

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

THE OHIO STATE UNIVERSITY	:	
	:	
Plaintiff,	:	
	:	Case No. 2:10-CV-00890
v.	:	
	:	Judge Watson
	:	
MAPLE STREET PRESS, LLC	:	Magistrate Judge Preston Deavers
	:	
Defendant.	:	

**PLAINTIFF THE OHIO STATE UNIVERSITY'S MOTION FOR PRELIMINARY AND
PERMANENT INJUNCTION**

Plaintiff The Ohio State University ("Ohio State") moves this Court, pursuant to Rule 65(a) of the Federal Rules Of Civil Procedure, for a preliminary and permanent injunction against Defendant Maple Street Press LLC ("Maple Street" or "Defendant"), and its agents, servants, employees, assigns, representatives and successors and all persons in active concert or participation with it:

1. preventing Defendant and its agents, servants, employees, successors, representatives and assigns, and all others in active concert and privity with it from infringing, or falsely designating the origin of, the Ohio State Trademarks, as defined in the Memorandum in Support of this Motion, from using the Ohio State Trademarks in a way that would suggest affiliation, endorsement or sponsorship by Ohio State, and from injuring Ohio State's reputation;
2. enjoining Defendant and its agents, servants, employees, successors, representatives and assigns, and all others in active concert and privity with it from using any Ohio State Trademarks or names or marks deceptively similar to the Ohio State Trademarks in connection with a website or as metatags, directory names, other computer addresses, invisible data, or otherwise engaging in acts or conduct that would cause confusion as to the source, sponsorship or affiliation of Ohio State with Defendant;
3. to not use the Ohio State Trademarks or any other words or signs or symbols or device that suggest an affiliation, approval, license, connection, sponsorship or

endorsement with Ohio State on the front or back cover of any publication, whether print or electronic; and to not use the Ohio State Trademarks or any other words or signs or symbols or device that suggest an affiliation, approval, license, connection, sponsorship or endorsement with Ohio State as the title of any publication, whether print or electronic;

4. to not produce, advertise, sell or giveaway any publication, whether print or electronic, that deals only with Ohio State and one (1) other school or university, in other words, to not produce, advertise, sell or giveaway any publication, whether print or electronic, that deals with Ohio State and could be considered as competitive with a "game day" program or "media guide", including but not limited to any bowl game program or media guide;
5. requiring Defendant and its agents, servants, employees, successors, representatives and assigns, and all others in active concert and privity with it to provide the Court and Ohio State with a complete list of all third persons, including, without limitation, retailers, distributors, agents, employees or representatives of Defendant, to whom Defendant has supplied copies of any print publication that includes any of the Ohio State Trademarks, including but not limited to the "Buckeye Battle Cry" publication; and that Defendant and its agents, servants, employees, successors, representatives and assigns, and all others in active concert and privity with it further take all legal and equitable measures to regain possession of all copies of publications containing any of the Ohio State Trademarks, including but not limited to the publication "Buckeye Battle Cry";
6. requiring Defendant and its agents, servants, employees, successors, representatives and assigns, and all others in active concert and privity with it to surrender all copies of print publications that include any of the Ohio State Trademarks, including but not limited to the publication "Buckeye Battle Cry", for destruction;
7. that Defendant account to Ohio State for its profits, the actual damages suffered by Ohio State as a result Defendant's acts of infringement, unfair competition and passing off, together with interest and costs, and that such damages be trebled because of the willful acts described above, which acts were committed in knowing disregard of Ohio State's known rights;
8. that Defendant pay compensatory and treble damages to Ohio State;
9. that Defendant disgorge all profits realized from the sale of print publications that include any of the Ohio State Trademarks, including but not limited to the "Buckeye Battle Cry" publication, or from the sale of advertising within such publications;

10. that Defendant pay Ohio State's attorneys' fees, together with the costs of this suit; and

11. all other and further relief as may be just and equitable.

Ohio State requests that this Motion be granted for the reasons set forth in detail in both the accompanying memorandum in support and the attached exhibits, including the Affidavit of Richard Van Brimmer, the Affidavit of Diana Sabau, the Affidavit of Joseph R. Dreitler and Ohio State's Complaint.

Respectfully submitted,

Richard Cordray
Attorney General of the State of Ohio

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Summary of Argument: The Court should grant Ohio State's motion for a preliminary injunction enjoining Defendants from publishing and distributing the Infringing Publications, based upon (1) the likelihood of Ohio State's success on the merits; (2) the fact that Ohio State will suffer irreparable injury without injunctive relief; (3) the fact that injunctive relief will not harm others; and (4) the public interest. Paccar, Inc. v. Telescan Technologies, L.L.C., 319 F.3d 243, 249 (6th Cir. 2003); Worthington Foods, Inc. v. Kellogg Company, 732 F. Supp. 1417, 1427 (S.D. Ohio 1990), citing Frisch's Restaurants, Inc. v. Shoney's Inc., 759 F.2d 1261, 1263 (6th Cir. 1985).

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Summary of Argument: Ohio State's trademarks are extremely strong because of their distinctiveness and clear association in the minds of consumers exclusively with Ohio State. Audi, 469 F.3d 534, citing Frisch's Restaurant, Inc. v. Shoney's

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

The ultimate issue in this case is The Ohio State University's ("Ohio State") continuing ability to decide who may use its trademarks on commercial products, and its ability to stop those who try to unlawfully capitalize on the valuable goodwill of and perceived association with Ohio State, and its athletics programs in particular. A little more than a month ago Judge Frost issued a Temporary Restraining Order against a similar defendant who was knocking off Ohio State's trademarks and trade dress on a website and publication. The Ohio State University v. Keith Antonio Thomas and GDS Marketing, LLC., 2010 U.S. Dist. LEXIS 96478 (S.D. Ohio, August 27, 2010) (Frost, J.). In the past, Judge Graham issued a Temporary Restraining Order against a knock-off calendar of Ohio State. The Ohio State University v. Sean M. Ashbrook, Case No. C2-99-800 (S.D. Ohio 1999), and Judge Sargus issued a Temporary Restraining Order against an infringing website of Ohio State. The Ohio State University v. Ground Hog Productions, et al., Case No. C2-99-1272 (S.D. Ohio 1999). So it is nothing new to the courts in the Eastern Division to confront defendants attempting to use the trademarks, trade dress and good will of Ohio State University to sell a product and make money off of Ohio State's intellectual property.

Like those in the past, Defendant Maple Street Press LLC ("Maple Street") is not licensed or otherwise permitted to use trademarks of Ohio State. Yet Defendant has widely distributed a commercial print publication called "Buckeye Battle Cry" that appropriates the name of the famous Ohio State fight song as its title and makes extensive use of Ohio State's trademarks. All of this is an unabashed effort to trade off the enviable reputation and valuable goodwill that Ohio State has developed in its athletics programs over the course of the past 100 years and make \$12.99 a copy.

Importantly, trademark law exists precisely to prevent businesses like Maple Street from profiting from another's reputation, goodwill and quality. As Learned Hand said: "A trademark is indeed often spoken of as a monopoly; but in fact it is only part of the protection of the owner's business from diversion to others by means of deceit." Artype v. Zapulla, 228 F.2d 695, 696 (2d Cir. 1956). In light of the evidence before the Court, there is no doubt consumers will be deceived into thinking that Maple Street's "Buckeye Battle Cry" is associated with or sponsored by Ohio State, and that the continued publication and distribution of this magazine will cause irreparable harm to Ohio State. Thus, this Court should issue a preliminary injunction to protect Ohio State from such diversion and deceit in the face of such bald-faced infringement.

