The Honorable Ronald B. Leighton

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

NATIONAL FOOTBALL SCOUTING, INC.,	)	Case No. 3:11-cv-05762
Plaintiff,	)	**PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT**
v.	)	
ROB RANG, et al.,	)	
Defendants.	)	Noted: November 30, 2012

I. INTRODUCTION

Plaintiff National Football Scouting, Inc. ("NFS") seeks to protect its intellectual property rights in the confidential and detailed scouting reports ("Scouting Reports") that it prepares and sells to National Football League ("NFL") clubs each year. Despite numerous warnings from NFS, Defendants Rob Rang ("Rang") and The Sports Xchange, Inc. ("TSX") repeatedly published articles disclosing grades and information taken from the Scouting Reports.

In Defendants' joint motion for summary judgment ("Defendants' Motion") [Doc. 31], they argue that Rang is a humble school teacher whose NFL Draft articles contained only a small amount of NFS's valuable scouting grades and information. Defendants assume the grades are copyright-protected but claim that the NFL's popularity makes them newsworthy, which allows

Defendants to enrich themselves by misappropriating the grades, in part because Rang's writing is "transformative." Defendants also argue that despite the independent economic value NFS's grades derive from their secrecy and NFS's efforts to maintain their confidentiality, the grades are not trade secrets. Accordingly, Defendants ask the Court to dismiss NFS's Complaint.

Defendants' Motion should be denied and summary judgment should be rendered in NFS's favor on Count II of its Complaint, as the undisputed facts show that NFS held valid copyrights, Defendants articles infringed NFS's copyrights, and under the facts of this case, the fair use defense fails. On Count I of the Complaint, NFS is entitled to partial summary judgment holding that the grades and other information in the Scouting Reports are trade secrets.

II. FACTS

A. NFS DISPUTES CERTAIN ALLEGED FACTS IN DEFENDANTS' MOTION

Defendants incorrectly conflate NFS's preparation and sale of confidential Scouting Reports to its member clubs with NFS's wholly separate work in organizing the annual "Combine." The Combine occurs *nine (9) months after* NFS distributes the Scouting Reports, and the information collected at the Combine is for the benefit of all 32 NFL teams. Defendants' Motion, p. 4; Declaration of Jeff Foster ("Foster Decl."), ¶¶ 40-42.

Defendants' characterizations of the Scouting Reports are inaccurate.[1] Defendants' Motion, pp. 4-5. Per the Court's recent order, NFS produced unredacted copies of the Scouting Reports for the eighteen (18) players for whom Defendants disclosed NFS's confidential information. A representative sample of the Scouting Reports for one such player, Jacob Locker, is provided to illustrate what NFS includes in the Scouting Reports. Foster Decl., ¶¶ 6-7, Ex. A.

[1] This is partially due to NFS's concern about producing copies of its trade secrets and unpublished copyrights and partially due to Defendants' decision not to depose NFS or its expert witness.

Defendants allege that Rang's sources "occasionally" provided him with grades and information "for a few specific players." Defendants' Motion, p. 5. Rang testified that he has received "National lists" by mail and email and produced one in discovery. Declaration of Eric Walter ("Walter Decl."), Ex. C ("Rang Tr."), p. 125/2-15; Foster Decl., ¶ 24, Ex. E.

B. NFS'S ADDITIONAL MATERIAL UNDISPUTED FACTS

1. NFS has registered the Scouting Reports as unpublished works.

To further protect the confidentiality of the Scouting Reports and its rights, NFS retained an intellectual property attorney to register its Scouting Reports for copyright protection as unpublished works. Foster Decl., ¶ 22, Ex. C, Ex. D. NFS holds Certificates of Registration for its copyrights on the two (2) years of Scouting Reports that are the subject of this lawsuit. *Id.*

In the eight (8) relevant articles, Defendants represented that their articles contained grades and other information that they learned or understood were generated by NFS and/or from its Scouting Reports. *Id.* at ¶ 23. Those representations were true, as the articles accurately disclosed grades and information from NFS's copyrighted Scouting Reports. *Id.* at ¶ 23.

2. The Scouting Reports derive economic value from their confidentiality.

NFS is paid substantial amounts to gather, organize, and provide detailed Scouting Reports evaluating and grading the senior college football players eligible for the following April's NFL Draft. Foster Decl., ¶¶ 1, 25. The Scouting Reports contain highly relevant information, the most important of which is the two-digit grade that NFS assigns to each player. *Id.* at ¶¶ 6-8; Declaration of Carl M.T. Sundquist, II ("Sundquist Decl."), ¶¶ 6-8; Declaration of John Dorsey ("Dorsey Decl."), ¶¶ 6-7. The grade NFS assigns to each player (on a 1.0 to 9.0 scale) is the subjective, professional opinion of NFS and its scouts and is the culmination and reflection of the entire body of information that NFS has gathered about that player. *Id.*

It would be extremely difficult and expensive for a journalist, an individual NFL club, or anyone else to duplicate the Scouting Reports by proper means. Foster Decl., ¶ 10; Sundquist Decl., ¶ 9; Dorsey Decl., ¶ 19. Rang admits he and TSX could not. Rang Tr., p. 90/22– p. 91/2. The Scouting Reports are prepared, distributed, and kept in a manner reasonably calculated to maintain their secrecy and strict confidentiality. Foster Decl., ¶¶ 12-22; Dorsey Decl., ¶¶ 12-14.

