

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**ICC EVALUATION SERVICE, LLC**

**Plaintiff**

**v.**

**INTERNATIONAL ASSOCIATION OF  
PLUMBING AND MECHANICAL  
OFFICIALS, INC. and IAPMO  
EVALUATION SERVICE, LLC**

**Defendants.**

Case No. 1:16-cv-00054

Judge Emmet G. Sullivan

**ORAL HEARING REQUESTED**

**DEFENDANTS INTERNATIONAL ASSOCIATION OF PLUMBING AND  
MECHANICAL OFFICIALS, INC. AND IAPMO EVALUATION SERVICE, LLC'S  
MOTION TO DISMISS THE AMENDED COMPLAINT**

Defendants International Association of Plumbing and Mechanical Officials, Inc. ("IAPMO") and IAPMO Evaluation Service, LLC ("IAPMO-ES") (collectively "Defendants"), by and through their undersigned counsel and pursuant to Fed R. Civ. P. 12(b)(6) and 17 U.S.C. § 301, hereby file this Motion to Dismiss Plaintiff ICC Evaluation Service, LLC's ("Plaintiff" or "ICC-ES") Amended Complaint, and state as follows:

1. In its Amended Complaint, Plaintiff seeks to recover from Defendants for copyright infringement (Count I), breach of contract (Count II), tortious interference with contract (Count III) and tortious interference with prospective business advantage (Count IV).
2. Plaintiff's cause of action under the Copyright Act fails to state a claim for which relief can be granted because it fails to sufficiently allege that unlawful copying took place. Plaintiff's allegations are vague and conclusory and do not allege what parts, if any, of their

documents are protected by Copyright Law or whether any of the copyright-protected portions were copied. Accordingly, this claim fails and must be dismissed, with prejudice, pursuant to Fed. R. Civ. P. 12(b)(6).

5. Counts II, III and IV of Plaintiff's Amended Complaint are preempted by the Copyright Act. 17 U.S.C. § 301. These Counts purport to set forth causes of action under District of Columbia law for breach of contract, tortious interference with contract and tortious interference with prospective business advantage. These claims come within the subject matter of copyright. 17 U.S.C. §§ 102, 103. Further, these state-law claims address rights equivalent to the rights within the scope of the Copyright Act. 17 U.S.C. § 106. As such, these Counts are preempted by the Copyright Act and should be dismissed.

6. Further, Plaintiff's causes of action under District of Columbia law should be dismissed, pursuant to Fed. R. Civ. P. 12(b)(6) because they fail to state claims upon which relief can be granted.

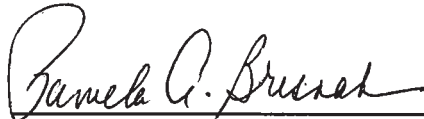
7. Attached hereto in further support of this Motion is a Memorandum of Points and Authorities, which is incorporated by referenced as if set forth fully herein.

8. Pursuant to Local R. 7(f), Defendants respectfully request an oral hearing on their Motion to Dismiss the Amended Complaint.

WHEREFORE, based upon the foregoing, Defendants International Association of Plumbing and Mechanical Officials, Inc. and IAPMO Evaluation Service, LLC respectfully request that this Court dismiss Plaintiff's Amended Complaint, with prejudice. A proposed Order is attached.

Dated: February 29, 2016

Respectfully submitted,

A handwritten signature in black ink, reading "Pamela A. Bresnahan". The signature is written in a cursive style with a horizontal line underneath.

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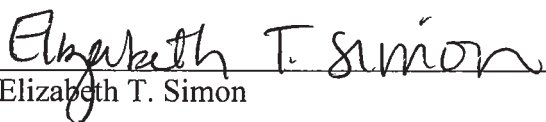
*Counsel for Defendants IAPMO and IAPMO-ES*

**CERTIFICATE OF SERVICE**

I certify that on this 29th day of February 2016, a copy of the foregoing Motion to Dismiss, Memorandum in Support thereof and Proposed Order were served through the Court's CM/ECF electronic filing system upon the following:

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**IN THE UNITED STATES DISTRICT COURT  
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**Plaintiff**

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**INTERNATIONAL ASSOCIATION OF  
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**Defendants**

Case No. 1:16-cv-00054

Judge Emmet G. Sullivan

**MEMORANDUM IN SUPPORT OF DEFENDANTS**  
**INTERNATIONAL ASSOCIATION OF PLUMBING AND MECHANICAL**  
**OFFICIALS, INC. AND IAPMO EVALUATION SERVICE, LLC'S**  
**MOTION TO DISMISS THE AMENDED COMPLAINT**

Defendants International Association of Plumbing and Mechanical Officials, Inc. (“IAPMO”) and IAPMO Evaluation Service, LLC d/b/a IAPMO Uniform Evaluation Service (“IAPMO-ES”) (collectively “Defendants”), by and through their undersigned counsel and, pursuant to Fed R. Civ. P. 12(b)(6) and 17 U.S.C. § 301, hereby file this Memorandum in Support of their Motion to Dismiss Plaintiff ICC Evaluation Service, LLC’s (“Plaintiff” or “ICC-ES”) Amended Complaint, and state as follows:

**I. Introduction.**

**A. Factual Background.**

ICC-ES and IAPMO-ES are direct competitors in the nationwide market for the evaluation of building products. Amended Complaint at ¶¶ 10, 15.

ICC-ES has historically been, and continues to be, the dominant player in this market, while IAPMO-ES entered the market in 2004. Indeed, this litigation is simply the latest chapter in Plaintiff's ongoing efforts to preserve its virtual monopoly and intimidate and shut out competitors. *See, e.g., WAKA, LLC v. DC Kickball*, 517 F. Supp. 2d 245 (D.D.C. 2007).