A. Ohio State's Exclusive And Well Known Trademarks.

For more than 120 years, Ohio State has contributed to the intellectual and cultural vitality of the State of Ohio by providing a variety of college-level educational courses, college sport exhibition events and recreation programs and dramatic and musical entertainment events. In connection with these activities, and as set forth in detail in its verified complaint, Ohio State has secured several federally registered trademarks, including:

- a. "BUCKEYES" — registration number 1,152,683, registered April 28, 1981, to provide college sport exhibition events and recreation programs;
- b. "BUCKEYES" — registration number 1,267,035, registered on February 14, 1984 for use on: toy stuffed animals, Christmas decorations, bean bags, plastic toys, foam toys and equipment sold as a unit for playing a stick ball game; clothing-namely, T-shirts, ties, scarves, bibs, sweatshirts, athletic shorts, hats, aprons, jogging suits and sweaters; blankets, textile placemats, handkerchiefs, quilts and pennants; tumblers, cups, mugs, glasses and insulated beverage container holders; hassocks, bean bag leisure furniture, letter holding boxes, mirrors, and folding seats for use by individuals in athletic stadiums and plaques; tote bags; pens, posters, decals, and paintings; jewelry-namely, rings, pins, belt buckles and key chains, all being made of precious metal; electric

lamps; providing college level educational programs, sport exhibition events and recreation programs;

- c. BUCKEYE DESIGN — registration number 2,437,954, registered January 2, 2001 for use on decals and stickers;
- d. "OHIO STATE" — registration number 1,294,114, registered September 11, 1984 for providing college level educational programs, sport exhibition events, recreation programs, toy stuffed animals, Christmas decorations, bean bags, plastic figurine toys, foam figurine toys, bats, balls and other equipment sold as a unit for playing a stick ball game, shoe laces, t-shirts, ties, scarves, bibs, sweatshirts, shorts, hats, aprons, jogging suits, sweaters, blankets, pennants, textile placemats, handkerchiefs, quilts, tumblers, cups, mugs, glasses, beverage container insulators, hassocks, bean bag leisure furniture, mirrors, and folding seats for use by individuals in athletic stadiums, tote bags, pens, posters, decals, paintings, letter holding boxes, rings, pins, belt buckles, key chains and electric lamps;
- e. "OHIO STATE" — registration number 1,152,682, registered April 28, 1981 for college sport exhibition events and recreation programs, dramatical and musical entertainment events and college level educational courses;
- f. "OSU" — registration number 1,121,595, registered July 3, 1979 for college sport exhibition events and recreation programs, dramatical and musical entertainment events and college level educational courses;
- g. "OHIO STATE UNIVERSITY" — registration number 1,294,115, registered September 11, 1984 for jewelry-namely, rings, pins, belt buckles and key chains; pens, posters, decals, paintings, letter holding boxes; hassocks, bean bag leisure furniture, plaques, mirrors and folding seats for use by individuals in athletic stadiums; tumblers, cups, mugs, glasses and beverage container insulators; blankets, pennants, textile placemats, handkerchiefs and quilts; clothing-namely, t-shirts, ties, scarves, bibs, sweatshirts, shorts, hats, aprons, jogging suits and sweaters; toy stuffed animals, Christmas decorations, bean bags, plastic figurine toys, foam figurine toys, and equipment-namely, bats and balls sold as a unit for playing a stick ball game; and providing college level educational programs, sport exhibition events and recreation programs.
- h. "O" — registration number 2,689, 612, registered February 25, 2003 for clothing, namely, jackets, sweaters, hats and T-shirts.

Copies of the certificates of registration for each of these trademarks are attached as Exhibits A, B, C, D, E, F, G and H, respectively to the Complaint.

The certificates of registration identified above are valid and subsisting and record title is in Ohio State. Moreover, the certificates of registration are prima facie evidence of the validity of the registrations, of Ohio State's ownership of the marks described therein, and of Ohio State's exclusive right to use the marks in commerce in connection with the goods and services specified in the certificates of registration under the provisions of 15 U.S.C. § 1057(b). They are also constructive notice of Ohio State's claim of ownership under 15 U.S.C. § 1072, such that there is a presumption that Defendant knew of the registered status of the trademarks described. Further, the registrations are incontestable, which provides conclusive evidence of its validity under 15 U.S.C. § 1115(b).

Ohio State has historically used the term "Buckeyes" to refer to and describe various individuals, teams, school songs and organizations affiliated with Ohio State, including use of the school fight song "Buckeye Battle Cry" since 1919. *Buckeye Battle Cry* was composed by vaudeville performer and songwriter Frank Crumit in 1919, as an entry in a contest to create a new Ohio State fight song in conjunction with the upcoming construction of Ohio Stadium. Since the 1930's, every football game in Ohio Stadium begins with The Ohio State University Marching Band entering the ramp to Ohio Stadium, and then performing *Buckeye Battle Cry* after it forms the famous Script Ohio. The tradition ends with the singing of one chorus of the fight song by band members. The song is also played after every time the Buckeyes score. The so-called "Ramp Entrance" is so popular among people all over the world that videos of The Ohio State University Marching Band entering Ohio Stadium, forming Script Ohio and performing Buckeye Battle Cry are available on YouTube, and have received thousands of hits.

Indeed, there are at least 50 different videos of *Buckeye Battle Cry* currently on YouTube, ranging from performances by the Ohio State Marching Band to 4-year-olds.

Buckeye Battle Cry

**In old Ohio (Columbus) there's a team,
That's known thru-out the land;
Eleven warriors, brave and bold,
Whose fame will ever stand,
And when the ball goes over,
Our cheers will reach the sky,
Ohio Field will hear again
The Buckeye Battle Cry.**

Chorus

**Drive! Drive on down the field;
Men of the scarlet and gray;
Don't let them thru that line,
We've got to win this game today,
Come on, Ohio!
Smash thru to victory,
We'll cheer you as you go;
Our honor defend
So we'll fight to the end
For Ohio.**



Copies of the sheet music for *Buckeye Battle Cry*, along with Frank Crumit's copyright registration (now expired) from 1919 that was assigned to Ohio State are attached as Exhibit C to the Affidavit of Richard Van Brimmer ("Van Brimmer Affidavit").

In addition, Ohio State owns common law trademarks in the distinctive use of its school colors, scarlet and gray, in the appearance of its Official Website for college athletics, www.ohiostatebuckeyes.com, and the use of the block "O" with buckeye leaves. Ohio State has used the block "O" with buckeye leaves continuously to identify the University for more than thirty years.



Ohio State has used its school colors for more than 100 years and stylized font style for decades:



Ohio State is the owner of both the Ohio State Trademark Registrations set out above, and the common law trademarks BUCKEYE, BUCKEYES, BUCKEYE BATTLE CRY, BLOCK "O", BLOCK "O" with Buckeye Leaves, OHIO STATE, OSU, OHIO STATE UNIVERSITY, the trade dress of Ohio State football uniforms and helmets, the school colors and font styles, school song and other symbols and indicia which point to and indicate origin in Ohio State (collectively, "Ohio State Trademarks").

The Sixth Circuit has recognized that:

The strength of a mark is a factual determination of the mark's distinctiveness. The more distinct a mark, the more likely is the confusion resulting from its infringement, and, therefore, the more protection it is due.