The Scouting Reports are extremely valuable to not only NFS and its member clubs but also NFS's direct competitor, BLESTO, and the NFL clubs who are not NFS members. Foster Decl., ¶¶ 4, 10-11; Sundquist Decl., ¶¶ 10-11; Dorsey Decl., ¶¶ 9-10. The confidentiality of the grades and information in the Scouting Reports is a substantial portion of their value. Foster Decl., ¶¶ 12-14, 16; Sundquist Decl., ¶¶ 12-13, 18-20; Dorsey Decl., ¶¶ 9-10, 12. Despite NFS's and its member clubs' best efforts, portions of the Scouting Reports sometimes leak out and often end up in the hands of NFL Draft journalists like Defendants. Foster Decl., ¶ 24.

In publishing articles disclosing NFS's information, and thereby destroying its confidentiality, journalists damage the market for the Scouting Reports by diminishing their value to the member clubs that pay to receive them. *Id.* at ¶ 25; Sundquist Decl., ¶ 15; Dorsey Decl., ¶ 16. If the publication of articles disclosing the confidential information in the Scouting Reports was to become more widespread and disclose more grades and information, there is a point at which enough of the NFS grades and information would be publicly available, and their value consequently so diminished, that NFS member clubs would no longer purchase the Scouting Reports. Foster Decl., ¶ 26; Sundquist Decl., ¶ 16; Dorsey Decl., ¶ 17. In an effort to avoid that possibility, NFS diligently communicates with such journalists to educate them and seek their agreement to remove the offending articles and not publish future articles disclosing NFS's grades and information. Foster Decl., ¶¶ 27-29.

3. In publishing the articles, Defendants knowingly misappropriated NFS's proprietary and confidential information for commercial purposes.

TSX paid Rang to write articles including the ones identified in the Complaint, and TSX published the articles to generate revenue. Rang Tr., p. 148/21–p. 149/5; p. 154/19-24; Walter Decl., Ex. D ("Cooney Tr"), p. 64/10-21; p. 68/14-17; p. 69/13–p. 70/16. If the articles were more interesting and had better content, they would drive more traffic to the website, which in turn would generate more money for TSX. Cooney Tr., p. 74/17–p. 75/9; Rang Tr., p. 292/14-21. One of Rang's supervisors on at least one occasion asked Rang if he received NFS or BLESTO reports and encouraged him to write an article with "insights from those reports[.]" Walter Decl., Ex. A; Ex. E ("Reuter Tr."), p. 167/3-13. With few exceptions, Rang obtained all the confidential grades and information he disclosed in his articles from sports agents. Rang Tr., p. 146/19–p. 147/18. Rang theorizes that the agents illicitly purchase NFS's confidential grades and information from "rogue scouts" employed by NFS member clubs. Rang Tr., p. 274/10-17.

As early as 2008, Rang believed NFS's grades were not "very valuable" and "worthless." Rang Tr., p. 91/21–p. 92/18; p. 101/3-8. Despite this, Rang published the grades because he believed their disclosure gave him "an insider type of appeal to fans" that increased interest in his articles and in turn increased traffic to TSX's website. Rang Tr., p. 230/4–p. 231/5; p. 288/21–p. 289/19; see also, Defendants' Motion, Rang Decl., Ex. E ("whispers about the grades and measurements of some of the highly touted 2012 prospects are now beginning to circulate."). Rang understood from interactions with his NFL scout friends that the NFS grades were a "serious" matter, because whenever Rang mentioned NFS grades to the scouts, "the conversation just dies" and "it changes their mood instantly." Rang Tr., p. 297/4-20.

When asked whether he believed NFS's grades were newsworthy, Rang's boss and TSX's founder, Frank Cooney, testified that, "I can only tell you that I believe I've never

referenced a National grade in almost 50 years of writing, and I've probably written about the draft more than anybody else, including Mel Kiper." Cooney Tr., p. 47/16–p. 49/3. Chad Reuter, a former writer at TSX with Rang, obtained lists containing NFS's grades and produced two examples in response to NFS's subpoena. Reuter Tr., p. 93/7-9; p. 94/11-17; p. 108/3-6. But Reuter never disclosed the grades in his articles, as he did not think they were newsworthy and because he understood the grades were confidential. Reuter Tr., p. 86/13–p. 87/7; 185/5-10.

Reuter "may have" supplied Rang with copies of entire lists containing NFS's grades Reuter Tr., p. 149/16–p. 150/1. If Rang had asked for copies of such lists, Reuter would have shared them. Reuter Tr., p. 175/20–p. 176/5; p. 177/4-9. Reuter could not verify that he emailed lists containing NFS's grades to Rang, because within hours of being served with NFS's subpoena, Reuter purposely deleted over 10,000 email messages from the email account he used to communicate with Rang and others at TSX. Reuter Tr., p. 121/21–p. 122/4; p. 124/18–p. 125/8; p. 125/20–p. 131/6. Reuter admitted that some of the deleted emails contained NFS grades, i.e., responsive to NFS's subpoena. Reuter Tr., p. 130/24–p. 131/6; p. 135/4-25.

