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LOS ANGELES TIMES, and THE WASHINGTON POST COMPANY and its wholly owned subsidiary, WASHINGTONPOST.NEWSWEEK INTERACTIVE COMPANY, Plaintiffs, vs. FREE REPUBLIC, ELECTRONIC ORCHARD, JIM ROBINSON, and DOES 1 THROUGH 10, inclusive, Defendants.

CASE NO. CV 98-7840 MMM (AJWx)

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

2000 U.S. Dist. LEXIS 5669; 54 U.S.P.Q.2D (BNA) 1453; Copy. L. Rep. (CCH) P28,075; 28 Media L. Rep. 1705

March 31, 2000, Decided

April 4, 2000, Filed; April 5, 2000, Entered

DISPOSITION:

[*1] Plaintiffs' motion for summary adjudication with respect to fair use granted and defendants' motion for summary judgment denied.

COUNSEL:

For LOS ANGELES TIMES, WASHINGTON NEWSWEEK INTERACTIVE COMPANY, plaintiffs: Rex S Heinke, Greines Martin Stein & Richland, Beverly Hills, CA.

For WASHINGTON POST COMPANY, plaintiff: Rex S Heinke, Heather L Wayland, Greines Martin Stein & Richland, Beverly Hills, CA.

For JIM ROBINSON, FREE REPUBLIC, ELECTRONIC ORCHARD, defendants: Brian L Buckley, Brian L Buckley Law Offices, Los Angeles, CA.

JUDGES:

MARGARET M. MORROW, UNITED STATES DISTRICT JUDGE.

OPINIONBY:

MARGARET M. MORROW

OPINION:

ORDER GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs Los Angeles Times and The Washington Post Company publish newspapers in print and online versions. Defendant Free Republic is a "bulletin board" website whose members use the site to post news articles to which they add remarks or commentary. Other visitors to the site then read the articles and add their comments. For the most part, Free Republic members post the entire text of articles in which they are interested; among these are verbatim copies [*2] of articles from the Los Angeles Times and Washington Post websites. Plaintiffs' complaint alleges that the unauthorized copying and posting of the articles on the Free Republic site constitutes copyright infringement.

Defendants have now moved for summary judgment. They assert that the copying of news articles onto their website is protected by the fair use doctrine. Plaintiffs have filed a cross-motion for partial summary judgment, arguing that defendants may not invoke fair use as a defense.

The fair use doctrine, codified at 17 U.S.C. § 107, permits the reproduction of copyrighted works for certain purposes. Section 107 sets forth four nonexclusive factors to be considered in determining whether a defendant's copying is fair use: "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational 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 U.S.C. § 107. Based on the evidence [*3] submitted by the parties, the court concludes that the first, third and fourth factors militate against a finding of fair use in this case. The second factor weighs in defendants' favor. The balance of all factors tips toward plaintiffs, and the court thus finds that defendants are not entitled to assert a fair use defense to the claims of copyright infringement alleged in the complaint.

Defendants also allege that the First Amendment protects the posting of plaintiffs' news articles to their website. They contend that, absent wholesale copying, Free Republic visitors will be unable to express their criticism and comments. There are other methods in which the visitors' rights of free expression can be protected, however, and the court cannot conclude that enforcing plaintiffs' rights under the copyright law impermissibly restricts defendants' right to free speech.

I. FACTUAL BACKGROUND n1

n1 All parties have filed evidentiary objections to the declarations submitted in support of or opposition to the cross-motions. To the extent the court has considered evidence contained in the declarations, it has ruled on the objections to that evidence and noted its rulings in this order. To the extent evidence contained in the declarations is not mentioned in this order, it has not been considered by the court, and no ruling on the objections is required.

[*4]

A. The Parties

Plaintiffs publish the Los Angeles Times and The Washington Post in print and online at "http://www.latimes.com" and "http://www.washingtonpost.com." n2 Their respective websites contain the current edition of the newspaper, which can be viewed free of charge, and archived articles that users must pay to view. n3 The Times charges \$ 1.50 to view an archived article, while the Post charges from \$ 1.50 to \$ 2.95 depending on the time of day. n4 In addition to income generated in this fashion, the websites also produce advertising and licensing revenue for the papers. n5 Because advertising is sold "CPM" (cost per thousand), the revenue generated from this source depends on the volume of traffic the sites experience during a given period. n6 The parties dispute the extent to which being able to access archived articles at a different site for free affects plaintiffs' ability to advertise, license, and sell the archived articles. n7

n2 Declaration of Carol Perruso ("Perruso Decl."), P 2; Declaration of Eric Koefoot ("Koefoot Decl."), PP 2-3.

n3 Perruso Decl., P 4; Koefoot Decl., P 4 [*5]

n4 Plaintiffs' Statement of Uncontroverted Facts and Conclusions of Law ("Pls.' Facts"), P 50; Defendants' Response to Plaintiffs' Separate Statement of Uncontroverted Facts ("Defs.' Genuine Issues"), P 50. The price per view figures cited in the text are set forth in the Perruso (Los Angeles Times) and Koefoot (Washington Post) declarations. While defendants have objected to the paragraphs of the declarations in which this information is found, their objection appears to relate to the declarants' assertion that it is not "impractical" to view the full text of an archived article on plaintiffs' websites rather than the Free Republic's site. (See Perruso Decl., P 8; Koefoot Decl., P 8; Defendants' Evidentiary Objections to Declarations of Carol Perruso, Eric Koefoot and Chappell Aldridge ("Defs.' Objections") at 2:7-10, 4:21-24.) The statements concerning the amounts charged for viewing articles on the Times and Post websites are not irrelevant, do not lack foundation, and are not ambiguous, speculative or conclusory. Consequently, to the extent defendants object to this aspect of the declarations, their objections are overruled.

n5 Perruso Decl., PP 10-12; Koefoot Decl., PP 10-12. Defendants object to paragraphs 10 and 12 of the Perruso and Koefoot declarations on the basis that they lack foundation, and are ambiguous, conclusory and speculative. (See Defs.' Objections at 2:12-15, 2:17-22, 4:26-28, 5:3-8.) Perruso and Koefoot are executive officers of their respective companies, and have personal knowledge of company operations and Internet business generally. Each is aware of the sources of revenue generated by their company's website, and of the factors that cause such revenue to increase or decrease. The testimony, which is general in nature and not directed specifically to the impact of the Free Republic site, is not speculative, ambiguous or conclusory. Consequently, defendants' objections to these portions of the Perruso and Koefoot declarations are overruled. [*6]

n6 Pls.' Facts, PP 33, 48; Defs.' Genuine Issues, PP 33, 48.

n7 See Pls.' Facts, PP 49, 51, 52; Defs.' Genuine Issues, PP 49, 51, 52.

Defendant Jim Robinson is the owner and operator of defendants Electronic Orchard and Free

Republic. n8 Although no longer actively engaged in business, Electronic Orchard is a for-profit limited liability company that offers "Internet programming and design services." n9 Free Republic is a limited liability corporation that operates freerepublic.com. n10 The website, which has been operational since 1996, allows registered visitors to "post" news articles and comments concerning them on the site. n11 Registered members may then post additional comments. n12 Free Republic has approximately 20,000 registered participants. The website receives as many as 100,000 hits per day, and between 25 and 50 million page view each month. n13

n8 Defendants' Exhibits - Vol. 4, Ex. 1009 [Deposition of James Curtis Robinson ("Robinson Depo.")] at 25:6-26:10, 19:16-19. Robinson's son, John, and Amy DeFendis are co-owners of the two companies. (Id. at 25:24-26:10.) [*7]

n9 Id. at 20:2-12; Pls.' Facts, P 24; Defs.' Genuine Issues, P 24.

n10 Robinson Depo. at 26:16-20.

n11 Pls.' Facts, PP 1, 24, 25; Defs.' Genuine Issues, PP 1, 24, 25; Declaration of James Robinson ("Robinson Decl."), P35; Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment ("Defs.' Mot.") at 7:17-24; Declaration of Heather L. Wayland ("Wayland Decl."), Ex. B (D000441, D000445).

n12 See, e.g., Wayland Decl., Ex. D.

n13 Pl.'s Facts, PP 18, 38; Defs.' Genuine Issues, PP 18, 38.

Plaintiffs contend that "perfect copies" of news articles appearing in their publications and on their websites are posted to the Free Republic site. Defendants maintain that the posted articles are merely "purported copies" of the original, and assert that one can verify that a posting is an exact copy only by visiting plaintiffs' websites. n14 Defendants nonetheless apparently concede that some of the postings are verbatim copies of original articles. n15

n14 See, e.g., Pls.' Facts, PP 45, 47; Defs.' Genuine Issues, PP 45, 47, 49, 51, 52. [*8]

n15 Defs.' Genuine Issues, PP 45, 47, 49, 51, 52 ("... With the exception of a very few articles, there is no evidence in the record to establish that the articles are 'perfect copies' as Plaintiffs allege").

B. Defendants' Profit Or Non-Profit Status

The parties dispute whether Free Republic is a for-profit or not-for-profit entity. n16 Despite this purported disagreement, it appears uncontroverted that Free Republic is presently a for-profit limited liability company. Free Republic's corporate counsel is currently preparing documents seeking tax-exempt status for the Free Republic Institute, a company incorporated on September 27, 1999. n17 Nothing has yet been submitted to the IRS, however, and tax-exempt status has not been granted. n18

n16 See Pls.' Facts, P 23; Defs.' Genuine Issues, P 23; Defendants' Separate Statement of Uncontroverted Facts ("Defs.' Facts"), P 6; Plaintiffs' Response to Defendants' Separate Statement of Uncontroverted Facts ("Pls.' Genuine Issues"), P 6.

n17 Free Republic Institute will apparently assume responsibility for operation of the website, freerepublic.com. (See Robinson Depo. at 98:15-21.) [*9]

n18 See Declaration of Harold Szabo ("Szabo Decl."), PP 3-6. Plaintiffs object to the Szabo Declaration on the basis that it is irrelevant, vague and ambiguous, without foundation, conclusory, and speculative, and that it offers improper opinion testimony to the extent it suggests tax-exempt status will be granted. (See Plaintiffs' Evidentiary Objections to Declarations of Richard L. Stout and Howard K. Szabo ("Pls.' Objections") at 11:21-15:19.) These objections are overruled as Szabo has personal knowledge of his retention, the work he was asked to perform, and the tasks he has completed to date. Thus, the statements he offers concerning the incorporation of Free Republic Institute and the status of his work on the tax-exempt application are neither vague, ambiguous, speculative or conclusory. Additionally, Szabo offers no opinions concerning the ultimate outcome of the application for tax-exempt status. Finally, while plaintiffs dispute the relevance of the information set forth in Szabo's declaration, this objection is not an attack on the admissibility of the evidence. Rather, it is argument concerning the legal import of the information Szabo provides. Consequently, there is no basis for striking the declaration.

