

**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

**DEFENDANTS' REPLY IN FURTHER SUPPORT OF THEIR
MOTION TO DISMISS THE AMENDED COMPLAINT**

Defendants International Association of Plumbing and Mechanical Officials, Inc. and IAPMO Evaluation Service, LLC, (collectively, "IAPMO"), by and through undersigned counsel, file this Reply in Further Support of their Motion to Dismiss Plaintiff's Amended Complaint.

I. Plaintiff's Attachments Of Extraneous Materials Must Be Disregarded.

As a preliminary matter, Plaintiff's Opposition includes materials that are outside the pleadings and which should be disregarded by this Court in deciding the sufficiency of Plaintiff's Amended Complaint. *See U.S. ex rel. Folliard v. CDW Tech. Svcs., et al.*, 722 F. Supp. 2d 20, 24 (D.D.C. 2010).

Federal courts in the District of Columbia have held that, in determining whether a complaint fails to state a claim, courts may consider only the facts alleged in the complaint, documents either attached to or incorporated into the complaint, matters of which courts may

take judicial notice, and documents appended to a motion to dismiss whose authenticity is not disputed, if they are referred to in the complaint and are integral to a claim. *Id.* at 24 (citations omitted). The documents included in Plaintiff's Opposition do not fall into any of those categories.

Plaintiff's Opposition contains what purports to be comparisons of the content of various ICC Evaluation Service, LLC ("ICC-ES") and IAPMO reports. These purported "comparisons" are not part of Plaintiff's Amended Complaint, are without foundation and are not authenticated. Moreover, ICC-ES represents, without support, that ICC-ES' documents are entirely "original content," an assertion that is contradicted by ICC-ES' Copyright Registrations and its own Opposition papers.¹ Plaintiff also attaches what it asserts are "screenshots" from IAPMO's website. These undated exhibits are not authenticated, are not incorporated into the Amended Complaint and are not integral to Plaintiff's claims.²

These inclusions are not properly before the Court and therefore, must not be considered in determining whether ICC-ES' Amended Complaint states plausible claims for relief.

II. Count I For Copyright Infringement Should Be Dismissed Because Plaintiff Fails To Allege What Portions Of The Works Are Copyright Protected.

Unlike novels, plays or other works of imagination, the "works" at issue in this case do not reflect any meaningful degree of creativity. *See* Def. Motion at 2-3. Instead, ICC-ES' "works" are principally evaluation reports concerning the technical attributes of products designed for use in the building industry. *See* Am. Compl. at ¶ 1.

¹ IAPMO's Motion to Dismiss raises significant issues about whether, and to what extent, any of ICC-ES' "works" are original to it, are owned by it or otherwise constitute matter properly subject to copyright protection.

² Plaintiff's Amended Complaint makes a single reference to IAPMO's website terms of use. *See* Am. Compl. at ¶ 44 ("...Defendants' websites utilize similar links to website terms of use that Defendants claim are binding on visitors to their websites.").

Plaintiff acknowledges that its product evaluation reports contain material drawn (*i.e.*, copied) from third-party sources. *See* Opp. at 15. ICC-ES' concessions, found in its Opposition and in its Copyright Registrations, that it "is not the author" of certain portions of these works and that those works are "derivative" in nature, are consistent with the manner in which such reports have been customarily prepared by ICC-ES, IAPMO and other providers. ICC-ES' concessions also highlight the grounds for dismissing Plaintiff's claim for Copyright Infringement.

Plaintiff is required to allege: "(1) which specific original works form the subject of the copyright claim; (2) that the plaintiff owns the copyrights in those [original] works; (3) that the copyrights have been registered in accordance with the statute; and (4) by what acts [and] during what time the defendant infringed the copyright". *Newborn v. Yahoo!, Inc.*, 391 F. Supp. 2d 181, 186 (D.D.C. 2005)³.