NFS and its attorneys sent Defendants numerous letters and telephone calls over the course of five years, advising that Defendants' publications were unlawfully disseminating NFS's confidential trade secrets and demanding that Defendants cease and desist. Foster Decl., ¶¶ 30-36, Ex. G– Ex. L. But Defendants continued disclosing NFS's grades and information in their articles, because they decided (without the benefit of any legal advice) that NFS's trade secret claims and cease and desist demands were completely meritless, or as Cooney labeled them, "just bs." Rang Tr., p. 184/11–p. 185/2; p. 187/4–p. 188/11; p. 189/20-24; p. 219/1-12; Cooney Tr., p. 95/25–p. 96/11; Walter Decl., Ex. B.

After receiving NFS's June 24, 2011 letter, Cooney instructed Rang to not disclose NFS grades and information in future articles, and Rang has complied. Rang Tr., p. 237/11-22. Rang would agree to never publish another article referring to NFS or disclosing its grades or other information from its Scouting Reports. Rang Tr., p. 223/17–p. 224/11; p. 245/4-13. But if Defendants prevail, Rang may change his opinion. Rang Tr., p. 244/10-19; p. 309/13-19.

III. ARGUMENT

"Under Rule 56(c), summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).[2] Once the moving party has satisfied its burden, it is entitled to summary judgment if the non-moving party fails to present evidence of "specific facts showing that there is a genuine issue for trial." *Id.* at 324. "[S]ummary judgment should be granted where the non-moving party fails to offer evidence from which a reasonable jury could return a verdict in its favor." *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995).

A. BAD FAITH INFRINGEMENTS FOR COMMERCIAL PURPOSES ARE NOT FAIR USE.

The fair use doctrine is rooted in "the constitutional policy of promoting the progress of science and the useful arts[.]" *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 549 (1985). The courts foster this policy by implying from every author his or her consent to "a reasonable use of his copyrighted works." *Id.* Essentially, the fair use inquiry asks whether a reasonable copyright owner would have consented to the infringing use. *Id.* at 549-50.

[2] NFS's cites herein omit internal quotations and citations.

"Fair use is a mixed question of law and fact[,]" and the "analysis must always be tailored to the individual case." *Id.* at 552, 560. "Section 107 requires a case-by-case determination whether a particular use is fair, and the statute notes four nonexclusive factors to be considered." *Id.* at 549; *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1183 (9th Cir. 2012) (courts consider the non-exclusive factors as a total package in assessing fair use). "[S]ince the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts." *Harper & Row*, 471 U.S. at 560.

The Ninth Circuit recently commented that fair use analysis is one of the most difficult issues courts confront. *Monge*, 688 F.3d at 1171 (labeling the factors "billowing white goo" and the doctrine "so flexible as virtually to defy definition."). In that spirit, Defendants' arguments focus on only what might favor their fair use while minimizing or ignoring principles and cases that defeat it. Defendants misplace their reliance on decisions involving *published* works, e.g., finding fair use for parodies of published musical compositions. *Harper & Row*, 471 U.S. at 551 (unpublished nature is factor not present in fair use of published works.). While the fair use statute allows for its possible application to unpublished works, case law overwhelmingly shows that Defendants' commercial use of NFS's confidential grades cannot possibly be a "fair" use.

"[I]t has never been seriously disputed that the fact that the plaintiff's work is unpublished . . . is a factor tending to negate the defense of fair use." *Id.* "Perhaps because the fair use doctrine was predicated on the author's implied consent to 'reasonable and customary' use when he released his work for public consumption, fair use traditionally was not recognized as a defense to charges of copying from an author's as yet unpublished works." *Id.* at 550-51; see also, *Id.* at 553 (fair use doctrine's application to unpublished works is narrowly limited).

In *Harper & Row*, former President Ford granted the plaintiffs exclusive rights to license prepublication excerpts of his unpublished memoirs. *Id.* at 542. After the plaintiffs sold those rights to Time Magazine but before publication, The Nation magazine obtained a secret, unauthorized copy of the memoirs, from which it took content for a story it published. *Id.* at 543. In reversing the Second Circuit's finding of fair use, the Supreme Court held that any public interest was not overcome by the work's unpublished character, and the small size of the infringement was trumped by the qualitative aspects of what was infringed. *Id.* at 569.

In *Monge*, the defendant magazine published secret unpublished photographs of a celebrity's wedding. *Monge*, 688 F.3d at 1168. The magazine obtained the photographs from the celebrity's driver and bodyguard, who presented the magazine with a written copyright assignment. *Id.* After the publication, the celebrity registered copyrights for the photographs, filed suit, and the magazine sought to hide behind the fair use defense. *Id.* at 1170. The Ninth Circuit rejected the fair use defense, holding that "[w]aving the news reporting flag is not a get out of jail free card in the copyright arena." *Id.* at 1183. The overarching policies underlying the fair use doctrine and the four statutory factors confirm that Defendants' publication of NFS's confidential grades and information should not be excused as fair use.