[*10]

Defendants contend that Robinson was not paid to create the Free Republic website, that he receives no salary from the entity, and that he receives almost no compensation for posting banners or links on the site. n19 Plaintiffs counter that Free Republic earns revenue through commercial advertising, merchandise sales, saleable consumer data, donations, "voluntary" subscriptions, and membership dues. n20 They also assert that Robinson uses the Free Republic site to advertise Electronic Orchard's services. n21

n19 Robinson Depo. at 24:1-8, 27:18-28:23, 38:4-40:12.

n20 Pls.' Facts, PP 27, 28, 29, 30, 31, 32, 34, 35.

n21 Pls.' Facts, PP 27, 28. Plaintiffs additionally note that the Free Republic website uses a ".com" domain name of the type generally employed by commercial entities. (Pls.' Facts, P 26.) Defendants dispute the relevance of this fact, noting that use of a ".com" domain name does not indicate whether their business is for-profit or not-for-profit. (Defs.' Genuine Issues, P 26; Supplemental Declaration of Richard Stout ("Supp. Stout Decl."), PP 35-38.)

[*11]

Defendants dispute these claims, contending that they have received no advertising revenue, commissions or donations for permitting various individuals and entities to place links on the freerepublic.com site. They assert, in fact, that the links have in some instances been posted on

the site by third-party users. n22 Defendants also contend that Electronic Orchard has received no business or financial benefit from any links appearing on the Free Republic website, and that Robinson has placed links for Electronic Orchard customers there solely as a courtesy. n23 Defendants maintain that Free Republic does not collect consumer data, and that it has not sold any information regarding its registered users to any other entity. n24 Additionally, they contend they have no connection with membership organizations of Free Republic supporters, and receive no benefit from dues revenue generated by these groups. n25 Defendants concede, however, that Free Republic has facilitated links to web pages run by third-party supporters where donations to Free Republic and/or Robinson are solicited. They also acknowledge that the website carries links to third-party web pages that offer Free Republic-related [*12] souvenir items in exchange for donations. n26

n22 Defs.' Genuine Issues, PP 32, 34.

n23 See Defs.' Genuine Issues, PP 27, 28,

n24 Defs.' Genuine Issues, P 35.

n25 Defs.' Genuine Issues, P 31.

n26 See Defs.' Genuine Issues, PP 29, 30.

C. The Impact Of The Free Republic Site On Traffic At Plaintiffs' Websites

The parties also dispute whether the posting of plaintiffs' news articles to the Free Republic site causes an increase or decrease in traffic at the Times and Post websites, whether it diminishes the available market for sale of plaintiffs' news articles, and whether it has a negative impact on plaintiffs' ability to license the works. Defendants assert that plaintiffs' websites actually gain viewers because people go to them after visiting the Free Republic site. n27 Plaintiffs maintain they lose traffic when Internet users read an article posted on freerepublic.com rather than visiting the Times or Post websites. They further assert that their ability to sell copies of the archived [*13] articles and their ability to license the works is diminished by having copies made freely available on the Free Republic site. n28

n27 Defs.' Genuine Issues, PP 49, 51, 52. As support, defendants rely, in part, on the Declaration of Rick Stout. Plaintiffs have filed objections to portions of this declaration, only certain of which are pertinent here. (See Pls.' Objections at 3:8-11:19.) Specifically, plaintiffs object to paragraphs 46, 50 and 51 on the basis that they lack foundation and are irrelevant, conclusory, speculative, vague and ambiguous. Plaintiffs' objections to paragraph 46 are overruled, as Stout has demonstrated that he is qualified to offer an opinion concerning the traffic moving from the Free Republic site to the Times site, and has offered a detailed explanation of his methodology in the preceding paragraphs of the declaration. As respects paragraphs 50 and 51, it is true that the opinions set forth therein are general. Stout's qualifications and his specific expertise in analyzing Internet traffic permits him to offer an opinion concerning the relative impact of freerepublic.com on plaintiffs' websites, however, and the generalized nature of the conclusions found in these paragraphs goes to their weight rather than their admissibility. [*14]

n28 Pls.' Facts, PP 49, 51, 52. Plaintiffs support these contentions with citations to the Perruso, Koefoot and Aldridge Declarations. Defendants object to the relevant portions of these declarations on the basis that they lack foundation, are speculative, conclusory, and ambiguous, and assume facts not in evidence. The relevant statements are found at paragraph 21 of the Perruso, and Koefoot Declarations, and paragraphs 3-6 of the Aldridge Declaration. In his declaration, Chappell Aldridge details a search he made for an article on the Post website and his retrieval of the full text of the article on the Free Republic site. The testimony is based on personal knowledge, and is not speculative, conclusory or ambiguous. Consequently, the court overrules defendants' objections to the Aldridge declaration, with the exception that the court has not considered the argumentative statement that this method of accessing articles is "a dodge ... available to anyone." As respects the Perruso and Koefoot Declarations, each is an executive officer of his or her respective company, and each thus has personal knowledge of company operations and Internet business generally. This knowledge provides a sufficient foundation for the expression of the opinions set forth in the declarations concerning the impact of freerepublic.com on traffic at the Times and Post sites. The generalized nature of the opinions offered goes to their weight rather than their admissibility. Consequently, defendants' objections to these portions of the Perruso, Koefoot and Aldridge declarations are overruled.

[*15]

II. DISCUSSION

A. Legal Standard Governing Motions For Summary Judgment

A motion for summary judgment must be granted when "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." Fed.R.Civ.P. 56(c). A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and of identifying those portions of the pleadings and discovery responses which demonstrate the absence of a genuine issue of material fact. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). Where the moving party will have the burden of proof on an issue at trial, the movant must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. On an issue as to which the nonmoving party will have the burden of proof at trial, however, the movant can prevail merely by pointing out that there is an absence of evidence to support the nonmoving party's case. See *id.* If the moving [*16] party meets its initial burden, the nonmoving party must then set forth, by affidavit or as otherwise provided in Rule 56, "specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); Fed.R.Civ.P. 56(e).

In judging evidence at the summary judgment stage, the court does not make credibility determinations or weigh conflicting evidence. Rather, it draws all inferences in the light most favorable to the nonmoving party. See *T.W. Electric Service, Inc. v. Pacific Electric Contractors Ass'n*, 809 F.2d 626, 630-31 (9th Cir.1987). The evidence presented by the parties must be admissible. Fed.R.Civ.P. 56(e). Conclusory, speculative testimony in affidavits and moving

papers is not sufficient to raise genuine issues of fact and defeat summary judgment. See *Falls Riverway Realty, Inc. v. Niagara Falls*, 754 F.2d 49, 56 (2d Cir.1985); *Thornhill Pub. Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir.1979).

Fair use is a mixed question of law and fact. *Harper & Row, Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 560, 85 L. Ed. 2d 588, 105 S. Ct. 2218 (1985). [*17] It is nonetheless proper to decide the issue at the summary judgment stage if the historical facts are undisputed and the only question is the proper legal conclusion to be drawn from those facts. *Narell v. Freeman*, 872 F.2d 907, 910 (9th Cir. 1989) ("Fair use is a mixed question of law and fact that may be resolved on summary judgment if a reasonable trier of fact could reach only one conclusion"); *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1151 (9th Cir. 1986) ("If there are no genuine issues of material fact, or if, even after resolving all issues in favor of the opposing party, a reasonable trier of fact can reach only one conclusion, a court may conclude as a matter of law whether the challenged use qualifies as a fair use of the copyrighted work"); *Fisher v. Dees*, 794 F.2d 432, 436 (9th Cir. 1986) (fair use issue was properly resolved on summary judgment because "no material historical facts [were] at issue in this case [and t]he parties disputed only the ultimate conclusions to be drawn from the admitted facts").

B. Elements Of Copyright Infringement

"Copyright law protects an author's expression; [*18] facts and ideas within a work are not protected." *Shaw v. Lindheim*, 919 F.2d 1353, 1356 (9th Cir. 1990). See also *Sid & Marty Krofft Television Productions v. McDonald's Corp.*, 562 F.2d 1157, 1163 (9th Cir. 1977) ("It is an axiom of copyright law that the protection granted to a copyrighted work extends only to the particular expression of the idea and never to the idea itself. Copyright infringement is established by demonstrating (1) ownership of a valid copyright and (2) copying of the original elements of the protected work. *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340, 361, 113 L. Ed. 2d 358, 111 S. Ct. 1282 (1991); *Kouf v. Walt Disney Pictures & Television*, 16 F.3d 1042, 1043, n. 2 (9th Cir. 1994). To prove copying, plaintiffs must show that defendants had access to the copyrighted work and that there is a substantial similarity between the copyrighted work and defendants' work. *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1472 (9th Cir.1992); *Chase-Riboud v. Dreamworks, Inc.*, 987 F. Supp. 1222, 1224 (C.D.Cal. 1997).

Before proceeding to the substance [*19] of the parties' motions, it is important to state what issues are not before the court at this time. Because the parties address the availability of a defense to copyright infringement, their motions assume for present purposes that such a claim can be proved. The court expresses no opinion as to whether this is so, given that the "copying" of news articles at issue in this case is to a large extent copying by third-party users of the Free Republic site. The court also makes no determination as to whether plaintiffs have in any manner consented to the copying of their articles. n29

n29 Defendants Robinson and Free Republic admit that they have personally posted certain of plaintiffs' articles on the Free Republic site. (See Defs.' Genuine Issues, P 9.) Because several thousand articles have been posted to the site, however, defendants assert that much of the posting has been done by registered third-party users. (See Pls.' Facts, PP 10, 41; Defs.' Genuine

Issues, PP 10, 41). Plaintiffs contend that defendants provide instructions and tools that permit third-party copying, that they have the ability to control what is posted on their website, and that they have removed certain postings from time to time. (Pls.' Facts, PP 11, 12, 13.) Defendants agree that they have the technical ability to remove material from the site, but argue that it is not feasible to monitor the large quantity of daily postings the site receives. (Defs.' Genuine Issues, PP 12, 13.) They do not respond directly to the assertion that they provide tools and instructions that permit third parties to copy plaintiffs' articles; rather, they acknowledge that "the Free Republic web site provides a virtual 'bulletin board' forum which enables and allows registered users to post whatever content they wish." (Defs.' Genuine Issues, P 11.) Whether defendants' operation of the Free Republic website, and the posting by third parties of verbatim copies of plaintiffs' copyrighted news articles renders defendants liable for copyright infringement is not an issue decided in this order. Similarly, the court does not address defendants' assertion that plaintiffs' posting of the articles on their websites constitutes implied consent for others to copy the works. (See Defs.' Genuine Issues, PP 6, 7, 9, 10, 11.)

