

**UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS**

JONATHAN MONSARRAT,	)	
	)	
Plaintiff,	)	Civil Action No. 20-cv-10810-RGS
	)	
v.	)	<b>MEMORANDUM IN SUPPORT</b>
	)	<b>OF MOTION TO DISMISS THE</b>
RON NEWMAN,	)	<b>FIRST AMENDED COMPLAINT</b>
	)	
Defendant.	)	
	)	

**INTRODUCTION**

Jonathan Monsarrat (“Monsarrat”) is again suing Ron Newman (“Newman”) over online comments first posted in 2009 and 2010 in the Davis Square LiveJournal community discussion forum (“DSLJ”). He first sued Newman, and dozens of others, over their online comments and alleged copyright infringements in 2013, in *Monsarrat v. Fileman, Newman, and Does 1-100*, No. 1381-cv-00399 (Mass. Super. Ct. Middlesex Cty.) (“*Newman I*”). That suit was dismissed with prejudice. In 2017 Newman migrated the DSLJ posts from the hosting service LiveJournal (“LJ”) to a new host site, Dreamwidth (“DW”). Based on that ostensibly wrongful act, Monsarrat again raises infringement and defamation claims for which Newman still cannot be held liable.

The copyright claim fails under the fair use doctrine. The allegedly infringed work was Monsarrat’s final post in a February 2010 DSLJ thread that discussed him after his widely reported arrest. In that post, entitled “Violation of LiveJournal abuse policies” (“Violation”), Monsarrat threatened to pursue harassment claims against Newman and other DSLJ users unless they deleted their posts from the thread. When DSLJ changed hosts in 2017, Newman made an archival, back-up copy of the forum to be maintained on DW, including Violation and many of the posts at issue in *Newman I*. Preserving a record of the threatening post, along with the other DSLJ posts that Monsarrat had threatened and sued him over, was a non-infringing fair use.

The defamation claims fare no better. Migrating DSLJ comments to a new host site did not alter their content or give them any defamatory character. Newman acted as the “provider or user of an interactive computer service” (“ICS”), so he may not “be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1).<sup>1</sup> He is immune from claims that frame him as the source of third-party comments.

### FACTUAL BACKGROUND

LJ is an interactive online social network on which users, in “shared or group journals called ‘communities,’” create message-board style threads of posts and comments. Doc. 9 ¶¶ 7-8, 18. Newman was one of the moderators of DSLJ, an LJ user community focused on Somerville. *Id.* ¶ 9; Exhibit A ¶ 44 cmt. 5; *see* Exhibit U p. 2.<sup>2</sup>

On July 24, 2009, a *Somerville News* reporter initiated a thread on DSLJ enquiring about Monsarrat’s “Wheel Questions” public art installation, which was on display in Somerville’s Davis Square plaza. Exhibit D. LJ users including Newman, under his LJ username ron\_newman, discussed the artwork and Monsarrat in that thread. *See id.* pp. 3-4; Doc. 9 ¶¶ 21(v) & (viii).

On January 29, 2010, Monsarrat was arrested at a party at his Somerville residence and charged with disorderly conduct and providing alcohol to minors. Exhibit S. The *Somerville Journal*’s Wicked Local Somerville website reported on the arrest on February 4, 2010. Exhibits T. That morning an LJ user initiated a thread on DSLJ entitled “Today’s Somerville Police Blog,” quoting and providing a link to that *Journal* article. Exhibit A ¶¶ 41-43; Exhibit C. The thread grew to 526 comments by dozens of LJ users, including Newman, who “offered editorial like

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<sup>1</sup> 47 U.S.C. § 230 (“Section 230” or “CDA”) codifies part of the Communications Decency Act of 1996, promulgated in Section 509 of the Telecommunications Act of 1996. 110 Stat. 137-39.

<sup>2</sup> For reasons further explained in Newman’s Request for Judicial Notice filed herewith, Exhibits A through U filed with the Motion to Dismiss (documents filed in *Newman I* and *Zaiger*; the LiveJournal and Dreamwidth posts at issue in the complaint; and online articles quoted in the complaint or hyperlinked in those posts) should be deemed incorporated by reference in the complaint or subject to judicial notice and considered in deciding the Motion to Dismiss.

comments.” *Id.*; Doc. 9 ¶¶ 9, 21(ii)-(iv), (vi), (viii). Monsarrat joined in, making 80 comments in the thread under his LJ username `make_you_laugh`. Exhibit C. In Violation, his parting shot on the thread, he threatened to pursue a claim that the other users’ comments violated LJ’s abuse policy. *Id.* p. 95; Exhibit G p. 2. After his “threats made to the community,” DSLJ’s moderators “permanently froze[]” the thread on February 6, 2010, preventing further replies. Exhibit C p. 1.

Monsarrat’s arrest inspired further media coverage and commentary on other websites. *See* Exhibit A ¶¶ 34-39, 44-49, Exhibit B; Doc. 9 ¶¶ 8, 21(i).

