

EXHIBIT 3

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

SIGNATURE MANAGEMENT  
TEAM, LLC

Plaintiff,

Case No. 4:13-cv-14005

v.

Honorable Judith E. Levy  
Mag. Judge David R. Grand

JOHN DOE,

Defendant.

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**PLAINTIFF'S RESPONSE TO DOE'S  
MOTION FOR SUMMARY JUDGMENT**

***FILED UNDER SEAL  
PURSUANT TO THE PROTECTIVE ORDER [DKT 51]  
ENTERED NOVEMBER 30, 2015***

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**CONCISE STATEMENT OF ISSUES PRESENTED**

1. Did Doe infringe Team's copyrights when he posted a verbatim copy of Team's entire work on his website?

2. Has Doe failed to meet his burden to establish the affirmative defense of fair use when his use of Team's work (1) was commercial in nature and not transformative, (2) copied and distributed Team's original and creative work in its entirety, and (3) negatively impacted the market for Team's work? Alternatively, has Doe met his burden to establish that there are no genuine issues of material fact surrounding his fair use defense?

3. Does Doe's copyright misuse defense fail as a matter of law where the defense has not been recognized in this jurisdiction and where Doe has not alleged facts to support the elements of copyright misuse in those jurisdictions that have entertained the defense?

4. Do genuine questions of material fact remain regarding Team's entitlement to a permanent injunction where Doe posted a link to an entire copy of Team's work on the internet allowing third parties to easily copy and redistribute



the work and Doe retains a copy of the work and has a strong motive to further infringe this and other works of Team, thereby creating a substantial likelihood of future infringement?

**CONTROLLING OR MOST APPROPRIATE AUTHORITY**

**Fair Use:**

*Princeton Univ Press v Michigan Document Services, Inc*  
99 F3d 1381 (CA 6 1996)

*Bridgeport Music, Inc v UMG Recordings, Inc*  
585 F3d 267 (CA 6 2009)

**Copyright Misuse:**

*Microsoft Corp v Compusource Distributors, Inc*  
115 F Supp 2d 800(ED Mich 2000)

*Calibrated Success, Inc v Charters*  
72 F Supp 3d 763 (ED Mich 2014)

**Permanent Injunction:**

*Bridgeport Music, Inc v UMG Recordings, Inc*  
585 F3d 267 (CA 6 2009)

## **INTRODUCTION**

Plaintiff, Signature Management Team, LLC ("Team"), submits this brief in opposition to Defendant John Doe's Motion for Summary Judgment (Doc. No. 25). Team respectfully requests that this Court deny the motion in its entirety because there is sufficient evidence in the record to support a jury finding in favor of Team on each of the issues contested in Doe's motion. Thus, there are material issues of fact that are genuinely in dispute. In addition, Doe has failed to establish that he is entitled to judgment as a matter of law. For these reasons, Doe's motion must be denied.


### **I. STATEMENT OF FACTS**

Team is the owner of a work entitled "The Team Builder's Textbook" (the "Book"). Orrin Woodward ("Woodward") and Chris Brady ("Brady") authored the Book and are leaders of Team and another company, LIFE. The Book is now in its ninth edition, and over 100,000 copies have been sold. Hallstrand Declaration, ¶2, Exhibit A.

The Book is an original, creative, instructional textbook that teaches the reader how to create a community based sales structure. Doe Tr, at 145, Exhibit B. Doe admits to copying the fourth edition of the Book in its entirety. See Doe's Discovery Responses, Exhibit C. The fourth and ninth editions teach and apply the same sales techniques and lessons - the fourth edition to the products of MonaVie

and the ninth edition to the products of LIFE. Doe Tr, at 175, Exhibit B. Accordingly, the fourth and ninth editions have substantially the same content as the table of contents for each edition demonstrates and Doe and his confidants admit and lament. See Exhibit D. See, Doe Tr, at 175, Exhibit B. Exhibit E (at Jan 19, 2013, 12:23 a.m., comment of MemoryLane).

The ninth edition of the Book can be purchased for the price of \$23.95. Exhibit F. The fourth edition of the Book can be purchased for \$1.98. Amazon, Exhibit G. The fourth edition of the Book posted by Doe on his website was available to copy for free. Because of their substantially similar content, the fourth edition of the Book is an effective substitution for the ninth edition. See Doe Tr, at 175, Exhibit B and Exhibits D and E.