[*20]

C. The Fair Use Defense

The fair use defense is a limitation on the exclusive right of a copyright owner "to reproduce the copyrighted work in copies." 17 U.S.C. § 106(1). It is codified at 17 U.S.C. § 107, which provides:

"Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include --

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational 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.

The fact [*21] that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors."

Because fair use is an affirmative defense to a claim of infringement, defendants carry the burden of proof on the issue. *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 918 (2d Cir. 1995); *Columbia Pictures v. Miramax Films Corp.*, 11 F. Supp. 2d 1179, 1187 (C.D.Cal. 1998)

("because fair use is an affirmative defense, Defendants bear the burden of proof on all of its factors"). See also *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1403 (9th Cir.), cert. dismissed, 521 U.S. 1146 (1997).

1. The Purpose And Character Of The Use

The first factor listed in § 107 is "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. § 107. This factor assesses whether "the new work 'merely supersedes the objects' of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, [*22] meaning, or message; it asks, in other words, whether and to what extent the new work is 'transformative.'" *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579, 127 L. Ed. 2d 500, 114 S. Ct. 1164 (1995) (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 348 (D.Mass. 1841)). "...The more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use." *Campbell*, supra, 510 U.S. at 579.

Inquiry concerning the character and purpose of a challenged use should be guided by the examples provided in the statute -- i.e., whether the use was for purposes of "criticism, comment, news reporting, teaching ..., scholarship, or research." 17 U.S.C. § 107; *Campbell*, supra. The list, however, is not intended to be exhaustive or to single out any particular use as presumptively fair. *Harper & Row*, supra, 471 U.S. at 561. Indeed, the fact that a use falls within one of these categories "is simply one factor in [the] fair use analysis." *Id.* Similarly, while the statute draws a distinction between non-profit and [*23] commercial use, not every commercial use of a copyrighted work is presumptively unfair. *Campbell*, supra, 510 U.S. at 579.

a. The Purpose Of Free Republic's Use And The Extent To Which Its Work Is Transformative

There is no dispute that at least some of the items posted on the Free Republic website are exact copies of plaintiffs' articles. n30 While defendants assert there is "no evidence" that all of the Times and Post articles that have been posted are verbatim copies, n31 the evidence they have presented reveals that, generally, exact copies of whole or substantial portions of articles n32 are posted. n33

n30 See Defendants' Exhibits - Vol. 4, Ex. 1009 at 53:8-54:3.

n31 See Defs.' Genuine Issues, PP 45, 46, 47 ("with the exception of a very few articles, there is no evidence in the record to establish that the articles are 'perfect copies' as Plaintiffs allege").

n32 Copying excerpts from the articles would satisfy the "copying" element of plaintiffs' copyright claim. See *Nihon Keizai Shimbun, Inc. v. Comline Business Data, Inc.*, 166 F.3d 65, 70-71 (2d Cir. 1999) (holding that there was substantial similarity between defendants' abstracts and plaintiffs' news stories because the "abstracts appeared to be direct, if not word-for-word, translations of the Nikkei articles, edited only for clarity," to "use[] about two-thirds of the protectable material in the corresponding Nikkei article," to "track the information in the articles sentence by sentence, in sequence," occasionally "combining two Nikkei sentences, dividing a

sentence, or rearranging the facts among different sentences," and to "adopt[], by and large, the exact same structure and organization of the facts reported by Nikkei"). See also *Wainwright Sec. Inc. v. Wall St. Transcript Corp.*, 558 F.2d 91, 93-94 and n. 1 (2d Cir. 1977) (the court held that defendant had infringed plaintiff's copyrights by summarizing its analytical financial reports because it "appropriated almost verbatim the most creative and original aspects of the reports, the financial analyses and predictions, which represent a substantial investment of time, money and labor"), cert. denied, 434 U.S. 1014, 54 L. Ed. 2d 759, 98 S. Ct. 730 (1978). [*24]

n33 See Defendants' Exhibits - Vol. 2, Exs. 1006; Vol. 3, 1007; Vol. 4, Ex. 1009 at 55:14-18 (Robinson's testimony that "[most people do not summarize" but post full text articles). Defendants contend that the only way to determine if the items posted to the Free Republic site are verbatim copies is to conduct a side-by-side comparison of the posting and the original article. Defendants bear the burden of proof on the issue of fair use. To the extent they wish to argue that something other than whole articles or substantial portions of articles are posted, they must adduce evidence that this is so. As noted, their evidence supports a contrary conclusion.

There is little transformative about copying the entirety or large portions of a work verbatim. See *Nihon Keizai Shimbun*, supra, 166 F.3d at 72 (where the infringing news abstracts were "for the most part direct translations of Nikkei articles," the court held that the first factor "weighed strongly against fair use"); *Infinity Broadcast Corp. v. Kirkwood*, 150 F.3d 104, 108 (2d Cir. 1998) (holding that "there [*25] [was] no transformation" where defendant retransmitted original broadcasts over the telephone); *Los Angeles News Service v. Reuters Television Int'l*, 149 F.3d 987, 993 (9th Cir. 1998) (defendant's unauthorized copying of news footage "was not very transformative" because it did "not explain the footage, edit the content of the footage, or include editorial comment"); *Sundeman v. The Seajay Society, Inc.*, 142 F.3d 194, 205-06 (4th Cir. 1998) (while it does not preclude a finding of fair use, "copying an entire work weighs against [such a] finding"); *Princeton University Press v. Michigan Document Service*, 99 F.3d 1381, 1389 (6th Cir. 1996) ("If you make verbatim copies of 95 pages of a 316-page book, you have not transformed the 95 pages very much -- even if you juxtapose them to excerpts from other works and package everything conveniently. This kind of mechanical 'transformation' bears little resemblance to the creative metamorphosis accomplished by the parodists in the *Campbell* case"), cert. denied, 520 U.S. 1156, 117 S. Ct. 1336, 137 L. Ed. 2d 495 (1997); *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 923 F. Supp. 1231, 1243 (N.D.Cal. 1995) [*26] ("*Netcom On-Line II*") (defendant's posting of plaintiffs' copyrighted material on the Internet was "only minimally transformative since, unlike the typical critic, [defendant] adds little new expression to the Church's works"). As the Supreme Court said in *Campbell*, supra:

"Whether 'a substantial portion of the infringing work was copied verbatim' from the copyrighted work is a relevant question, ... for it may reveal a dearth of transformative character or purpose under the first factor, or a greater likelihood of market harm under the fourth; a work composed primarily of an original, particularly its heart, with little added or changed, is more likely to be a merely superseding use, fulfilling demand for the original." *Campbell*, supra, 510 U.S. at 587-88.

See also 3 M. and D. Nimmer, *NIMMER ON COPYRIGHT*, § 13.05[D][1] ("whatever the intent of the copier, a verbatim reproduction will of necessity serve the function of the plaintiff's

work").

Defendants proffer two reasons why their full text copying of plaintiffs' articles is nonetheless transformative. First, they assert that the copies of the articles found on the Free [*27] Republic site do not in reality substitute for the originals found on plaintiffs' web pages. Second, they contend they copy no more than necessary to fulfill their purpose of criticizing the manner in which the media covers current events and politics. Each of these contentions will be examined in turn.

Defendants' first argument -- that the copies of plaintiffs' articles found on the Free Republic site do not substitute for those on plaintiffs' sites -- focuses on readers' ability to access and review specific articles in which they are interested. Defendants contend that using the Free Republic site to read current articles would be impractical since there is a delay between the time information is posted to the site and the time it is indexed by third-party search engines. Additionally, they assert that the imprecision of search language makes it difficult to locate archived articles at the site. n34 These arguments overlook the fact that the Free Republic site has its own search engine that apparently has immediate search capability. n35

n34 See Defs.' Mot. at 11:14-12:3. See also Supp. Stout Decl., PP 4-25. [*28]

n35 See Defendants' Exhibits - Vol. 4, Exs. 1002, 1003; Aldridge Decl., P 5.

Even were this not true, the articles posted on the Free Republic site ultimately serve the same purpose as "that [for which] one would normally seek to obtain the original -- to have it available ... for ready reference if and when [website visitors adding comments] need[] to look at it." *American Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 918 (2d Cir. 1995) (the court held that the first fair use factor weighed against a defendant that encouraged its employees to make unauthorized photocopies of articles in scientific and medical journals and keep them in their offices for ready reference).

Defendants' web page acknowledges this. It states, inter alia, that the Free Republic site is a place where visitors "can often find breaking news and up to the minute updates." n36 Indeed, it is clear from the content of the representative pages submitted by defendants that visitors can read copies of plaintiffs' current and archived articles at the Free Republic site. For those who visit the [*29] site regularly, therefore, the articles posted there serve as substitutes for the originals found on plaintiffs' websites or in their newspapers.

n36 Wayland Decl., Ex. C (D000448).

Defendants next argue that their use of plaintiffs' works is transformative because registered Free Republic users add comments and criticism concerning the articles following a posting. Copying portions of a copyrighted work for the purpose of criticism or commentary is often considered fair use. See *Twin Peaks Productions, Inc. v. Publications Int'l, Ltd.*, 996 F.2d 1366, 1375 (9th Cir. 1993) ("Inevitably, some identification of the subject matter of a writing must occur before any useful comment may be made about it, and it is not uncommon for works serving a fair use purpose to give at least a brief indication of the plot. Works of criticism, teaching, and news

reporting customarily do so"). The fact that criticism is involved, however, does end the inquiry. See *Harper & Row*, supra, 471 U.S. at 561 [*30] (list contained in § 107 is not intended to be exhaustive or to single out any particular use as presumptively fair); *Sony Corp.*, supra, 464 U.S. 417 at 452 ("even copying for noncommercial purposes may impair the copyright holder's ability to obtain the rewards that Congress intended him to have"). Rather, it must be considered in combination with other circumstances to determine if the first factor favors defendants. See *Twin Peaks*, supra, 996 F.2d at 1375-76 ("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").