Monsarrat sued Newman, Deb Filcman, and 100 Doe defendants in state court in 2013 in *Newman I*, alleging defamation, Chapter 93A violations, commercial disparagement, copyright infringement, intentional infliction of emotional distress, and conspiracy. Doc. 9 ¶¶ 11 & 21(vii), Exhibits A, K, N, U. He voluntarily dismissed all claims with prejudice on June 7, 2013. Doc. 9 ¶ 12; Exhibits E-F. *See* Mike Masnick, *Jonathan Monsarrat Drops Ridiculous Lawsuit Against Online Commenters*, TechDirt (June 10, 2013), [techdirt.com/articles/20130608/08444123372](http://techdirt.com/articles/20130608/08444123372); Julie McMahon, *Them’s fightin’ words*, 41 Mass. Law. Wkly. 1932 (July 15, 2013).

LJ modified its terms of service on April 4, 2017, making the service subject to Russian law and potentially political censorship. *See* Exhibit P p. 14 (“The new terms prompted wide concern from users who believed that their content would now be targeted under Russian censorship policies, including the country’s ‘gay propaganda’ law.”); Doc. 9 ¶ 7 (citing Exhibit P). To migrate the Davis Square community to DW (“DSDW”) from LJ, on or after April 30, 2017, Newman backed up a compilation of the forum threads and reposted them on DSDW, including the 2009 “Wheel Questions” thread, the 2010 “Today’s Somerville Police Blog” thread, and threads from 2013 discussing *Newman I*. Doc. 9 ¶¶ 16, 20, 21(ii)-(ix); Exhibits I-K & N. The community now operates on DW as it had on “its LiveJournal predecessor.” Doc. 9 ¶¶ 18, 32.

In *Monsarrat v. Zaiger*, No. 1:17-cv-10356-PBS (“*Zaiger*”), Monsarrat sued Brian Zaiger in this Court in 2017, alleging copyright infringement on a page about Monsarrat on the website Encyclopedia Dramatica. Doc. 9 ¶¶ 8, 14; Doc. 13. The Court dismissed his claim as time-barred. Exhibit R; *Zaiger*, 286 F. Supp. 3d 253, 257 (D. Mass. Dec. 21, 2017). The community news blog *Universal Hub* reported on that dismissal on December 26, 2017. Exhibit M. In a post on DSDW later that day, Newman discussed the *Zaiger* dismissal in the context of *Newman I*. Doc. 9 ¶ 32; Exhibit L. His post included hyperlinks to that *Universal Hub* article; to two DSLJ threads from 2013, migrated to DSDW, about the earlier case; and to a compilation of archived threads from the community with a “jonmon” tag discussing Monsarrat. Exhibits K-O.

#### LEGAL STANDARD

“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). That requires more than “‘naked assertions’ devoid of ‘further factual enhancement.’” *Id.* (quoting *Twombly*, 550 U.S. at 557). “[F]acts that are ‘merely consistent with’ a defendant’s liability” fall short. *Id.* (quoting *Twombly*, 550 U.S. at 557). “[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not ‘show[n]’—‘that the pleader is entitled to relief.’” *Id.* at 679 (quoting Fed. R. Civ. P. 8(a)(2)). Pleadings that contain “no more than conclusions are not entitled to the assumption of truth.” *Id.* “If the factual allegations in the complaint are too meager, vague, or conclusory to remove the possibility of relief from the realm of mere conjecture, the complaint is open to dismissal.” *SEC v. Tambone*, 597 F.3d 436, 442 (1st Cir. 2010) (citing *Twombly*, 550 U.S. at 555).

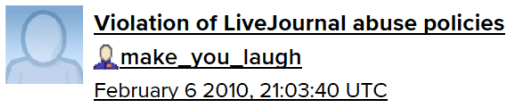
The Court must “accept as true all well-pleaded facts set forth in the complaint and draw all reasonable inferences therefrom in the pleader’s favor.” *Artuso v. Vertex Pharms., Inc.*, 637

F.3d 1, 5 (1st Cir. 2011). The Court “may augment these facts and inferences with data points gleaned from documents incorporated by reference into the complaint, matters of public record, and facts susceptible to judicial notice.” *Haley v. City of Boston*, 657 F.3d 39, 46 (1st Cir. 2011) (citing *In re Colonial Mortgage Bankers Corp.*, 324 F.3d 12, 15 (1st Cir. 2003)). Dismissal is proper when the facts establishing an affirmative defense are apparent from those materials. *Colonial Mortgage Bankers*, 324 F.3d at 16. “[W]hen a written instrument contradicts allegations in the complaint to which it is attached, the exhibit trumps the allegations.” *Young v. Wells Fargo Bank, N.A.*, 717 F.3d 224, 229 n. 1 (1st Cir. 2013).

## ARGUMENT

### A. The republication of Monsarrat’s Violation post on DSDW was a fair use.

The Violation post, which Monsarrat posted on DSLJ in 2010, appears there as follows:



LiveJournal's abuse policies are at <http://www.livejournal.com/abuse/policy.bml>

Under the section "Harassment", it says that "If a user makes a statement which encourages or incites others to harass another person in any way, access to that content will be disabled. This can also extend to entries in which harassment has not been explicitly called for, but is implied, at the discretion of the Abuse Prevention Team."

This is it. I'll give everyone here until Monday at 12pm to remove your comments from this board. At that point, I'm collecting every single one of them. I have already filed an abuse report with LiveJournal but won't call them until Monday at 12pm.