 He operates the Internet blog known as Amthrax (the "Blog") under the pseudonym, Amthrax. Doe argues strenuously to maintain his anonymity but he is not truly anonymous. His identity as Amthrax is known to his wife and numerous friends. Doe Tr, at 35-38, Exhibit B. Others know enough to determine that Doe is Amthrax. *Id.* None of these people have made any written commitments to keep Doe's identity secret. *Id.*, at 38.

Doe took an unauthorized digital copy of the Book after finding it on another website. Doe Tr, at 23, Exhibit B. That link was not authorized and was taken down at Team's insistence. Hallstrand Declaration, at ¶5, Exhibit A. Doe then

made additional unauthorized copies of the Book and posted them on the Blog in two places: the "December 2012 Page", Exhibit H, and the "January 2013 Page", Exhibit E. The links on these pages distributed a free copy of the Book to the public during the period of December 4, 2012 – February 22, 2013. Doe Tr, at 18-19, 24, Exhibit B. On February 22, 2013, the links to the Book on these pages were deactivated but the pages otherwise appear now as they did then. Except for a possible Internet archive of these pages, Doe is unaware of any other location where a free digital copy of the Book is or was available. Doe Tr, 26-27, 33-34, Exhibit B.

When Doe created the Blog on the WordPress platform, rather than pay for WordPress' blog hosting he chose the platform option where ads run, ad revenue is collected by WordPress and he pays nothing to WordPress for hosting the Blog. *Id.* See Exhibit I. The December 2012 Page and January 2013 Page each included a revenue generating ad. See Exhibits E, H and J. The ads were running in 2012 and 2013 and still run today. Doe Tr, at 161-162, Exhibit B. Doe receives a financial benefit from these ads as they pay for the blogging platform that Doe receives from WordPress at no charge.

Doe used the Book on the Blog in two distinct ways. The first was to take five quotes (consisting of 12 sentences) from the Book and then immediately comment on those quotes. See Exhibits K and L. The quotes selected by Doe are

all of the content of the 216 page Book he needed to give context to his comments. This use of the Book continues today. Doe Tr, at 19, Exhibit B.

The other use by Doe of the Book, the one at issue here, is the posting of the entire Book in two places without any comment or criticism offered in connection with that posting. See Exhibits M and N (highlighting the words that once were active hyperlinks to the Book). There are no comments or other use of the Book by Doe directly associated with these links and copies other than an invitation by Doe that the public take free copies. *Id.* On both pages, the entire Book is gratuitously provided. As noted above, the five quotes and related comments by Doe remain today. This demonstrates that there were two distinct uses by Doe of the Book – one arguably fair use that continues today and the other gratuitous copying of the entire Book without any commenting that has ended.

Doe's fair use defense relies heavily on his claim that the Blog is highly critical of MLMs. But this does not tell the full story. Doe and the Blog focus on only TEAM, LIFE and Woodward. Doe Tr, at 107-109, 116, Exhibit B. See also Exhibits E and H (the topic links of the Blog focus only on Team and LIFE).

Doe is not just critical of Team, LIFE and Woodward, he attacks them with hatred and vengeance. See, for example, Exhibit O (entire article regarding Woodward being late for a conference call) and Exhibit P (entire article regarding a prominent Team leader who failed to timely pay his property taxes). Doe tries

very hard to personally embarrass Team, and LIFE, and its leaders like Woodward, and to negatively impact their business. Even Doe's confidants see the "anger, pain and even borderline hate" that Doe has for Woodward. Exhibit Q. Doe does not deny his hatred of Woodward. *Id.*

Although he claims to be anti-MLM, Doe is supportive of Amway, perhaps the biggest and most well known MLM, and was once a member. Doe Tr, at 48, Exhibit B. He left because he felt he could make more money elsewhere. Doe Dep Tr, at 67, Exhibit B. Doe admits that he "[doesn't] have a problem with people building a retail-focused Amway business," it just wasn't for him. Exhibit R.