ICC-ES alleges in its Opposition that IAPMO asserts that there is a "heightened pleading standard" for copyright infringement claims. *See* Opp. at 11-15. However, IAPMO and ICC-ES rely on the exact same standard for pleading copyright infringement. The pleading standard is particularly important in a case where, as here, the copyright plaintiff admits that the works are not entirely original or that they are not fully owned by Plaintiff.⁴

³ Plaintiff cites *Newborn* for the pleading standard, but, at the same time, also attempts to distinguish it. It notes that the case addresses "contributory copyright infringement," which is "not at issue here." *See* Opp. at 12 n.2. However, to maintain a claim for contributory infringement against a defendant, the plaintiff first must establish direct infringement by a third-party. *See Newborn*, 391 F. Supp. 2d at 186. While the pleading deficiencies in *Newborn* were more egregious than those in the case at bar, the dismissal of the infringement claim in that case is nonetheless instructive because the Court explained that a copyright infringement claim does not provide adequate information for a defendant to evaluate a claim against it, when the complaint fails "to sufficiently identify the materials which were infringed and fail[s] to demonstrate that those materials are entitled to copyright protection." *Id.* at 189. That is precisely the issue here, because ICC-ES has acknowledged that it is not the author of portions of the allegedly infringed works, a fact supported by its own Registration Certificates.

⁴ The only parts of a derivative work that are entitled to protection "are the non-trivial, original features, if any, contributed by the author or creator of these derivative works." *See Durham Indus. v. Tomy Corp.*, 630 F.2d 905, 909 (2d Cir. 1980) (the requirement of originality is particularly crucial with respect to derivative works "to

Plaintiff asserts that it has complied with the Rule 8 requirement to set forth a “short and plain statement of the claim.” Opp. at 15. However, “[r]ule 8(a)(2) has been construed to require a plaintiff to plead with specificity the acts by which a defendant has committed copyright infringement. A ‘properly plead [sic] copyright infringement claim must allege . . . by what acts during what time the defendant infringed the copyright.’” *Marvullo v. Gruner & Jahr*, 105 F. Supp. 2d 225, 230 (S.D.N.Y. 2000) (citing *Kelly v. L.L. Cool J.*, 145 F.R.D. 32, 36 (S.D.N.Y. 1992)). A copyright infringement claim must “set out the ‘particular infringing acts . . . with some specificity. Broad, sweeping allegations of infringement do not comply with Rule 8.’” *Marvullo*, 105 F. Supp. 2d at 230, citing *Kelly*, 145 F.R.D. at 36 n.3. See also *Hartman v. Hallmark Cards, Inc.*, 639 F. Supp. 816, 820 (W.D. Mo. 1986) (“broad, sweeping allegation of infringement does not comply with Rule 8’s requirement that specific mention of the acts which infringe are necessary in order to assert a cause of action and are required so that the defendant can adequately respond”).

For example, in a copyright case involving allegations of the unlawful use of photographs in a video, the court explained that, to survive a motion to dismiss, plaintiff was required to “allege that the Video is substantially similar to particular original expressions of these subjects in the Photographs,” and, specifically, to allege the “protectible elements” of the photographs. *LaChappelle v. Fenty*, 812 F. Supp. 2d 434, 445 (S.D.N.Y. 2011) (denying the motion to dismiss because plaintiff successfully alleged protectable elements of the allegedly infringed photographs).

support a copyright the original aspects of a derivative work must be more than trivial” and “the scope of protection afforded a derivative work must reflect the degree to which it relies on preexisting material and must not in any way affect the scope of any copyright protection in that preexisting material”).

Likewise, a dismissal was warranted where there were “‘broad sweeping allegations of infringement,’” and “plaintiff failed to allege (1) ownership of a valid copyright and (2) copying of constituent elements of the work that are original, requirements essential to the maintenance of a copyright claim under federal law.” *Goffe v. Winfrey*, No. 08 Civ. 8653 (NRB), 2008 U.S. Dist. LEXIS 111025 (S.D.N.Y. Dec. 30, 2008); *see also Ritani, LLC v. Aghjayan*, 880 F. Supp. 2d 425, 442 (S.D.N.Y. 2012) (“Thus, even assuming [defendant] copied [plaintiff’s] work, the failure to plead facts regarding how the [jewelry designs at issue] are ‘substantially similar,’ including identifying the protectable elements of the works as part of its claim, will result in the dismissal of the copyright claim.”).

The cases cited by Plaintiff are inapposite because they fail to address the circumstances present in this case, i.e., where the allegedly infringed works admittedly include unprotectable content. The cases relied on by Plaintiff fall into two general categories: (1) cases that generally address pleading copyright infringement, including the principle that there is no “heightened” pleading or “particularity” requirement⁵; and, (2) cases in which ownership and originality of the content at issue is in fact alleged or not ambiguous.⁶ In both instances, these cases are distinguishable on the facts and do not save Plaintiff’s claim for copyright infringement.