1. Defendants' commercial use is neither news reporting nor transformative.

Under the first factor, courts should consider "(1) 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.A. § 107. The Ninth Circuit identifies three principles relevant to the first factor: news reporting, transformation, and commercial use. *Monge*, 688 F.3d at 1173. However, the "character of the use" also turns on "the propriety of the defendant's conduct." *Harper & Row*, 471 U.S. at 562. "Fair use presupposes good faith and fair dealing." *Id.*

In *Harper & Row*, the defendant infringer "knowingly exploited a purloined manuscript." *Id.* at 563. The Supreme Court held that, "*[u]nlike the typical claim of fair use*, The Nation cannot offer up even the fiction of consent as justification." *Id.* (emphasis added). "Fair use distinguishes between a true scholar and a chiseler who infringes a work for personal profit." *Id.*

To write his articles and disclose NFS's confidential grades and information, Rang obtained NFS's grades and information from sports agents, whom he believes covertly purchased them from "rogue scouts" employed by NFS member clubs. Even after NFS's president called Rang, and even after NFS's attorneys sent him and TSX multiple cease and desist letters, Rang continued to infringe NFS's copyrights for the noble purpose of appearing to be an "insider" to his readers and to generate more revenue for TSX. This does not "presuppose[] good faith and fair dealing," and in the fair use balancing test, Defendants clearly fall not on the side of the "true scholar" but on the side of "a chiseler who infringes a work for personal profit." *Id.* at 562-63.

a. News Reporting

While "[t]he preamble to the fair use statute lists 'news reporting' as an illustrative basis supporting fair use under this factor . . . it is not sufficient itself to sustain a per se finding of fair use." *Monge*, 688 F.3d at 1173 (finding no per se public interest exception); *Murphy v. Millennium Radio Grp. LLC*, 650 F.3d 295, 307 (3d Cir. 2011) ("News organizations are not free to use any and all copyrighted works without the permission of the creator simply because they wish to report on the same events a work depicts."). While Defendants offer no analysis, they suggest their infringements are fair use because the grades and information are "newsworthy."

Defendants' infringements do not satisfy this principle, as Defendants did not publish NFS's grades and information to report "news" they believed people wanted to know. In fifty years, Cooney never referenced an NFS grade in his publications, because he first had to

decipher it for the reader to understand. Cooney Tr., p. 89/13–p. 90/2 (calling the practice "jabberwocky"). Similarly, Reuter testified that despite having NFS's grades, he did not publish them because he did not think they were newsworthy. Even Rang testified that he thought NFS's grades were "worthless" but published them anyway, not to report news but because they made him appear to be an "insider."

Courts also reject fair use when the infringement is not necessary to report the news. *Harper & Row*, 471 U.S. at 557; *Monge*, 688 F.3d at 1175 (could have reported celebrity's secret marriage with copy of (less sensational but public) marriage certificate instead of copyrighted photographs). Journalists can offer "newsworthy" information about college players without needlessly robbing NFS of the value rooted in the confidentiality of its scouting information.

b. Transformation

Defendants argue that, by supplementing NFS's confidential grades with his "insightful analysis" and "original commentary," Rang "transformed the cold, numerical rankings that National designed for NFL executives into vivid narratives that the average sports fan can understand." Defendants' Motion, pp. 8-11. Defendants analyze the articles in table form, declare that "[t]he transformative nature of Rang's articles is striking," and then conclude that Rang's work "epitomizes a fair use." *Id.* at 11.

Defendants' arguments lack merit, as they ignore that the fair use doctrine is rooted in "the constitutional policy of promoting the progress of science and the useful arts[.]" *Harper & Row*, 471 U.S. at 549. In a case Defendants cite heavily, the Supreme Court held that "the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright[.]" *Campbell v. Acuff-Rose Music, Inc.*, 510

U.S. 569, 579 (1994). Defendants' articles disclosing NFS's grades and then adding self-described "insightful analysis" do nothing to "promote science and the arts." See, e.g., Defendants' Motion, Rang Decl., Ex. C (disclosing that NFS assigned grade of 6.7 to Ponder and Locker and adding "insightful analysis" that "[h]ow the two perform under this spotlight the rest of the year will go a great way in determining which of the two is drafted first.").