Behind the scenes of the Blog is a regular and ongoing email discussion between Doe and his cadre of confidants. This group acts in concert and rejects those who do not believe as they do. See Exhibits S (discussion regarding how to best use their collective time to attack Team and Woodward); and T (distrust of a new member who may not believe as the group believes). On the other hand, the group welcomes the presence of former and current Amway members. Doe Dep Tr, at 70-71, 101-107, Exhibit B. [REDACTED]

[REDACTED]

The true purpose and affect of the Blog is not to educate people regarding the pitfalls of MLMs, but to cause harm to Team, Life and Woodward and to

benefit Amway. Another Doe confidant and strong proponent of [REDACTED] [REDACTED] to Doe that Amway benefits when Doe and the Blog attack Team and Woodward. See Exhibit V. Doe did not deny that causal connection. *Id.* Doe Tr, at 103, Exhibit B.

Doe's express purpose for the Blog, and in particular the pages of the Blog where the Book was posted, is to "[help] people either (1) get out of the business or (2) not get started in the business to begin with." Exhibit E, at p 2 (under Media War and Results). The words "the business" mean Team and LIFE because the Blog focuses on Team and Life. Accordingly, the stated purpose of the Blog is to drive members away from Team and LIFE. Doe has succeeded doing both. Doe Tr, at 157, Exhibit B. Taking and posting a complete copy the Book was an instrumental part of Doe's intent to drive members from Team.

Doe did not track who downloaded the Book from the Blog, how many copies were downloaded or how many people made downloads. Doe Tr, at 130-131, Exhibit B. These were digital copies that are easy for his readers to further copy and distribute. Doe has no idea what his readers did with those digital copies. *Id.* Doe doesn't know how many more copies were made or what, if any, income was earned from copies of the Book taken from his Blog. *Id.* Importantly Doe doesn't care what damage he did or allowed to occur. *Id.*



Doe admits that his free copies of the Book negatively affect the market for the fourth edition. Doe Tr, at 190, Exhibit B. Since he agrees that earlier editions are effective substitutes for the current edition, it follows that his free copies of the Book negatively affect the market for the current edition. See Doe Tr at 175-178, Exhibit B. Exhibit E (at Jan 19, 2013, 12:23 am, comment of MemoryLane).

The Book is not the only copyrighted material of Team or LIFE that Doe has copied and distributed without permission. Doe has also copied and distributed, without permission, a variety of internal documents from LIFE and Team and, as recent as November 2015, entire pages from the LIFE Internet site (that clearly bear copyright notices). Exhibits W and X. Doe Tr, at 204-205, 213-214, Exhibit B. Doe took efforts to hide from Team and LIFE any means for them to determine how and from where these documents were obtained. Exhibits Y, Z and AA. Doe Tr, at 207-211, 214, Exhibits B. This wholesale copying, posting of digital copies and the attempts to hide the copying are evidence of willful infringement. Contrast this with an example that shows Doe does know how and when to ask for permission to copy and post (but only when the owner is a friend). Exhibit BB. Doe Tr, at 214-215, Exhibit B.

## LEGAL ARGUMENT

### I. SUMMARY JUDGMENT STANDARD

Summary judgment is proper only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. FRCP 56(c). The moving party bears the "heavy burden" of demonstrating an absence of any triable issue of material fact. *Nationwide Life Ins Co v Bankers Leasing Ass'n, Inc*, 182 F3d 157, 160 (CA 2 1999). The court must view the evidence in a light most favorable to the non-moving party. *Matsushita Elec Indus Co, Ltd v Zenith Radio Corp*, 475 US 574, 587 (1986). Summary judgment must be denied if a material fact is in genuine dispute, *i.e.*, if the evidence regarding that fact "is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v Liberty Lobby, Inc*, 477 US 242, 248 (1986).

A prima facie case of copyright infringement is shown by (1) ownership of a valid copyright and (2) copying of constituent elements of the work that are original. *Feist Publications, Inc, v Rural Telephone Service Co, Inc*, 499 US 340, 361 (1991). Doe does not challenge Team's ownership of the copyright in the Book or that the copyright has been registered. Doe admits that he copied, without permission, the entire Book. See Exhibit C. The only issues remaining are those related to Doe's affirmative defenses. Because Doe cannot succeed on his affirmative defenses, judgment must enter for Team.