⁵ *See, e.g., Mid Am. Title Co. v. Kirk*, 991 F.2d 417 (7th Cir. 1993); *CoStar Realty Info., Inc. v. Field*, 612 F. Supp. 2d 660, 674 (D. Md. 2009); *Kindergartners Count, Inc. v. Demoulin*, 171 F. Supp. 2d 1183 (D. Kan. 2001); *Jetform Corp. v. Unisys Corp.*, 11 F. Supp. 2d 788 (E.D. Va. 1998).

⁶ *See, e.g., Facebook, Inc. v. Power Ventures, Inc.*, No. C 08-5780 JF (RS), 2009 U.S. Dist. LEXIS 42367 at *10-11 (N.D. Cal. May 11, 2009) (plaintiff’s entire website was alleged to have been copied by defendants, but plaintiff undeniably owned the copyright to all pages and content, with the exception of user content, which is clearly identifiable); *Prunté v. Universal Music Group*, 484 F. Supp. 2d 32 (D.D.C. 2007) (there was no issue as to whether plaintiff alleged that the musical works were original to him, but, in the context of a motion to dismiss, the court declined to engage in the more intensive factual analysis of whether plaintiff proved that there was “substantial similarity”); *Pfeffer v. Empire Stat, Inc.*, No. 03 Civ. 1404 LTS FM, 2006 U.S. Dist. LEXIS 79816 at *8-9 (S.D.N.Y. Nov. 1, 2006) (complaint contained allegations that the works at issue, which consisted of plaintiff’s document formats, including structure, layout, text and content, were original to plaintiff).

Because originality is an indispensable element for copyright protection under 17 U.S.C. § 102(a) and required for pleading a claim for infringement⁷, ICC-ES' concessions that it copied from third-party sources, that its works are "derivative works" and that it is "not the author" of portions of its works, necessarily means that it failed to adequately plead the first two requisite elements for a claim for copyright infringement.

Plaintiff's Amended Complaint identifies the IAPMO documents that allegedly infringe upon ICC-ES' works, but fails to identify any copying that amounts to infringement of ICC-ES' works. Plaintiff alleges that there was copying of ICC-ES' works, but does not clearly allege that such copying infringed on material protected by copyright. *See* Def. Motion at 7. Plaintiff fails to identify any copyrightable material that has been unlawfully copied. As set forth above, Defendant is not arguing for a heightened pleading standard. However, without knowing what material is actually protected by copyright in Plaintiff's works, Defendants cannot respond to Plaintiff's Amended Complaint.

Thus, in addition to ICC-ES' failure to satisfy the first two elements of pleading a proper copyright infringement claim, it also fails to plead properly the fourth requisite element of alleging "what acts [and] during what time the defendant infringed the copyright," *Newborn*, 391 F. Supp. 2d at 186. *See* Motion at 8 ("Plaintiff has also failed to allege how, or in what manner, Defendants [infringed]").

Plaintiff further argues that "registration of the copyright in the subsequent version is sufficient to support claims for infringement of the copyrights in the prior version, provided that the same entity owns both versions." *Opp.* at 14. It is not clear from Plaintiff's Opposition whether it is now claiming that the Evaluation Reports and Acceptance Criteria it has identified are derivative works of prior versions. No such allegations are contained in the Amended

⁷ *See Newborn*, 391 F. Supp. 2d at 186.

Complaint. Plaintiff references seventeen (17) Evaluation Reports and Acceptance Criteria, in addition to copyright registration numbers for those documents, in its Amended Complaint. There is no allegation of infringement of any prior version of the Evaluation Reports or Acceptance Criteria and no copyright registration numbers have been provided for any prior versions. Thus, Plaintiff has not stated a claim to the extent that it is claiming infringement on prior versions of the documents it has identified in the Amended Complaint. Therefore, Count I of Plaintiff's Amended Complaint should be dismissed.