Frisch's Restaurant, Inc. v. Shoney's, Inc., 759 F.2d 1261, 1264 (6th Cir. 1985). The Sixth Circuit went on to observe that:

A mark is strong if it is highly distinctive, i.e., **if the public readily accepts it as the hallmark of a particular source; it can become so because it is unique, because it has been the subject of wide and intensive advertisement, or because of a combination of both.**

Id., 759 F.2d at 1264, quoting Callmann, *Unfair Competition, Trademarks & Monopolies*, ¶ 20.43 (4th ed. 1983).

Ohio State has used the Ohio State Trademarks continuously and exclusively for identification with Ohio State and its academic, athletic and entertainment activities. There is no question that the Ohio State Trademarks are accepted by the public as the hallmark of Ohio State. *See, e.g., The Ohio State University v. Keith Antonio Thomas and GDS Marketing, LLC.*, 2010 U.S. Dist. LEXIS 96478 (S.D. Ohio, August 27, 2010) (Frost, J.) at *15-16 ("Third, the Court finds that when used in connection with Ohio State athletics the term "Buckeye" as well as the other Ohio State trademarks used throughout the alleged infringing website and publications are readily accepted by the public as hallmarks of Ohio State athletics.").

Without question, Ohio State alumni have an affinity for Ohio State that runs deep, and these Buckeyes can be found in every corner of the country. There are approximately 464,000 Ohio State alumni located in virtually every country throughout the world. When consumers throughout the nation (or world) hear the word "Buckeye" in connection with college athletics, hear the *Buckeye Battle Cry* or the fight song, or see or hear the words "Buckeye Battle Cry", they immediately associate it with Ohio State. And Ohio State's enormous success, especially in

football and basketball over the years, has only made its marks stronger and its association with Ohio State more pronounced.

Thus, as a result of Ohio State's fame and its extensive use, advertising, and sale of goods and performance of athletic services bearing the Ohio State Trademarks, the Ohio State Trademarks have acquired strong secondary meaning, have achieved favorable national recognition, and have become assets of significant value as symbols pointing only to Ohio State, its services, products and goodwill.

Ohio State has run a highly successful licensing program for more than thirty years. One of the only independent collegiate licensing programs, it has become the most profitable collegiate licensing program in the United States in the past five (5) years, generating royalties of more than \$35 million. Ohio State currently has approximately 500 authorized licensees for products using the Ohio State Trademarks on all types of clothing products, including shirts, food products and services, such as ice cream, breakfast cereals, popcorn snacks, pretzel snacks, tortilla chips, cinnamon cracker snacks, gourmet candies, hot dogs, cafés and restaurants, to computer equipment, such as screen savers, mouse pads, and wrist rests, hats, flags and banners. Over the years, Ohio State has licensed hundreds of musical products that play *Buckeye Battle Cry*, including figurines, toys, and even a musical mobile that plays "the Ohio State fight song converted into a soothing, easily recognizable tune appropriate for a baby's crib."

Ohio State also licenses the sale of DVDs of important and memorable Ohio State athletic contests which are a significant source of royalty income. For example, in 2003, more than 150,000 copies of a licensed DVD of the 2003 Fiesta Bowl were sold. The Ohio State University Marching Band, referred to as "The Pride of the Buckeyes" and TBDBITL, performs *Buckeye Battle Cry* at concerts and public appearances throughout the year. *Buckeye Battle Cry*

has been recorded many times by The Ohio State University Marching Band and is the title of a recording of The Ohio State Marching Band's greatest hits released in the 1970's (which includes *Buckeye Battle Cry*), and is still being sold to this day

More specifically relevant to the infringing activities of Defendant in this case, Ohio State publishes athletic programs for all men's and women's fall, winter and spring sports, including football, basketball, soccer, ice hockey, and track & field, and sells programs for football, men and women's basketball, men's ice hockey and baseball. Affidavit of Diane Sabau ("Sabau Affidavit"), filed in support of the Motion, at ¶ 3. Ohio State has published and sold football programs for more than 100 years, and during the 1990's, Ohio State's official football gameday program was called "Buckeye Battle Cry". Affidavit of Rick Van Brimmer at ¶ 3. ("Van Brimmer Affidavit"). See also Exhibit A to Van Brimmer Affidavit for historical examples of football gameday programs.

Of the current Ohio State athletics publications, the football gameday programs are the most extensive, and can be nearly 200 pages long. Sabau Affidavit at ¶ 3. Ohio State's current football program publication, its Official Gameday Magazine, includes extensive information on the Ohio State coaches, the team roster, statistics and season schedule, information on the opposing team, including team rosters and statistics, feature articles on Ohio State players, articles about Ohio State players currently in the NFL and in the Pro Football Hall of Fame, and articles about Ohio State traditions. The lyrics to *Buckeye Battle Cry* appear on page 45. Sabau Affidavit at ¶ 7 and Exhibit B.

All of Ohio State's official gameday programs make extensive use of the Ohio State Trademarks, including the famous block "O", buckeye leaves, the trade dress of Ohio State

football uniforms and helmets, the school colors and font styles, and prominent use of the mark "Buckeyes" to refer to the Ohio State football team. Sabau Affidavit at ¶ 3.

The athletic programs are a substantial source of revenue to Ohio State and to its licensees. Sabau Affidavit, at ¶ 4. From 2000 through 2007, the programs were printed by The Dispatch Printing Company, which paid an annual sponsorship fee to Ohio State in exchange for retaining the advertising revenue. Id. For the 2005-2006 school year, The Dispatch agreed to pay a sponsorship fee of \$600,000. Starting with the 2008-09 school year, IMG Communications, Inc. took over printing the programs, and paid Ohio State \$1.4 million for the rights to do so. Id.

Prior to 2010, Ohio State retained the revenue from the game program sales. Sabau Affidavit, ¶5. For the 2008-09 school year, Ohio State sold more than 50,000 football game programs, with revenues in excess of \$400,000. Between licensing fees and program sales, Ohio State's revenue associated with the football programs was close to \$2 million. Id.

Ohio State also strictly controls the content on the www.ohiostatebuckeyes.com website, which is "The Official Website of Ohio State University Athletics" (the "Official Website"), that is run by a third party. Sabau Affidavit at ¶ 10. The Official Website has been promoting Ohio State athletics since 1997. For the time period July 2007 through June 2010, the Official Website averaged more than 80,000 hits per day. However, during football season (September 1 through November 20) usage spikes. During the 2007 football season, the Official Website averaged 119,332 hits per day, it received 114,459 hits per day during the 2008 football season, and for the 2009 football season, it received 132,223 hits per day. Sabau Affidavit at ¶ 9. The Official Website makes prominent use of the Ohio State Trademarks, including the school

colors, the Athletic Logo, and repeatedly uses the terms "Buckeye" and "Buckeyes" to refer to Ohio State students, alumni and athletes. *Id.* at ¶ 10. The Official Website provides content of interest to fans of Ohio State athletics, such as blogs, news stories, photographs, videos and team schedules. *Id.* It has a section on "Football Traditions" that includes references to the Ohio State Marching Band and *Buckeye Battle Cry*. It is intended to be a prime destination for fans of Ohio State sports and related information and services. *Id.* Until 2009 Ohio State published and sold a printed media guide for its football program which was filled with stories, statistics and other materials about Ohio State football. Since 2009, the Ohio State media guide has become an online publication, at the website www.OhioStateBuckeyes.com. Sabau Affidavit at ¶ 11. Annual advertising revenue from the Official Website was \$109, 760 for the 2007-08 school year, \$101, 580 for the 2008-09 school year, and \$132, 700 for the 2009-2010 school year. . Sabau Affidavit at ¶ 10.