## **II. DOE CANNOT ESTABLISH FAIR USE AS AN AFFIRMATIVE DEFENSE TO COPYING PLAINTIFF'S ENTIRE WORK**

Doe bears the burden of proving his fair use defense. *See, e.g., Henley v DeVore*, 733 F Supp 2d 1144, 1151 (CD Cal 2010) (citing *Campbell v Acuff-Rose Music, Inc*, 510 US 569, 590 (1994)). Fair use is a mixed question of law and fact. *Harper & Row Publishers, Inc. v. Nation Enterps*, 471 US 539, 560 (1985). The statutory four fair use factors:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit education purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 USC § 107. Doe's posting of Team's entire work, the Book, was not fair use, and at a minimum, genuine issues of material fact exist that require the Court to deny Doe's Motion for Summary Judgment. *Cf Los Angeles News Serv v KCAL-TV Channel 9*, 108 F3d 1119, 1123 (CA 9 1997).

### **A. FIRST FAIR USE FACTOR: DOE'S USE OF THE BOOK WAS NOT TRANSFORMATIVE AND HAD A COMMERCIAL PURPOSE**

The first fair use factor has two-prongs: (1) whether the infringing work is transformative, and (2) to what extent the purpose of the infringing work is

commercial. *Calibrated Success, Inc v Charters*, 72 F Supp 3d 763, 771 (ED Mich 2014). Doe cannot prevail on either.

### 1. Transformative Nature

The Court must consider whether, and to what extent, Doe made a "transformative use" of the Book. *Images Audio Visual Productions, Inc v Perini Bldg Co*, 91 F Supp 2d 1075, 1081 (ED Mich 2000). This inquiry determines "whether the new work merely 'supersede[s] the objects' of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message." *Id.* (citing *Campbell*, 510 US at 579 (citations omitted)). The Sixth Circuit has noted that the "degree" of transformation is important. *Princeton Univ Press v Michigan Document Services, Inc*, 99 F3d 1381, 1389 (CA 6 1996). Namely, "if you make verbatim copies of . . . a . . . book, you have not transformed . . . very much—even if you juxtapose them to excerpts from other works and package everything conveniently." *Id.*

The Supreme Court has held that "the first §107 factor militated against a finding of fair use where the defendant's use of the plaintiff's work 'had not merely the incidental effect but the *intended purpose* of supplanting [one of] the copyright holder's commercially valuable right[s]." *Perini*, 91 F Supp 2d at 1081 (citing *Harper & Row*, 471 US at 561). Where the defendant "could have accomplished his or her goal equally well by taking nonprotectable material or less expression, it

may be questioned whether the purpose and character of the use are legitimately for criticism or comment." See Patry on Copyright § 10:13 (citing *Salinger v Random House, Inc*, 811 F2d 90, 97 (CA 2 1987) *opinion supplemented on denial of reh* 818 F2d 252 (CA 2 1987)). "This analysis is not done at the macro level—at the level of the defendant's work as a whole—but rather at the micro level, *i.e.*, each individual use within defendant's work: Was this particular use or that particular use necessary for the defendant's stated purpose?" *Id.* (citing *Paramount Pictures Corp v Carol Pub Group*, 11 F Supp 2d 329, 335 (SDNY 1998) *sub nom. Paramount Pictures Corp v Carol Pub Group, Inc*, 181 F3d 83 (CA 2 1999) (in examining which of the defendant's uses were fair use, the court wrote: "It simply can not be the case that an illicit copying can be protected by being placed in the midst of segments that do not infringe.")). As Judge Leval has stated:

In analyzing a fair use defense, it is not sufficient simply to conclude whether or not justification exists. The question remains how powerful, or persuasive, is the justification, because the court must weigh the strength of the secondary user's justification against factors favoring the copyright owner.

See Patry on Copyright § 10:13.

The Sixth Circuit, in *Balsley v LFP, Inc*, held that the jury was not unreasonable in weighing the four fair use factors and finding in favor of the plaintiff. 691 F3d 747, 761 (CA 6 2012). *Balsley* owned the copyrights in photos

taken of her without her permission that cast her in an embarrassingly light. *Hustler* magazine obtained copies elsewhere and published the photos, with minor editing, to illustrate a news story. Balsley sued for copyright infringement. The jury rejected *Hustler's* fair use defense.

On appeal, *Hustler* argued that its use was transformative because the photos were edited, published in a different medium and were used to "illustrate its entertainment news story." *Balsley*, 691 F3d at 759. The Sixth Circuit rejected that argument and found the use was not transformative because the photos were "unaltered other than for minor cropping and [were] merely reprinted in a different medium - a magazine rather than a website - essentially serving as a market replacement."