Exhibit G p. 2; *see* Doc. 9 ¶ 45. His attempt to suppress an archival copy of Violation, Exhibit H p. 2, is true to form. As Newman observed during *Newman I*, “One of Mr. Monsarrat’s intimidation tools, as he seeks to strong-arm silence about his past, is to demand silence about his demands.” Exhibit U p. 17; *see also* Adam Gaffin, *Online moderator fires back at lawsuit over discussions about arrest*, Universal Hub (May 15, 2013), [universalhub.com/2013/online-moderator-fires-back-lawsuit-over-discussio](http://universalhub.com/2013/online-moderator-fires-back-lawsuit-over-discussio). Monsarrat fails to state a copyright infringement claim over the copy of his threat now preserved on DSDW because it constitutes a fair use.

Fair use is often found on a motion to dismiss. *See Oyewole v. Ora*, 776 Fed. Appx. 42, 43-44 (2d Cir. 2019), *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 690 (7th Cir. 2012), *Leadsinger, Inc. v. BMG Music Publ'g*, 512 F.3d 522, 530 (9th Cir. 2008); *cf. Lombardo v. Dr. Seuss Enters., L.P.*, 729 Fed. Appx. 131, 132-33 (2d Cir. 2018) (affirming fair use finding on motion for judgment on the pleadings), *Shell v. DeVries*, No. 07-1086, 2007 U.S. App. LEXIS 28317 (10th Cir. Dec. 6, 2007) (same).

Fair use can be found upon the undisputed material facts properly before the Court under Rule 12. “[W]hen all relevant facts are presented ... the only two pieces of evidence needed to decide the question of fair use” are the plaintiff’s work and the defendant’s use of it. *Brownmark*, 682 F.3d at 690. The original post and the copy on DSDW are both integral to the complaint and subject to judicial notice. Doc. 9 ¶¶ 45-46. Monsarrat posted Violation on DSLJ in 2010, demanding that users take down their posts. Exhibit C p. 95. He sued Newman and others over those posts in 2013. Doc. 9 ¶¶ 7-12. LJ changed its terms of service in 2017. *Id.* ¶ 7, 19; *see* Exhibit P p. 14. Soon after, Newman saved copies of all DSLJ threads and migrated them to DSDW. Doc. 9 ¶¶ 16, 18, 20. On those facts, fair use protects the migrated copy of the threat.

“[T]he fair use of a copyrighted work ... is not an infringement of copyright.” 17 U.S.C. § 107. “Copyright law has the potential to restrict speech, and fair use serves as a necessary ‘First Amendment safeguard[]’ against this danger.” *Bouchat v. Baltimore Ravens Ltd. P’ship*, 737 F.3d 932, 944 (4th Cir. 2013) (*quoting Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003)). “Fair use ‘creates a privilege for others to use the copyrighted material in a reasonable manner despite the lack of the owner’s consent.’” *Soc’y of the Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F.3d 29, 59 (1st Cir. 2012) (*quoting Weissmann v. Freeman*, 868 F.2d 1313, 1323 (2d Cir. 1989)). “The Copyright Act codifies the fair use doctrine and breaks it into four factors that a

court must weigh in assessing whether use of a work is fair or infringing[:] the purpose and character of a work’s use, the nature of the copied work, the extent of the copying, and its effect on a work’s market value[.]” *Id.* (citing 17 U.S.C. § 107). “The ultimate determination of whether a use is fair requires a case-by-case analysis in which the four factors are to be ‘weighed together in light of the purposes of copyright.’” *Núñez v. Caribbean Int’l News Corp.*, 235 F.3d 18, 21 (1st Cir. 2000) (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994)). The four factors weigh strongly in favor a finding of fair use.

**1. The use of the post had a noncommercial purpose and transformative character.**

The first fair use factor considers “the purpose and character of the use,” including whether the use is “commercial” or for nonprofit educational purposes. 17 U.S.C. § 107(1). Central to this inquiry is whether the use “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message,” in short, “whether and to what extent the new work is ‘transformative.’” *Campbell*, 510 U.S. at 579.

Newman had no commercial purpose. The DSLJ posts could not be plausibly construed as “part of a business transaction.” Exhibit U p. 11. He and the other DSLJ moderators were unpaid volunteers. *Id.* p. 2; see *Mavrix Photographs, LLC v. LiveJournal, Inc.*, 873 F.3d 1045, 1050 (9th Cir. 2017) (discussing typical “LiveJournal communities ... operated exclusively by volunteer moderators”). He did not “directly and exclusively acquire[] conspicuous financial rewards from [his] use of the copyrighted material.” *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 922 (2d Cir. 1994). He could not have profited even indirectly because there is no advertising on the DW page. Exhibits H, J & Q pp. 2-3. And “the crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from the exploitation of the copyrighted material without paying the customary price.” *Harper & Row, Publr. v. Nation Enters.*, 471 U.S. 539, 562 (1985). There is no customary

price, as Monsarrat posted Violation on DSLJ for free, and it is not plausible that he ever charges anyone to view it. The use was wholly noncommercial.

The use also had a distinct and transformative purpose. “[C]opying from an original for the purpose of criticism or commentary on the original or provision of information about it, tends most clearly to satisfy *Campbell*’s notion of the ‘transformative’ purpose involved in the analysis of Factor One.” *Authors Guild, Inc. v. Google Inc.*, 804 F.3d 202, 215-16 (2d Cir. 2015). Fair use is supported when the work is not copied “for its intrinsic purpose,” that is, not “for the same purpose that the copyright holder intended his audience to use or enjoy the work.” *Jartech, Inc. v. Clancy*, 666 F.2d 403, 406 (9th Cir. 1982); *see Gregory*, 689 F.3d at 60-61.