A review of the articles themselves shows that their primary purpose is to disclose NFS's grades and make Rang look like an "insider" to his readers. Rang's articles offer little "new expression, meaning, or message" and contain no "further purpose or different character." *Campbell*, 510 U.S. at 579 (1994). On the contrary, Rang's articles purport to have the same purpose as NFS's Scouting Reports: to offer opinions about the draft prospects of college football players. The only difference is that Rang hijacks NFS's confidential information to gain reader interest, then adds commentary, much of which was just facts told to him by others.[3]

The Ninth Circuit has rejected similar transformative claims. Rang's "original commentary" and "insightful analysis" is no more transformative than the rejected claim that a new station's voice-over transformed its broadcast of copyrighted video of the Rodney King beating. *L.A. News Serv. v. KCAL–TV Channel 9*, 108 F.3d 1119, 1122 (9th Cir.1997) (finding voice-over did not add "anything new or transformative to what made the [ ] work valuable—a clear, visual recording of the beating itself."); see also, *Elvis Presley Enters., Inc. v. Passport*

[3] Rang's article about Juron Criner is one example. Defendants' Motion, Rang Decl., Ex. F. Rang first reminds readers that he previously reported NFS's grade on Criner's quarterback, discloses that grade again, reports learning that Criner's grade from NFS was only slightly better, discloses Criner's grade, reports the draft spots of three other wide receivers that NFS had assigned the same grade (thereby disclosing *those grades*), reports Criner's publicly-known statistics, discloses that *others* had reported Criner considered leaving school early, and the apparent concerns others have about Criner, including that scouts are skeptical of his true speed. Only in the final sentence does Rang offer anything that might be his "original commentary," stating that his website (NFLDraftScout.com) rates Criner as the No. 6 receiver and has estimated him at 4.60 in the 40-yard dash. TSX owns and licenses NFLDraftScout.com to www.cbssports.com in exchange for fifty percent (50%) of the ad revenue it generates. Through writers like Rang, TSX supplies the site with content about the NFL Draft.

Video, 349 F.3d 622, 628–29 (9th Cir.2003). Similarly, adding text and articles to the celebrity's unpublished wedding photographs was "at best minimally transformative." *Monge*, 688 F.3d 1176. That is the most that could be said about Rang's articles, which were primarily focused on his possession and disclosure of NFS's confidential grades and information.

c. Commercial Use

"The fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use." *Harper & Row*, 471 U.S. at 562 ("[E]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright."). Rang's articles undisputedly infringed NFS's copyrights for commercial purpose, and Defendants concede as much in their Motion.

2. The Scouting Reports are unpublished works expressing original opinions.

Under the second factor, courts should consider "(2) the nature of the copyrighted work[.]" 17 U.S.C.A. § 107. The Ninth Circuit holds that this factor considers the extent to which the work is creative and whether it is unpublished. *Monge*, 688 F.3d at 1177.

a. Extent of Creativity

The Scouting Reports, and especially the grades, contain the original expressions and subjective professional opinions of NFS and its scouts, based on not only factual information but also observations and conclusions, e.g., watching games and interviewing coaches. The assignment of grades is not a mathematical or mechanical process but the deliberate expression of NFS's opinion based on the body of information it has gathered. Different scouts and scouting services would offer differing opinions on the same player.

Defendants argue that the Scouting Reports are primarily fact-based numerical data, not creative efforts, and deserve less protection. While the Scouting Reports contain factual

compilations, the facts are combined with the professional observations and conclusions to create and assign a grade reflecting NFS's original expression of its subjective, professional opinion. While a player's grade from NFS has independent factual significance, as discussed in Section C *infra*, the grades necessarily reflect NFS's qualitative analysis and opinions. The grades bear all the creative characteristics needed for copyright protection and to defeat a fair use claim. Defendants' dismissal of the grades as simple "two digit" numbers is as superficial as arguing that photographs are just factual reflections of what they depict. *Monge*, 688 F.3d at 1177.

b. Unpublished

The nature of the Scouting Reports is confidential, trade secret-protected player evaluations prepared for the exclusive benefit of NFS member clubs. To preserve their valuable confidentiality, they are registered as unpublished copyrights. The Supreme Court holds that, standing alone, "the unpublished nature of a work is a key, though not necessarily determinative, factor tending to negate a defense of fair use." *Harper & Row*, 471 U.S. at 554.

Defendants attempt to overcome this by relying on *Wright v. Warner Books, Inc.*, 953 F.3d 731 (2d Cir. 1991). *Wright* is wholly distinguishable, as it involved the publication of a scholarly biography, and the infringements were of letters that the copyright holder *had sent to the infringer*. *Id.* at 731 (finding no bad faith because Dr. Walker's conduct "bore no similarity to the sharp practices condemned in *Harper & Row*[.]").

3. Defendants' articles infringed upon the heart of the Scouting Reports.

The third factor asks courts to consider "(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole [.]" 17 U.S.C.A. § 107. Defendants make much of their mathematical calculations showing the percentage of the Scouting Reports they infringed upon. But Defendants ignore the bulk of the inquiry, i.e., the "substantiality" of the

portion used and the purpose of the use. *Monge*, 688 F.3d at 1178 ("We examine both the quantitative and qualitative aspects of the portion of the copyrighted material taken."). This inquiry includes whether the infringement is "reasonable in relation to the purpose of the copying." *Campbell*, 510 U.S. at 586-87 (for third factor, court considers justification for infringement under first factor, as the result varies with the purpose and character of the use).