IAPMO-ES is a limited liability company organized and existing under the laws of the State of Delaware, with its principal place of business in Ontario, California. IAPMO-ES is wholly-owned by IAPMO. IAPMO is a not-for-profit organization that, amongst other things, coordinates the development of the Uniform Plumbing Code, Uniform Mechanical Code, and other model codes to ensure safe, sanitary plumbing and mechanical systems.

ICC-ES is a limited liability company alleged to be organized and existing under the laws of the State of Delaware, with its principal place of business in Brea, California. Am. Compl. at ¶ 8. ICC-ES is a wholly-owned subsidiary of the International Code Council ("ICC"). *Id.* at ¶ 9.

ICC-ES and IAPMO-ES are Conformity Assessment Bodies ("CABs") accredited by the American National Standards Institute ("ANSI").<sup>1</sup> A CAB reviews engineering data and laboratory test results for products and then certifies that a product conforms to applicable codes and standards and that the manufacturer of the product is capable of producing a product that consistently meets the applicable codes and standards.

Jurisdictions, be they State, County, City or Municipal, through code enforcement officials, enforce building codes that typically require a building product to be code compliant in order for the product to be installed within that jurisdiction. The certification of a product by a CAB, by and through a written report issued by the CAB, is essential to the code enforcement official as evidence of the code compliance of that product. Obtaining such certification from an

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<sup>1</sup> See <http://www.ansi.org/Accreditation/product-certification/DirectoryListingAccredited.aspx?menuID=1&prgID=1> (last visited 2/21/2016).

accredited, reputable and widely accepted CAB is, therefore, an essential gateway to installing relevant products across the country.

The Amended Complaint, filed by ICC-ES in this Court, is the latest tactic employed by ICC-ES and its parent ICC to achieve its anticompetitive objectives in the market for the evaluation of building products. Styled as a copyright infringement complaint, ICC-ES' pleading is an effort to prohibit IAPMO-ES from using certain standard words, phrases and technical information that have predominantly come from third-party sources and that have been routinely used by CABs in support of product evaluation reports for their customers and clients.

#### **B. Procedural Background.**

On January 13, 2016, Plaintiff filed a Complaint against Defendants, alleging copyright infringement (Count I), breach of contract (Count II), tortious interference with contract (Count III) and tortious interference with prospective business relationships (Count IV). On February 1, 2016, Plaintiff filed an Amended Complaint.<sup>2</sup>

The Amended Complaint asserts that ICC-ES (referred to as "ES" in the Amended Complaint) is the author and owner of certain written works known as Evaluation Reports and Acceptance Criteria. *See* Am. Compl. at ¶ 22. ICC-ES alleges that Defendants, in violation of the Copyright Act, "reproduced in substantial and significant part, and copied with minimal changes from, at least . . . seventeen works authored and copyrighted by ES." *See* Am. Compl. at ¶ 25.

Plaintiff also alleges that Defendants are in breach of a purported "Website User Agreement" that prohibits, *inter alia*, the reprinting, republishing, modification or distribution of any portion of ICC-ES' website without express written permission. *See* Am. Compl. at ¶¶ 43-

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<sup>2</sup> The only changes from the original Complaint are that two (2) of Plaintiff's pending copyright applications were subsequently registered. *See* Paragraphs 25, 90 and 93 of the Complaint and the Amended Complaint.

49. ICC-ES alleges that “Defendants accessed and used [ICC-ES] website,” “had actual notice of the Website User Agreement” and “willfully, repeatedly, and systematically copied [ICC-ES] Evaluation Reports available on the [ICC-ES] website and modified those reports . . . .” *See* Am. Compl. at ¶¶ 44, 112.

Plaintiff claims that Defendants tortiously interfered with ICC-ES’ contractual relationships by inducing ICC-ES’ customers to breach their contracts by, among other things, providing “Evaluation Reports to Defendants to be copied and used by them” and “permitting reproduction of significant parts of [ICC-ES] Evaluation Reports in Defendants’ evaluation reports.” *See* Am. Compl. at ¶ 41. Plaintiff further alleges that Defendants tortiously interfered with ICC-ES’s business relationships by “offering to produce evaluation reports at a lower cost and/or more quickly by copying and reproducing [ICC-ES] proprietary, copyrighted Evaluation Reports.” *See* Am. Compl. at ¶ 42.

### **C. Summary of Argument.**

Defendants move to dismiss Plaintiff’s Amended Complaint on two (2) separate grounds. First, none of the counts contained in Plaintiff’s Amended Complaint set forth viable claims upon which relief could be granted. Plaintiff’s Copyright Act claim fails to sufficiently set forth that unlawful copying took place. ICC-ES’ purported contract and tort claims likewise cannot be maintained, as a matter of law, because ICC-ES has not, and cannot, allege the requisite elements necessary to maintain those claims. Because the deficiencies in those claims cannot be cured by further amendment, those claims should be dismissed, with prejudice and without leave to amend. Accordingly, dismissal under Fed. R. Civ. P. 12(b)(6) is appropriate.

Second, Plaintiff’s state law claims are also subject to dismissal because they are preempted, as a matter of law, by ICC-ES’s purported copyright infringement claim. As



demonstrated below, each of those claims asserts the same allegedly wrongful act by Defendants in that those parties allegedly reproduced, disseminated or otherwise made use of ICC-ES' protected "works." Because common law claims that assert acts squarely within the ambit of the Copyright Act are preempted, as a matter of law, those claims must be dismissed.

