11).

[8] This basic proposition is not unique to the NFL. Imagine a law firm that hired nine of its ten associates a year without reviewing their resumes. Though law students today might welcome such a crapshoot, the practice is not commercially feasible.

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journalists" like Rang. So his articles do not even affect demand for the Scouting Reports in National's intended market, much less any other. This final fair use factor weighs in Rang's favor.

In sum, Rang meets each of the four statutory factors in the fair use analysis, entitling him to invoke the defense and eradicating National's claim for infringement. *See Arica Inst., Inc. v. Palmer*, 970 F.2d 1067, 1079 (2d Cir. 1992) (affirming summary judgment of fair use and holding the "defendant need not shut out her opponent on the four factor tally to prevail, [but] if she does so, victory on the fair use playing field is assured.") (quotations and citations omitted). The Court should grant summary judgment for Rang on National's copyright claim.

C. NATIONAL'S TRADE SECRET CLAIM IS NOT COGNIZABLE.

National brings its second and final cause of action under Washington's Uniform Trade Secrets Act ("UTSA"). RCW 19.108.010, *et seq*. Summary judgment is appropriate in trade secret claims "where a party has failed to meet its burden of proof . . . by generating through evidentiary submissions a genuine issue of material fact." *MP Med. Inc. v. Wegman*, 151 Wn. App. 409, 420 (2009) (affirming trial court's finding of non-misappropriation on summary judgment). National cannot overcome its inevitable failure to do so here, rendering this entire lawsuit dismissible.

1. National's Two-Digit Player Grades—Which Amount to Expressions of a Subjective Opinion—Are Not Trade Secrets Under Washington Law.

To invoke the UTSA, National must show that the Player Grades are actually trade secrets. *Ed Nowogroski Ins., Inc. v. Rucker*, 137 Wn. 2d 427, 439 (1999). The company cursorily assumes that the Player Grades are protectable by boasting about the alleged expense and hassle necessary to create these grades. But this puffery clouds what National actually seeks to protect. It does not, and indeed cannot, claim that the inputs upon which it bases its grades—a player's height, weight, speed, etc.—are trade secrets that it owns. Nor does National allege that Rang disclosed the methodologies it uses to weigh differently those inputs to arrive at its grade—for

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example, favoring certain positions or valuing speed over size—, which it presumably fine-tuned over years of ranking players. Instead, National invokes the UTSA to protect what merely amounts to its opinion—or the abstract idea—that one player is more talented than another. Not only does such a broad reading of the UTSA have First Amendment implications, it also substantially expands Washington law.

The analysis begins with the statute. A protectable trade secret is any "information, including a formula, pattern, compilation, program, device, method, technique, or process" that is secret and has independent economic value as a result. RCW 19.108.010(4) (emphasis added). Defining "information" thus is key to determining whether something is protectable as a trade secret. A careful synthesis of the statute's examples of the term reveals that "information" is limited to factual information: knowledge that is, or things that facilitate the discovery of knowledge that is, demonstrably true or false. *City of Seattle v. Dept. of Labor & Indus.*, 136 Wn. 2d 693, 699 (1998) (defining *ejusdem generis* rule of statutory interpretation wherein specific terms in an illustrative list modify or restrict the application of general terms where both are used in sequence). Not only does this accord with common understanding of the word,[9] California, another UTSA jurisdiction, explicitly recognizes this interpretation:

> Trade secret law does not protect ideas[. A] trade secret may consist of something we would not ordinarily consider an idea (a conceptual datum) at all, but more a fact (an empirical datum), such as a customer's preferences, or the location of a mineral deposit.

Silvaco Data Sys. v. Intel Corp., 184 Cal. App. 4th 210, 220-21 (2010), *disapproved on other grounds by Kwikset Corp. v. Superior Court*, 246 P.3d 877 (Cal. 2011) (emphasis added). The *Silvaco* court took great pains to differentiate patent law, which provides limited protection to ideas, from the UTSA, which does not.

[9] BALLENTINE'S LAW DICTIONARY defines "information" as "acquired knowledge or knowledging of facts which advise and lead to the acquisition of knowledge." *Id*. (3d. ed.) (emphasis added).

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Although no Washington case provides as crisp an analysis as *Silvaco*, the same principle is borne out in the precedent here and in other states. In all these cases that found a piece of information to constitute a protectable trade secret, that information was factual—capable of absolute proof. For example:

(1) as a "compilation," whether a customer did business with a competitor in the past, *Nowogroski*, 137 Wn.2d at 440 (holding customers lists protectable under the UTSA);

(2) as a "pattern," whether windows manufactured from blueprints will have the characteristics necessary for flight, *Boeing Co. v. Sierracin Corp*., 108 Wn.2d 38, 49-50 (1987) (holding airplane blueprints protectable);

(3) as a "formula," whether a chemical reaction will yield a certain compound, *Progressive Prod., Inc. v. Swartz*, 258 P.3d 969, 978 (Kan. 2011) (interpreting the UTSA, holding that chemical formula for pipe treatment was a trade secret); and

(4) as a "process," whether a manufacturing technique results in the desired plastic, *INEOS Croup Ltd. v. Chevron Phillips Chem. Co., LP*, 312 S.W.3d 843, 848-49 (Tex. Ct. App. 2009) (interpreting the UTSA).