The goal of Violation was to threaten. Monsarrat demanded that DSLJ users “remove your comments from this board” or face an “abuse report with LiveJournal.” Exhibit C p. 95. Newman, as one of the threatened, did not share that goal. He stood up to the 2013 lawsuit on free speech grounds. *See Exhibits N & U*. When new LJ policies endangered DSLJ he created an archive of the forum on DSDW, including Violation. That archival copy “conveyed the fact of the post rather than its underlying message ... [and] thus had a substantially different purpose than the post itself, a fact which weighs heavily in favor of fair use.” *Stern v. Does*, 978 F. Supp. 2d 1031, 1045 (C.D. Cal. 2011), *aff’d on other grounds sub nom. Stern v. Weinstein*, 512 Fed. Appx. 701 (9th Cir. 2013). His purpose of preservation is well recognized as favoring fair use. *See Sundeman v. Seajay Soc’y, Inc.*, 142 F.3d 194, 201 (4th Cir. 1999) (finding copies made to prevent damage to original manuscript and allow its authentication had a “non-commercial and nonexploitative” purpose); *Authors Guild, Inc. v. Google Inc.*, 954 F. Supp. 2d 282, 288 (S.D.N.Y. 2013) (“Google Books helps to preserve books and give them new life”). Maintaining a record of Monsarrat’s accusations of abuse against the DSLJ community further served



historical and autobiographical purposes. *See Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 609-10 (2d Cir. 2006) (finding posters originally used to promote upcoming Grateful Dead concerts were used transformatively as “historical artifacts” in coffee-table book).

This use is paradigmatic of the pro-speech purposes of the fair use doctrine. “When a copyrighted work contains unfair, inaccurate, or derogatory information concerning an individual or institution, the individual or institution may copy and reproduce such parts of the work as are necessary to permit understandable comment on the statements made in the work.” *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1153 n. 8 (9th Cir. 1986) (quoting H.R. Rep. No. 94-1476, 94th Cong., 2nd Sess. 73 (1976)). As this Court has observed, a blogger who reposted a photograph of someone flipping the bird at her “would have a plausible, and even dispositive fair use affirmative defense” to infringement. *Tuteur v. Crosley-Corcoran*, 961 F. Supp. 2d 329, 330, 333 (D. Mass. 2013). “It has never been the purpose of the copyright laws to restrict the dissemination of information about persons in the public eye even though those concerned may not welcome the resulting publicity.” *Rosemont Enters. v. Random House, Inc.*, 366 F.2d 303, 312 (2d Cir. 1966) (Lumbard, C.J., concurring). The first factor weighs heavily in favor of finding that Newman engaged in a noncommercial, transformative fair use.

**2. The post was previously published and had a factual, informational character.**

The second factor, the “nature of the copyrighted work,” also weighs in favor of fair use. 17 U.S.C. § 107(2). “Courts construe fair use protection broadly when the copyrighted material is more informational than entertaining in nature, and when it has already been released to the public.” *NAGE/Int’l Bhd. of Police Officers v. BUCI TV, Inc.*, 118 F. Supp. 2d 126, 129 (D. Mass. 2000) (citing *Harper & Row*, 471 U.S. at 563-64); accord *Gregory*, 689 F.3d at 61-62.

Monsarrat published Violation on DSLJ for free, intending that it be disseminated, so it is “hardly confidential or secret.” *Núñez*, 235 F.3d at 24 (finding second factor favored fair use).

He posted it to convey a demand that users delete their posts, and a threat to pursue claims with LJ. It was informational, not a vehicle of literary expression. Fair use is especially appropriate when such a factual or informational published work is reused “for its historical significance rather than its intrinsic creative worth.” *Bouchat*, 737 F.3d at 948 (citing *Bill Graham Archives*, 448 F.3d at 612-13). Therefore this factor weighs in favor of fair use.

**3. The extent of the use was limited to what was necessary to serve Newman’s purpose.**

The third factor is the “amount and substantiality of the portion used in relation to the copyrighted work as a whole.” 17 U.S.C. § 107(3). The “inquiry must be a flexible one, rather than a simple determination of the percentage used.” *Núñez*, 235 F.3d at 24. Courts analyze the first and third factors in tandem, and even wholesale copying does not weigh against fair use when it is consistent with the purpose of the use. *See id.* (“to copy any less than [the full amount] would have made the [use] useless”); *Haberman v. Hustler Magazine, Inc.*, 626 F. Supp. 201, 212 (D. Mass. 1986); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 820-21 (9th Cir. 2003).

The claim concerns a miniscule taking: a single post from a thread of 526 comments as of 2010. *See* Exhibit C pp. 95-96. Copying all of Violation was necessary to Newman’s historical, preservationist purposes. “In an age of blogs, listservs, and other online fora, a person’s short comment in cyberspace is frequently quoted in its entirety as others reply or forward it elsewhere. It would be strange, dangerous even, if every such quotation subjected the copier to liability and a federal lawsuit.” *Stern*, 978 F.2d at 1049. Accordingly this factor is neutral, and “of little consequence” to the Court’s analysis. *Núñez*, 235 F.3d at 24; *Kelly*, 336 F.3d at 820-21.