Since the first posting of an article to the Free Republic site often contains little or no commentary, it does not significantly transform plaintiffs' work. In *Netcom On-Line II*, supra, defendant posted [*31] verbatim copies of works copyrighted by the Church of Scientology to an Internet website "with little or no added comment or criticism." 923 F. Supp. at 1243. The court found that the works were only "minimally transformative" because "unlike the typical critic, [defendant] added little new expression to the Church's works." *Id.* The court specifically rejected defendant's argument that his copying was fair use because subsequent visitors added further comments. It concluded that while the copying of "works that were previously posted by their authors on the basis of an implied license or fair use argument" might be justified, such a defense would not be available "where the first posting made an unauthorized copy of a copyrighted work." *Id.* at 1247, n.18. n37

n37 While the court made this observation in analyzing the third fair use factor, it is equally relevant in evaluating the extent to which a particular work is transformative.

Similarly, in *Religious Technology Center v. [*32] Lerma*, 1996 U.S. Dist. LEXIS 15454, 1996 WL 633131 (E.D.Va. 1996), n38 defendant downloaded or scanned into his computer portions of works copyrighted by the Church of Scientology. He then posted segments of the works on the Internet. *Id.* at *4. Defendant argued that his use was transformative, because he was a "dedicated researcher delving into the theory and scholarship of Scientology," and was "providing materials which 'add new value to public knowledge and understanding, thereby advancing the goals of copyright as set forth in the Constitution.'" *Id.* at *5. The court rejected this argument, noting that it did "not justify the wholesale copying and republication of copyrighted material," and concluding that "the degree of copying by [defendant] combined with the absence of commentary on most of his Internet postings, is inconsistent with the scholarship exception." *Id.* n39

n38 The court believes that *Netcom On-Line II* and *Lerma* are more pertinent to analysis of defendants' fair use defense than the decision in *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 1361 (N.D.Cal. 1995) ("*Netcom On-Line I*"). In *Netcom On-Line I*, the court considered the fair use defense of Internet access provider *Netcom On-Line*. In doing so, it distinguished *Netcom's* involvement in the posting of copyrighted works from that of the individual who actually posted copies of the works to a

Usenet newsgroup. The poster gained access to the web through a bulletin board service that was not directly linked to the Internet, but that connected through the facilities of Netcom On-Line. See *id.* at 1365-66. The court stated: "The proper focus here is on whether Netcom's actions qualify as fair use, not on whether Erlich himself engaged in fair use; the court has already found that Erlich was not likely entitled to his own fair use defense, as his postings contained large portions of plaintiffs' published and unpublished works quoted verbatim with little added commentary." *Id.* at 1378. Despite the commercial nature of Netcom's function as an Internet access provider, the court found that the first fair use factor weighed in its favor, *inter alia*, because (1) "its financial incentive [was] unrelated to the infringing activity and [it] received no direct financial benefit from the acts of infringement"; (2) "there [was] no easy way for a defendant like Netcom to secure a license for carrying every possible type of copyrighted work onto the Internet," and thus it "should not be seen as 'profiting from the exploitation of the copyrighted work without paying the customary prices'"; (3) Netcom did not "directly gain anything from the content of the information available to its subscribers on the Internet"; and (4) it did not "provide the files or solicit infringing works." *Id.* at 1379. Here, defendants admit that they themselves post copies of plaintiffs' new articles to the Free Republic site. Additionally, their relationship to the site, and to the material posted, is significantly more direct than that of Netcom, a company that maintains a software system that automatically forwards messages received from subscribers onto the Usenet, and temporarily stores copies of the messages on its system in the process. See *id.* at 1368. [*33]

n39 The decision in *Religious Technology Center v. F.A.C.T.NET, Inc.*, 901 F. Supp. 1519 (D.Colo. 1995) is not to the contrary. There, because the matter before it was a motion for preliminary injunction, the court did not make final legal rulings, but merely assessed the likelihood that plaintiff would prevail on the merits. Defendant in the case, F.A.C.T.NET, was a nonprofit corporation that maintained a library of materials concerning the Church of Scientology. Certain of its materials were posted on an Internet bulletin board by Arnaldo Lerma (the defendant in the case cited in text). *Id.* at 1521-22. Focusing heavily on the fact that it had copied the works for inclusion in its private library, the court found that F.A.C.T.NET was likely to prevail on its fair use defense. See *id.* at 1524. As respects its possible involvement in supplying materials to Lerma for Internet posting (an involvement F.A.C.T.NET denied), the court noted evidence that the postings "were made in the context of ongoing dialogue in [a] particular newsgroup," and that they "formed part of the topical debate concerning whether the Works are of substance or are perpetuated as part of systemic mind control." *Id.* at 1526. Because plaintiff had adduced no evidence "showing a likelihood that a follower of the Church would consider the postings by Lerma as a market substitute for the Works," nor any demonstrating that the postings "were of a commercial nature or had any effect on the potential market for the works," the court held they might "well be considered as having been made for the purposes of criticism, comment or research falling within the fair use doctrine." *Id.* Given the limited nature of the evidence before it, the F.A.C.T.NET court's "preliminary" findings are substantially less persuasive than, and cannot be said to contradict, the Lerma court's direct and detailed analysis of Lerma's posting activities.

[*34]

Additionally, even where copying serves the "criticism, comment and news reporting" purposes

highlighted in § 107, its extent cannot exceed what is necessary to the purpose. See *Twin Peaks*, supra, 996 F.2d at 1375-76 (the fact that defendant "detailed ... the plots [of episodes of a television series]... far beyond merely identifying their basic outline for the transformative purposes of comment or criticism" weighed against a finding of fair use because the "abridgment ... elaborated in detail far beyond what is required to serve any legitimate [transformative] purpose"); *Toho Co., Ltd. v. William Morrow and Co., Inc.*, 33 F. Supp. 2d 1206, 1217 (C.D.Cal. 1998) (relying, inter alia, on the fact that the infringing work contained detailed plot summaries of the *Godzilla* movies to find that the first fair use factor weighed heavily in favor of a copyright plaintiff, despite the fact that the work also contained "numerous biographies [and] analyses of the movies, including commentary, trivia and other bits of information"). Thus, an individualized assessment of the purpose for which defendants are copying the works and a comparison of [*35] that purpose to the amount copied is required. See *Campbell*, supra, 510 U.S. at 586-87 ("we recognize that the extent of permissible copying varies with the purpose and character of the use"); *Sundeman*, supra, 142 F.3d at 205-05 (same). See also *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 449-50, 78 L. Ed. 2d 574, 104 S. Ct. 774 (1984) (reproduction of an entire television program did "not have its ordinary effect of militating against a finding of fair use" where programs were videotaped for home viewing); *Harper & Row*, supra, 471 U.S. at 564 ("Even substantial quotations might qualify as fair use in a review of a published work or a news account of a speech").

Here, it seems clear that the primary purpose of the postings to the Free Republic site is to facilitate discussion, criticism and comment by registered visitors. Defendants contend that copying all or parts of articles verbatim is necessary to facilitate this purpose. n40 They argue that full text posting is required because links expire after a week or two, and because unsophisticated Internet users will have difficulty [*36] accessing a linked site. n41 Defendants' assertion that links expire after a period of time is presumably a reference to the fact that articles are available on plaintiffs' websites free of charge only for a certain number of days. Thereafter, there is a charge for viewing and/or printing them. That this is so does not make linking plaintiffs' websites to the Free Republic site "impractical." It merely requires that Free Republic visitors pay a fee for viewing plaintiffs' articles just as other members of the public do. Similarly, defendants' suggestion that articles are posted to the Free Republic site long after they are published is not supported by the representative postings they have submitted. n42 These reflect that the vast majority of comments are posted the same day the articles appear or within one to three days afterwards. n43 Finally, defendants' assertion that unsophisticated Internet users would be confused by links is unpersuasive. Linking is familiar to most Internet users, even those who are new to the web.

n40 See Defs.' Mot. at 17:21-23. See also *id.* at 12:20-23; 13:20-21; Defs.' Genuine Issues, P 42; Defendants' Exhibits - Vol. 4, Ex. 1009 at 75:12-76:20. [*37]

n41 Defs.' Genuine Issues, P 42.

n42 See *id.*, P 42.

n43 See Defendants' Exhibits - Vol. 2, Ex. 1006; Vol. 3, Ex. 1007.

As evidence that verbatim copying is in fact not necessary to defendants' purpose, plaintiffs cite the fact that defendants provided a hypertext link to Jewish World Review's website at its request, and requested that registered Free Republic visitors no longer copy the publication's articles verbatim. n44 That defendants accommodated Jewish World Review belies their current contention that only verbatim posting of articles will serve the criticism and comment purposes of the Free Republic site. Indeed, they acknowledge that honoring Jewish World Review's request "did not significantly detract from the purpose of the freerepublic.com website." n45

n44 See Wayland Decl., Ex. Q.

n45 Defs. Genuine Issues, P 43. While defendants dispute the proposition that "widespread use of such 'links' would not significantly detract from the purpose of the freerepublic.com site, ... and contend that there is controverting evidence," none of the evidence they cite in support addresses the subject.

[*38]

The fact that linking the text of an article as it appears on plaintiffs' websites to the Free Republic site, or summarizing the article's text, is not as easy or convenient for Free Republic users as full text posting does not render the practice a fair use. Rather, the focus of the inquiry must be whether verbatim copying is necessary to defendants' critical purpose. See Campbell, supra, 510 U.S. at 586-87; Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc., 150 F.3d 132, 144 (2d Cir. 1998) ("The inquiry must focus upon whether 'the extent of ... copying' is consistent with or more than necessary to further 'the purpose and character of the use'"); Rogers v. Koons, 960 F.2d 301, 311 (2d Cir. 1992) ("It is not fair use when more of the original is copied than necessary"); Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 758 (9th Cir. 1978) ("while other factors in the fair use calculus may not be sufficient by themselves to preclude the fair use defense, ... excessive copying precludes fair use").