Here, of course, National's Player Grades are nothing more than an expression of its opinion that one player is better than another. The grades cannot be reframed as a question capable of absolute proof, for there is no absolute method of quantifying NFL talent, a point National's expert stresses when he states that the grades are valuable precisely because they represent the "opinions and judgment of [National's] scouts." (Hade Decl. Exh. C). To hold that such non-factual, subjective opinion "information" is protectable as a trade secret would substantially expand that the scope of the statute. The Court, which must exercise restraint before interpreting state law in a novel way, should decline National's invitation to enlarge the UTSA. *Air-Sea Forwarders, Inc. v. Air Asia Co.*, 880 F.2d 176, 186 (9th Cir. 1989); *Lord v. Swire Pacific Holdings, Inc.*, 203 F. Supp. 2d 1175, 1178 (D. Idaho 2002).

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Moreover, an interpretation of the UTSA that allows National to grab exclusive ownership of an opinion infringes Rang's First Amendment rights. There is a reason why the UTSA protects only factual information. Each law in the intellectual property realm regulates a discrete subject matter: a trade secret restricts disclosure of discovered facts, a copyright bars republication of creative expressions, and a patent restricts profit from novel ideas. This scheme is constructed in this way because intellectual property protections are in tension with First Amendment freedoms, and Congress and state legislatures have narrowly tailored intellectual property laws to avoid constitutional ire. Copyright laws, for example, contain "built-in First Amendment accommodations" and "are not restrictions on freedom of speech as copyright protects only form of expression and not the ideas expressed." *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003); *Harper & Row*, 471 U.S. at 556 (emphasis added). Instead, ideas are exclusively the dominion of patent law, but even there protection is limited. "Abstract ideas"—those, like an assessment of personal talent, that are not unique to any one individual—are "[e]xcluded from patent protection" because of First Amendment limitations. *Diamond v. Diehr*, 450 U.S. 175, 185 (1981).

And, like the other intellectual property laws, the UTSA necessarily makes room for First Amendment freedoms. In an action by Apple Computer against an Internet blogger for publishing alleged trade secrets about an upcoming product, the California Court of Appeals addressed the conflict between the Constitution and the UTSA:

> This case involves not a purely private theft of secrets for venal advantage, but a journalistic disclosure to, in the trial court's words, "an interested public." In such a setting, whatever is given to trade secrets law is taken away from the freedom of speech. In the abstract, at least, it seems plain that where both cannot be accommodated, it is the statutory quasi-property right that must give way, not the deeply rooted constitutional right to share and acquire information.

O'Grady v. Superior Court, 139 Cal. App. 4th 1423, 1476 (2006) (emphasis added). Like with coverage of a new consumer electronic device, the First Amendment trumps the UTSA with regard to Rang's stories about the NFL, "whose 'public interest' character is amply demonstrated

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by the elaborate sports section in every daily newspaper published in this nation and by the numerous periodicals . . . exclusively devoted to sports." *Time, Inc. v. Johnston*, 448 F.2d 378, 383 (4th Cir. 1971); *see also Garfinkel v. Twenty-First Century Pub. Co.*, 30 A.D.2d 787, 788 (N.Y. App. Div. 1968) (in action brought by scouting report publisher against magazine, holding that basketball scouting are matters of general public interest, "particularly in light of the great attraction the game has for the public"). Nevertheless, National, by framing its subjective Player Grades as trade secrets, seeks to circumvent the First Amendment accommodations inherent in the intellectual property laws and assert exclusive ownership over the idea that some football players are better than others. This violates Rang's and others' freedom of expression.

In sum, National's Player Grades are not capable of proof and are not factual "information" the UTSA protects. Indeed, if a team could objectively prove that one player was better than another, it would have no need for National's services at all. The grades are merely how National chooses to express its opinion about the relative talents of players. That National does so using a technical-looking "6.7" instead of "first-round pick" does not transform those opinions into trade secrets. This is not to say that the Player Grades are afforded no protection, just not under the UTSA. National can protect the grades as creative expressions via copyright law, but that claim, as discussed above, fails under the fair use doctrine.

For the reasons above, the Court should find the Player Grades are not "information" under the UTSA, should hold the First Amendment otherwise protects Rang's disclosure of them, and should grant Rang summary judgment on National's trade secret claim.