## **II. Plaintiff's Count I for Copyright Infringement Should Be Dismissed For Failure To State A Claim.**

### **A. Standard for a Motion to Dismiss.**

A motion to dismiss, pursuant to Fed. R. Civ. P. 12(b)(6), tests whether the complaint states a claim upon which relief can be granted. *ZilYen, Inc. v. Rubber Mfrs. Ass'n*, 935 F. Supp. 2d 211, 216 (D.D.C. 2013) (*quoting* Fed. R. Civ. P. 12(b)(6)). In order to survive a 12(b)(6) 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.'" *Id.* at 216 (*quoting* *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*quoting* *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007))). A motion to dismiss is proper "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Int'l Kitchen Exhaust Cleaning Ass'n v. Power Washers of North America*, 81 F. Supp. 2d 70, 71 n.1 (D.D.C. 2000).

In assessing whether a complaint has stated a claim for relief that is plausible on its face, the Court must give plaintiff "the benefit of all inferences that can be derived from the facts alleged." *ZilYen*, 935 F. Supp. 2d at 216 (*quoting* *Am. Nat'l Ins. Co. v. FDIC*, 642 F.3d 1137, 1139 (D.C. Cir. 2011) (internal quotation marks and citation omitted)). In evaluating a Rule 12(b)(6) motion, the Court "may consider only the facts alleged in the complaint[,] any documents either attached to or incorporated in the complaint, and matters of which [the Court] may take judicial notice." *ZilYen*, 935 F. Supp. 2d at 216 (*quoting* *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997) (footnote omitted)) (brackets in original).

Merely raising a sheer possibility that a defendant acted unlawfully will not satisfy the facial plausibility element required for a complaint to survive a motion to dismiss. *ZilYen*, 935 F. Supp. 2d at 216; *Iqbal*, 556 U.S. at 678. Further, “conclusory allegations are not entitled to an assumption of truth, and even those allegations pleaded with factual support need only be accepted to the extent that ‘they plausibly give rise to an entitlement to relief.’” *ZilYen*, 935 F. Supp. 2d at 216 (*quoting Iqbal*, 556 U.S. at 679). The court is also not required to accept plaintiff’s legal conclusions. *Lilley v. Stout*, 384 F. Supp. 2d 83, 85 (D.D.C. 2005); *Kowal v. MCI Communications Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994).

**B. Plaintiff’s Copyright Claim Fails to State a Claim.**

Plaintiff’s first count for copyright infringement is deficient and must be dismissed, because Plaintiff fails to allege that the copying by Defendants was actionable. “To establish copyright infringement, a plaintiff must prove ‘(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.’” *Prunte v. Universal Music Grp., Inc.*, 699 F. Supp. 2d 15, 22 (D.D.C. 2010) (*quoting Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991)); *see also Stenograph L.L.C. v. Bossard Assocs., Inc.*, 144 F.3d 96, 99 (D.C. Cir. 1998).

With respect to the second requirement, copying of original constituent elements, a plaintiff must show: (1) that the defendant actually copied the plaintiff’s work; and, (2) that the defendant’s work is “substantially similar” to protectable elements of the plaintiff’s work.<sup>3</sup> *Prunte*, 699 F. Supp. 2d at 22 (*citing Sturdza v. United Arab Emirates*, 281 F.3d 1287, 1295 (D.C. Cir. 2002)). To prevail on a copyright infringement claim, even if actual or factual

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<sup>3</sup> The first sub-element is often referred to as “actual” or “factual” copying, while the second sub-element is often referred to as “improper” or “actionable” copying. *Prunte*, 699 F. Supp. 2d at 22 (*citing Johnson v. Gordon*, 409 F.3d 12, 18 (1st Cir. 2005); 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.01[B] at 13-8 (2008)).

copying is established,<sup>4</sup> a plaintiff still must show that the copying was actionable. *Id.* In other words, “[c]opying as a factual matter is insufficient, if [actionable copying] is lacking.”

*Prunte*, 699 F. Supp. 2d at 22 (*quoting* 4 Melville B. Nimmer & David Nimmer, *Nimmer On Copyright* §13.01[B] at 13-9 (2008) (brackets in original)).

Here, actionable copying is lacking. Specifically, in its Amended Complaint, Plaintiff has failed to plead that Defendants have engaged in unlawful, actionable copying. Highlighting this deficiency, the Registration Certificates from the United States Copyright Office (which are attached to and incorporated into Plaintiff’s Amended Complaint) acknowledge that some or all of the allegedly infringed works are not protected by copyright. Nevertheless, Plaintiff fails, in its Amended Complaint, to identify what portions, if any, of the works at issue are, in fact, protected by copyright. Even worse, Plaintiff fails to allege that those protected portions have been infringed by Defendants.

To illustrate the depth of the pleading deficiency, Plaintiff’s copyright Registration Certificate for ICC-ES Evaluation Report ESR-1215 (Exhibit 4 to the Amended Complaint) expressly states under the heading “Limitation of copyright claim”:

**Material excluded from this claim: Prior version of this report; certain third-party text.**

**New material included in this claim: New and revised text and table.**

Significantly, there are identical disclaimers in each and every Registration Certificate issued regarding the “works” at-issue in this case. *See* Exhibits 5-20.

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<sup>4</sup> If a plaintiff does not have direct evidence of actual copying, a plaintiff may draw an inference of actual copying by showing (1) that a defendant had access to plaintiff’s subject work; and, (2) substantial similarity between the works (which is often referred to as “probative similarity”). *See* 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.01[B] (Matthew Bender, Rev. Ed. 2015).