III. Plaintiff's State Law Claims Should Be Dismissed Because They Are Preempted By The Copyright Act.

As described in Defendant's Motion to Dismiss, a claim is preempted by the Copyright Act when (1) the claim involves rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by Section 106 of the Copyright Act; and, (2) the works at issue are works of authorship fixed in a tangible medium of expression and come within the subject matter of copyright as specified by Sections 102 and 103 of the Copyright Act. *See Int'l Kitchen Exhaust Cleaning Ass'n v. Power Washers of N. Am.*, 81 F. Supp. 2d 70, 73 (D.D.C. 2000).

The District of Columbia Circuit employs the "extra element" test to determine whether a state law claim is preempted by the Copyright Act. In *Sturdza v. United Arab Emirates*, the Court explained that preemption is not warranted where "an extra element is required instead of or in addition to the acts of reproduction, performance, distribution or display in order to constitute a state-created cause of action, . . . provided that the extra element *changes the nature of the action* so that it is *qualitatively different* from a copyright infringement claim." 281 F.3d 1287, 1304 (D.C. Cir. 2002) (quoting *Wrench LLC v. Taco Bell Corp.*, 256 F.3d 446, 456 (6th Cir. 2001)) (emphasis added). In arguing against dismissal on the ground of preemption, ICC-

ES strives to repackage and recharacterize its state law claims in a manner that distinguishes them from its primary effort to seek vindication of its rights under the Copyright Act.

A. ICC-ES' Breach of Contract Claim is Preempted by the Copyright Act and Must Be Dismissed.

Plaintiff relies on the general principle that “breach of contract claims are not preempted by the Copyright Act.” Opp. at 20. However, numerous cases have found breach of contract claims to be preempted where, as here, the essence of the breach of contract claim is a claim that defendant violated plaintiff’s statutory rights by engaging in one or more of the acts described in Section 106. Indeed, as explained in *Wrench*: “[A]ll breach of contract claims [do not] survive preemption simply because they involve the additional element of promise. . . . If the promise amounts only to a promise to refrain from reproducing, performing, distributing or displaying the work, then the contract claim is preempted.” *Wrench*, 256 F.3d at 457 (citing and quoting 1 Melville B. Nimmer & David Nimmer, *Nimmer On Copyright* § 1.01[B][1][a] at 1-22 (1999) (“[P]re-emption should continue to strike down claims that, though denominated ‘contract,’ nonetheless complain directly about the reproduction of expressive materials.”)); *see also Canal+ Image UK Ltd. v. Lutvak*, 773 F. Supp. 2d 419, 444 (S.D.N.Y. 2011) (not every promise in a contract can be deemed an “extra element” to preclude the preemption of a breach of contract claim; it “depend[s] on what the promise is”); *American Movie Classics Co. v. Turner Entm’t Co.*, 922 F. Supp. 926, 931 (S.D.N.Y. 1996) (“a breach of contract claim is preempted if it is merely based on allegations that the defendant did something that the copyright laws reserve exclusively to the plaintiff (such as unauthorized reproduction, performance, distribution, or display)”).

Close examination of Plaintiff’s breach of contract claim leads to the conclusion that it is nothing more than a repackaged copyright infringement claim that does not differ qualitatively

from rights protected by the Copyright Act. For instance, Plaintiff alleges that, pursuant to the Website User Agreement, Defendants agreed not to copy, modify or distribute anything from Plaintiff's website and breached such agreement. These are precisely the exclusive rights that the Copyright Act seeks to protect.⁸ Therefore, Plaintiff's claim is preempted. *Wrench*, 256 F.3d at 458, *see also*, 1 Nimmer on Copyright § 1.01[B][1][a] at 1-23 (2015).

ICC-ES attempts to avoid preemption by arguing that the Website User Agreement contains contractual agreements which are "outside of the exclusive rights protected by Section 106 of the Copyright Act" Opp. at 21. Namely, Plaintiff argues that Defendants agreed not to "remove any copyright, trademark or other intellectual property or proprietary notice or legend contained on the Site or the Site Information" and was required to retain all such marks or notices contained on the Site. Opp. at 21.