B. Defendant's Misuse Of Ohio State's Trademarks.

Defendant is not a licensee of Ohio State for any products or services. Despite this fact, Defendant is publishing and continues to publish, without permission or license, a magazine devoted exclusively to Ohio State football called "Buckeye Battle Cry", which directly competes against Ohio State's own publications, both printed and electronic. Maple Street's "Buckeye Battle Cry" even claims to provide "All You Need to Know About the 2010 Buckeyes". The publication sells for \$12.99 and has been widely distributed throughout the Central Ohio area at Kroger, CVS, Giant Eagle, Walgreen's Rite Aid, Walmart, Meijer, Target, Kmart, Barnes & Noble, Borders and Waldenbooks. It is also marketed extensively at Defendant's website, www.maplestreetpress.com, where it is available for purchase. Photographs of the front and back covers of "Buckeye Battle Cry" are inserted in the Complaint at ¶ 42. Copies of the front and back covers of Maple Street's "Buckeye Battle Cry"

is attached as Exhibit A to the Affidavit of Joseph R. Dreitler ("Dreitler Affidavit") (The full publication will be offered into evidence at the hearing on this matter).

As set out in detail in Ohio State's Complaint, not only does Maple Street's "Buckeye Battle Cry" publication appropriate Ohio State's trademark rights in and title of its famous school fight song as the publication's name, the publication contains many other uses of other Ohio State trademarks, trade dress and 130 pages of content that is competitive with Ohio State's athletics publications, including repeated use of "Buckeye Battle Cry" and "Buckeyes" throughout the publication; a detailed article on the members of the Ohio State 2010 football team titled "Primed – The 2010 Ohio State Roster" which includes a listing of each player by name, number, position, height, weight, eligibility and high school; a detailed article entitled "Know They Enemy – The 2010 Ohio State Schedule"; a chart listing "2009 Buckeye Statistics"; several in-depth articles on current and former Ohio State football players and coaches; an article entitled "Graduate School – A look at former Buckeyes in the NFL"; and numerous photographs depicting current and former Ohio State football players in competition, wearing uniforms that prominently display the Ohio State Trademarks. Sabau Affidavit at ¶ 8.

Simply put, Defendant's actions are a blatant effort to rip off Ohio State for its own commercial gain. Consumers are only interested in Defendant's publication because it appears to be a licensed product of Ohio State devoted solely to Ohio State. Indeed, Ohio State fans interested in Ohio State football are drawn to, and purchase Defendant's publication because of the title, "Buckeye Battle Cry", use of the school colors, buckeye leaves and the cover picture of Ohio State quarterback Terrell Pryor wearing the Ohio State football uniform -- not the "Maple Street Press" banner on the cover. By producing this publications, and claiming that it contains

"all you need to know about the 2010 Buckeyes", Defendant robbed Ohio State of the right to control the uses of its Ohio State Trademarks, has diverted fans away from purchasing Ohio State's official gameday publication (and other licensed products), has diverted fans (and advertisers) away from the ohiostatebuckeyes.com website, and is unfairly competing with Ohio State for sales revenue in a publication that otherwise would not compete (and likely would not be successful) had it not unlawfully used Ohio State's intellectual property.

Moreover, Defendant's actions risk not only cheapening, but destroying the value of the licenses Ohio State grants to lawful users of its marks -- why would any business take a license to use Ohio State's, or any entity's, trademarks if they could simply adopt and use it without the owner's approval? Indeed, Ohio State currently licenses Marathon Oil to produce a "mini" version of the Buckeye media guide entitled "2010 Ohio State Gridiron Guide". This licensed publication, which includes advertising from major Ohio State sponsors such as Kroger and AEP, contains articles, player rosters, and schedules -- content that is nearly identical to what is contained in Maple Street's "Buckeye Battle Cry". Sabau Affidavit at Exhibit D. If Ohio State's rights are not upheld by this Court, current and future licensees will be reluctant to sign a license with Ohio State and pay a royalty for trademarks that have become associated in the minds of the consumers with products that do not have the quality guarantees of those properly licensed by Ohio State to use its marks. Advertisers will be diverted, or dissuaded from becoming official sponsors. The Sixth Circuit has recognized the importance of trademarks as a property interest to be protected:

Although trademark protection may have had its start in common law as an action in fraud, over the past one hundred fifty years it has come to focus also on protecting property interests in trademarks themselves. This shift is the result of

the recognition of the purposes trademarks serve in the modern, impersonal economy. They act as a means of identifying a product as coming from or being associated with a particular, although anonymous, source, and inducing subsequent purchases by consumers. As a commentator pointed out sixty years ago:

The fact that through his trademark the manufacturer or importer may "reach over the shoulder of the retailer" and across the latter's counter straight to the consumer cannot be over-emphasized, for therein lies the key to any effective scheme of trademark protection. . . . [A trademark is] not merely the symbol of good will but often the most effective agent for the creation of good will, imprinting upon the public mind an anonymous and impersonal guaranty of satisfaction, creating a desire for further satisfactions. The mark actually *sells* the goods. Schechter, *The Rational Basis of Trademark Protection*, 40 Harv. L. Rev. 812, 818-819 (1927) (emphasis original).

Thus, trademark law now pursues two related goals -- the prevention of deception and consumer confusion, and, more fundamentally, the protection of property interests in trademarks.

Ameritech, Inc. v. American Information Technologies Corp., 811 F.2d 960, 964 (6th Cir. 1987).

Indeed, Courts in this Circuit have long recognized the essential unfairness of the type of "free-riding" so amply illustrated by Maple Street's "Buckeye Battle Cry". As Judge Lambros stated in Jewel Cos. v. Westhall Co., 413 F. Supp. 994 (N.D. Ohio 1976) affm'd 575 F. 2d 1176 (6th Cir. 1978):

"In developing the law of unfair competition and trademark infringement, the courts have taken a logical approach. There is a strong desire to protect the rights of the first user of the mark. This arises from a sense of basic fairness, more then from any particular concept of property law". Jewel Tea Co. v. Kraus, 187 F.2d 278, 282-3 (7th Cir. 1951) . After all, the first user recognized the value of the mark and went through the effort necessary to establish the mark as a meaningful symbol. To allow others to usurp that mark and gain from the first user's efforts is unjust. And viewed from the consumer's position, such conduct is an unfair trade practice in that it deceives the purchaser or user. It is a fraud on the public, as it were, which the courts will not tolerate."

And as only the late Chief Judge Rubin could say it, in Kroger Company v. Johnson & Johnson, 223 U.S.P.Q. 29 S.D. Ohio 1983),

There is something inherently unfair in the effort by the plaintiffs to avail themselves of the name and good will of Tylenol. Defendants have expended millions of dollars in advertising their product to the American public. To permit a bystander who has spent a minimum of time, money and effort in developing its product to profit by marketing the identical commodity with a similar name and packaging is contrary to the stated Congressional purpose of the Lanham Act. . . . While nursery rhymes have no known precedential value, they frequently contain concepts of inherent wisdom. This case is somehow reminiscent of the plight of the Little Red Hen whose friends declined to plant, harvest or thresh the wheat, grind or bake the flour but were all too ready to share with her the bread that would result.