Because of these very broad disclaimers, it is incumbent on Plaintiff to identify what portions, if any, of the Evaluation Reports and Acceptance Criteria are protected by copyright. In lieu of such necessary allegations, Plaintiff merely offers vague and conclusory allegations that “Defendants have knowingly and willfully infringed on the copyrights in the Works by reproducing the Works or copying them with minimal alterations.” *See* Am. Compl. at ¶ 27.

Although Plaintiff appears to allege (contrary to express disclaimers in the Registration Certificates) that the entirety of the Evaluation Reports and Acceptance Criteria are protected by copyright, the Registration Certificates themselves demonstrate otherwise. As a result, the copyright claim is deficient, because it is impossible for the Defendants or this Court to determine whether any actionable copying has been sufficiently alleged. *See, e.g., Newborn v. Yahoo!, Inc.*, 391 F. Supp. 2d 181, 187 (D.D.C. 2005) (dismissing Plaintiff’s claim of contributory copyright infringement because, among other reasons, it was virtually impossible to determine what materials had allegedly been infringed.)

In tandem with its failure to identify what portions, if any, of the subject works are protected by copyright, Plaintiff has also failed to allege how, or in what manner, Defendants copied, modified or otherwise used the Evaluation Reports or Acceptance Criteria. Although, in Paragraph 25 of the Amended Complaint, Plaintiff alleges that Defendants “reproduced in substantial and significant part,” the subject Evaluation Reports and Acceptance Criteria, Plaintiff fails to allege what portions, if any, of the pertinent documents actually protected by copyright have been copied. This omission is likewise fatal to Plaintiff’s ability to maintain a viable cause of action. *See Newborn*, 391 F. Supp. 2d at 187; *Iqbal*, 566 U.S. at 678 (“[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements,” cannot survive a motion to dismiss.).

For all of these reasons, Count One of Plaintiff's Amended Complaint for copyright infringement should be dismissed, with prejudice.

**III. Plaintiff's District of Columbia Claims Are Preempted By The Copyright Act.**

As demonstrated below in Section IV, Plaintiff's claims for relief under District of Columbia law are fatally flawed because they do not plausibly state claims for relief, and should therefore be dismissed. But as a more fundamental matter, they fail because they are copyright claims loosely disguised as tort and contract claims. Plaintiff's claims for breach of contract, tortious interference with contract and tortious interference with prospective business advantage must be dismissed as a matter of law, because those claims are preempted by the Copyright Act.

**A. Standard.**

Section 301 of the Copyright Act explicitly provides for the preemption of state law claims, whether statutory or common law, under certain conditions:

[A]ll legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of express and come within the subject matter of copyright as specified by sections 102 and 103 . . . are governed exclusively by this title. . . . [N]o person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

17 U.S.C. § 301(a); *see also Sturdza*, 281 F.3d at 1303 (quoting the Copyright Act). In other words, a state law claim is preempted by the Copyright Act if two (2) conditions are met: (1) the subject matter protected by the state law claim comes within the subject matter of copyright as specified by Sections 102 and 103 of the Act; and, (2) the state law claim governs a legal or equitable right that is equivalent to any of the exclusive rights within the general scope of copyright as specified by Section 106. *See Int'l Kitchen*, 81 F. Supp. 2d at 73 (citation omitted).

As to the first prong of the preemption test, the Second Circuit has held that "works may fall within the subject matter of copyright, and thus be subject to preemption, even if they

contain material that is uncopyrightable under section 102” of the Copyright Act. *Forest Park Pictures v. Universal TV Network, Inc.*, 683 F.3d 424, 429 (2d Cir. 2012) (explaining that a work may fall within the subject matter of copyright even if it contains uncopyrightable facts or ideas). As to the second prong of the preemption test, a claim is preempted if it involves the rights of authors under Section 106 of the Copyright Act, which are, among others, the rights to: (1) reproduce the work; (2) prepare derivative works; (3) distribute copies to the public via sale or other ownership transfer or by rental, lease or lending; and, (4) publicly display the work. *See Int’l Kitchen*, 81 F. Supp. 2d at 73. Thus, state law causes of action alleging the same or similar conduct that constitute a violation of rights under copyright are preempted, as a matter of law, by the Copyright Act.

The District of Columbia Circuit applies the “extra element” test to determine whether a state law claim is preempted by the Copyright Act. *See, e.g., Sturdza*, 281 F.3d at 1304. This test examines the qualitative differences between the state law claims and the federal copyright claims to determine whether preemption applies. *Id.* (explaining that in order to determine whether a state law claim is qualitatively different from a copyright claim, that is, whether the state claim has an “extra element,” courts generally examine both the elements of the state law cause of action and the way the plaintiff has actually pled that cause of action.); *see also Int’l Kitchen*, 81 F. Supp. 2d at 73 (applying the “extra element” test). Pursuant to this test, if an “extra element” is required for the state law cause of action, for example, instead of or in addition to the acts underlying the protected rights set forth in Section 106 of the Act, there is no preemption where the “extra element” changes the nature of the action so that it is qualitatively different from a copyright infringement claim. *See Sturdza*, 281 F.3d at 1304.



**B. Because Plaintiff's Breach of Contract Claim is Preempted By The Copyright Act, It Must Be Dismissed.**

Plaintiff's breach of contract claim must be dismissed, because it satisfies both conditions set forth in the Copyright Act, and thus is preempted. As to the first condition, even though Defendants dispute that ICC-ES holds a valid copyright in the subject works, the written Evaluation Reports and Acceptance Criteria are documents fixed in a tangible medium of expression and, therefore, are within the subject matter protected by the Copyright Act. *See* 17 U.S.C. § 102(a).