**4. The use had no effect on any market for, or value of, the Violation post.**

The fourth factor is “the effect of the use upon the potential market for or value of the copyrighted work.” 17 U.S.C. § 107(4). It weighs strongly in favor of fair use because no such effect is plausible. There is no licensing market for threats issued by disgruntled website users.

The fourth factor is the “single most important element of fair use.” *Harper & Row*, 471 U.S. at 566. Fair use protects “copying by others that does not materially impair the marketability of the work which is copied.” *Id.* at 566-67 (quoting 3 Melville Nimmer, Nimmer on Copyright § 1.10[D] at 1-87 (1984)); see *Haberman*, 626 F. Supp. at 210-11. The issue is “the likelihood of significant market harm.” *Campbell*, 510 U.S. at 590. “Evidence of substantial harm to it would weigh against a finding of fair use[.]” *Id.* at 593. “But a use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author’s incentive to create.” *Sony Corp. of Am. v. Univ. City Studios, Inc.*, 464 U.S. 417, 450 (1984). “What is necessary is a showing by a preponderance of the evidence that *some* meaningful likelihood of future harm exists.” *Id.* at 451.

Violation has no viable market. Monsarrat has not plausibly alleged that any market value “has been affected in any way by the alleged infringement.” *Doe v. Backpage.com, LLC*, 817 F.3d 12, 28 (1st Cir. 2016). Reproducing it on DW “did not affect its marketability. Unlike a manuscript, or other copyrightable works consumers might actually purchase, there is no market for” Monsarrat’s threat. *Devil’s Advocate, LLC v. Zurich Am. Ins. Co.*, 666 Fed. Appx. 256, 266 (4th Cir. 2016); see *Stern*, 978 F. Supp. 2d at 1048. “Where no market exists for a copyrighted work because the copyright holder ‘[n]ever tried to sell it,’ the fourth factor favors fair use.” *Bassett v. Jensen*, 459 F. Supp. 3d 293, 307 (D. Mass. 2020) (quoting *Núñez*, 235 F.3d at 25).

Monsarrat seeks “to redress a single legal injury” rooted in defamation. Doc. 13 p. 1; see Doc. 9 ¶ 1 (copyright use was “an integral part of Defendant’s defamatory statements”). No such injury is “a harm cognizable under the Copyright Act.” *Campbell*, 510 U.S. at 592. Reputational harms related to defamation are not relevant under the fourth factor. See *id.* (explaining “distinction between remediable [market] displacement and unremediable disparagement”). “The

goals of patent and copyright law ... focus[] on the right of the individual to reap the reward of his endeavors and have little to do with protecting feelings or reputation.” *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977). Thus, “any negative impact must result from the alleged act of copyright infringement, not merely from a disparaging remark.” *NAGE*, 118 F. Supp. 2d at 129 (citing *New Era Publ’g Int’l APS v. Henry Holt & Co.*, 904 F.2d 152, 160 (2d Cir. 1990)). The lack of any redressable market harm strongly supports a finding of fair use.

**5. The four-factor analysis strongly supports a finding of fair use.**

The four statutory factors are “weighed together, in light of the purposes of copyright.” *Campbell*, 510 U.S. at 578. On balance they strongly favor a finding of fair use. Newman maintained a record of a threat to the DSLJ community’s free expression. That noncommercial use had no demonstrable market effect, because the threat had no conceivable market. All four factors strongly support fair use except the third, which does not weigh against it. This is a hallmark case of fair use, not infringement, so the copyright claim should be dismissed.

**B. Section 230 immunizes the republication of third-party statements on DSDW.**

The Court should dismiss the defamation claims over statements written and posted online by third parties. Several of the allegedly defamatory statements were posted not on DSLJ or DW but on sites where Newman had no control, and migrating DSLJ to DW did not republish those statements. And Newman cannot be held liable for any of the posts that were migrated, because he may not be treated as their publisher or speaker under Section 230.

Defamation claims are often dismissed under Rule 12. *See Lemelson v. Bloomberg L.P.*, 903 F.3d 19, 23 (1st Cir. 2018); *Small Justice LLC v. Xcentric Ventures LLC*, 873 F.3d 313, 317-19 (1st Cir. 2017); *see also Kelleher v. Lowell Gen. Hosp.*, 98 Mass. App. Ct. 49, 52-54 (2020) (same under state rule). “Ordinarily, summary disposition of defamation claims is ‘especially favored’ in Massachusetts because meritless cases put ‘an unjustified and serious damper on

freedom of expression’ and ‘the costs of litigation may induce an undesirable self-censorship.’” *Mullane v. Breaking Media, Inc.*, 433 F. Supp. 3d 102, 110 (D. Mass. 2020) (quoting *King v. Globe Newspaper Co.*, 400 Mass. 705, 512 N.E.2d 241, 243 (Mass. 1987)). “Context matters in assessing such claims: ‘The court [must] examine the statement in its totality in the context in which it was uttered or published. The court must consider all the words used, not merely a particular phrase or sentence.’” *Amrak Prods. v. Morton*, 410 F.3d 69, 72-73 (1st Cir. 2005) (quoting *Foley v. Lowell Sun Publ’g Co.*, 404 Mass. 9, 11, 533 N.E.2d 196, 197 (Mass. 1989)).