However, Plaintiff's argument fails because even these alleged "additional rights" claimed by ICC-ES are merely the functional equivalent of the exclusive right to reproduce the work or the exclusive right to prepare a derivative work. Even though such a right may not be explicitly enumerated under § 106 of the Copyright Act, such rights arise directly from Plaintiff's exclusive rights as the alleged copyright holder of the works. *See Int'l Kitchen*, 81 F.Supp. 2d at 73 (explaining the second prong of the preemption analysis as "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.") (emphasis added). Thus, Plaintiff has not sufficiently demonstrated that its breach of contract claim is qualitatively different than a copyright claim or that its claim protects rights in addition to those enforced by copyright. In

⁸ See 17 U.S.C. § 106, which provides that "the owner of copyright under this title has the exclusive rights", among other things: "(1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (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;...."

sum, “[l]abeling [a] claim as one for breach of contract cannot change the fact that the claim is not ‘qualitatively different from a copyright infringement claim.’” *Canal+ Image UK Ltd.*, 773 F. Supp. 2d at 446 (citation omitted). The alleged harm described in ICC-ES’ breach of contract claim is solely the result of Defendants’ alleged unauthorized copying and distribution of ICC-ES’ “works” -- acts that are at the core of copyright protection. Accordingly, this claim is preempted by the Copyright Act.

B. ICC-ES’ Claim for Tortious Interference with Contract is Preempted by the Copyright Act and Must Be Dismissed.

Contrary to Plaintiff’s arguments, Plaintiff’s state law claim for tortious interference with contractual relations is preempted by the Copyright Act because the “extra elements” pleaded by Plaintiff are not qualitatively different than the rights protected by federal copyright law. Plaintiff asserts that its tortious interference with contract claim is not preempted because the interference with Plaintiff’s contractual rights is done through conduct other than the “reproduction[,] . . . preparation[,] . . . distribution[,] . . . performance[,] . . . or display of the copyrighted work.” *Opp.* at 26 (quoting *Sturdza v. United Arab Emirates*, 281 F.3d 1287, 1305 (D.C. Cir. 2002)). However, courts examining the nature of tortious interference claims have concluded that the gravamen of such claims fall squarely under the exclusive rights protected by copyright. *See American Movie Classics*, 922 F. Supp. at 932 (“[t]he allegations unique to the tortious interference claim -- that [defendant] acted wrongfully and intentionally with knowledge of the Agreement -- make no difference to the preemption analysis,” nor do the “additional elements” of awareness and intentional interference, which go “merely to the scope of the right,” and do not represent a qualitative difference).

Plaintiff’s assertions that IAPMO induced ICC-ES’ customers to breach their contracts with ICC-ES by “permitting Defendants to misrepresent authorship of ES’s proprietary and

copyrighted material,” by “failing to obtain advance approval from ES when there was a question about the use of an ES Evaluation Report” are not qualitatively different than the rights protected by copyright. *See Tegg Corp. v. Beckstrom Elec. Co.*, 650 F. Supp. 2d 413, 422 (W.D. Pa. 2008) (explaining that “[e]ven if a state cause of action has an element that appears to be beyond the scope of a copyright claim, ‘not every extra element is sufficient to establish a qualitative variance between rights protected by federal copyright law and that by state law.’”) (quoting *Dun & Bradstreet Software Servs. v. Grace Consulting, Inc.*, 307 F.3d 197, 218 (3d Cir. 2002)). Put simply, the gravamen of this claim, like the breach of contract claim, is that Defendants allegedly copied and used reports, reproduced reports, allegedly misrepresented authorship of the reports, and failed to obtain authorization from Plaintiffs. Thus, Plaintiff’s claim for tortious interference with contract is preempted by the Copyright Act and should be dismissed.

C. ICC-ES’ Count for Interference with Prospective Business Advantage is Preempted by the Copyright Act and Must Be Dismissed.

Numerous courts have found that claims for tortious interference with prospective economic advantage are preempted by the Copyright Act. *See, e.g., Balsamo/Olson Grp., Inc. v. Bradley Place Ltd. Pshp.*, 950 F. Supp. 896, 899 (N.D. Ill. 1997); *Aagard v. Palomar Builders, Inc.*, 344 F. Supp. 2d 1211, 1219 (E.D. Cal. 2004). Importantly, those courts have found that allegations of deception/misrepresentation or loss of business do not supply the requisite “extra element” that is necessary to transform the claim into one that is “qualitatively different” from a copyright claim.