As to the second condition, Plaintiff's breach of contract claim asserts rights that are qualitatively the same as rights protected by copyright.<sup>5</sup> Specifically, Plaintiff's Amended Complaint alleges that Defendants breached a contract, namely the Website User Agreement<sup>6</sup>, by accessing and copying Evaluation Reports that were available on ICC-ES's website, modifying those reports, failing to preserve the copyright notice on those reports, using the copies and modified versions for their own commercial purposes, distributing the copies and modified versions and representing that the copies and modified versions were Defendants' own evaluations and conclusions. *See* Am. Compl. at ¶ 112. These are precisely the exclusive rights that are protected by the Copyright Act.<sup>7</sup>

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<sup>5</sup> Pursuant to District of Columbia law, the essential elements of a breach of contract claim are (1) a valid contract between the parties; (2) an obligation or duty arising out of the contract; (3) a breach of that duty; and, (4) damages caused by [the] breach. *See Tsintolas Realty Co. v. Mendez*, 984 A.2d 181, 187 (D.C. 2009); *San Carlos Irrigation & Drainage District v. United States*, 877 F.2d 957, 959 (Fed. Cir. 1989).

<sup>6</sup> For purposes of the preemption argument related to Count II only, Defendants assume the validity of the Website User Agreement. Defendants do not, however, concede that they were aware of the Website User Agreement, that Defendants manifested any type of assent to the Website User Agreement or that the Website User Agreement is otherwise valid and/or enforceable. *See also*, Section IV.A., *infra*.

<sup>7</sup> *See* 17 U.S.C. § 106, which provides that "the owner of copyright under this title has the exclusive rights", among others: "(1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; [and] (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending..."

Put differently, Plaintiff fundamentally complains about a breach of an alleged promise not to copy, reproduce or distribute the materials contained on ICC-ES's website, including Plaintiff's copyrighted Evaluation Reports and Acceptance Criteria. But in making this allegation, Plaintiff is asserting a claim regarding the alleged copying, reproducing or distributing materials protected by copyright. As such, the gravamen of Plaintiff's breach of contract count is clearly within the scope of the Copyright Act and, hence, is preempted as a matter of law. *See* 17 U.S.C. § 301.

Although in Section IV.A., below, Defendants demonstrate that the Website User Agreement is invalid and unenforceable, the validity and enforceability of that "agreement" is irrelevant to the conclusion that a breach of contract claim is preempted. Even if that "agreement" were found to be an enforceable contract, Plaintiff's claim for breach of contract is still preempted by the Copyright Act, because it is a re-packaged copyright claim. *See Wrench LLC v. Taco Bell Corp.*, 256 F.3d 446, 457 (6th Cir. 2001) (explaining that not "all state law contract claims survive preemption simply because they involve the additional element of promise" and that if "the promise amounts only to a promise to refrain from reproducing, performing, distributing or displaying the work, then the contract claim is preempted"); *see also id.* at 458 (*quoting* 1 Melville B. Nimmer & David Nimmer, *Nimmer On Copyright* § 1.01[B][1][a] at 1-23 (1999) (explaining that "preemption should continue to strike down claims that, though denominated 'contract,' nonetheless complain directly about the reproduction of expressive materials.")).

In its breach of contract claim, Plaintiff attempts to obtain contract damages for purported copyright infringement. However, Plaintiff's claim that Defendants allegedly agreed not to copy, change or distribute anything from Plaintiff's website, but then allegedly breached that



agreement, by copying, changing or distributing items from Plaintiffs' website, seeks to protect a right properly protected under copyright. There is no qualitative difference between the rights sought to be enforced in Plaintiff's breach of contract claim and the rights sought to be enforced in Plaintiff's copyright claim. Because Plaintiff's breach of contract claim fails to allege anything more than a violation of the exclusive rights protected under copyright, it is necessarily preempted and must therefore be dismissed.

**C. Because Plaintiff's Tortious Interference with Contract Claim is Preempted By The Copyright Act, It Must Be Dismissed.**

In its tortious interference with contract claim, Plaintiff attempts to obtain tort damages for a purported copyright infringement. This claim, like its breach of contract claim, is simply a repackaged copyright infringement claim and, thus, must be dismissed on preemption grounds.

In order to make a *prima facie* case of tortious interference with contract under District of Columbia law, a plaintiff must prove: "(1) the existence of a valid contractual or other business relationship; (2) the defendant's knowledge of the relationship; (3) intentional interference with that relationship by the defendant; and, (4) resulting damages." *Havilah Real Prop. Servs. v. VLK, LLC*, 108 A.3d 334, 345-46 (D.C. 2015) (*quoting Onyeoziri v. Spivok*, 44 A. 3d 279, 286-87 (D.C. 2012) (*citing* Restatement (Second) of Torts § 766 (1979))).

In this case, Plaintiff's tortious interference with contract claim is not qualitatively different than Plaintiff's copyright claim. Plaintiff seemingly tries to avoid preemption by alleging that Defendants induced Plaintiff's customers to breach their respective agreement with ICC-ES in order to obtain copies of the pertinent reports. *See* Am. Compl. at ¶ 41. Plaintiff's allegation here is no different than the conduct alleged in Count I, for copyright infringement. The gravamen of this interference is still that Defendants allegedly copied and used the reports, reproduced the reports, and allegedly misrepresented authorship of the reports and failed to

obtain approval or a license from ICC-ES regarding use of the Evaluation Reports. *See, e.g.*, Am. Compl. at ¶ 41 (asserting that Defendants engaged in copying, reproduction and use of the reports). These rights are all co-terminus with copyright law. Thus, this count is no different than an allegation of copyright infringement, and, as such, is preempted by the Copyright Act.