Monsarrat alleges that Newman compiled and republished the nine “false and defamatory statements,” each written by a non-party to this action, that are excerpted at Doc. 9 ¶¶ 21(i)-(ix):

#	Statement allegedly regarding Monsarrat	Author/source	Incorporation by reference in <i>Newman I</i>
(i)	is a child “molester”	Deb Filcman, <i>Wicked Local Somerville</i> (Mar. 8, 2010)	Exhibit A ¶ 39(g), Exhibit B p. 1
(ii)	“is a sexual predator in our community”	plumtreeblossom, “Today’s Somerville Police Blog” (Feb. 4, 2010)	Exhibit A ¶ 43 cmt. 3, Exhibit C p. 56; <i>see</i> Exhibit J p. 93
(iii)	“has a social rap sheet as long as my arm of sexual harassment and preying on young women”	contradictacat, “Today’s Somerville Police Blog” (Feb. 5, 2010)	Exhibit A ¶ 43 cmt. 9, Exhibit C p. 71; <i>see</i> Exhibit J p. 118
(iv)	“habitually rape[s] strangers”	laura47, “Today’s Somerville Police Blog” (Feb. 6, 2010)	Exhibit C p. 80; <i>see</i> Exhibit J p. 133
(v)	is a “creepy [ <i>sic</i> ] staulker”	brynddragon, “Wheel Questions” (July 24, 2009)	Exhibit D p. 4
(vi)	“keeping teenagers away from creeps is part of every community’s duty”	ocschwar, “Today’s Somerville Police Blog” (Feb. 4, 2010)	Exhibit C p. 58; <i>see</i> Exhibit J p. 98
(vii)	is a “statutory raping douchbag”	pywaket, “Help! I am being sued for my participation in davis_square” (Apr. 30, 2013)	n/a; <i>see</i> Exhibit K p. 10
(viii)	“lure[s] teenage girls”	contradictacat, “Wheel Questions” (July 24, 2009)	Exhibit A ¶ 51 cmt. 2, Exhibit D p. 3
(ix)	“repeatedly behave[s] in a predatory fashion”	rax, “Today’s Somerville Police Blog” (Feb. 6, 2010)	Exhibit C pp. 81-82; <i>see</i> Exhibit J p. 136

**1. Claim preclusion bars any claims over the statements as originally published.**

No claim over any of the comments as originally posted is viable because Monsarrat

dismissed the *Newman I* action against Newman and others with prejudice in 2013. Doc. 9 ¶ 12; Exhibits A & E. Claim preclusion bars any cause of action that he raised, or could have raised, in that action. *See Goldstein v. Gavin*, 719 F.3d 16, 22-23 (1st Cir. 2013) (claim preclusion under Massachusetts law); *accord Noonan v. Staples, Inc.*, 707 F. Supp. 2d 85, 90 (D. Mass. 2010). A voluntary dismissal with prejudice precludes relitigation. *See Coughlin v. Town of Arlington*, No. 10-cv-10203-MLW, 2011 U.S. Dist. LEXIS 146285, \*20-21 (D. Mass. Dec. 19, 2011).

**2. Monsarrat fails to state a claim over allegedly defamatory statements that never appeared on DSLJ, because migrating the forum to DW did not republish them.**

Several statements identified in the complaint were published not on DSLJ but elsewhere online, as Monsarrat alleged in *Newman I*. As a result, migrating DSLJ to DW—the ostensibly wrongful act—did not affect those comments and cannot support liability.<sup>3</sup>

Monsarrat alleges that Newman republished a post calling him “a child ‘molester.’” Doc. 9 ¶ 21(i). That is contradicted by the *Newman I* amended complaint, which duly identified the “molester” term as appearing not on DSLJ but in a blog post by Deb Filcman on the *Somerville Journal’s* Wicked Local Somerville website. Exhibit A ¶ 39(g), Exhibit B p. 1.

Monsarrat’s *Newman I* complaint also refutes his contention that comments calling him “a ‘Rapist/Con-Man’ and a ‘child predator’” appeared on DSLJ. Doc. 9 ¶ 8. As he alleged in 2013, those comments had appeared on other LJ forums, *davis\_snark* and *sf\_drama*, which Newman did not moderate or migrate to DW. Exhibit A ¶¶ 47 (cmt. 1), 49 (cmt. 2). As Newman explained the day he was served with process in *Newman I*, “I have no control whatsoever over *davis\_snark*, *sf\_drama*, *journalfen*, or the *Somerville Journal* blog.” *See* Exhibit K p. 6.

The allegations about these three statements are not a basis to hold Newman liable.

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<sup>3</sup> On November 27, 2020, through counsel, Monsarrat stated that he “will stipulate to the removal/dismissal of the three allegedly defamatory comments that were not in fact published on Dreamwidth,” and that he shall file such a stipulation upon agreement as to its form.

**3. Section 230 bars Monsarrat’s claims over allegedly defamatory statements that appeared on DSLJ and DW.**

Monsarrat’s defamation claims would hold Newman liable as the publisher or speaker of statements written and provided by others. His theory of the case is barred by Section 230, which grants a “broad immunity” to online entities and users who “facilitate the speech of others on the Internet.” *Univ. Comm’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 415 (1st Cir. 2007). Although Section 230 is an affirmative defense, “it can still support a motion to dismiss if the barrier to suit is evident from the face of the complaint.” *Nat’l Ass’n of the Deaf v. Harvard Univ.*, 377 F.3d 49, 68 (D. Mass. 2019) (quoting *Klayman v. Zuckerberg*, 753 F.3d 1354, 1357 (D.D.C. 2014)). Monsarrat’s complaint raises Section 230 head on. Doc. 9 ¶ 25; *see id.* ¶ 37.