Rang thought NFS's grades were worthless but still infringed on NFS's copyrights, despite repeated warnings, because he wanted his readers to think he was an "insider." This purpose weighs against fair use, as does the substantiality or qualitative inquiry. Most of Rang's disclosures were of NFS's grades, which are the heart of the Scouting Reports and which explains why Rang disclosed them. This factor cannot support a finding of fair use when the infringement takes the "heart of the copyrighted work." *Harper & Row*, 471 U.S. at 564-65; *Sundeman v. The Seajay Soc'y, Inc.*, 142 F.3d 194, 205 (4th Cir.1998).

In *Harper & Row*, the infringer admitted that the limited portions he selected were "among the most powerful passages in those chapters" and that "he used verbatim excerpts because simply reciting the information could not adequately . . . show that 'this comes from President Ford,' or carry the 'definitive quality' of the original[.]" *Harper & Row*, 471 U.S. at 565. Similarly, Rang did not decipher the grades or ambiguously share that "scouts thought Locker was a first round player." Instead, Rang selected the grades for disclosure because his purpose was to show he had obtained "NFS's grades" and portray himself as an "insider."

4. Defendants' articles damage the market for and value of the Scouting Reports.

The fourth factor asks courts to consider "(4) the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107. "Fair use, when properly applied, is limited to copying by others which does not materially impair the marketability of the

work which is copied." *Harper & Row*, 471 U.S. at 566-67. As with the other three, this factor is addressed through a "sensitive balancing of interests." *Campbell*, 510 U.S. at 591, n. 21.

Defendants argue, correctly, that Rang's eight (8) articles could not possibly serve as a market substitute for NFS's Scouting Reports. However, the analysis of this factor is far more nuanced, examining the effect Defendants' misappropriation of NFS's grades has on both "the potential market for and the value of the copyrighted work." 17 U.S.C. § 107. Rang's articles damaged both the value and the potential market for grades, weighing against fair use.

The declarations attached hereto present undisputed evidence that Defendants' articles damaged the value of the Scouting Reports. The value of the grades and scouting information is rooted in their confidentiality. When Rang casually inserted this information in his articles to appear to be an "insider," he decimated the information's value by making it publicly available to the NFL teams that did not pay to receive it.

Moreover, the Supreme Court holds that to negate fair use entirely, a copyright holder "need only show that if the challenged use should become widespread, it would adversely affect the *potential* market for the copyrighted work." *Harper & Row*, 471 U.S. at 568 ("Isolated instances of minor infringements, when multiplied many times, become in the aggregate a major inroad on copyright that must be prevented."). Defendants label their infringements "*de minimis*" but if similar uses were to become widespread enough, it would adversely affect the potential market for NFS's Scouting Reports.

To protect the value of its Scouting Reports and their market, NFS has worked diligently to inform journalists and dissuade them from disclosing NFS's information. While other journalists have previously published articles disclosing grades, the practice has nearly ended in the past year. But if the practice resumed and became more widespread (as it might if

Defendants' use is excused as fair[4]), there is a point at which the Scouting Reports' value would be so diminished that NFL clubs would no longer purchase them and NFS's market would be destroyed. Preserving the value of the Scouting Reports and NFS's market for them outweighs the commercial benefit journalists might realize from portraying themselves as "insiders."

The statutory factors weight strongly against fair use in this case. "A sensitive balancing of interests" (*Campbell*, 510 U.S. at 584) yields the same result, as Defendants' desire to appear to be an "insider" cannot trump NFS's interest in maintaining the confidentiality and unpublished character of its Scouting Reports, and by extension, their value and potential market. Excusing Defendants' infringements also does not further the policy underlying fair use, which is to not "stifle the very creativity which that [copyright] law is designed to foster." *Iowa State Univ. Research Found., Inc. v. Am. Broad. Companies, Inc.*, 621 F.2d 57, 60 (2d Cir. 1980).

B. NFS IS ENTITLED TO SUMMARY JUDGMENT ON COUNT II OF THE COMPLAINT.

1. NFS owns valid copyrights on the Scouting Reports, including the grades.

Copyright protection exists for any original works of authorship fixed in any tangible medium of expression. 17 U.S.C.A. § 102. Under the Copyright Act, copyright owners possess the exclusive right to reproduce or publicly display copyrighted works. 17 U.S.C. § 106(1) and (5). To establish copyright infringement, only two elements are required: (1) ownership of a valid copyright, and (2) copying of constituent elements of work. *Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361 (1991). Based on the undisputed facts, NFS is entitled to summary judgment holding that Defendants infringed on NFS's copyrights.

A copyright holder's certificates of copyright registration made before or within five (5) years after first publication of the work constitute *prima facie* evidence of the validity of the

[4] Rang testified that he might resume the practice if Defendants prevail.

copyrights. 17 U.S.C. § 410(c); *Apple Computer, Inc. v. Formula Int'l Inc.*, 725 F.2d 521, 523 (9th Cir. 1984). Thus, Defendants have the burden of overcoming the presumption of validity.