Defendants have not met their burden of demonstrating that verbatim copying of all or a substantial [*39] portion of plaintiffs' articles is necessary to achieve their critical purpose. They argue that the purpose of full text posting is to enable Free Republic users to criticize the manner in which the media covers current events. n46 The statement or purpose found on the website, however, is somewhat different. There, defendants state that visitors to the Free Republic site "are encouraged to comment on the news of the day ... and ... to contribute whatever information they may have to help others better understand a particular story." n47 In fact, a review of the representative articles submitted by defendants reveals that visitors' commentary focuses much more on the news of the day than it does on the manner in which the media reports that news. n48 This is significant, since the extent of copying that might be necessary to comment on the nature of the media's coverage of a news event is arguably greater than the amount needed to facilitate comment on the event itself. Commentary on news events requires only recitation of the underlying facts, not verbatim repetition of another's creative expression of those facts in a news article. So too, the fact that a particular [*40] media outlet published a given story, or approached that story from a particular angle can be communicated to a large degree without posting a full text copy of the report. n49 For this reason, the court concludes that verbatim posting of plaintiffs' articles is "more than is necessary" to further defendants' critical purpose.

See *Castle Rock Entertainment, supra*, 150 F.3d at 144. See also *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1153 (9th Cir. 1986) (examining whether defendant copied "more than was necessary" in responding to a parody).

n46 Defs. Mot. at 12:20-22; 17:21-23.

n47 Wayland Decl., Ex. C (D000448).

n48 See Defendants' Exhibits - Vol. 2, Ex. 1006; Vol. 3, Ex. 1007.

n49 Indeed, a few Free Republic visitors summarize the content of news articles rather than post verbatim copies of the text with little apparent impact on the quantity and quality of the commentary their postings attract. (See, e.g., Defendants' Exhibits - Vol. 2, Ex. 1006 at 24-25.)

[*41]

For all these reasons, the court concludes that defendants' use of plaintiffs' articles is minimally, if at all, transformative.

b. Commercial Nature Of The Free Republic Website

In addition to examining defendants' purpose in copying plaintiffs' articles, the first fair use factor also directs that the court evaluate the "character" of the use. The mere fact that a use is commercial does not "give rise to a presumption of unfairness." *Sony Computer Entertainment, Inc. v. Connectix Corp.*, 203 F.3d 596, 606 (9th Cir. 2000). See also *Campbell, supra*, 510 U.S. at 584-85 (noting that the Court's earlier decision in *Sony, supra*, 464 U.S. at 451, "called for no hard evidentiary presumption"). Rather, a defendant's commercial purpose is only "a separate factor that tends to weigh against a finding of fair use." *Campbell, supra*, 510 U.S. at 585. Thus, a court evaluating the first fair use factor "must weigh the extent of any transformation ... against the significance of other factors, including commercialism, that militate against fair use." *Sony Computer, supra*, 203 F.3d at 607. [*42]

The parties vigorously dispute whether defendants' operation of the Free Republic website is a profit or non-profit venture as those terms are used in § 107. Their disagreement focuses on the corporate status of Free Republic, and on the extent to which defendants' operation of the website generates revenue, donations, and commissions.

Defendants argue that Free Republic is a non-profit organization and that they make no money from operating the website. The undisputed evidence reveals that Free Republic is currently a for-profit company. It also demonstrates that Free Republic solicits donations from visitors to the website who wish to support its mission and operations. n50 In addition to these direct solicitations, defendants concede that they have facilitated links to third-party web pages where donations to Free Republic and/or Robinson are requested, and where donors receive Free Republic-related souvenir items in exchange for a contribution. n51

n50 See Wayland Decl., Ex. M (TM092) ("FreeRepublic is supported by donations. We are a

NON commercial and NOT for profit public forum and discussion group. If you would like to sponsor FreeRepublic and/or place an ad or banner linking your website, contact Jim. If you would like to support FreeRepublic, donations may be sent to: [P] Jim Robinson[,] c/o Electronic Orchard[,] P.O. Box 9771[,] Fresno, CA 93794-9771. [P] Or click here to donate by secure credit card transaction"). See also *id.*, Ex. P (TM001, TM084). [*43]

n51 See Defs.' Genuine Issues, PP 29, 30.

There is also evidence that the Free Republic web page advertises the website design services of Electronic Grenard, and contains links to Electronic Orchard clients. n52 Defendants maintain that these links have been included as a courtesy to Electronic Orchard customers, and that they receive no revenue from them. Accepting this as true, the fact that Electronic Orchard's services are advertised and that Robinson is able to provide free links for his clients' businesses demonstrates that he and Electronic Orchard derive goodwill from the Free Republic site.

n52 Wayland Decl., Ex. M (TM092) ("Jim also operates Electronic Orchard[,] an Internet web design and software development company located in Fresno, California. Please visit www.e-orchard.com and our clients' websites. We can also create and/or host your website. For effective Internet software that gets results, contact Jim Robinson"). See also *id.*, Ex. P (TM001, TM084).

[*44]

Nonetheless, defendants' operation possesses many characteristics of a non-profit entity. It does not market or sell a product, and does not generate revenue in the traditional sense. "The commercial nature of a use is a matter of degree, not an absolute. ..." *Maxtone-Graham v. Burtchaeil*, 803 F.2d 1253, 1262 (2d Cir. 1986). See also *Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1522 (9th Cir. 1993) (same). Here, while the Free Republic operation has commercial aspects, its overall character is more properly viewed as non-commercial.

Additionally, the Free Republic site provides a public service by fostering debate and discussion regarding the issues of the day. This too is a factor that should be taken into account in assessing the character of defendants' use of plaintiffs' copyrighted material. See *Sega Enterprises*, *supra*, 977 F.2d at 1523 ("Public benefit need not be direct or tangible, but may arise because the challenged use serves a public interest"); *Hustler*, *supra*, 796 F.2d at 1153 ("When the use has both commercial and non-profit characteristics, the court may consider 'whether the alleged infringing [*45] use was primarily for public benefit or for private commercial gain'").

Section 107(1) does not mandate "a clear-cut choice between two polar characterizations, 'commercial' and 'non-profit.'" *Maxtone-Graham*, *supra*, 803 F.2d at 1262. Here, choosing one of these two extremes does not properly reflect the nature of the Free Republic site, or defendants' activities in operating it. Rather, attempting the "sensitive balancing of interests" required for application of the fair use doctrine (*Campbell*, *supra*, 510 U.S. at 584; *Sony*, *supra*, 464 U.S. at 455, n. 40), the court finds that the operation of the Free Republic site is only minimally commercial.

The relevant inquiry, however, "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." *Harper & Row*, supra, 471 U.S. at 562. See *Campbell*, supra, 510 U.S. at 584 ("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 [*46] of a use bars a finding of fairness"); *Infinity Broadcasting*, supra, 150 F.3d at 110 ("societal benefit does not guarantee a finding of fair use"); *Marcus v. Rowley*, 695 F.2d 1171, 1175 (9th Cir. 1983) ("a finding of a nonprofit educational purpose does not automatically compel a finding of fair use"). n53 Here, defendants and registered third-party visitors to the Free Republic site copy and post plaintiffs' news articles, which are then available to others visiting the site free of charge. Since the general purpose of the site is to provide a forum where individuals can discuss current events and media coverage of them, posting copies of plaintiffs' articles assists in attracting viewers to the site.

n53 In *American Geophysical*, the court stated that the proper focus of the commercial/non-commercial inquiry is "on the use of the copyrighted material," not on the profit or not-for-profit status of the user. *American Geophysical*, supra, 60 F.3d at 921-22. Nonetheless, it noted that the profit or non-profit status of the user was not "irrelevant" and "need not [be] ignored." *Id.* at 921, 922.

[*47]

In *Marobie-FL, Inc. v. National Assoc. of Fire Equipment Distributors*, 983 F. Supp. 1167 (N.D.Ill. 1997), the court examined an analogous situation in which a non-profit organization placed copyrighted clip art on its website without paying the copyright owners. *Id.* at 1175. Despite defendant's non-profit status, the court found that "its conduct [could] still be considered commercial." *Id.* The court reasoned that defendant had obtained the clip art for free, although it would ordinarily have cost money, and then had made the files available on its website to members and other Internet users without charge. *Id.* This was beneficial to it, since the organization used the website "for the commercial purposes of promoting the association (whose members pay dues) and generating advertising revenue." *Id.* Consequently, the court concluded that defendant's use of the clip art "enhanced the Web Page and furthered ... commercial purposes." *Id.* See also *Marcus*, supra, 695 F.2d at 1175-76 (the court held that a defendant who replicated a substantial portion of plaintiff's copyrighted work could not assert a [*48] fair use defense despite the fact that her copying was for a nonprofit educational purpose, since both she and plaintiff used the material for the same purpose, i.e., to teach cake decorating); *Television Digest, Inc. v. United States Telephone Assoc.*, 841 F. Supp. 5, 9-10 (D.D.C. 1993) (the court concluded that a non-profit trade association's duplication and distribution of a copyrighted newsletter was not a non-commercial use because it saved money by photocopying one subscription issue rather than ordering the number of subscriptions it required per reader); *Encyclopaedia Britannica Educational Corp. v. Crooks*, 447 F. Supp. 243, 252 (W.D.N.Y. 1978) (a non-profit educational services corporation that videotaped copyrighted films, made copies, and distributed them to public schools was not making fair use of the films since it was reproducing large numbers of the videotapes in a "highly organized and systematic" way).

Cases decided since *Marobie-FL* have utilized a more nuanced approach in evaluating the commercial/non-commercial aspect of the first fair use factor. Recent Ninth Circuit decisions, for example, assess whether a defendant's copying [*49] led directly to the generation of revenue

and profit, or whether it merely had an indirect relation to commercial gain. See *Sony Computer*, supra, 203 F.3d at 607 (because defendant copied video game for purpose of reverse engineering it and producing software that would be compatible with it, its "commercial use of the copyrighted material was an intermediate one, and thus was only 'indirect or derivative'"); *Sega Enterprises*, supra, 977 F.2d at 1522 (although defendant's ultimate purpose was the commercial one of developing Genesis-compatible games for sale, "its direct purpose in copying Sega's code, and thus its direct use of the copyrighted material, was simply to study the functional requirements for Genesis compatibility so that it could modify existing games and make them usable with the Genesis console").