**D. Because Plaintiff's Tortious Interference with Prospective Business Relationships Claim is Preempted By The Copyright Act, It Must Be Dismissed.**

Plaintiff's tortious interference with prospective business advantage claim is also preempted. As with Plaintiff's other state law claims, this claim is not qualitatively different than the rights protected under copyright and, thus, must be dismissed.<sup>8</sup>

Plaintiff's Amended Complaint alleges that "by intentionally appropriating [ICC-ES's] copyrighted works, Defendants have been able to offer similar evaluation reports or evaluation criteria more quickly and for less money than they could have done without the unlawful use of [ICC-ES's] works." *See* Am. Compl. at ¶ 125. Plaintiff alleges that Defendants' alleged unauthorized reproduction, modification and distribution of its Evaluation Reports and Acceptance Criteria caused ICC-ES to lose the expectancy of future patronage from existing and prospective customers. *See id.* at ¶¶ 124-126.

The gravamen of this claim is the unauthorized reproduction, modification and distribution of ICC-ES' works. Because this claim arises directly from activity which is squarely protected by copyright, it is, therefore, preempted. *See, e.g., Balsamo/Olson Grp., Inc. v. Bradley Place Ltd. Pshp.*, 950 F. Supp. 896, 899 (C.D. Ill. 1997) (explaining that plaintiff's claim for tortious interference with economic advantage was preempted because it was in

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<sup>8</sup> The elements of a *prima facie* case of tortious interference with prospective business advantage under District of Columbia law, are the same as those for a claim for tortious interference with contract. Specifically, a plaintiff must prove: "(1) the existence of a valid contractual or other business relationship; (2) the defendant's knowledge of the relationship; (3) intentional interference with that relationship by the defendant; and, (4) resulting damages." *Havilah Real Prop. Servs.*, 108 A.3d at 345-46 (citation omitted).

essence a claim for copyright infringement, even though the state law claims contained an extra element of deception or misrepresentation); *Miller v. Holtzbrinck Publishers, LLC*, 377 Fed. Appx. 72, 73-74 (2d Cir. 2010) (holding that plaintiff's claim of tortious interference with a business relationship was preempted, because, where an unauthorized publication is the gravamen of the claim, the right for which protection is being sought is coextensive with an exclusive right already safeguarded by the Copyright Act); *Agard v. Palomar Builders, Inc.*, 344 F. Supp. 2d 1211, 1219 (E.D. Cal. 2004) (holding that defendant's intentional interference with prospective economic advantage counterclaim was preempted because the claim alleged a violation of essentially the same rights provided for by the Copyright Act, even though the state law claim contained an "extra element" of loss of business).

Similarly, in this case, the Copyright Act protects the alleged use of ICC-ES' Evaluation Reports and Acceptance Criteria, which is the same right sought to be protected here. Accordingly, Plaintiff's claim for tortious interference with prospective business relationship is, therefore, preempted and must be dismissed.

#### **IV. Plaintiff's State Law Claims Must Be Dismissed Because Those Claims Are Deficient.**

##### **A. As a Matter of Law, Plaintiff's Claim for Breach of Contract Does Not Sufficiently State, Nor Can It Be Amended To State, a Claim for Relief.**

Plaintiff's breach of contract claim fails to plausibly state a claim for relief, because the Amended Complaint fails to allege a valid contract between the parties. In order for a valid contract to exist, there must be "agreement as to all material terms" and "intention of the parties to be bound." *Kramer Assocs., Inc. v. Ikam, Ltd.*, 888 A.2d 247, 251 (D.C. 2005) (quoting *Georgetown Entertainment Corp. v. District of Columbia*, 496 A.2d 587, 590 (D.C. 1995)).

Plaintiff's Amended Complaint fails to allege either an oral or a written contract between the parties. Rather, the Amended Complaint alleges that the "use and access" of Plaintiff's

website is “subject to its Website User Agreement.” *See* Am. Compl. at ¶ 43. According to Plaintiff, Defendants had actual or constructive knowledge of the Website User Agreement because “all pages of [ICC-ES’s] website conspicuously feature a link to the Website User Agreement, and because Defendants’ website utilizes similar links to website terms of use that Defendants claim are binding on visitors to their websites.” *See id.* at ¶ 44. As demonstrated below, this is insufficient to plead an enforceable agreement.

Courts that have examined similar website agreements, commonly referred to as “browsewrap” agreements, have concluded that they are not enforceable due to the lack of mutual assent. *See, e.g., Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1178-79 (9th Cir. 2014) (holding that “where a website makes its terms of use available via a conspicuous hyperlink on every page of the website but otherwise provides no notice to users nor prompts them to take any affirmative action to demonstrate assent, even close proximity of the hyperlink to relevant buttons users must click on – without more – is insufficient to give rise to constructive notice”); *Hines v. Overstock.com, Inc.*, 668 F. Supp. 2d 362, 366-67 (E.D.N.Y. 2009) (holding that an arbitration clause contained in a website was not valid, because links to that browsewrap agreement at the bottom of the page were insufficient to provide to website users notice or constructive notice of it, rendering the browsewrap agreement unenforceable).

In this case, as the screen shot of the website makes clear, the “Website User Agreement” appears only as a small link at the bottom of the page. *See* Exhibit 3 to Plaintiff’s Amended Complaint. Significantly, users are not required to click on the link to continue using the website or to take any other affirmative action indicating assent or agreement to the terms and conditions of use of the website. Moreover, Defendants were not required to review the Website User Agreement, nor is there a statement notifying users that continued use of the website will be

considered assent or agreement to the website terms and conditions as explained in the “Website User Agreement.”