The statute provides: “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1). “No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” 47 U.S.C. § 230(e)(3).

“Section 230 immunity should be broadly construed.” *Lycos*, 478 F.3d at 419. By its terms, Section 230 precludes a state law claim when three criteria are met: “(1) [the defendant] is a ‘provider or user of an interactive computer service’; (2) the claim is based on ‘information provided by another information content provider’; and (3) the claim would treat [the defendant] ‘as the publisher or speaker’ of that information.” *Id.* at 418. “As a result, ‘lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred.’” *Hiam v. HomeAway.com, Inc.*, 267 F. Supp. 3d 338, 346 (D. Mass. 2017) (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)), *aff’d on other grounds*, 887 F.3d 542 (1st Cir. 2018).

All three criteria apply to each allegedly defamatory statement identified in the complaint.

Newman did not write them. His ostensibly wrongful act, providing a home for those comments with their contents unaltered, was a quintessential editorial function shielded by Section 230.

**First**, Newman is a “provider or user” of an ICS. Monsarrat recognizes that “Dreamwidth is an interactive computer service” and that Newman is “a user” of DW. Doc. 9 ¶¶ 18, 20, 24. He also concedes that LJ is a “social networking service” and that Newman was both a DSLJ moderator and commenter. *Id.* ¶¶ 7, 9. Section 230 immunity covers ICS providers and users equally, including website moderators like Newman. *See Barrett v. Rosenthal*, 40 Cal. 4th 33, 58-62 (Cal. 2006) (*citing Batzel v. Smith*, 333 F.3d 1030-32 (9th Cir. 2003)); *Directory Assistants, Inc. v. SuperMedia, LLC*, 884 F. Supp. 2d 446, 450-52 (E.D. Va. 2012).

**Second**, the claim is based on “information provided by another information content provider.” 47 U.S.C. § 230(c)(1). This second element is “a key limitation,” because Section 230 does not protect the ““person or entity that is responsible, in whole or in part, for the creation or development of information”” that is alleged to be wrongful. *Lycos*, 478 F.3d at 419-20 (*quoting* 47 U.S.C. § 230(f)(3)). But Monsarrat’s contention that Newman “is the legally responsible information content provider ... and is not entitled to the immunity under the Communications Decency Act, 47 U.S.C. § 230,” fails as a matter of law. Doc. 9 ¶ 25. He does not allege that Newman personally wrote, or materially contributed to the creation or development of, any of the allegedly “defamatory posts whose words had been both created and then originally published on LiveJournal by the anonymous users.” *Id.* ¶ 20. Newman made only non-defamatory, “editorial like comments” in the DSLJ threads at the time, then copied and migrated them to DW in 2017. *Id.* ¶¶ 8-9, 20-24.

**Third**, Monsarrat’s defamation claim “necessarily requires that the defendant be treated as the publisher or speaker of content provided by another.” *Backpage.com*, 817 F.3d at 19



(citing *Barnes v. Yahoo, Inc.*, 570 F.3d 1096, 1101-02 (9th Cir. 2009)). One element of a defamation claim is that *the defendant* made a defamatory statement to a third party. *Shay v. Walters*, 702 F.3d 76, 81 (1st Cir. 2012). Expressly seeking such publisher liability, Monsarrat alleges that Newman is liable for a “republication” on DW of content that third parties wrote and published on DSLJ. Doc. 9 ¶¶ 8-10, 20-24.

Migrating the DSLJ posts to DSDW made them accessible on a “different website,” with a new URL. *Id.* ¶ 23. Such mere technical “modifications to the way information is accessed, as opposed to changes in the nature of the information itself, do[] not constitute republication” at all. *Atkinson v. McLaughlin*, 462 F. Supp. 2d 1038, 1054 (D.N.D. 2006) (citing *Churchill v. State*, 876 A.2d 311, 319 (N.J. Super. A.D. 2005)). And even if the migration counts as a republication as alleged, it is immunized by Section 230. “Nothing in the text of the CDA indicates that immunity turns on how many times an interactive computer service publishes ‘information provided by another information content provider.’” *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1270 (9th Cir. 2016). “Simply put, dissemination and proliferation of content does not equal creation or development of content.” *Id.* at 1271. Changing the hosting service did not make Newman liable for other users’ words, because he “did not alter the content of the information [they] posted such that [he] could be said to have been ‘responsible for ... creat[ing] or develop[ing]’ that content by reason of having actually authored it, whether in whole or in part.” *Small Justice*, 873 F.3d at 322.