Citing *Sega*, the Second Circuit has described the proper analysis as "differentiating between a direct commercial use and [a] more indirect relation to ... commercial activity." *American Geophysical*, supra, 60 F.3d at 921. In *American Geophysical*, the court stated that the heart of "the commercial/nonprofit dichotomy [*50] concerns the unfairness that arises when a secondary user makes unauthorized use of copyrighted material to capture significant revenues as a direct consequence of copying the original work." *Id.* at 922. Since, in the case before it, *Texaco* did not derive direct or immediate revenue or profits from photocopying articles in scientific and medical journals for members of its research staff, the court held that its use was "intermediate," and that the link between the copying and *Texaco*'s commercial gain was "somewhat attenuated." *Id.* at 921, 922. Nonetheless, it concluded that *Texaco* "reaped at least some indirect benefit from its photocopying," and that this in turn had some impact on its ability to develop marketable products. *Id.* at 922. Accordingly, the court stated, "it is not obvious why it is fair for *Texaco* to avoid having to pay at least some price to copyright holders for the right to photocopy the original articles." *Id.*

Here, the analysis is much the same. Defendants do not generate revenue or profits from posting plaintiffs' articles on the Free Republic website. At most, they derive indirect economic benefit by enhancing [*51] the website's cachet, increasing registrations, and hence increasing donations and other forms of support. Coupled with the fact that Free Republic has many of the attributes of a non-profit organization, this indirect benefit argues against a finding that the use is strictly commercial. Rather, it is more appropriate to conclude that, while defendants do not necessarily "exploit" the articles for commercial gain, their posting to the Free Republic site allows defendants and other visitors to avoid paying the "customary price" charged for the works. See *Harper & Row*, supra, 471 U.S. at 562.

c. Conclusion Regarding First Fair Use Factor

Following *Campbell*, it is clear that the court must balance and weigh the various elements of the first fair use factor in deciding whether it favors plaintiffs or defendants. See *Campbell*, supra, 510 U.S. at 584 (emphasizing the need for a "sensitive balancing of interests," and noting that Congress has "eschewed a rigid, bright-line approach to fair use," quoting *Sony*, supra, 464 U.S. 455, n. 40). See also *Sony Computer*, supra, 203 F.3d at 607 ("we must weigh the extent [*52] of any transformation ... against the significance of other factors, including commercialism, that militate against fair use"). In the process, it must bear in mind that "the concept of a 'transformative use' is central to a proper analysis under the first factor." *American Geophysical*, supra, 60 F.3d at 923. For this reason, "the more critical inquiry under the first factor and in fair

use analysis generally is ... whether and to what extent the new work is transformative," not whether the use is commercial. *Castle Rock*, supra, 150 F.3d at 142 (internal quotations omitted).

Here, the court has found that defendants' copying of plaintiffs' articles is minimally, if at all, transformative. The comments of the individual who posts an article generally add little by way of comment or criticism to its substance. The extent of the copying is more than is necessary to foster the critical purpose it is designed to serve. Because the copying is verbatim, encompasses large numbers of articles, and occurs on an almost daily basis, the evidence supports a finding that defendants (and visitors to the Free Republic page) engage in extensive, systematic copying [*53] of plaintiffs' works.

Weighed against the essentially non-transformative nature of defendants' use is the fact that they do not directly derive revenue or profit from the posting of plaintiffs' articles, and the fact that their operation of the Free Republic website has many characteristics of a non-profit venture. So too, their use of plaintiffs' articles appears to be intended more for public benefit than for private commercial gain.

Since the "central purpose" of the inquiry on the first fair use factor is to determine "whether the new work merely 'supersede[s] the objects' of the original creation, ... or instead adds something new" (*Campbell*, supra, 510 U.S. at 579), the court finds that the non-transformative character of the copying in this case tips the scale in plaintiffs' favor, and outweighs the non-profit/public benefit nature of the purpose for which the copying is performed. This is particularly true since the posting of plaintiffs' articles to the Free Republic site amounts to "systematic ... multiplying [of] the available number of copies" of the articles, "thereby serving the same purpose" for which licenses are sold or archive charges imposed. [*54] See *American Geophysical*, supra, 60 F.3d at 924. The first fair use factor thus favors plaintiffs.

2. The Nature Of The Copyrighted Work

The second factor identified in § 107 recognizes "that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied." *Campbell*, supra, 510 U.S. at 586. Thus, "the more creative a work, the more protection it should be accorded from copying; correlatively, the more informational or functional the plaintiff's work, the broader should be the scope of the fair use defense." *NIMMER*, supra, § 13.05[A][2][a]. Newspaper articles to a large extent gather and report facts. Nonetheless, a news reporter must determine which facts are significant and recount them in an interesting and appealing manner. See *Harper & Row*, supra, 471 U.S. at 547 ("creation of a nonfiction work, even a compilation of pure fact, entails originality").

A number of cases that have analyzed alleged copying of news articles or videotapes of news events have concluded that the second fair [*55] use factor weighs in the defendant's favor. See *Reuters Television*, supra, 149 F.3d at 994 (the court held that the second factor weighed in favor of defendants that copied news footage); *Los Angeles News Service v. KCAL-TV Channel 9*, 108 F.3d 1119, 1122 (9th Cir. 1997) (the second factor weighed in favor of a finding of fair use where defendants copied news footage); *Los Angeles News Service v. Tullo*, 973 F.2d 791, 792, 798 (9th Cir. 1992) (the second factor favored a video news clipping service that used portions of

copyrighted videotapes of newsworthy events). See also *American Geophysical*, supra, 60 F.3d at 925 (given the "manifestly factual character of the ... articles" from scientific and medical journals copied by defendant, the court held that the second factor weighed in favor of fair use); *Television Digest*, supra, 841 F. Supp. at 10 (the court found that the second factor weighed in favor of a defendant that copied a newsletter containing original news stories). Compare *Nihon Keizai Shimbun*, supra, 166 F.3d at 72-73 (in a suit by a newspaper publisher against a defendant [*56] that gathered news articles from various sources and sold "abstracts" of them to its customers, the court recognized that newspaper articles are predominantly factual in nature and that expressive elements do not dominate, but nonetheless concluded that the second "factor is at most neutral on the question of fair use").

While plaintiffs' news articles certainly contain expressive elements, they are predominantly factual. Consequently, defendants' fair use claim is stronger than it would be had the works been purely fictional. See *Sony*, supra, 464 U.S. at 455, n. 40 ("Copying a news broadcast may have a stronger claim to fair use than copying a motion picture"). The court concludes that the second factor weighs in favor of a finding a fair use of the news articles by defendants in this case.

3. The Amount And Substantiality Of The Portion Used In Relation To The Copyrighted Work As A Whole

Defendants concede that they have copied and posted entire articles published in plaintiffs' newspapers, although they dispute that all of plaintiffs' articles posted to the Free Republic site are verbatim copies. As noted earlier, defendants' evidence does [*57] not support their contention in this regard. In his deposition, defendant Robinson conceded that verbatim copying of entire articles or substantial portions thereof is the norm, and the exhibits submitted by defendants bear this out. n54

n54 See Defendants' Exhibits - Vol. 2, Ex. 1006; Vol. 3, Ex. 1007; Vol. 4, Ex. 1009 at 55:14-18.

The fact that exact copies of plaintiffs' article are posted to the Free Republic site weighs strongly against a finding of fair use in this case. See *American Geophysical*, supra, 60 F.3d at 926 (defendant's copying of entire copyrighted articles militated against a finding of fair use and led the court to conclude that the third factor weighed in plaintiffs' favor); *Hustler*, supra, 796 F.2d at 1155 ("although wholesale copying does not preclude fair use per se," reproducing an entire parody was the type of wholesale copying that "militated against a finding of fair use"); *Supermarket of Homes, Inc. v. San Fernando Valley Board of Realtors*, 786 F.2d 1400, 1409 (9th Cir. 1986) [*58] ("generally, no more of a work may be taken than is necessary to make the accompanying comment understandable"); *Television Digest*, supra, 841 F. Supp. at 10 (because an entire copyrighted work was used, the court concluded that the third factor weighed against a finding of fair use); *NIMMER*, supra, § 13.05[A][3] ("whatever the use, generally, it may not constitute a fair use if the entire work is reproduced").

Citing the fact that plaintiffs' copyright registration covers their newspapers as a whole, defendants contend that the papers are plaintiffs' "works," and not the individual articles that appear in them. Thus, they contend, the copying of a single article constitutes reproduction of only a small portion of the work. This proposition is not supported by the case law. See

American Geophysical, *supra*, 60 F.3d at 925-26 (despite the fact that plaintiffs' copyright registration covered their journals as a whole, the court held that copying an entire article was equivalent to copying the entire work); *Hustler*, *supra*, 796 F.2d at 1155 (stating that "[a] creative work does not deserve less copyright protection [*59] just because it is part of a composite work" and holding that the copying of a one-page parody from a 154-page magazine constituted reproduction of the entire work); *Netcom On-Line II*, *supra*, 923 F. Supp. at 1247 ("although many of Hubbard's lectures, policy statements, and course packets are collected into larger volumes, and registered as a whole, they may still constitute separate works for the purposes of this factor"); *Lerma*, *supra*, 1996 WL 633131 at *9 ("we find that the Works at issue in this case are combined in 'collections' and that each subpart must be considered a 'single work' for the purposes of fair use analysis").

Defendants also contend that copying all or a substantial portion of the articles is essential to the critical purpose of the Free Republic website. See *Campbell*, *supra*, 510 U.S. at 586 (the applicable test to use in assessing the third fair use factor is whether the amount copied was "reasonable in relation to the purpose of the copying"). In assessing such an argument, *Campbell* instructs that the court focus on "the persuasiveness of a [copier's] justification for the particular copying done," and [*60] noted that "the enquiry will harken back to the first of the statutory factors, for ... the extent of the permissible copying varies with the purpose and character of the use." *Id.* at 586-87.