Plaintiff alleges that IAPMO interfered with prospective business relationships by “offering similar evaluation reports or evaluation criteria more quickly and for less money than they could have done without the unlawful use of [ICC-ES’] works.” *See* Am. Compl. at ¶¶ 125-

127. Plaintiff admits in its Opposition papers that the gravamen of its interference claim is the alleged “wrongful offering” by IAPMO of the reports. Opp. at 30-31. There is no qualitative difference between a “wrongful offering” of a copyrighted document and the reproduction of a copyrighted document, or the distribution of a copyrighted document. Thus, no matter how you parse out the allegations in Plaintiff’s complaint, the claim for tortious interference in prospective business relationships alleges a violation of the exact rights that are protected by the Copyright Act. Therefore, the claim is preempted and must be dismissed.

IV. ICC-ES Has Also Failed To Sufficiently Plead The Requisite Elements For The State Law Claims.

A. ICC-ES’ Claim for Breach of Contract Fails As a Matter of Law.

ICC-ES argues that it has successfully pleaded a cause of action for breach of contract because it alleges that IAPMO had actual or constructive knowledge of the Website User Agreement and that IAPMO affirmatively accepted the Website User Agreement. Opp. at 18-19. However, Plaintiff fails to provide any facts that support such an allegation. Contrary to Plaintiff’s assertion, the Court is not required to accept conclusory allegations as true. *See ZilYen, Inc. v. Rubber Mfrs. Ass’n*, 935 F. Supp. 2d 211, 216 (D.D.C. 2013). “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citations omitted). “[A] complaint [does not] suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Mead v. Lindlaw*, 839 F. Supp. 2d 66, 70 (D.D.C. 2012) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

Plaintiff has failed to provide any factual statements or assertions that support its allegation that IAPMO affirmatively accepted the Website User Agreement.⁹ Similarly, as described in Defendants' Motion to Dismiss, courts have concluded that such browsewrap agreements, such as the one on Plaintiff's website, are not enforceable because of a lack of mutual assent. *See, e.g., Long v. Provide Commerce, Inc.*, 245 Cal. App. 4th 855, 867, 2016 Cal. App. LEXIS 199 at *21 (Cal. Ct. App. 2016) (explaining that "to establish the enforceability of a browsewrap agreement, a textual notice should be required to advise consumers that continued use of a Web site will constitute the consumer's agreement to be bound by the Web site's terms of use."); *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1178-79 (9th Cir. 2014).¹⁰ Thus, Plaintiff has failed to allege a valid, enforceable contract between the parties and its claim for breach of contract should be dismissed for failure to state a claim.

B. ICC-ES' Claim for Tortious Interference with Contract is Deficient and Should be Dismissed.

Plaintiff has failed to plead a cause of action for intentional interference with contract because it has not made a sufficient showing of intent. Contrary to Plaintiff's assertion, courts in

⁹ Plaintiff's reference to IAPMO's "Website Terms of Use" is irrelevant, immaterial and only serves to confuse the issues in this case. IAPMO's website is not at issue in this case. As explained above in Section I, ICC-ES' reference to IAPMO's website is a matter outside of ICC-ES' pleading and should be excluded from its Opposition. *See U.S. ex rel. Folliard v. CDW Tech. Svcs., et al.*, 722 F. Supp. 2d 20, 24 (D.D.C. 2010). Moreover, this exact argument was explicitly rejected in *Nguyen*:

Barnes & Noble's argument that Nguyen's familiarity with other websites governed by similar browsewrap terms, including his personal website <www.kevinkhoa.com>, gives rise to an inference of constructive notice is also of no moment. Whether Nguyen has experience with the browsewrap agreements found on other websites such as Facebook, LinkedIn, MySpace, or Twitter, has no bearing on whether he had constructive notice of Barnes & Noble's Terms of Use.

Nguyen, 763 F.3d at 1179.