D. NATIONAL IS USING THIS LAWSUIT TO CIRCUMVENT PROHIBITIONS AGAINST DISCLOSURE OF JOURNALISTS' ANONYMOUS SOURCES.

This lawsuit is not about money damages. National has not alleged that it lost subscribers to its scouting services or that Rang's articles deprive it of profits it would have obtained from selling its information to the media. Instead, this endeavor is National's thinly-veiled attempt to smoke out the sources who gave Rang access to the Scouting Reports. The company has made

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no effort to hide its displeasure from the leaks within its organization. In the letters National occasionally sent Rang leading up to this action, each offered to forgo this litigation completely if Rang identified his sources. (Rang Decl. ¶18). In 2010, National's attorneys spoke with Rang for nearly an hour, quizzing him about the sources he has now, those he has used in the past, and those he thought other reporters might be using, all the while maintaining that a lawsuit was not likely forthcoming. (*Id*.). And all of National's settlement demands to date have required Rang to name his sources. (Hade Decl. ¶4). But regardless of the outcome of this case, National will never obtain the relief it ultimately desires, for both federal and state law protect the anonymity of journalistic sources.

1. The First Amendment Encompasses a News Reporting Privilege.

"[N]o harassment of newsmen [is] tolerated" under the United States Constitution, which provides journalists like Rang with a qualified privilege against disclosing their confidential sources. *Branzburg v. Hayes*, 408 U.S. 665, 709-10 (1972) (Powell, J. concurring). Rooted in the First Amendment, the privilege recognizes that society has an important interest "in protecting the integrity of the newsgathering process, and in ensuring the free flow of information to the public." *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993) (holding book author entitled to privilege even though he was not a member of "the institutionalized print or broadcast media"). To overcome the privilege and obtain the identity of Rang's confidential sources, National carries the burden of demonstrating that (1) the informants' identities are centrally relevant to this case, and (2) they are unavailable from other sources. *See, e.g., Wright v. Fred Hutchinson Cancer Research Ctr.*, 206 F.R.D. 679, 682 (W.D. Wash. 2002). And in nearly all civil cases, even including those involving purported trade secrets, "the litigant's interest in disclosure [will] yield to the journalist's privilege." *Shoen v. Shoen*, 48 F.3d 412, 415 (9th Cir. 1995) ("*Shoen II*"); *O'Grady*, 139 Cal. App. 4th at 1464-65 (applying First Amendment privilege to Internet blogger who allegedly disclosed trade secrets about Apple's upcoming products).

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National cannot meet its burden. This lawsuit is not for defamation or libel, where the underlying source of the information might have relevance to National's claims and Rang's defenses. The supporting facts for both claims here, copyright infringement and trade secret misappropriation, are gleaned from the published and freely-available articles that Rang admits authoring. Nor can National meet its burden of showing that it cannot find the informants another way. By its own admission, National purports to exert substantial control over the Scouting Reports and Player Grades. (Complaint ¶¶6-15). It knows who and how many people initially have access to its databases. Indeed, it is in the best position to find its leak. These circumstances will not subvert Rang's constitutional privilege.

2. RCW 5.68.010 Adds Another Layer of Protection.

Moreover, Washington also has an established tradition of protecting the identity of journalists' sources. Arising from the "need of a free press for a confidential relationship with its news sources," *Senear v. Daily-Journal-American*, 97 Wn.2d 148, 157 (1982) (en banc), the common law of this state required that courts "do their utmost to avoid the need for reporter disclosure, ordering it only as a last resort." *Clampitt v. Thurston County*, 98 Wn.2d 638, 643 (1983). Traditionally parties could obtain the identity of confidential informants only upon a showing that the public welfare, and not private business interests, favored unmasking. In 2007, the legislature codified this public policy into statute:

> Except [in criminal and unrelated civil matters] no judicial, legislative, administrative, or other body with the power to issue a subpoena or other compulsory process may compel the news media[10] to testify, produce, or otherwise disclose . . . [t]he identity of a source of any news or information or any information that would tend to identify the source where such source has a reasonable expectation of confidentiality[.]

[10] Though "news media" is undefined, there is no indication that online sports reporters would not qualify. In fact, the author of the statute has stated his intent was to include bloggers like Rang. *See* Curtis Cartier, "Unlike Oregon, Bloggers *Are* Journalists in Washington State, *Do* Qualify for Legal Protections," SEATTLE WEEKLY, Dec. 6, 2011, *at* http://blogs.seattleweekly.com/dailyweekly/2011/12/unlike_oregon_bloggers_are_jou.php (last accessed Aug, 13, 2012).

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RCW 5.68.010(1)(a). Like the common law it supplements, the statute compels disclosure only when there is a "compelling public interest" to do so. *Id*. 5.68.010(2)(iv) (emphasis added).

There is no compelling public interest here. Frankly, there is no public interest at all. The only concern at issue is National's private desire to identify and punish the individuals who are divulging its purportedly proprietary information. The Court should not allow National to commandeer judicial resources in a fruitless effort to stifle communication within its own organization.

IV. CONCLUSION

National asks the Court to grant it excusive ownership over its opinions that some football players are better than others. The Player Grades—subjective opinions of players' skills—are not factual "information" protectable as a trade secret. Even if they were, here that protection must succumb to Rang's First Amendment rights. And although the Scouting Reports might be protectable expressions of National's opinion, Rang's limited reproduction of a handful of grades in eight blog articles is a fair use. No trial is necessary here. Because both of National's claims fail as a matter of law when applied to the undisputed facts, TSX and Rang are entitled to summary judgment and an order of dismissal.

DATED this 12th day of September, 2012.

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