Clearly, if Defendant is permitted to continue to publish its competitive publication (under the name "Buckeye Battle Cry" or some other title suggesting a connection to Ohio State), it will irreparably injure Ohio State, an injury that will render any subsequent remedy pointless. Ohio State's only recourse is the exercise by this Court of its inherent, equitable power to issue a preliminary injunction preventing Defendant from publishing or distributing this publication, and to then permanently enjoin Defendant from commercially using the Ohio State Trademarks in any manner going forward.

II. ARGUMENT

The Court should grant Ohio State's motion for a preliminary injunction enjoining Defendant from publishing and distributing the Infringing Publications. The standard this Court must apply in determining whether to grant a preliminary injunction to Ohio State is well settled. Specifically, the standard requires an examination of:

1. The likelihood of the plaintiff's success on the merits;
2. Whether the plaintiff will suffer irreparable injury without injunctive relief;
3. Whether the injunctive relief will harm others; and
4. Whether the public interest will be served by the injunction.

Abercrombie & Fitch, et al. v. Fashion Shops of Kentucky, Inc., et al. 363 F. Supp. 2d 952, 958 (S.D. Ohio 2005), citing Paccar, Inc. v. Telescan Technologies, L.L.C., 319 F.3d 243, 249 (6th Cir. 2003); Worthington Foods, Inc. v. Kellogg Company, 732 F. Supp. 1417, 1427 (S.D. Ohio 1990) citing Frisch's Restaurants, Inc. v. Shoney's Inc., 759 F.2d 1261, 1263 (6th Cir. 1985); In re DeLorean Motor Co., 755 F.2d 1223, 1228 (6th Cir. 1985); Martin-Marietta Corp. v. Bendix Corp., 690 F.2d 558, 564-65 (6th Cir. 1982).

These factors are not prerequisites, but elements to be balanced by the Court. Abercrombie & Fitch, 363 F. Supp. 2d at 958; Worthington Foods, 732 F. Supp. at 1427; citing Frisch's, 759 F.2d at 1263; DeLorean Motor Co., 755 F.2d at 1229. Moreover, as this Court has previously recognized, under the Lanham Act, "a movant may merit preliminary injunctive relief simply upon a showing of irreparable harm and either a likelihood of success on the merits or 'sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.'" Abercrombie & Fitch, 363 F. Supp. 2d at 959, citing Worthington Foods, 732 F.Supp. at 1428 quoting, Frisch's Restaurants, Inc. v. Elby's Big Boy, Inc., 670 F.2d 642, 651 (6th Cir. 1982). As the Complaint reveals and as evidenced below, each of these elements weighs in favor of this Court's granting Ohio State's motion for a preliminary injunction.

A. Ohio State Is Likely To Succeed Against Defendant On The Merits On Its Claims Under 15 U.S.C. § 1114(a) and 15 U.S.C. § 1125(a) for Infringement, Unfair Competition and Passing Off.

Ohio State will prevail on the merits in its actions against Defendant under 15 U.S.C. § 1114(a) and 15 U.S.C. § 1125(a). Section 32 of the Lanham Act provides a cause of action against "[a] person who uses in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause

confusion." 15 U.S.C. § 1114(1). "A claim for trademark infringement under §1114 requires a showing of the following: (1) ownership of a valid, protectable trademark; (2) that Defendant[s] used the mark in commerce and without the registrant's consent; and (3) there is a likelihood of consumer confusion." HER, Inc. v. RE/MAX First Choice LLC, 2008 U.S. Dist. LEXIS 40164, *21 (S.D. Ohio 2008) (citing Too, Inc. v. TJX Cos., 229 F.Supp. 2d 825, 829 (S.D. Ohio 2002)). The same test of likelihood of confusion applies to claims for infringement under §1114 and for unfair competition and passing off under §1125. As the Sixth Circuit has noted:

Today, the keystone of that portion of unfair competition law which relates to trademarks is the avoidance of a likelihood of confusion in the minds of the buying public. Whatever route one travels, whether by trademark infringement or unfair competition, the signs give direction to the same enquiry-whether defendant's acts are likely to cause confusion." J. Thomas McCarthy, 1 *McCarthy on Trademarks and Unfair Competition* §§ 2:7-2:8 (4th ed. 1996); see also AutoZone, Inc. v. Tandy Corp., 373 F.3d 786, 791 (6th Cir. 2004) (noting that federal trademark and unfair competition claims require the likelihood of confusion inquiry); Champions Golf Club, Inc. v. The Champions Golf Club, Inc., 78 F.3d 1111, 1123 (6th Cir. 1996) ("[F]alse designation is simply a species of unfair competition That the two claims are one and the same is made clear both by the language of the statute, and by many cases."); Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 833 (6th Cir. 1983) (stating that Michigan common law unfair competition claims use the same likelihood of confusion test as the Lanham Act); K'Arsan Corp. v. Christian Dior Perfumes, Inc., No. 97-1867, 1998 U.S. App. LEXIS 27658, 1998 WL 777987, at *8 (6th Cir. Oct. 21, 1998) (unpublished) (stating that the likelihood of confusion inquiry applies to claims of unfair competition and of trademark infringement under Michigan common law).

Gen. Motors Corp. v. Keystone Auto. Indus., Inc., 453 F.3d 351, 354 (6th Cir. 2006); see also, Audi AG and Volkswagen of America, Inc. v. D'Amato, 469 F.3d 534, 542 (6th Cir. 2006) (noting that "the likelihood of confusion between the two marks" is the test for claims for trademark infringement, unfair competition or false designation of origin).

There can be no dispute that Ohio State owns valid trademarks, and that Defendant has used the Ohio State Trademarks in commerce without Ohio State's consent. Thus, in this case as in others, "the touchstone of liability under §1114 [and, in this case, §1125(a)] is whether the

defendant's use of the disputed mark is likely to cause confusion among consumers regarding the origin of the goods offered by the parties." Paccar, 319 F.3d at 249. "The general concept underlying the likelihood of confusion [test] is that the public believe that 'the mark's owner *sponsored or otherwise approved* the use of the trademark.'" Wynn II, 943 F.2d at 599, citing Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 834 (6th Cir. 1983) (emphasis in original), quoted in Wynn I, 839 F.2d at 1186. The question before the Court, then, is whether it is likely that consumers will be led to think that the Maple Street's "Buckeye Battle Cry" publication is endorsed, affiliated, sponsored or approved in any way by Ohio State. See also, Champions Golf Club, Inc. v. The Champions Golf Club, Inc., 78 F.3d 1111, 1121 (6th Cir. 1996) (citations omitted).

In assessing the likelihood that Defendant's use of the Ohio State Trademarks will confuse consumers, the Court should consider the following factors:

1. the strength of the plaintiff's mark;
2. the relatedness of the goods;
3. the similarity of the marks;
4. evidence of actual confusion;
5. marketing channels used;
6. degree of purchaser care;
7. defendant's intent in selecting the mark; and
8. the likelihood of expansion in selecting the mark.

Audi, 469 F.3d at 542-43; Champions Golf Club, 78 F.3d at 1116 (citations omitted).