Although Plaintiff has asserted in the Amended Complaint that Defendants had actual or constructive notice of the Website User Agreement, there is no allegation that Defendants ever actually agreed or assented to the Website User Agreement. As a result, there can be no valid contract existing between the parties. For this reason, Plaintiff’s Amended Complaint fails to make such a claim plausible and should be dismissed.

**B. As a Matter of Law, Plaintiff’s Claim for Tortious Interference with Contract Does Not State, Nor Can It Be Amended to Plausibly State a Claim for Relief.**

Plaintiff’s claim for tortious interference with contractual relations must be dismissed because the allegations in the Amended Complaint are insufficient to state a claim.

In the District of Columbia, the elements of a claim for tortious interference with contract are: (1) the existence of a valid contract; (2) knowledge of the contract on the part of the interferor; (3) intentional interference causing termination of the contract or relationship or causing a failure of performance by one of the parties; and, (4) resultant damage. *Onyeoziri v. Spivok*, 44 A.3d 279, 286 (D.C. 2012) (describing a claim for tortious interference with contract under D.C. law).

The District of Columbia has held that the third element of this claim - intentional interference causing termination of the contract or relationship or causing a failure of performance by one of the parties - requires that a plaintiff plead and make a “strong showing of intent” to disrupt an ongoing business relationship. *See Nanko Shipping, USA v. Alcoa, Inc.*, 107 F. Supp. 3d 174, 182-83 (D.D.C. 2015); *Bell v. Ivory*, 966 F. Supp. 23, 31 (D.D.C. 1997). A plaintiff must also allege affirmative, intentional acts of interference. *See Nanko*, 107 F. Supp. 3d at 183; *Benedict v. Allen*, 2001 U.S. Dist. LEXIS 26293, at \* 21-23 (D.D.C. June 13, 2001).

Here, Plaintiff inadequately pleads that Defendants “intentionally induced” ICC-ES’s customers to breach their contracts with ICC-ES, and fails to identify any of the elements required to set forth a *prima facie* tort. Indeed, Plaintiff fails to identify any specific client that was allegedly induced, provides no allegations regarding any alleged termination or breach, provides no information regarding what affirmative or intentional acts occurred or any other specifics. Such general and vague allegations fail, as a matter of law, to state a claim for tortious interference with contract, and should be dismissed.

In addition, Plaintiff’s claim for tortious interference with contract also fails because ICC-ES cannot demonstrate that any conduct on the part of Defendants proximately caused its alleged injury. *See Steele v. Isikoff*, 130 F. Supp. 2d 23, 34 (D.D.C. 2000) (explaining that it is a fundamental principle that a plaintiff bringing a tort action must show that defendant’s conduct proximately caused plaintiff’s claimed injury). Without a reasonable connection between the alleged act or omission by a defendant and the damages suffered by a plaintiff, there is no proximate cause. *Sabre Int’l Sec. v. Torres Advanced Enter. Solutions*, 820 F. Supp. 2d 62, 75 (D.D.C. 2011). ICC-ES affirmatively alleges that its Evaluation Reports are available on its website and that IAPMO-ES obtained those reports from the ICC-ES website. *See* Am. Compl. ¶ 112. For this reason, and even taking as true Plaintiff’s allegations that IAPMO-ES persuaded certain ICC-ES customers to share their Evaluation Reports, Defendants’ alleged conduct of persuading customers to share reports that were posted on ICC-ES’ website cannot possibly support a finding of proximate cause. As a matter of law, Plaintiff cannot establish “but for” causation for its alleged damages where, according to Plaintiff’s Amended Complaint, the “works” at issue were available on ICC-ES’ website. *See, Sabre*, 820 F. Supp. 2d at 75.



Although the gravamen of Plaintiff's interference claim is that Defendants caused Plaintiff's customers to breach their confidentiality agreements by sharing their respective Evaluation Reports with Defendants (*see* Am. Compl. at ¶ 119), this conduct cannot be the "but for" cause of Plaintiffs alleged injuries because anyone could view the reports on the ICC-ES website, regardless of Defendants' alleged conduct. For this additional reason, this claim must be dismissed.

**C. As A Matter Of Law, Plaintiff's Claim For Tortious Interference With Prospective Business Advantage Does Not State, Nor Can It Be Amended To Plausibly State, A Claim For Relief.**

Plaintiff has failed to sufficiently allege a claim for tortious interference with prospective business advantage and, thus, this claim must be dismissed.

As a threshold matter, and in order to satisfy the first element of a claim for tortious interference with prospective business advantage, the "business expectancy... must be 'commercially reasonable to anticipate'" *Command Consulting Grp., LLC v. NeuralIQ, Inc.*, 623 F. Supp. 2d 49, 52 (D.D.C. 2009) (*quoting* *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002)). Moreover, Plaintiff is also required to make a strong showing of an intent to disrupt a business relationship or expectancy. *Id.*; *Bennett Enters. v. Domino's Pizza, Inc.*, 45 F.3d 493, 499 (D.C. Cir. 1995). Allegations of a general intent to interfere with a business relationship or expectancy or even allegations of knowledge fall short of the required showing of intent. *See Bennett Enters.*, 45 F.3d. at 499 ("a general intent to interfere or knowledge that conduct will injure the plaintiff's business dealings is insufficient to impose liability"); *Sheppard v. Dickstein, Shapiro, Morin & Oshinsky*, 59 F. Supp. 2d 27, 34 (D.D.C. 1999) (*citing* *Bennett Enters.*).

