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7

8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
10 SOUTHERN DIVISION  
11

12 **MAVRIX PHOTOGRAPHS LLC,**  
13 Plaintiff,  
14  
15 v.  
16 **LIVEJOURNAL, INC.; and DOES 1**  
**through 10, inclusive,**  
17 Defendants.

CASE NO. 13-CV-00517-CJC (JPR)  
**ANSWER AND AFFIRMATIVE  
DEFENSES OF DEFENDANT  
LIVEJOURNAL INC. TO  
PLAINTIFF'S FIRST AMENDED  
COMPLAINT**  
DEMAND FOR JURY TRIAL

1 Defendant LiveJournal Inc. (“LiveJournal), by and through its attorneys, hereby  
2 answers the First Amended Complaint (“Complaint”) of Plaintiff Mavrix Photographs  
3 LLC (“Mavrix” or Plaintiff”) and asserts defenses as follows:

4 **JURISDICTION AND VENUE**

5 1. Answering paragraph 1 of the Complaint, this paragraph contains  
6 conclusions of law and not averments of fact for which a response is required. To the  
7 extent a response is required, LiveJournal admits that Plaintiff purports to bring this  
8 civil action against LiveJournal under the Copyright Act, 17 U.S.C. §§ 101, *et seq.* as a  
9 claim for copyright infringement. Live Journal admits that this Court has subject  
10 matter jurisdiction over that claim. Except as expressly admitted herein, LiveJournal  
11 denies the allegations of paragraph 1 of the Complaint.

12 2. Answering paragraph 2 of the Complaint, this paragraph contains  
13 conclusions of law and not averments of fact for which a response is required. To the  
14 extent a response is required, LiveJournal admits only that this Court has personal  
15 jurisdiction over LiveJournal for purposes of this action and that venue is proper in this  
16 District. Except as expressly admitted herein, LiveJournal denies the allegations of  
17 paragraph 2 of the Complaint.

18 **PARTIES**

19 3. LiveJournal is without knowledge or information sufficient to form a  
20 belief as to the truth of the allegations set forth in paragraph 3 of the Complaint and, on  
21 that basis, denies the allegations of paragraph 3 of the Complaint.

22 4. Answering paragraph 4 of the Complaint, LiveJournal admits that it is  
23 incorporated under the laws of California and that its principal place of business is in  
24 San Francisco, California.

25 5. Answering paragraph 5 of the Complaint, this paragraph contains  
26 conclusions of law and not averments of fact for which a response is required. To the  
27 extent a response is required, Live Journal denies the allegations contained in  
28 paragraph 5 of the Complaint.

**ALLEGATIONS COMMON TO ALL COUNTS**

1  
2 6. LiveJournal is without knowledge or information sufficient to form a  
3 belief as to the truth of the allegations set forth in paragraph 6 of the Complaint and, on  
4 that basis, denies the allegations of paragraph 6 of the Complaint.

5 7. Answering paragraph 7 of the Complaint, LiveJournal admits that it owns  
6 LiveJournal, a web-based social media platform ([www.livejournal.com](http://www.livejournal.com)), and that *Oh*  
7 *No They Didn't!* (<http://ohnotheydidnt.livejournal.com>) is a LiveJournal community.  
8 LiveJournal admits that *Oh No They Didn't!* is also known as ONTD and that ONTD is  
9 a federally-registered trademark of LiveJournal. Except as expressly admitted herein,  
10 LiveJournal denies the allegations of paragraph 7 of the Complaint.

11 8. Answering paragraph 8 of the Complaint, this paragraph contains  
12 conclusions of law and not averments of fact for which a response is required. To the  
13 extent a response is required, LiveJournal admits that it receives advertising revenue  
14 from *Oh No They Didn't!*. LiveJournal is without knowledge or information sufficient  
15 to admit or deny the allegations concerning whether CubeStat made the statements  
16 attributed to it in paragraph 8 of the Complaint. LiveJournal is without sufficient  
17 knowledge or information to admit or deny the allegation concerning how content  
18 websites, in general, “may effectively monetize the content on their websites.” Except  
19 as expressly admitted herein, LiveJournal denies the allegations of paragraph 8 of the  
20 Complaint.

21 9. Answering paragraph 9 of the Complaint, LiveJournal admits that  
22 Brenden Delzer is a full-time employee of LiveJournal, and that Mr. Delzer works out  
23 of LiveJournal’s San Francisco office. LiveJournal admits that Mr. Delzer is identified  
24 as a member of the LiveJournal “team” on [www.livejournalinc.com](http://www.livejournalinc.com). Except as  
25 expressly admitted herein, LiveJournal denies the allegations of paragraph 9 of the  
26 Complaint.

27 10. Answering paragraph 10 of the Complaint, LiveJournal admits that  
28 <http://ohnotheydidnt.livejournal.com> has a section entitled “The Rules” that states,

1 among other things, that members will be banned from the *Oh No They Didn't!*  
2 community for “racism and other forms of discrimination,” that posts with hotlinks  
3 will be rejected, and that “spam . . . will get you banned” from the *Oh No They Didn't!*  
4 community. LiveJournal admits that “The Rules” section of  
5 <http://ohnotheydidnt.livejournal.com> lists among other “unnecessary things,” the  
6 following statement: “‘Mods, please delete if it’s already been posted.’ Believe us, we  
7 will.” Except as expressly admitted herein, LiveJournal denies the allegations of  
8 paragraph 10 of the Complaint.