The facts here are analogous to *Princeton* and *Balsley*. As in *Princeton*, the fact that Doe posted a complete copy of the Book near other quoting and commenting on the Book, does not make that posting transformative or a fair use. As in *Balsley*, Doe's argument that his copying was fair use because he posted the Book in a different medium or to bolster his anti-MLM arguments, fails to overcome the clear fact that the complete copy he posted provided a market replacement for the Book. As in both *Princeton* and *Balsley*, Doe's use was not transformative. This is especially so when it was unnecessary for Doe to publish anything more than the five quotes that still remain on his blog.

The facts here are also analogous to *Calibrated Success v Charters*, where the court held that the defendant's downloading and copying of Plaintiff's instructional video with "some" material added, did not transform the work under the first fair use factor. 72 F Supp 3d 763, 771 (ED Mich 2014). The Court stated:

[I]t is undisputed that each disc [Defendant] made, even the ones with the added materials, contained a complete copy of [Plaintiff's] Tuning Guide. Thus, [Defendant's] copies of [Plaintiff's] Tuning Guide did not communicate a new message to the viewer. [Defendant's] copies did not further a different purpose than [Plaintiff's] discs; It conveyed the same information.

*Id.* Here, Doe's posting of a complete copy of the Book did not communicate a new message to the viewer; it conveyed the same message. Doe's copying and use of the entire Book is not transformative and does not satisfy the first prong of the first factor of the fair use defense.

## 2. Commercial Use

The second prong of the first fair use factor is whether the infringing use is of a commercial nature or is for nonprofit education purposes. *Campbell*, 510 US at 578 (citing 17 USC § 107(1)). The mere fact that a use is educational and not for profit "does not insulate it from a finding of infringement, any more than the commercial character of a use bars a finding of fairness." *Id.* Commerciality is not absolute and must be considered on a spectrum. The Second Circuit has held:

"Purpose" in fair use analysis is not an all-or-nothing matter. The issue is not simply whether a challenged work serves one of the non-

exclusive purposes identified in section 107, such as comment or criticism, but whether it does so to an insignificant or a substantial extent. The weight ascribed to the "purpose" factor involves a more refined assessment than the initial, fairly easy decision that a work serves a purpose illustrated by the categories listed in section 107 [such as comment or criticism].

*Twin Peaks Productions, Inc v Publications Intern, Ltd*, 996 F2d 1366, 1374 (CA 2 1993).

Doe argues that posting the Book in its entirety was not for a commercial purpose for two reasons. The first is because he did not personally and directly receive revenue. The second is because he was merely commenting on issues of public importance not engaged in any commercial activity. Neither is true.

First, Doe admits that the Blog generates income that is received by WordPress and, in exchange, his fees to WordPress are waived. The receipt by Doe of income from the Blog, whether directly or indirectly, is evidence of a commercial purpose.

Second, regardless of whether Doe received "monetary gain" from posting the Book, Doe operates the Blog with a clear commercial purpose. That purpose is to negatively affect the business of Team with the resultant benefit to the business of Amway. See Exhibit V. Doe advocates against Team. He intends to drive members from Team and to discourage new memberships. Exhibit E, at p 2 (under Media War and Results). He has succeeded. This is a commercial purpose.



This is similar to *Dahlen v Michigan Licensed Beverage Ass'n*, 132 F Supp 2d 574, 576 (ED Mich 2001), where the plaintiff created a poster that advised bar patrons of facts related to drinking and driving. The defendant, a state-wide nonprofit trade association, developed a substantially similar poster. The defendant argued that its status as a nonprofit, and the fact that it did not charge its members for the poster, established the educational, noncommercial use of the poster. *Id.* at 586. The court found the defendant's argument unpersuasive where it clearly advocated a commercial interest. The court stated:

As an initial matter, the Court finds that Defendant has somewhat overstated its "nonprofit" purpose, where most or all of the constituent members of the Defendant association apparently are commercial establishments, and where it plainly advances the commercial interests of Defendant's membership to furnish safe drinking and driving information to the patrons of these establishments. As the Supreme Court has explained, "[t]he crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."

*Dahlen*, 132 F Supp 2d at 586 (citing *Harper & Row*, 471 US at 562).