Motive or purpose to disrupt an ongoing business relationship is a critical requirement in tortious interference cases. *Sheppard*, 59 F. Supp. 2d at 34. To establish such a claim, the

conduct alleged “must be egregious, for example, it must involve libel, slander, physical coercion, fraud, misrepresentation, or disparagement.” *Sheppard*, 59 F. Supp. 2d at 34 (*quoting Genetic Sys. Corp. v. Abbott Labs.*, 691 F. Supp. 407, 423 (D.D.C. 1988)).

There is no allegation of conduct on Defendants’ part that rises to the requisite level of “egregiousness” necessary to demonstrate a motive or purpose to disrupt an ongoing business relationship. *See Sheppard*, 59 F. Supp. 2d at 34; *see also Genetic Sys. Corp.*, 691 F. Supp. at 423. Indeed, Plaintiff’s Amended Complaint merely alleges that Defendants “intentionally interfered with and induced and/or caused the breach and/or termination of those prospective business relationships by offering to produce evaluation reports at a lower cost and/or more quickly by copying and reproducing [ICC-ES’s] proprietary, copyrighted Evaluation Reports.” *See Am. Compl.* at ¶ 42.<sup>9</sup> These allegations are insufficient to meet the threshold of “egregious” conduct necessary to support a cause of action for tortious interference under District of Columbia law.

Furthermore, Plaintiff’s Amended Complaint completely fails to allege a legally cognizable “business expectancy” that can support its cause of action. Plaintiff’s Amended Complaint merely alleges that “[ICC-ES] has valid business expectancies in its relationships with its customers that use or will use [ICC-ES] Evaluation Reports and [ICC-ES] Acceptance Criteria.” *See Am. Compl.* at ¶ 124. Contrary to the controlling law in this jurisdiction, Plaintiff utterly fails to identify any *specific* third-party or future potential customer that was “commercially reasonable to anticipate.” *See Command Consulting*, 623 F. Supp. 2d at 52. As such, this claim must be dismissed due to its vague and conclusory nature. Plaintiff’s allegations represent exactly the kind of indefinite, speculative and non-actionable “expectations” or “hopes” that are insufficient to support a claim for tortious interference with prospective business

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<sup>9</sup> *See also Am. Compl.* at ¶ 126.



relationships. *Xereas v. Heiss*, 933 F. Supp. 2d 1, 11 (D.D.C. 2013) (tortious interference claim dismissed because of plaintiff's "failure to identify any specific future employment prospects").

Significantly, this Court recently held that tortious interference claims are "routinely dismissed where the plaintiff fails to name specific contractual relationships that the defendant allegedly interfered with, or to identify any facts related to future contracts compromised by the alleged interferer." *Nyambal v. AlliedBarton Sec. Servs., LLC*, 2016 U.S. Dist. Lexis 8749, at \*13 (D.D.C. Jan. 26, 2016) (Sullivan, E.). Here, for this reason, ICC-ES' failure to allege a valid business expectancy mandates dismissal of the claim. *See Command Consulting*, 623 F. Supp. 2d at 52-53; *Williams v. Fed. Nat'l Mortgage Ass'n*, 2006 U.S. Dist. LEXIS 42911, at \*27 (D.D.C. June 26, 2006) (explaining that "unspecified relationships" with third-parties could not support plaintiff's tortious interference claim); *Kwang Dong Pharm. Co. v. Han*, 205 F. Supp. 2d 489, 496-97 (D. Md. 2002) (dismissing claim for tortious interference with prospective business advantage because plaintiff had not pointed to any specific employment prospects to support his claim); *Sheppard*, 59 F. Supp. 2d at 34-35 (plaintiff failed to allege a specific future relationship).

As shown above, Plaintiff's Amended Complaint fails to assert facts which would allow the court to determine that any alleged prospective business advantage was "reasonable" or "probable." *See Klein v. Grynberg*, 44 F.3d 1497, 1506 (10th Cir. 1995) (a protected relationship exists only if there is a reasonable likelihood or probability that a contract would have resulted; there must be something beyond a "mere hope" of a prospective relationship). The Amended Complaint also fails to allege any egregious conduct by Defendants. For these reasons, Count IV must be dismissed.

**V. Conclusion.**

For all of the above-stated reasons, and with regard to the Amended Complaint as a whole, Plaintiff has failed to state claims upon which relief can be granted. Further, Plaintiff's causes of action under District of Columbia law are preempted by the Copyright Act and should be dismissed. Accordingly, Defendants respectfully request that Plaintiff's Amended Complaint be dismissed, with prejudice.

Respectfully submitted,



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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**ICC EVALUATION SERVICE, LLC**

**Plaintiff**

**v.**

**INTERNATIONAL ASSOCIATION OF  
PLUMBING AND MECHANICAL OFFICIALS,  
INC. and IAPMO EVALUATION SERVICE,  
LLC**

**Defendants.**

Case No. 1:16-cv-00054

Judge Emmet G. Sullivan

**ORDER**

Upon consideration of Defendants International Association of Plumbing and Mechanical Officials, Inc. and IAPMO Evaluation Service, LLC's Motion to Dismiss Plaintiff's Amended Complaint, any Opposition thereto and the entire record herein, it is, this \_\_\_\_ day of \_\_\_\_\_, 2016, hereby

**ORDERED, ADJUDGED AND DECREED** that Defendants' Motion to Dismiss Plaintiff's Amended Complaint is **GRANTED** and Plaintiff's Amended Complaint is hereby **DISMISSED WITH PREJUDICE**.

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Emmet G. Sullivan, Judge  
United States District Court for the District of Columbia