These factors "imply no mathematical precision, and a plaintiff need not show that all, or even most, of the factors listed are present in any particular case to be successful." Wynn Oil Co. v. Thomas, 839 F.2d 1183, 1186 (6th Cir. 1988) ("Wynn I"). Instead, they are "simply a guide to help determine whether confusion would be likely to result from simultaneous use of the two contested marks." Worthington Foods, 732 F. Supp. at 1432, citing Wynn I. Although the

Court's analysis of each of the eight factors is a question of fact, the determination of whether these facts create a likelihood of confusion is a question of law. Champions Golf Club, 78 F.3d at 1116.

It is beyond dispute that the Maple Street publication is likely to cause confusion and will lead consumers to believe that there is an affiliation, sponsorship or approval by Ohio State of Maple Street's "Buckeye Battle Cry" publication when there most certainly is not. Indeed, Judge Frost of this Court has already made that determination in his recent decision granting Ohio State's Motion for Temporary Restraining Order against another company that was similarly infringing the Ohio State Trademarks on its website, www.buckeyeillustrated.com, and in printed publications devoted to Ohio State football. See The Ohio State University v. Keith Antonio Thomas and GDS Marketing, LLC, 2010 U.S. Dist. LEXIS 96478 (S.D. Ohio August 27, 2010) (hereinafter, "Thomas") (Opinion attached hereto as Ex. 1). Examples of the infringing buckeyeillustrated.com publications are attached as Exhibit B to the Dreitler Affidavit.

1. **Consumer Identification of Ohio State's Ohio State Trademarks With Ohio State Is Strong.**

"The strength of a mark is a factual determination of the mark's distinctiveness. The more distinct a mark, the more likely is the confusion resulting from its infringement, and therefore the more protection it is due." Audi, 469 F.3d 534, citing Frisch's Restaurant, Inc. v. Shoney's, Inc., 759 F.2d 1261, 1264 (6th Cir. 1985). The terms "Buckeye," "Buckeye Battle Cry", the block "O" with Buckeye Leaves, the terms "Ohio State," "Ohio State University," the colors and the expression "Scarlet & Gray," and the other Ohio State Trademarks are all strong marks worthy of the fullest protection. To begin with, the trademarks "Buckeye," "Ohio State," "Ohio State University," "OSU," the block "O", and the Buckeye design are all federally

registered trademarks. Accordingly, Ohio State is entitled to all of the legal presumptions of exclusive right to use set out in 15 U.S.C. § 1114. See Thomas at 9.

As noted above, there is no question that consumers strongly identify with the Ohio State Trademarks. Ohio State has been prominently using these trademarks in connection with athletics and band activities for decades. Ohio State's licensing program has become the most profitable collegiate licensing program in the United States in the past five (5) years, generating royalties of more than \$35 million. The "Buckeye", block "O", block "O" with Buckeye Leaves, and the school fight song *Buckeye Battle Cry* (and many other marks) appear on thousands of licensed products, including printed materials such as posters, schedules, calendars, playing cards, puzzles, wrapping paper, gift bags, signs and stickers, coffee table and children's books, coasters, flash cards, note cards and football player cards. Ohio State currently has approximately 500 authorized licensees for products using the Ohio State Trademarks and Ohio State also licenses the sale of DVDs of important and memorable Ohio State athletic contests, which are a significant source of royalty income. For the 2008-09 school years, Ohio State generated nearly \$2 million from the Official Website and licensed programs sales.

The reason for the success of Ohio State's merchandise licensing program is evident: consumers, particularly those in Ohio, equate merchandise and publications using the Ohio State Trademarks with sponsorship, approval and a guarantee of quality from The Ohio State University. It is beyond dispute: the Ohio State Trademarks are strong. As Judge Frost noted:

Accordingly, the Court concludes that the marks at issue here are quite strong in the context of a website or publication *providing information exclusively related to Ohio State athletics*.

Thomas at *16.

2. Ohio State Publishes and Licenses Products That are Essentially Identical To Defendant's Publication.

The relatedness, or similarity, between materials either published or licensed by Ohio State and Defendant' Infringing Publications also points to a high likelihood of confusion. The Sixth Circuit has used three criteria for testing the relatedness factor: (1) if the parties compete directly, confusion is likely if the marks are sufficiently similar; (2) if the goods and services are somewhat related, but not competitive, then the likelihood of confusion will turn on other factors; and (3) if the products are unrelated, confusion is highly unlikely. Kellogg Co. v. Toucan Golf, Inc., 337 F.3d 616, 624 (6th Cir. 2003).

Clearly, this case falls within the first relatedness factor. Ohio State currently publishes game day programs for football, licenses a mini media guide, as well as numerous other sports programs and materials containing athletics news, player information, team statistics, schedules, etc., all of which also appear in the Maple Street publication. Ohio State also publishes the website www.ohiostatebuckeyes.com, which contains substantial overlapping content with that of Maple Street's publication. Ohio State also currently licenses its Ohio State Trademarks to IMG, which publishes athletic programs directed to consumers with an affinity for Ohio State, an affinity that Defendant seeks to use for its own gain.

Defendant's use of the Ohio State Trademarks infringes on a products identical to those produced and licensed by Ohio State. Both in print media and online, for football as well as other sports, and for consumers and potential advertisers, Defendant's products compete directly with Ohio State's own publications in the market. Defendant's "Buckeye Battle Cry" publication is clearly directed to the same audience – fans of Ohio State athletics. It is also confusingly

similar to Ohio State athletic programs in its content, such as schedules, player rosters, stats, articles and photographs of Ohio State athletes, its overall layout, in its use of Ohio State Trademarks such as the school colors, the athletic logo, buckeye leaves, and in its appropriation of the name "Buckeye Battle Cry" as the title for a publication that directly competes with Ohio State's athletic programs.

As a result, the relatedness of these publications increases the likelihood that consumers will incorrectly believe that Ohio State has licensed, sponsored, endorsed or approved of Defendant's print publication. As Judge Frost noted:

The facts here fit into the category of "competing directly" by offering the exact same goods or services--information and advertising about Ohio State athletics. Therefore, "confusion is likely if the marks are sufficiently similar." *Daddy's Junky Music Stores*, 109 F.3d at 282. The marks here however are not only similar, but they are identical. Further, Ohio State currently publishes game day programs for football, as well as numerous other sports programs and material containing athletics news, player information, team statistics, and schedules. This is the exact information Defendants publish on their website, electronic publications, and anticipated printed publication.

Thomas at *17-18.

3. The Infringing Publications Use Trademarks Identical To Ohio State's Ohio State Trademarks.

To determine the similarity of trademarks, this Court must ask ". . . 'whether the mark "will be confusing to the public when singly presented.'" Wynn I, 839 F.2d at 1188, quoting Beer Nuts, Inc. v. Clover Club Foods Co., 711 F.2d 934, 941 (10th Cir. 1983). The test under this factor is the consumer's perception when presented with the challenged product alone, rather than a side-by-side comparison. Id., quoting Levi-Strauss & Co. v. Blue Bell, Inc., 632 F.2d 817, 822 (9th Cir. 1980). The Sixth Circuit has also noted that: "[W]hile similarity alone does not compel

a determination that marks are likely to be confused, . . . it is a factor entitled to considerable weight." Champions Golf Club, 78 F.3d at 1119 (citations omitted); see also Thomas at *20 ("Similarity of marks is a factor of considerable weight."). "A proper analysis of similarity includes examining the pronunciation, appearance, and verbal translation of conflicting marks." Wynn I, 839 F.2d at 1188, citing McCarthy, Trademarks and Unfair Competition, § 23:4 (2d ed. 1984).