In a similar case, *Religious Technology Center v Lerma*, the court held that the noncommercial character of the defendant's post did not outweigh the non-neutral and non-scholarly motives in publishing the protected work. *Religious Tech Ctr v Lerma*, No CIV A 95-1107-A, 1996 WL 633131, at \*6 (ED Va October 4, 1996). This case involved the defendant's acquisition and internet publication of texts from the Church of Scientology. The court noted that the defendant was not

in competition with the church and he did not profit from the postings. *Id.* at 6. Nonetheless, the court held that "the degree of copying by [the defendant], combined with the absence of commentary on most of his Internet postings, is inconsistent with the scholarship exception . . . [T]here is a limit to the extent of reproduction that can be undertaken even by [a] bona-fide researcher." *Id.* at \*5. The defendant's claim to a scholarship purpose was not believable because his motive was clearly to cause harm. The use was not fair use. Doe's motives are, likewise, relevant. A jury is not likely to believe Doe's claim that he posted the Book only to offer scholarly criticism when he used much more than was necessary and posted the Book with the express purpose of causing commercial harm.

Courts determine commercial use on a case-by-case, fact specific basis. The commercial (or nonprofit) nature of the infringer is less significant in the analysis than the nature of the usage of the work. Here, Doe provided the Book free of charge for the sole and express purpose of deterring business away from TEAM. This is a clear commercial motive and purpose. Doe's claim that he posted the entire Book to corroborate his arguments is demonstrably false because his pages already contained the corroborating evidence necessary to make his point—the five quotes he had already taken from the Book. These arguments by Doe are simply an after-the-fact attempt to justify his wholesale copying of the Book. Because his

use of the entire Book had "not merely the incidental effect but the *intended purpose* of supplanting [Team's] commercially valuable right," Doe's use of the Book cannot constitute fair use. *See Harper & Row*, 471 US at 562. The first fair use factor favors Team.

**B. SECOND FAIR USE FACTOR: THE BOOK IS AN ORIGINAL AND CREATIVE WORK AND IS ENTITLED TO THE FULL BREADTH OF COPYRIGHT PROTECTION**

The second fair use factor considers the nature of the Book. The Supreme Court has passed over this factor without giving it much attention, stating that it is often "not much help." *Sony Computer Entmt Am, Inc v Bleem, LLC*, 214 F3d 1022, 1028 (CA 9 2000), *amended on denial of reh* (July 10, 2000) (citing *Campbell*, 510 US at 586). The nature of a work must be determined on a case-by-case basis because the extent of expression is "not easily or helpfully classified by broad categories such as 'fact works' or 'fictional works.'" *Patry on Copyright* § 10:138.

The Sixth Circuit has stated that "[f]actual compilations, such as telephone book listings and football rosters, with only a small element of creativity and originality, may be used more freely than creative works." *Princeton*, 99 F3d at 1405 (internal citations omitted). The Book is not a compilation of facts such as a telephone book or a football roster. It is an original and creative textbook, like those in *Princeton*. Doe Tr, at 144, Exhibit B. It is an instructional work with

creative and original content like that in *Calibrated*, 72 F Supp 3d 763 . As such, it deserves the full breadth of copyright protection.

Doe argues that the nature of the Book is irrelevant because it is an old edition. Doe has no legal support for that argument. Cases hold directly to the contrary. "[W]hen a work is taken out of circulation by the copyright owner with concrete plans to introduce a new version, permitting substantial unauthorized use of the old version may impair the copyright owner's ability to effectively market the new version, and ultimately deprive the public of improvements contained therein." Patry on Copyright § 10:140 (citing *Worldwide Church of God v Philadelphia Church of God, Inc*, 227 F3d 1110, 1119 (CA 9 2000) (holding that the plaintiff's failure to exploit the work for ten years and its "lack of a concrete plan to publish a new version" did not diminish the plaintiff's rights because the plaintiff has "a right to change his mind.")); *Robinson v Random House, Inc*, 877 F Supp 830, 843 (SDNY 1995) *mod* 1995 WL 502525 (SDNY March 26, 1995) (noting that out-of-print status is not dispositive)). The second fair use factor favors Team.

**C. THIRD FAIR USE FACTOR: DOE COPIED THE ENTIRE BOOK WHICH WEIGHS HEAVILY AGAINST FAIR USE**

Doe admits that he published the entire Book. *See* Doe Tr, at 178, 181, Exhibit B. Exhibit C. When a defendant copies a work in its entirety, "the third factor weighs against a finding of fair use." *Calibrated*, 72 F Supp 3d at 772.