As detailed in the court's consideration of the first fair use factor, defendants have not offered a persuasive argument that full-text copying is essential to the critical purpose of the Free Republic site. Contrasted with the purpose and character of the use, the wholesale copying of plaintiffs' articles weighs against a finding of fair use. See *Castle Rock*, *supra*, 150 F.3d at 144 ("In *Campbell*, ... the Supreme Court clarified that the third factor -- the amount and substantiality of the portion of the copyrighted work used -- must be examined in context. The inquiry must focus upon whether 'the extent of ... copying' is consistent with or more than necessary to further 'the purpose and character of the use'"); *Infinity Broadcasting*, *supra*, 150 F.3d at 110 ("the question most relevant to th[e third] factor [is] whether 'no more was taken than necessary'").

4. The Effect Of The Use On The Potential Market For Or Value Of The [*61] Copyrighted Work

The fourth factor examines "the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107(4). It requires evaluating not only the extent of market harm caused by the alleged infringer's use, but also "whether unrestricted and widespread conduct of the sort engaged in by the defendant ... would result in a substantially adverse impact on the potential market' for the original." *Campbell*, *supra* (quoting *NIMMER*, *supra*, § 13.05[A][4]); *Harper & Row*, *supra*, 471 U.S. at 568. In this regard, it is significant if widespread use of the type in which the defendant is engaged would "diminish[] potential sales, interfer[e] with marketability, or usurp[] the market" for the original. *Sega*, *supra*, 977 F.2d at 1523 (noting that if copying had this effect, "all other considerations might be irrelevant"). Markets for derivative works, i.e., those markets 'that creators of original works would in general develop or license others to develop,' must be considered in addition to the market for the original. *Campbell*, *supra*, 510 U.S. at 590, 592. [*62] See also *American Geophysical*, *supra*, 60 F.3d at 929-30;

Cable/Home Communication Corp. v. Network Productions, Inc., 902 F.2d 829, 845 (11th Cir. 1990) ("potential market' means either an immediate or a delayed market, and includes harm to derivative works").

In assessing the fourth factor, courts frequently contrast a use that "suppresses" or "destroys" the market for the original or derivative works with one that "usurps" or "substitutes" for those markets. See, e.g., *Castle Rock*, supra, 150 F.3d at 145. See also *Campbell*, supra, 510 U.S. at 593; *Sony Computer*, supra, 203 F.3d at 607; *Sundeman*, supra, 142 F.3d at 207; *Sega*, supra, 977 F.2d at 1523. "[A] work that merely supplants or supersedes another is likely to cause a substantially adverse impact on the potential market of the original, [while] a transformative work is less likely to do so." *Sony Computer*, supra, 203 F.3d at 607. See also *Sega*, supra, 977 F.2d at 1523 ("The Harper & Row Court found a use that effectively usurped the market for the copyrighted work [*63] by supplanting that work to be dispositive").

Applying these principles to the present case, the undisputed evidence shows that the Free Republic website has approximately 20,000 registered users, receives as many as 100,000 hits per day, and attracts between 25 and 50 million page views each month. The evidence also shows that visitors to the site are able to read full text copies of articles from plaintiffs' newspapers and archives without purchasing the papers, visiting plaintiffs' websites or paying the fee plaintiffs charge for retrieving an article from their archives. While defendants argue that the Free Republic site is a "poor substitute" for locating plaintiffs' articles on their websites, n55 the court has found that for those individuals who visit the site, the articles posted to freerepublic.com do substitute for the original works. Given the number of registered visitors, hits and page views Free Republic attracts, the court cannot accept defendants' assertion that the site has only a de minimis effect on plaintiffs' ability to control the market for the copyrighted works. n56

n55 Defs.' Opp. at 20:4-5. [*64]

n56 See id. at 20:7-8; Stout Decl., PP 47-51. In his declaration, Richard Stout opines that the detrimental impact of the Free Republic site on plaintiffs' websites is "trivial." (Id., P 51.) He bases this conclusion on the fact that the volume of traffic visiting the Free Republic site is "trivial" in comparison with the number of visitors to plaintiffs' sites, and that only a small percentage of the articles that appear on the Free Republic site are from plaintiffs' publications. (Id., PP 48, 49.) Thus, he concludes that the "general public" wishing to read articles from plaintiffs' publications has "no reason to believe" that the Free Republic site is a better place to view plaintiff's articles than the papers' own websites. (Id., P 50.) This overlooks the fact that those who visit the Free Republic site can read plaintiffs' articles without visiting their websites. As to those individuals, the articles posted to the Free Republic site clearly substitute for the originals, and make a visit to plaintiffs' websites unnecessary.

Moreover, this kind of de minimis argument [*65] has been rejected by the courts. In *Infinity Broadcasting*, for example, the court considered the fair use defense of an individual who operated a "dial-up" service that allowed "subscribers (for a fee) to listen over the telephone to contemporaneous radio broadcast in remote cities," including broadcasts by stations owned by the plaintiff. *Infinity Broadcasting*, supra, 150 F.3d at 106. *Infinity* offered a similar service on a

limited basis to certain clients, but acknowledged that it had "no present interest" in developing the market further. *Id.* at 107, 111. The defendant argued that its operation was likely to have no material effect on the value of the copyrighted works because it was "directed to a narrow and specialized audience" and generated "extremely modest" revenues. *Id.* at 111. The court rejected this. Noting that it could not conclude defendant's use had only a negligible effect on Infinity's ability to exploit the potential market, the court stated:

"Infinity, in the exercise of its business judgment, has decided that its best current use of listen lines is to offer them at no additional cost to certain 'valued [*66] customers.' Dial-Up disrupts this practice by removing Infinity's control over who should have access to such lines. Kirkwood is selling Infinity's copyrighted material in a market that Infinity, as the copyright owner, is exclusively entitled to exploit. Kirkwood does not suppress demand for Infinity's broadcasts in the manner of a reviewer, but instead replaces Infinity as the supplier of those broadcasts to meet the demand of his customers. This is precisely the kind of harm the fourth factor aims to prevent." *Id.* n57

See also *Sega Enterprises Ltd. v. Maphia*, 948 F. Supp. 923, 937 (N.D.Cal. 1996) (in finding that the fourth fair use factor cut against a bulletin board service that allowed users to download plaintiff's video games, the court rejected defendant's argument that any impact on plaintiff's sales was de minimis, since only a limited number of users had copiers that enabled them to play the games, the users probably played in their own homes, and there was no evidence that they had further distributed the downloaded video games; the court determined that "unrestricted and widespread conduct of this sort would result in a substantial adverse [*67] impact on the market for the Sega games"); *Playboy Enterprises, Inc. v. Frena*, 839 F. Supp. 1552, 1559 (M.D.Fla. 1993) (rejecting defendant's argument that his use was de minimis).

n57 While the Supreme Court's decision in *Sony* suggests that some potential markets should be considered "too insubstantial [or speculative] to tilt the fourth fair use factor in favor of the copyright holder" (see *American Geophysical*, supra, 60 F.3d at 930, n. 18), the market is presently being exploited by plaintiffs via their websites, and thus cannot be said to be of this type.

This is precisely defendants' argument here -- that the Free Republic site is small in comparison to the sites operated by plaintiffs, is not known to the general public, and thus could not divert a substantial amount of business from plaintiffs. As the copyright holders, however, plaintiffs have the "right to control" access to the articles, and defendants' activities affect a market plaintiffs currently seek to [*68] exploit.

Plaintiffs assert they have lost and will lose revenue because visitors to the Free Republic site can read plaintiffs' archived news articles without paying the fee they would be charged for accessing the articles at plaintiffs' sites. Similarly, plaintiffs contend that defendants' use affects their ability to generate licensing revenue, since the fact that the articles are available for free viewing on Free Republic's web page diminishes their value to licensees. Finally, plaintiffs argue that defendants' copying reduces the number of people visiting their sites, and thus causes them to lose advertising revenue calculated on the number of hits they receive. n58

n58 At the hearing on the motions, defendants claimed they had been "sandbagged" because, contrary to the declarations submitted in connection with the motions for summary judgment, plaintiffs' designated Rule 30(b)(6) witnesses testified at their depositions that there was no evidence that posting plaintiffs' articles to the Free Republic site diverted hits from plaintiffs' websites. Specifically, defendants cited Koefoot's testimony, in which he said there was no quantitative data that defendants' posting of articles diverted traffic from the Washington Post website. (See Defendants' Exhibits - Vol. 7, Ex. 1012 (Deposition of Eric Koefoot) at 56:15-57:24.) Koefoot added, however, that "qualitative data" supported such a conclusion since it is self-evident that a person who reads an article on the Free Republic site will not go to the Washington Post site to read the same thing. (Id. at 57:25-58:8.) Defendants also cited Eric Schvimmer's deposition testimony, in which he stated that he did not search for, and did not know of, any documents showing an decrease or increase in the number of hits to the Washington Post's website as a result of defendants' allegedly infringing acts. (Defendants' Exhibits - Vol. 6, Ex. 1011 (Deposition of Eric Schvimmer) at 65:6-11, Ex. 5 at 6.) Plaintiffs did not submit a declaration from Schvimmer in connection with the motions. They did submit Koefoot's declaration, however, which contains generalized statements to the effect that the Washington Post website loses potential "hits" when people can access Post articles at the Free Republic site. (Koefoot Decl., PP 21-22.) Perruso makes an almost identical statement respecting the Los Angeles Times' website in her declaration. (Perruso Decl., PP 20-21.) These statements do not contradict the deposition testimony. While plaintiffs may have no "quantitative data" to support the claim, they have consistently asserted that the Free Republic site reduces traffic on their web pages.

[*69]

Defendants respond that plaintiffs have not adduced evidence of lost revenue resulting from operation of the Free Republic site. This, however, is not determinative. See *Sony*, supra, 464 U.S. at 451 ("Actual present harm need not be shown"). In *Reuters*, supra, 149 F.3d at 994, defendants copied plaintiffs' news footage without permission. Plaintiffs could not prove that they had lost sales of the footage or that they had suffered any actual adverse market effect. Id. The court noted that allowing a customer to buy the footage from defendants rather than plaintiffs lessened the market for plaintiffs' footage, and concluded that "such actions if permitted would result in a substantially adverse impact on the potential market for the original works." Id. See also *Ringgold v. Black Entertainment Television*, 126 F.3d 70, 81 (2d Cir. 1997) (artist who created a story quilt that was used as set decoration for a television program was "not required to show a decline in the number of licensing requests for" a poster depicting the quilt since the program aired so long as she could demonstrate that there was "a 'traditional, reasonable, [*70] or likely to be developed' market for licensing [the] work as set decoration").