The trademarks Defendant has incorporated into its "Buckeye Battle Cry" publication go beyond mere similarity. Indeed, they are not only identical to the Ohio State Trademarks, they are in many respects the Ohio State Trademarks, used in actual publications, including its own websites and athletics magazines and programs. Defendant has even used "Buckeye Battle Cry" -- Ohio State's famous fight song title, and a name Ohio State has used in the past for its official gameday programs -- as the title of its publication. Defendant has used registered trademarks of Ohio State utilizing the scarlet and gray school colors with the block text style and buckeye leaves associated with Ohio State's athletics programs. In addition, Defendant's publication is full of photographs that show Ohio State athletes in Ohio State trade dress, including close-up photographs of the Buckeye leaves on football player helmets, as well as background photographs of landmarks like Ohio Stadium.

Defendant has both used the actual marks of Ohio State and styled its publication to appear like licensed or original Ohio State materials. The degree of similarity between the marks employed by Defendant and the marks of Ohio State could not be greater. As a result, this factor points inextricably to a likelihood of confusion. See Thomas at *21 ("Defendants have used both actual marks of Ohio State and styled their publications to appear like licensed or original Ohio

State materials. The Court finds that this factor weighs heavily in favor of the likelihood of confusion.").

4. Evidence of Actual Confusion

There is no current evidence available of actual consumer confusion. However, "it does not follow that lack of actual confusion should be a significant factor..." Worthington Foods, 732 F. Supp. at 1443, quoting Wynn I, 839 F.2d at 1188. In fact, "although such evidence is the best indicator of likelihood of confusion, 'the absence of actual confusion evidence is inconsequential.'" Audi, 469 F.3d at 543 (quoting Paccar, 319 F.3d at 252). And "[s]ince the Court must determine the *likelihood* of confusion, evidence of actual past confusion is only one factor to be considered." Worthington Foods, 732 F. Supp. at 1443, citing Wynn I, 839 F.2d at 1188 (emphasis added). Each of the seven remaining factors lead to the conclusion that Defendant's publication and distribution of the Infringing Publications will likely result in consumer confusion.

5. Defendant Uses The Same Marketing Channels Used By Ohio State And Its Licensees.

Ohio State, its licensees and Defendant all use the same marketing channels to sell and/or distribute its respective publications. This factor calls on the Court to consider "how and to whom the respective goods ... are sold," Champions Golf Club, 78 F.3d at 1120, quoting Homeowners Group, Inc. v. Home Mktg. Specialists, Inc., 931 F.2d 1100, 1110 (6th Cir. 1991), including the similarities or differences between the predominant customers of the parties' respective goods. Daddy's Junky Music Stores Inc. v. Big Daddy's Family Music Center, 109 F.3d 285 (6th Cir. 1997). The intended market for Defendant's "Buckeye Battle Cry" is evident from the publication's own content: Ohio State's student body, alumni and supporters of Ohio State athletics, particularly in the central Ohio area. The athletics programs sold by Ohio State

and its licensees are directed to the exact same demographic and geographic area of consumers. Moreover, in touting itself as "All you need to know about the 2010 Buckeyes", Defendant's product is being sold as a replacement or substitute for official Ohio State publications. Consequently, this factor also points in the direction of likely confusion.

6. Consumers of the Defendant's Publication Will Not Exercise Significant Care.

Prospective purchasers and/or viewers of Defendant's publication will not exercise the requisite care necessary to determine that "Buckeye Battle Cry" is not affiliated with Ohio State. And why should they? The publication of the Ohio State fight song, the colors, fonts, typestyle and photo on the cover all scream to consumers that this is an Ohio State licensed product. In general, the less care that a purchaser is likely to take in comparing products, the greater the likelihood of confusion. Wynn Oil Co. v. American Way Service Corp., 943 F.2d 595, 602 (6th Cir. 1991) (Wynn II). One of the primary indicators of consumer care is the cost of the potential purchase. Worthington Foods, 732 F. Supp. at 1448. Purchasers of lower cost items, like athletic programs, are presumptively less careful in their purchases than consumers of, say, automobiles, appliances or airline tickets. Id.; Champions Golf Club, 78 F.3d at 1121.

Defendant's "Buckeye Battle Cry" publication is sold for approximately the same price as Ohio State's official game day publication (\$12.99 vs. \$10.00). The relatively low cost of both programs weighs in favor of confusion.

7. Defendant Intends To Trade on Ohio State's Goodwill.

A defendant who purposely chooses a particular mark because it is similar to that of a senior user normally only does so to benefit from the goodwill or reputation of that senior mark.

In effect, the defendant, by so copying another's mark, admits that there is a likelihood of confusion, because the sole intent of the infringer is to benefit from that confusion and "the defendant ought to know at least as much about the likelihood of confusion as the trier of fact." Little Caesar Ent., Inc. v. Pizza Caesar, Inc., 834 F.2d 568, 571 (6th Cir. 1987). The Sixth Circuit has also indicated that a defendant's intentional copying of a senior user's mark creates a presumption of likelihood of confusion. Ferrari s.p.a. Esercizio Fabriche Automobili E. Corse v. Roberts, 944 F.2d 1235 (6th Cir. 1991). It has also held that "the extensive advertising and long-term use of a protected mark can create a presumption that the alleged infringer knew of the protected mark." Daddy's Junky Music Stores Inc. v. Big Daddy's Family Music Center, 109 F.3d 275 (6th Cir. 1997).

In AutoZone, Inc. v. Tandy Corp., 373 F.3d 786 (6th Cir. 2004), the Court stated:

"If a party chooses a mark with the intent of causing confusion, that fact alone may be sufficient to justify an inference of confusing similarity." Homeowners Group, Inc. v. Home Mktg. Specialists, Inc., 931 F.2d 1100 at 1111 (6th Cir. 1991). "Circumstantial evidence of copying, particularly the use of a contested mark with knowledge of the protected mark at issue, is sufficient to support an inference of intentional infringement where direct evidence is not available." Therma-Scan, Inc. v. Thermoscan, Inc., 295 F.3d 623, at 638-30 (6th Cir. 2002).

There can be no doubt that Defendant copied the Ohio State Trademarks, that Defendant had full knowledge of the Ohio State Trademarks at the time they were misappropriated, and that Defendant intended to capitalize on the commercial value of the Ohio State Trademarks and the reputation and good will associated with Ohio State itself.

Moreover, the Maple Street publication prominently displays the claim that it contains "All you need to know about the 2010 Buckeyes," conveying the clear, but false message that the publication is a licensed or approved product of Ohio State itself. Defendant's entire business is built on Ohio State's intellectual property. Based on the directed efforts Defendant is taking to

publish and distribute its "Buckeye Battle Cry" in and around Ohio State's campus, and Defendant's clear knowledge that the consuming public would be confused by it, it is evident that Defendant intend to trade upon the goodwill of those with an affinity for Ohio State. See also, Thomas, at *28 ("Accordingly, the Court finds that Defendants intentionally copied Ohio State's trademarks intending to capitalize on the commercial value of Ohio State's reputation and good will.").