Copying large portions of the original is highly relevant to the entire fair use analysis because "it may reveal a dearth of transformative character or purpose under the first factor, or a greater likelihood of market harm under the fourth." *Bridgeport Music, Inc v UMG Recordings, Inc*, 585 F3d 267, 277 (CA 6 2009) (citing *Campbell*, 510 US at 587).

Doe's reliance on *Swatch Group* to justify his verbatim copying is misplaced. *Swatch Group Mgt Services Ltd v Bloomberg LP*, 756 F3d 73, 77 (CA 2 2014). *Swatch Group* involved a financial earnings call with investors that had little or no creative expression and, therefore, enjoyed very limited copyright protections. The original, protectable expression in *Swatch Group* was only a thin slice of the earnings call: the tone, cadence, and accents of the executive group. Here, the protectable expression is the entire creative, written work that instructs and informs readers on various methods of improving leadership skills. Attempting to compare a financial earnings call to a written, instructional text on leadership skills is like comparing apples to oranges. Moreover, the earnings call did not have any monetary value. *Id.* at 91-92. The Book, on the other hand, has value to Team based on its capacity to generate sales and licensing royalties and, unlike in *Swatch Group*, Doe's post of the entire Book diminished Team's value in the copyright. In short, Does' reliance on *Swatch Group* as an analogous case is inherently flawed. The third fair use factor heavily favors Plaintiff.

**D. FOURTH FAIR USE FACTOR: DOE'S COPYING, POSTING AND ENCOURAGING OTHERS TO COPY, NEGATIVELY IMPACTS ON THE MARKET FOR THE BOOK**

The Supreme Court has stated that in determining whether a use is "fair," "the most important factor is the fourth, the one contained in 17 USC § 107(4)." *Princeton*, 99 F3d at 1385. If the infringer's use is commercial in nature, he has the burden to show market effect, or lack thereof. *Id.* at 1385-86. As shown above, Doe's use of the Book was commercial in nature. The burden on this factor is his but all he offers is the fact that the fourth edition is an older version of the Book. But as shown above, the fourth edition is the functional equivalent of the ninth edition and there is a market for both, and posting free copies of the fourth edition harms that market. Exhibit E (at Jan 19, 2013, 12:23 a.m. comment of MemoryLane). Ex. H. Doe Tr, at 175, 190, Exhibit B. It is axiomatic then that providing a free copy of the Book affects the market for both the fourth and ninth editions.

To show a market effect and "to negate fair use . . . one need only show that if the challenged use 'should become widespread, it would adversely affect the potential market for the copyrighted work.'" *Princeton*, 99 F3d at 1386-87. This final factor requires the court to consider "not only the harm to the market caused by the allegedly infringing use, but also the potential for harm caused by others following in the alleged infringer's footsteps, as well as any harm to the market for

derivative works." *Bridgeport Music*, 585 F3d at 277 (citing *Campbell*, 510 US at 590)(emphasis added). There is no question that allowing bloggers to post entire copies of the Book will cause harm to the market for the Book in its fourth edition, as well as harm to the market for all derivative works (derivative works are all copies of the Book in its 5<sup>th</sup> -9<sup>th</sup> editions). The fourth factor weighs in favor of Plaintiff.

Doe cannot prevail on any one of the four fair use factors. There are ample facts to support a jury verdict that Doe copied the Book in its entirety and without any fair use justification. Doe's fair use defense should be rejected and his motion denied.

### **III. THE COPYRIGHT MISUSE DEFENSE FAILS AS A MATTER OF LAW**

The Sixth Circuit has neither accepted nor rejected the copyright misuse defense. *Microsoft Corp v Compusource Distributors, Inc*, 115 F Supp 2d 800, 810 (ED Mich 2000). This Court should not accept the copyright misuse defense for the first time in this action. To properly assert such a defense were it available, Doe must establish that Team (1) violated antitrust laws, (2) unlawfully extended the scope of the monopoly granted under its copyright, or (3) violated the public policy behind the copyright laws. *Malibu Media v Doe*, No. 13-11432, 2014 WL 2616902, at \*4 (ED Mich June 12, 2014) (citing *Microsoft*, 115 F Supp 2d at 810). None of this is seriously contended by Doe.