Section 230 precludes liability for an ICS user who “republishes” third-party posts. *Jones v. Dirty World Entm’t Recordings, LLC*, 755 F.3d 398, 403-04, 415-16 (6th Cir. 2014) (granting Section 230 immunity to website and its operator who “selected for publication,” and reposted, allegedly defamatory third-party statements). “Republishing an already-existing user-submitted

comment, without altering the content of that comment, does not materially contribute to its allegedly defamatory nature.” *Ayyadurai v. Floor64, Inc.*, 270 F.3d 343, 368 (D. Mass. 2017). “[C]ourts have found that ‘merely taking action that is necessary to the display of allegedly illegal content,’ including republishing and commenting upon user generated content, does not constitute ‘creation or development.’” *Id.* (quoting *Jones*, 755 F.3d at 410), quoted with approval in *Small Justice*, 873 F.3d at 322. That is essentially what Monsarrat alleges Newman did. Doc. 9 ¶¶ 8-9, 20. “[A]n interactive computer provider [who] merely hosts or republishes defamatory content ... is protected by Section 230.” *Pace v. Baker-White*, 432 F. Supp. 3d 495, 504 (E.D. Penn. 2020) (collecting cases). Under the statute, “re-posting comments originally created by third-party users [does not] amount[] to the ‘creation or development of information.’” *Ayyadurai*, 270 F. Supp. 3d at 367-68. Neither does aggregating or re-aggregating user content. *See Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 831 (2002); *Elliott v. Donegan*, No. 18-CV-5680, 2020 U.S. Dist. LEXIS 114151, \*32 (E.D.N.Y. June 30, 2020).

Monsarrat contends that republishing the third party speech “materially contributed to its unlawfulness.” Doc. 9 ¶ 24(ii). But his claim that Newman thereby “took ownership” of that content cannot suffice. *Id.* ¶ 23. He fails to allege that Newman made “a material contribution to the creation or development of [that] content.” *Kimzey*, 836 F. Supp. 3d at 1269. Allegations that a defendant “‘republish[e]d’ the [allegedly defamatory] statements” elsewhere, “and in that fashion became the actual author of that iteration of the content ... [may] have superficial appeal, but they extend the concept of an ‘information content provider’ too far and would render the CDA’s immunity provisions meaningless.” *Id.* “[A]n adoption or ratification theory ... is not only inconsistent with the material contribution standard of ‘development’ but also abuses the concept of responsibility.” *Ayyadurai*, 270 F. Supp. 3d at 368 (quoting *Jones*, 755 F.3d at 415).

Accordingly, Section 230 immunity must apply to the central act alleged: republishing existing online comments via another website or ICS. *See Directory Assistants*, 884 F. Supp. 2d at 452 (immunity for compiling allegedly defamatory website comments and forwarding by email); *Batzel*, 333 F.3d at 1031 (the “sole content provider” liable for an email was its author, and a third party who posted its contents on a listserv was immune); *Comyack v. Giannella*, No. SOM L 1356-19, 2020 N.J. Super. LEXIS 49, \*7-11, \*114-118 (N.J. Super. Ct. Apr. 21, 2020) (Facebook republications “accurately repeating the information” from Reddit and Instagram were “absolutely privileged under the CDA”). Newman cannot be held liable for disseminating third-party content on DW, or beyond it “via search engines” like Google. Doc. 9 ¶¶ 21, 33, 40. *See Small Justice*, 873 F.3d at 322 (citing *Kimzey*, 836 F.3d at 1270). Again, Section 230 shields “a publisher’s traditional editorial functions.” *Backpage.com*, 817 F.3d at 18 (quoting *Zeran*, 129 F.3d at 330). “Reposting content created and initially posted by a third party is well within ‘a publisher’s traditional editorial functions.’” *Shiamili v Real Estate Group of N.Y., Inc.*, 17 N.Y.3d 281, 291 (N.Y. Ct. App. 2011) (quoting *Zeran*, 129 F.3d at 330). So are the measures that publishers take to keep published works accessible. “[M]aking information more available is ... an essential part of traditional *publishing*; it does not amount to ‘developing’ that information within the meaning of Section 230.” *Force v. Facebook, Inc.*, 934 F.3d 53, 70 (2d Cir. 2019).

Section 230 immunity further applies to Newman’s “editorial like comments” on the threads. “A website operator cannot be responsible for what makes another party’s statement actionable by commenting on that statement *post hoc*.” *Ayyadurai*, 270 F. Supp. 3d at 368 (quoting *Jones*, 755 F.3d at 415). The allegation that his 2017 post on DSDW about *Zaiger* encouraged others to read the migrated DSLJ posts, and to download and read the Encyclopedia Dramatica page via PACER exhibits filed in *Zaiger*, is also not actionable. Doc. 9 ¶¶ 31-34.

“Increasing the visibility of a statement is not tantamount to altering its message ... Absent a changing of the disputed reports’ substantive content that is visible to consumers, liability cannot be found.” *Asia Econ. Institute v. Xcentric Ventures, LLC*, No. CV 10-01360, 2011 U.S. Dist. LEXIS 145380, \*19 (C.D. Cal. May 4, 2011). “As multiple courts have accepted, there is no relevant distinction between a user who knowingly allows content to be posted to a website he or she controls and a user who takes affirmative steps to republish another person’s content; CDA immunity applies to both.” *Charles Novins, Esq., P.C. v. Cannon*, Civ. No. 09-5354, 2010 U.S. Dist. LEXIS 41147, \*7 (D.N.J. Apr. 27, 2010). So Newman cannot be liable for including, in that 2017 post, a hyperlinked “tag” leading to previously published forum posts about Monsarrat tagged with his “jonmon” nickname. Doc. 9 ¶¶ 32, 33(i); see Exhibit O. Such a “link structure ... [is] standard for message boards and other web sites. To impose liability here would contravene Congress’s intent and eviscerate Section 230 immunity.” *Lycos*, 478 F.3d at 420.

### CONCLUSION

Monsarrat fails to state a viable claim for copyright infringement or for defamation. Therefore this case should be dismissed.

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