9 11. Answering paragraph 11 of the Complaint, this paragraph contains  
10 conclusions of law and not averments of fact for which a response is required. To the  
11 extent a response is required, LiveJournal admits that “The Rules” section of  
12 <http://ohnotheydidnt.livejournal.com> states, among other things: “Don't be lazy with  
13 your posts. Include the article and picture(s) in your post . . . do not simply refer us off  
14 to another site for the goods.” Except as expressly admitted herein, LiveJournal denies  
15 the allegations of paragraph 11 of the Complaint.

16 12. Answering paragraph 12 of the Complaint, this paragraph contains  
17 conclusions of law and not averments of fact for which a response is required. To the  
18 extent a response is required, LiveJournal denies the allegations of paragraph 12 of the  
19 Complaint.

20 13. Answering paragraph 13 of the Complaint, this paragraph contains  
21 conclusions of law and not averments of fact for which a response is required. To the  
22 extent a response is required, LiveJournal denies the allegations of paragraph 13 of the  
23 Complaint.

24 14. LiveJournal is without knowledge or information sufficient to form a  
25 belief as to the truth of the allegations set forth in paragraph 14 of the Complaint and,  
26 on that basis, denies the allegations of paragraph 14 of the Complaint.

27 15. Answering paragraph 15 of the Complaint, LiveJournal incorporates by  
28 reference its responses contained in Paragraphs 1 through 14 of its Answer.

1           16. Answering paragraph 16 of the Complaint, this paragraph contains  
2 conclusions of law and not averments of fact for which a response is required. To the  
3 extent a response is required, LiveJournal is without knowledge or information  
4 sufficient to form a belief as to the truth of the allegations set forth in paragraph 16 of  
5 the Complaint and, on that basis, denies the allegations of paragraph 16 of the  
6 Complaint.

7           17. Answering paragraph 17 of the Complaint, this paragraph contains  
8 conclusions of law and not averments of fact for which a response is required. To the  
9 extent a response is required, LiveJournal is without knowledge or information  
10 sufficient to form a belief as to the truth of the allegations set forth in paragraph 17 of  
11 the Complaint and, on that basis, denies the allegations of paragraph 17 of the  
12 Complaint.

13           18. Answering paragraph 18 of the Complaint, this paragraph contains  
14 conclusions of law and not averments of fact for which a response is required. To the  
15 extent a response is required, LiveJournal denies the allegations of paragraph 18 of the  
16 Complaint.

17           19. Answering paragraph 19 of the Complaint, this paragraph contains  
18 conclusions of law and not averments of fact for which a response is required. To the  
19 extent a response is required, LiveJournal denies the allegations of paragraph 19 of the  
20 Complaint.

21           20. Answering paragraph 20 of the Complaint, this paragraph contains  
22 conclusions of law and not averments of fact for which a response is required. To the  
23 extent a response is required, LiveJournal denies the allegations of paragraph 20 of the  
24 Complaint.

25           21. Answering paragraph 21 of the Complaint, this paragraph contains  
26 conclusions of law and not averments of fact for which a response is required. To the  
27 extent a response is required, LiveJournal denies the allegations of paragraph 21 of the  
28 Complaint.

1           22.    Answering paragraph 22 of the Complaint, this paragraph contains  
 2 conclusions of law and not averments of fact for which a response is required. To the  
 3 extent a response is required, LiveJournal denies the allegations of paragraph 22 of the  
 4 Complaint.

5           23.    Answering paragraph 23 of the Complaint, this paragraph contains  
 6 conclusions of law and not averments of fact for which a response is required. To the  
 7 extent a response is required, LiveJournal denies the allegations of paragraph 23 of the  
 8 Complaint.

9           24.    Answering paragraph 24 of the Complaint, this paragraph contains  
 10 conclusions of law and not averments of fact for which a response is required. To the  
 11 extent a response is required, LiveJournal denies the allegations of paragraph 24 of the  
 12 Complaint.

13           25.    Answering Plaintiff’s Prayer for Relief, Live Journal denies that Plaintiff  
 14 is entitled to any relief sought in paragraphs 1 through 5 of the Prayer for Relief.

15                               **AFFIRMATIVE DEFENSES**

16           LiveJournal asserts the following affirmative defenses to the Complaint.  
 17 Assertion of such a defense is not a concession that LiveJournal has the burden of  
 18 proving the matter asserted.

19                               **Facts Common to LiveJournal’s Defenses**

20           26.    Defendant LiveJournal, Inc. provides an internet service, LiveJournal, a  
 21 web-based social media platform (www.livejournal.com) that allows registered users  
 22 to create and contribute to online “journals,” where they can post written entries,  
 23 messages, data, information, music, photography, video, and other content.