Doe's only allegation in support of this defense is that Team is pursuing a *de minimis* copyright violation as a pretext to learn Doe's identity so it can investigate him and intimidate him. This argument fails for three reasons. First, Doe admits that Team has a legitimate claim to raise a copyright lawsuit. Doe Tr, at 139 – 140, Exhibit B. There is no evidence that Team is doing anything but protecting its copyrights in the Book. Doe Tr, at 141-146, Exhibit B. This novel defense cannot be based on Doe's subjective speculation that Team may take other action against him. Moreover, Team cannot commit copyright misuse by doing exactly, and only, what the Copyright Act permits it to do – file an action to protect its copyrights.

Second, allegations of *de minimis* copyright violations require the alleged infringer show that his copying of the “protected material is so trivial as to fall below the quantitative threshold of substantial similarity.” *Calibrated*, 72 F Supp 3d at 770. The "quantitative threshold" considers the "quantity" of Doe's copying relative to the entire work, not the market value of the work. There is nothing *de minimis* about copying an entire work. *Id.* Furthermore, Doe admits that the value of the Book is not relevant on the issue of whether Team has protectable copyrights. Doe Tr, at 188, Exhibit B.

Third, the misuse defense applies where the copyright owner is trying to manipulate competition in other markets. *Alcatel USA, Inc v DGI Techs, Inc*, 166



F3d 772, 793 (CA 5 1999). Doe does not claim this and there is no evidence supporting it. Doe's copyright misuse defense must fail.

**IV. THERE ARE GENUINE ISSUES OF MATERIAL FACT REGARDING AN INJUNCTION THAT CANNOT BE RESOLVED ON SUMMARY JUDGMENT**

Permanent injunctions are expressly authorized by the Copyright Act, 17 USC §§502, 503. In the Sixth Circuit, permanent injunctions are granted upon a showing of past infringement and a substantial likelihood of future infringement. *Bridgeport Music*, 507 F3d at 492. Courts have held that behavior indicating a willful disregard of copyrights is a sufficient basis for awarding a permanent injunction. *Broadcast Music, Inc v Diamond Investments, Inc*, 2013 WL 1681151 (SD Ind April 17, 2013).

The facts here are clear that 1) Doe hates Team and Woodward and works hard to negatively impact their business, 2) Doe posted a complete copy of the Book when only five quotes were necessary because he wanted to provide the public with free copies that could be further copied and distributed, 3) Doe continues still today to knowingly copy without permission other copyrighted documents and materials that belong to Team, 4) Doe takes great effort to prevent detection of his copying by hiding tracking data in electronic documents and maintaining his anonymity, and 5) Doe does not care about Team's property rights or how he may damage them. This shows a pattern of knowing and willful

copying. Team has every reason to believe, and a jury could reasonably conclude, that given the chance, Doe will continue to infringe the Book and other Team property. The risk of this is even greater if Doe remains anonymous.

The fact that Doe still retains a digital copy of the Book and posted the Book in digital format on the Internet intending for it to be further copied is important under *ABKCO Music v Washington*, 2011 US Dist LEXIS 120081 (ED Mich 2011). In that case, the defendant argued that an injunction should be denied because the infringing advertisement was removed and so the issue was "moot". The Court disagreed in large part because "given the nature of the infringement, specifically a third parties' ability to easily reproduce or redistribute a video that is posted on a website, there is a substantial likelihood of future infringement ...". The ease of further copying by third parties greatly increases the harm to the copyright owner.

The facts here are analogous to *ABKCO Music*. Once Doe posted the entire Book on the internet, it was free to be copied, linked, and distributed. Doe's removal of the Book does not prevent the harm of the initial accessibility. Like *ABKCO Music*, given the nature of the infringement, specifically the ability of third parties to easily reproduce or redistribute the video, there is a substantial likelihood of future infringement and a likelihood of substantial harm to Team should it occur. For these reasons, Doe is not entitled to summary judgment.

**CONCLUSION**

For the foregoing reasons, Plaintiff respectfully requests that Doe's Motion for Summary Judgment be denied.

Respectfully submitted,

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Dated: February 1, 2016

**CERTIFICATE OF SERVICE**

I hereby certify that on February 1, 2016, I electronically filed the foregoing paper *under seal* with the Clerk of the Court using the ECF system, which will send notification of such filing to counsel of record.

**KERR, RUSSELL AND WEBER, PLC**

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