Here, plaintiffs have shown that they are attempting to exploit the market for viewing their articles online, for selling copies of archived articles, and for licensing others to display or sell the articles. n59 Defendants' use "substitutes" for the originals, and has the potential of lessening the frequency with which individuals visit plaintiffs' websites, of diminishing the market for the sale of archived articles, and decreasing the interest in licensing the articles. See *Hustler*, supra, 796 F.2d at 1155-56 (if the copying "fulfill[s] 'the demand for the original' works and 'diminish[es] or prejudice[s]' their potential sale," this justifies a finding that the fourth fair use

factor favors the copyright holder); *Wainwright Securities*, supra, 558 F.2d at 96 (defendant's abstracts filled the demand for plaintiff's financial reports).

n59 Koefoot Decl., PP 8, 10-13; Perruso Decl., PP 8, 10-13.

[*71]

Defendants counter that there is no evidence that people who view the articles on the Free Republic site would ever have visited plaintiffs' websites. It is not necessary, however, to show with certainty that future harm will result. See *Sony*, supra, 464 U.S. at 451. Rather, "what is necessary is a showing by a preponderance of the evidence that some meaningful likelihood of future harm exists." *Id.* That likelihood is present when articles that would otherwise be available only at sites controlled or licensed by plaintiffs are available at a different site as well. The likelihood only increases when one considers the impact on the market if defendants' practice of full text copying were to become widespread.

Defendants also contend that plaintiffs actually benefit from having their articles posted verbatim on the Free Republic site. While they argue that plaintiffs' sites receive "literally tens of thousands, if not hundreds of thousands of hits per month" n60 as a result of referrals from the Free Republic site, this overstates their expert's quantification of the number of referral hits. In his declaration, Richard Stout states that the Los Angeles Times' website [*72] receives approximately 20,000 hits per month from users who visit the Free Republic site before accessing the Times' site. Stout estimates that these referral hits generate approximately \$ 1,000 in revenue for the paper each month. n61 Defendants argue that this information regarding referral hits demonstrates that plaintiffs' advertising revenue is not diminished because of a reduction in the number of hits to their sites. Stout's declaration, however, does not address how many hits are diverted from plaintiffs' websites as a consequence of the posting of articles to the Free Republic site, and this is the pertinent inquiry in terms of potential market harm.

n60 Defs.' Mot. at 14:16.

n61 See Stout Decl., P 46. Stout's figures concern the Los Angeles Times site only.

Defendants assert the evidence regarding referral hits demonstrates that Free Republic is creating a demand for plaintiffs' works. Even if this is the case, it does not mandate a conclusion that the fourth fair use factor favors defendants. [*73] Courts have routinely rejected the argument that a use is fair because it increases demand for the plaintiff's copyrighted work. See *Campbell*, supra, 510 U.S. at 591, n. 21 (even if a "film producer's appropriation of a composer's previously unknown song ... turns the song into a commercial success[,] the boon to the song does not make the film's ... copying fair"); *Ringgold*, supra, 126 F.3d at 81, n. 16 ("Even if the unauthorized use of plaintiff's work in the televised program might increase poster sales, that would not preclude her entitlement to a licensing fee"); *D.C. Comics Inc. v. Reel Fantasy, Inc.*, 696 F.2d 24, 28 (2d Cir. 1982) ("Since one of the benefits of ownership of copyrighted material is the right to license its use for a fee, even a speculated increase in DC's comic book sales as a consequence of RFI's infringement would not call the fair use defense into play as a matter of law. The owner of the copyright is in the best position to balance the prospect of increased sales against revenue from a

license"); *Storm Impact, Inc. v. Software of the Month Club*, 13 F. Supp. 2d 782, 790 (N.D.Ill. 1998) [*74] ("This argument that increased distribution of the author's work is a benefit to the author has been rejected by the Supreme Court," citing *Harper & Row, supra*, 471 U.S. at 569)).

In short, plaintiffs have demonstrated that they are attempting to exploit the market for viewing their articles online, for selling copies of archived articles, and for licensing others to display or sell the articles. They have demonstrated that the availability of verbatim copies of the articles at the Free Republic site has the potential to interfere with these markets, particularly if it becomes a widespread practice. See *Sony, supra*, 464 U.S. at 451; *Tullo, supra*, 973 F.2d at 798; *Hustler, supra*, 796 F.2d at 1155 (copyright owner may demonstrate that there is "some meaningful likelihood of future harm" by showing that, "should the challenged use become widespread, it would adversely affect the potential market for the work"; this inquiry focuses on "whether the infringing use (1) 'tends to diminish or prejudice the potential sale of [the] work,' or (2) tends to interfere with the marketability of the work"). Defendants, who bear [*75] the burden of proof on fair use, have not rebutted this showing by proving "an absence of 'usurpation' harm to" plaintiffs. *Infinity Broadcasting, supra*, 150 F.3d at 111. Accordingly, the fourth factor weighs against a finding of fair use in this case.

5. Balancing The Fair Use Factors

In sum, three of the four fair use factors weigh in plaintiffs' favor. Moreover, the factor that favors defendants -- the nature of the copyrighted work -- does not provide strong support for a fair use finding, since defendants copied both the factual and the expressive elements of plaintiffs' news articles. Conversely, the amount and substantiality of the copying and the lack of any significant transformation of the articles weigh heavily in favor of plaintiffs on this issue. The court thus finds that defendants may not assert a fair use defense to plaintiffs' copyright infringement claim. See *Reuters, supra*, 149 F.3d at 994-95 ("the district court, having found that only one of the four statutory factors weighed in favor of defendants, correctly concluded that the fair use defense did not apply"); *Tullo, supra*, 973 F.2d at 799 (the [*76] only one of the four fair use factors -- the nature of the copyrighted work -- supported a fair use finding, the court held that the defense could not be invoked to shield defendant from liability for infringing plaintiff's copyrights).

D. First Amendment Defense

Defendants assert, as a separate defense, the fact that the First Amendment protects their posting of copies of plaintiffs' news articles to the Free Republic website. n62 Defendants contend that visitors to the Free Republic site will be unable to express their views concerning the manner in which the media covers current events since the omissions and biases in the articles will be difficult to communicate to readers without the full text of the article available. n63

n62 Often, First Amendment concerns are considered as part of the fair use analysis. See, e.g., *Hustler, supra*, 796 F.2d at 1151-52 ("Courts balance [the fair use] factors to determine whether the public interest in the free flow of information outweighs the copyright holder's interest in exclusive control over the work").

n63 Defs.' Mot. at 17:21-23.

[*77]

In *Harper & Row, supra*, *Nation* magazine reprinted, without authorization, 300 words from the memoirs of President Gerald Ford. 471 U.S. at 542-45. The Court noted that factual information concerning current events contained in news articles is not protected by copyright. It stated, however, that "copyright assures those who write and publish factual narratives ... that they may at least enjoy the right to market the original expression contained therein as just compensation for their investment." *Id.* at 556-57 (citing *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 575, 53 L. Ed. 2d 965, 97 S. Ct. 2849 (1977)). It stressed that copyright fosters free expression because it "supplies the economic incentive to create and disseminate ideas" by "establishing a marketable right to the use of one's expression." 471 U.S. at 558. It noted that copyright also promotes the countervailing First Amendment right to refrain from speech by protecting the owner of a copyrighted work from being forced to publish it. *Id.* at 559. For all these reasons, the Court concluded that "that copyright's idea/expression dichotomy 'strike[s] [*78] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression.'" *Id.* at 556.

Accordingly, it rejected defendant's First Amendment argument that material could be copied because it was "newsworthy," (*id.* at 559) and "limited its inquiry to 'the traditional equities of fair use,' unexpanded by any free speech concerns." *NIMMER, supra*, § 1.10[B][2] (quoting *Harper & Row, supra*, 471 U.S. at 560). Courts have generally interpreted this discussion in *Harper & Row* to mean that First Amendment considerations are subsumed within the fair use Analysis. *Nihon Keizai Shimbun, supra*, 166 F.3d at 74 ("We have repeatedly rejected First Amendment challenges to injunctions from copyright infringement on the ground that First Amendment concerns are protected by and coextensive with the fair use doctrine"); *Twin Peaks, supra*, 996 F.2d at 1378 ("except perhaps in an extraordinary case, 'the fair use doctrine encompasses all claims of first amendment in the copyright field'"); *Tullo, supra*, 973 F.2d at 795 ("Copyright [*79] law incorporates First Amendment goals by ensuring that copyright protection extends only to the forms in which ideas and information are expressed and not to the ideas and information themselves. ... First Amendment concerns are also addressed in the copyright field through the 'fair use' doctrine").

Nimmer argues that if the "copying of the expression is essential effectively to convey the idea expressed," then the First Amendment protects the copying regardless of copyright. As the court in *Tullo* noted, "no court has adopted *Nimmer's* proposal." *Tullo, supra*, 973 F.2d at 796, n. 5. *Nimmer* argues that the Supreme Court in *Harper & Row* implicitly adopted this framework when it acknowledged that some of the briefer quotations from President Ford's memoirs were "arguably necessary adequately to convey the facts; for example, Mr. Ford's characterization of the White House tapes as the 'smoking gun' is perhaps so integral to the idea expressed as to be inseparable from it." *Harper & Row, supra*, 471 U.S. at 563; *NIMMER, supra*, § 1.10[D].

Even assuming this is true, defendants have failed to show that copying plaintiffs' news articles [*80] verbatim is essential to communication of the opinions and criticisms visitors to the website express. As discussed above in connection with analysis of defendants' fair use defense, visitors' comments more often concern the underlying news event than they do the manner in

which that event was covered by the media. And, even where media coverage is the subject of the critique, the gist of the comments (which concern the fact that a particular media outlet published a story or approached the story from a particular angle can generally be communicated without full text copying of the article. The availability of alternatives -- such as linking and summarizing -- further undercuts any claim that First Amendment rights are implicated. While defendants and other users of the Free Republic site may find these options less ideal than copying plaintiffs' articles verbatim, this does not demonstrate that a First Amendment violation will occur if full text posting is prohibited.

III. CONCLUSION

For the foregoing reasons, plaintiffs' motion for summary adjudication with respect to fair use is granted, and defendants' motion is denied.

DATED: March 31, 2000

MARGARET M. [*81] MORROW

UNITED STATES DISTRICT JUDGE