For the second element, *Harper & Row* holds that others may take from a copyrighted work those constituent elements that are not "original," such as facts in the public domain, so long as such use does not unfairly appropriate the author's original contributions. *Harper & Row*, 471 U.S. at 548. To be original "means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity." *Feist*, 499 U.S. at 345. The "requisite level of creativity is extremely low[,]" and the "vast majority of works make the grade quite easily, as they possess some creative spark, no matter how crude, humble or obvious it might be." *Id.*

NFS's grades, the constituent elements that Defendants misappropriated for commercial use, are original works. As discussed *supra*, the grades are independently created by NFS and its scouts, and by virtue of being subjective and educated professional opinions, possess far more than the minimal degree of creativity required to be original works under the Copyright Act.

In the eight (8) articles identified in the Complaint, Defendants reproduced and publicly displayed NFS's copyrighted grades and other information without authorization, in violation of the Copyright Act. Absent any valid defenses, NFS is entitled to judgment of copyright infringement and an award of statutory damages, attorneys' fees, and costs. See 17 U.S.C. § 504(c), 502 and 505.

2. Defendants' affirmative defenses fail as a matter of law.

Defendants' affirmative defenses, to the extent they are asserted as to Count II, are not supported by either the undisputed facts before the Court or applicable law, and they provide no obstacle to summary judgment in NFS's favor. Defendants' first affirmative defense is that Plaintiff's Complaint fails the Supreme Court's sufficiency test for pleadings. Both parties have

moved past the pleadings, completed discovery, and have moved for summary judgment, so the sufficiency of the Complaint (albeit sufficient) cannot provide a viable defense.

Defendants' second affirmative defense purports to raise a generic reporters' privilege. Many of the cases analyzing the fair use doctrine involve journalists and news organizations invoking the defense, and one consideration is whether the use constitutes news reporting. Reporters possess no special privilege insulating them from claims of copyright infringement. See, e.g., *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164 (9th Cir. 2012).

Defendants' third affirmative defense, raising causation and relative damages principles, has no merit against NFS's copyright claims in Count II, as NFS is electing herein for relief in the form of statutory damages. 17 U.S.C.A. § 504(c)(1). Copyright infringement is a strict liability tort. *Educational Testing Service v. Simon*, 95 F.Supp.2d 1081, 1087 (C.D. Cal. 1999). A copyright owner is entitled to an award of statutory damages for all infringements for which *any one* infringer is liable. 17 U.S.C.A. § 504(c)(2).

Defendants' fourth affirmative defense, claiming fair use, fails as discussed *infra*.

3. Defendants' willful infringements warrant substantial statutory damages.

The Copyright Act authorizes statutory damages "in a sum of not less than $750 or more than $30,000 as the court considers just." 17 U.S.C.A. § 504(c)(1). However, "where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than $150,000" per work. 17 U.S.C. Section 504(c)(2). Within these statutory limits, the assessment of damages is at the discretion of the court. *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 231-32 (1952) ("the court's conception of what is just in

the particular case, considering the nature of the copyright, the circumstances of the infringement and the like, is made the measure of the damages to be paid[.]").

"[W]hen infringement is willful, the statutory damages award may be designed to penalize the infringer and to deter future violations." *Nintendo of Am., Inc. v. Dragon Pac. Int'l*, 40 F.3d 1007, 1011 (9th Cir. 1994) ("The punitive and deterrent purposes explain the heightened maximum award"). "Statutory damages further compensatory and punitive purposes and help sanction and vindicate the statutory policy of discouraging infringement." *Dream Games of Arizona, Inc. v. PC Onsite*, 561 F.3d 983, 992 (9th Cir. 2009); *Frank Music Corp. v. Metro-Goldwyn-Mayer Inc.*, 886 F.2d 1545, 1554 (9th Cir. 1989) ("Statutory damages are available in order to effectuate two purposes underlying the remedial provisions of the Copyright Act: to provide adequate compensation to the copyright holder and to deter infringement.").

The Copyright Act does not define willful but a defendant's knowledge that he is using copyrighted works without authority, or his reckless disregard of the likelihood of same, is sufficient to trigger the increased statutory damages. *Lang-Correa v. Diaz-Carlo*, 672 F. Supp. 2d 265, 272 (D.P.R. 2009) (plaintiff repeatedly contacted defendants by telephone, email, and through his attorneys). Defendant's knowledge that his actions constitute infringement can be inferred from his conduct. *N.A.S. Imp., Corp. v. Chenson Enterprises, Inc.*, 968 F.2d 250, 252 (2d Cir. 1992).

Defendants are journalists who publish articles for commercial purposes, and thus, presumably have some knowledge of copyright principles. More importantly, NFS's attorneys sent them repeated cease and desist letters, warning that their published articles were unlawful. Defendants dismissed the warnings as "just bs," declined to obtain a legal opinion to confirm their "assessment," and blithely continued publishing articles disclosing NFS's copyrighted

works. Defendants' infringements in the face of NFS's repeated warnings were clearly willful, justifying statutory damages per infringed work of up to $150,000.

The Copyright Act grants courts discretion to award full costs and a reasonable attorneys' fee to the prevailing party. In awarding attorneys' fees to a prevailing party, courts should consider factors including "frivolousness, motivation, objective unreasonableness (both in the factual and in the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence." *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 535 (1994). Applying the undisputed facts of this case to these factors strongly favors an award of NFS's costs and a reasonable attorneys' fee.