24           27.    LiveJournal fosters personal expression, communication, and social  
 25 interaction among its users by, *inter alia*, allowing them to create and participate in  
 26 “communities”—group journals organized around a common interest or subject, where  
 27 multiple users can post comments or entries. LiveJournal currently hosts over 64.5  
 28 million journals and communities.

1 28. *Oh No They Didn't!* is a LiveJournal community—organized around a  
2 shared interest in pop culture and celebrity news—where members can post and  
3 comment on written entries, videos, photographs, and other content. Like other  
4 content found on LiveJournal, the content of *Oh No They Didn't!* is posted by  
5 LiveJournal users. The *Oh No They Didn't!* community has almost 100,000 members  
6 with the ability to post entries and other content.

7 29. There is a wide range of content posted on the Live Journal service and on  
8 *Oh No They Didn't!*, including user-created original works and social and political  
9 commentary. The vast majority of the content uploaded to Live Journal and to *Oh No*  
10 *They Didn't!* has never been the subject of a claim of copyright infringement.

11 30. LiveJournal respects the intellectual property rights of third parties.  
12 LiveJournal expressly advises its users that by posting content to LiveJournal they are  
13 acknowledging and agreeing that they have all rights necessary to post such content,  
14 and for LiveJournal to serve such content, without violation of any intellectual  
15 property rights of third parties.

16 31. In compliance with the “Safe Harbor” provisions of 17 U.S.C. § 512,  
17 LiveJournal has implemented a variety of policies and procedures to help copyright  
18 owners safeguard their intellectual property rights. LiveJournal responds expeditiously  
19 to notifications to take down content that copyright owners claim is infringing in  
20 accordance with the applicable provisions of the Digital Millennium Copyright Act  
21 (“DMCA”). LiveJournal has a registered DMCA agent and provides a number of  
22 conspicuous links to the agent so that allegedly infringing material can be reported.  
23 LiveJournal also has a policy of terminating the accounts of repeat copyright  
24 infringers.

25 **First Affirmative Defense**

26 32. Plaintiff’s action is barred because the Complaint does not state a claim  
27 on which relief could be granted.

28

**Second Affirmative Defense**

1  
2 33. Plaintiff’s action is barred by the “Safe Harbor” provisions of 17 U.S.C.  
3 § 512.

4 34. LiveJournal qualifies for the DMCA “Safe Harbor” which limits liability for  
5 “infringement of copyright by reason of the storage at the direction of a user of  
6 material that resides on a system or network controlled or operated by or for the  
7 service provider.” 17 U.S.C. § 512(c)(1). Live Journal is a “service provider” within  
8 the meaning of the DMCA and stores content, including photographs, at the direction  
9 of its users. LiveJournal maintains a notice and take-down policy which complies in  
10 all respects with the obligations imposed by the DMCA.

11 35. Under 17 U.S.C. § 512(c), a service provider is immune from liability for  
12 copyright infringement allegedly committed by its users where it meets the following  
13 three requirements:

- 14 (1) the service provider (i) does not have actual knowledge that the  
15 material or an activity using the material on the system or network is  
16 infringing; (ii) in the absence of such actual knowledge, is not aware of  
17 facts or circumstances from which infringing activity is apparent; or upon  
18 obtaining such knowledge or awareness acts expeditiously to remove, or  
19 disable access to, the material;
- 20 (2) does not receive a financial benefit directly attributable to the  
21 infringing activity, in a case in which the service provider has the right  
22 and ability to control such activity; and
- 23 (3) upon notification of claimed infringement, responds expeditiously to  
24 remove, or disable access to, the material that is claimed to be infringing  
25 or to be the subject of infringing activity.

26 LiveJournal meets each of these requirements.  
27  
28



1 **Third Affirmative Defense**

2 36. Plaintiff's action is barred, in whole or in part, by Plaintiff's failure to  
3 comply with the requirements of the DMCA, 17 U.S.C. § 512, including by failing to  
4 provide LiveJournal with a DMCA-compliant notification of any claimed  
5 infringement.

6 **Fourth Affirmative Defense**

7 37. Plaintiff's action is barred by the fair use doctrine.

8 **Fifth Affirmative Defense**

9 38. Plaintiff is not entitled to any injunctive relief because any alleged injury  
10 to Plaintiff is not immediate or irreparable, Plaintiff has an adequate remedy at law for  
11 any alleged injury, and such relief would be contrary to compelling public interests.

12 **Sixth Affirmative Defense**

13 39. Plaintiff has failed to mitigate its damages, if any.

14 **Seventh Affirmative Defense**

15 40. Plaintiff's prayer for statutory damages, if any, is limited on the ground  
16 cannot allege or prove facts sufficient to show that the alleged infringement by  
17 LiveJournal was willful.

18 **Eighth Affirmative Defense**

19 41. Plaintiff's action is barred by the doctrine of laches.

20 **Ninth Affirmative Defense**

21 42. Plaintiff's action is barred, in whole or in part, in light of Plaintiff's  
22 misuse of the alleged copyrights at issue in a manner violative of the public policy  
23 embodied in the grant of copyright.

24 **Tenth Affirmative Defense**

25 43. Plaintiff's action is barred, in whole or in part, by the doctrine of unclean  
26 hands.