8. Defendant Is Poised To Expand The Market And Distribution Channels For The Infringing Publication.

As an initial matter, where the product lines between the plaintiff and defendant already overlap, there is no need to analyze the final factor. Audi, 469 F.3d at 545. Indeed, in this case, there is no overlap – the products are identical. Nonetheless, there is also evidence that Defendant will continue to publish, and expand the market and distribution channels for publications devoted to Ohio State football. Defendant's website, www.maplestreetpress.com, lists dozens of similar publications devoted to various college and professional sports teams. It publishes special commemorative editions for the BCS Championship Bowl. Ohio State is currently ranked #1 in the nation, and is certainly a contender for the BCS Championship game. Defendant's entire business model is built around these types of publications; thus, it is clear that it will continue to print infringing publications devoted to Ohio State football unless enjoined by this Court.

9. Overview Of Likelihood Of Confusion Factors.

Based on the seven factors on which Ohio State currently has evidence, Defendant's "Buckeye Battle Cry" publication is highly likely to result in consumer confusion. Accordingly, it is extremely likely that Ohio State will succeed on the merits at trial, and the "likelihood of

success" prong of the preliminary injunction standard weighs heavily in favor of granting this motion.

B. Ohio State Will Suffer Irreparable Harm Unless This Court Issues A Preliminary Injunction.

Once a moving party has demonstrated a likelihood of confusion, irreparable injury is presumed. Wynn II, 943 F.2d at 608; DAP Products, Inc. v. Color Tile Mfg. , Inc., 821 F. Supp. 488, 493 (S.D. Ohio 1993). Consequently, as Ohio State has already demonstrated above that there is a high likelihood that consumers will associate Maple Street's "Buckeye Battle Cry" publication with Ohio State, irreparable injury is presumed. Ohio State will also, in fact, suffer immediate and irreparable harm if Defendant is allowed to continue to publish and disseminate *any* publications which do nothing more than improperly use the Ohio State Trademarks and trade on the goodwill and reputation of Ohio State.

Given a trademark's unique role in protecting intangible assets, such as reputation and goodwill, injuries that arise out of trademark infringement and public confusion "are by its very nature irreparable and not susceptible of adequate measurement for remedy at law." Processed Plastic Co. v. Warner Communications, Inc., 675 F.2d 852, 858 (7th Cir. 1982). The Processed Plastic court went on, observing that:

The most corrosive and irreparable harm attributable to trademark infringement is the inability of the victim to control the nature and quality of the defendant's goods. Even if the infringer's products are of high quality, the plaintiff can properly insist that its reputation should not be imperiled by the acts of another.

Processed Plastic, 675 F.2d at 858, quoting Ideal Industries, Inc. v. Gardner Bender, Inc., 612 F.2d 1018, 1024 (7th Cir. 1979), quoting 4 R. Calmann Unfair Competition, Trademarks and Monopolies, §88.3(h) at 205 (3rd ed. 1970).

Citing to Processed Plastics, the Sixth Circuit put it as follows:

[I]n the context of an infringement action, a finding of a likelihood of confusion or possible risk to reputation usually results in irreparable injury. "The irreparable injury usually flows 'both from the potential difficulty of proof of plaintiff's damages, and also from the impairment of intangible values....'" *Id.* (quoting Koppers Co., Inc. v. Krupp-Koppers GmbH, 517 F. Supp. 836, 849 (W.D. Pa. 1981)). The intangible values include damage to reputation that may result from the inability of the victim to control the nature and quality of the defendant's goods.

Wynn Oil Co. v. American Way Serv. Corp., 943 F.2d 595 (6th Cir 1991).

If Defendant is permitted to continue to market these publications, Ohio State will suffer precisely the type of harm that concerned the Processed Plastic court. Accordingly, this element of the preliminary injunction standard also favors Ohio State.

C. A Preliminary Injunction Will Not Cause Cognizable Harm To Others.

The only person who may be harmed if the Court grants Ohio State's motion is Defendant. However, the Court is not permitted to consider the harm that Defendant may suffer if an injunction issues, because, as demonstrated above, Defendant has willingly and knowingly infringed on the Ohio State Trademarks. Worthington Foods, 732 F. Supp. at 1461. A party who willfully proceeds to expend funds on infringing activities cannot claim the loss of those funds as a ground for denying preliminary injunctive relief. Central Benefits Ins. Co. v. Blue Cross and Blue Shield Ass'n, 711 F. Supp. 1423, 1435 (S.D. Ohio 1989). In addition, since Ohio State has shown a likelihood of success against Defendant, the "harm to others" factor also favors Ohio State. Worthington Foods, 732 F. Supp. at 1462.

While in most cases the Court need only consider "the fortunes of the plaintiff and the defendant," Worthington Foods, 732 F. Supp. at 1461-62; in this case there are other businesses to whom Ohio State has licensed the right to publish materials using the Ohio State Trademarks. Each of these enterprises agreed not only to compensate Ohio State for the right to market

licensed Ohio State products, but allowed Ohio State to exercise its legal requirement of quality control over the products sold bearing Ohio State's trademarks. Allowing Defendant a free ride in publishing its "Buckeye Battle Cry" publication would be unfair not only to the current publishing licensees, but also to every other licensee of the Ohio State Trademarks. Accordingly, considering both Ohio State and others, the balance of harms favors granting Ohio State's motion for a preliminary injunction.

D. The Public Interest Favors Granting Ohio State's Motion For A Preliminary Injunction.

The public interest favors issuing a preliminary injunction. In trademark cases, public policy concerns may weigh in favor of preliminary injunctive relief because an injunction could halt confusion in the marketplace. Worthington Foods, 732 F. Supp. at 1463. The Worthington Foods court went on to note that likely consumer confusion is an appropriate consideration under the public interest prong of the preliminary injunction standard. Id. Even more, because Ohio State is a public institution of higher learning, the public that funds Ohio State has an interest in ensuring that its marks are used properly and under the quality control of Ohio State, and an interest in ensuring that Ohio State is able to maximize its own revenue associated with the use of its name, reputation, goodwill and intellectual property. If the Court fails to enjoin Defendant from continuing to publish materials that convey a false association with Ohio State, the public interest will be harmed.

E. No Bond Is Required

Finally, the Court must determine whether a bond is appropriate in this case. It is well established that the discretion of a court to set the amount of a bond under Rule 65 includes the discretion to set a nominal bond. Roth v. Bank of the Commonwealth, 583 F.2d 527, 538-39 (6th Cir. 1978); Urbain v. Knapp Bros. Mfg. Co., 217 F.2d 810, 814-15 (6th Cir. 1954) (no abuse of

discretion for lower court's decision not to require any bond); see also Colquette v. Byrd, 59 Ohio Misc. 45, 49, 392 N.E.2d 1328, 1331 (1976).

At most a nominal bond is appropriate here in light of the detailed showing of wrongdoing, and the high likelihood that the Ohio State will succeed on the merits.

III. CONCLUSION

Ohio State is one of the flagship institutions of this State, and, after its faculty, student body and alumni, its reputation, history and goodwill are its most valued and valuable properties. The Ohio State Trademarks are that reputation and history made manifest. Defendant has knowingly appropriated the Ohio State Trademarks for its own self-seeking purposes. This Court is not only justified, but obligated to prevent Defendant from continuing to infringe on Ohio State's intellectual property rights by issuing a preliminary injunction forbidding Defendant from printing, publishing and/or distributing its "Buckeye Battle Cry" publications, or any other publication that misappropriates Ohio State Trademarks, and ordering Defendant to recall any such publications that may have already been distributed to third parties.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing was served by First Class Mail, postage prepaid, and via electronic mail to WHilton@gc-law.com this 15th day of October 2010 upon:

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/s/ Joseph R. Dreitler

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