C. NFS'S GRADES AND SCOUTING INFORMATION QUALIFY AS TRADE SECRETS

Defendants' arguments regarding trade secrets misconstrue Washington's Uniform Trade Secrets Act ("UTSA"), which defines trade secret generally as "information" and provides examples, including one that applies to the Scouting Reports on a whole (a compilation). RCW § 19.108.010(4). Contrary to Defendants' arguments, the grades are facts capable of trade secret protection. Defendants' effort to label the grades as "abstract ideas" is meritless, and their citation to inapplicable and distinguishable cases fails to support their conclusion.

The grades that NFS ultimately assigns to college players, while subjective opinions and expressions, are also unquestionably facts with independent significance. This undeniable truth is confirmed by the deleterious effect of TSX's publication of Rang's articles. For example, Rang published the *fact* that NFS assigned Jacob Locker a 6.7. Regardless of whether this grade is subjectively right or wrong, good or bad, the immutable fact is that NFS assigned it and published it in its confidential Scouting Reports. Like a "verbal act" under hearsay concepts, the fact that NFS assigned a given grade to a given player has independent significance.

For example, a grade informs NFS member clubs of what their fellow NFS member clubs were told was NFS's professional opinion, i.e., each member club's "starting point." Based on the fact of those opinions, NFS member clubs to help determine which players they will target for further scouting and prepare their draft rankings.

But more importantly, if the *fact* of an NFS grade is disclosed to non-NFS clubs, e.g., by publication in Rang's articles, those non-NFS clubs just obtained valuable *factual* information about the opinion that NFS gave to its member clubs, which is significant in the hyper-competitive world of professional football. The fact that NFS assigned a certain grade to a certain player can influence an NFL club's decision on whether and where to draft a player. And if the fact of that grade is substantially different than a non-NFL's club's perspective, that fact can inform the club that they may lack important information about the player. NFS's subjective opinion grades are also clearly facts, rendering them capable of trade secret protection as well. By comparison, Rang's published opinions about Jake Locker, for example, would not have the factual significance to NFL clubs that NFS's grades do.

Defendants' arguments focus exclusively on attempting to mislabel the grades, and they do not (and cannot) dispute that NFS's Scouting Reports, including its grades, otherwise satisfy the elements in the UTSA's definition. NFS and its member clubs agree in their contracts, and the declarations attached hereto undisputedly prove, that the Scouting Reports and grades "[d]erives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use[.]" RCW § 19.108.010(4)(a). Similarly, the Scouting Reports, including the grades, are "the subject of efforts that are reasonable under the circumstances to maintain [their] secrecy." RCW § 19.108.010(4)(b).

Defendants argue that NFS's trade secret rights would somehow infringe on Rang's First Amendment rights by "grab[bing] ownership of an opinion[.]" Defendants' Motion, p. 18. This argument is baseless, as NFS's trade secret right would only extend to *its facts*, including its opinion grades. Rang is free to offer his own opinions, his own rankings, his own commentary or insights, and otherwise publish articles he thinks his readers would enjoy. But his First Amendment rights end at the point that he violates NFS's trade secret rights and infringes on NFS's copyrights. NFS's intellectual property rights would not even obstruct Rang's freedom to *independently* develop and publish opinions that coincidentally match NFS's, so long as he is (1) not relying on NFS's Scouting Reports; and more importantly (2) not actually disclosing NFS's grades and information in his articles.

This Court should render partial summary judgment on Count I of the Complaint, holding that NFS's Scouting Reports, including its grades, are trade secrets under the USTA.

D. NFS HAS ONLY SOUGHT RELIEF AUTHORIZED UNDER WASHINGTON LAW.

Defendants attempt to color NFS with improper motives for praying in its Complaint for an order directing Defendants to identify their source(s) of NFS's valuable information. Notwithstanding their right to conceal confidential sources, courts will order journalists to disclose sources if certain factors are satisfied. *Wright v. Fred Hutchinson Cancer Research Ctr.*, 206 F.R.D. 679, 682 (W.D. Wash. 2002). One such factor is that the challenger must have first "exhausted all reasonable alternative sources" for the information. *Id.* NFS began that process and thoroughly investigated its own employees (including its President), its computer consultants, and several of its member clubs. However, the investigations proved too burdensome and expensive to complete, and thus, NFS no longer intends to present evidence to support that relief in Count I.

IV. CONCLUSION

Despite repeated warnings, Defendants repeatedly and willfully infringed NFS's copyrights and disseminated its trade secrets so that Rang could portray himself as an insider and generate more revenue for TSX. Defendants' actions cannot be excused under the fair use defense or their other defenses, and NFS is entitled to statutory damages of up to $150,000 per infringed work and an award of its costs and a reasonable attorneys' fee.

Dated: November 5, 2012

Respectfully submitted,

By: /s/ Eric M. Walter

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CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to Douglas C. Berry, Kellen Hade, GRAHAM & DUNN PC, 2801 Alaskan Way, Suite 300, Seattle, Washington 98121.

/s/ Eric M. Walter