¹⁰ Plaintiff takes issue with Defendants' reliance on *Nguyen*, explaining that the court in *Nguyen* recognized that "courts have consistently enforced browsewrap agreements where the user had actual notice of the agreement." Although Plaintiff alleges that Defendants had actual notice of the Website User Agreement, the allegation is made "upon information and belief" and no further factual support is provided for the allegation. As described above, the court is not required to accept such conclusory allegations as true.

the District of Columbia have held that a plaintiff must plead and make a “strong showing of intent” in a claim for tortious interference with contract. *See Nanko Shipping, USA v. Alcoa, Inc.*, 107 F. Supp. 3d 174, 182-183 (D.D.C. 2015). *See also Gov’t Rel. Inc. v. Howe*, 2007 U.S. Dist. LEXIS 4952 at *30, Civil Action No. 05-1081 (D.D.C. Jan. 24, 2007) (explaining that “[i]ntentional procurement of a breach must involve egregious conduct such as ‘libel, slander, physical coercion, fraud, misrepresentation, or disparagement.’”).

In this case, Plaintiff has only pleaded broad assertions such as “IAPMO intentionally induced and/or caused ES’s customers” and “will continue intentionally to induce and/or cause ES’s customers” to breach their contracts. *See Opp.* at 23. Plaintiff fails to allege any of the egregious conduct necessary to state a cause of action for tortious interference with contract such as libel, slander, physical coercion or fraud. Plaintiff’s broad-sweeping, vague and general allegations fail to provide factual support or identify conduct which would meet the elements of a *prima facie* case of the tort. Plaintiff’s allegations merely describe a garden-variety commercial dispute and are a far cry from the level of “egregious” behavior required as a threshold matter to assert such a cause of action under applicable state law. Thus, Plaintiff’s claim fails to state a claim for which relief can be granted and should be dismissed.

C. ICC-ES Has Failed to State a Claim for Tortious Interference with Prospective Business Advantage.

Plaintiff’s failure to identify the existence of valid business relationships or expectancies mandates the dismissal of Plaintiff’s cause of action for tortious interference with prospective business advantage. The District of Columbia has held that to state a claim for tortious interference with prospective business relationships, Plaintiff is, in fact, required to identify specific business relationships and expectancies. *Nyambal v. AlliedBarton Security Services, LLC*, 2016 U.S. Dist. LEXIS 8749 (D.D.C. Jan. 26, 2016). In *Nyambal*, plaintiff’s cause of

action failed because his allegations did not specify the identity of the government officials, or the specific contractual relationships that were interfered with by the defendant. *Id.* at *12-13. Absent specificity, it cannot be determined whether the expectancy is “commercially reasonable to anticipate.” *Id.* (citing *Command Consulting Group LLC v. Neuraliq, Inc.*, 623 F. Supp. 2d 49, 52 (D.D.C. 2009)).

To properly allege the first element of the tort for tortious interference with a business expectancy, a plaintiff must refer to the specific business opportunities that were interfered with by the defendant. *Guttenberg v. Emery*, 41 F. Supp. 3d 61 (D.D.C. 2014).

In *Guttenberg*, plaintiffs alleged that defendants knew that their disparaging comments were interfering with plaintiff’s business expectancy by causing doctors to terminate their referrals and send those referrals to defendants, and that the decline in referrals damaged plaintiffs’ reputation and caused economic harm. *Guttenberg*, 41 F. Supp. 3d at 73. The *Guttenberg* court stated:

The D.C. Circuit recently noted that “the first element of the tort, ‘a valid business relationship or expectancy,’ appears to require rather specific business opportunities (to be sure, however, not ones necessarily manifested in any contract).” *Jankovic v. Int’l Crisis Grp.*, 593 F.3d 22, 29-30, 389 U.S. App. D.C. 170 (D.C. Cir. 2010); *see also Xereas v. Heiss*, 933 F. Supp. 2d 1, 11 (D.D.C. 2013) (“A claim of tort[i]ous interference with prospective business relations cannot survive where the plaintiff does not allege any specific future business relations or expectancies and only provides general references to potential opportunities.”) (citations omitted).

Jankovic states that the cases where plaintiffs were found to have satisfied the first element of the tort involved “‘specific anticipated transactions’ such as specific book deals,

specific sources of prospective employment, the development of a specific property, the opportunity to represent a specific client, and so on.” *Jankovic*, 593 F.3d at 29.¹¹

Each of the cases cited in Defendants’ brief leads to the same, inescapable conclusion for Plaintiff, specifically, that Plaintiff’s Amended Complaint does not adequately identify the specific business relationships that the defendant allegedly interfered with, or any facts related to future business relationships that were compromised by the alleged interferer. *Nyambal*, *supra* at *13. Accordingly, Plaintiff’s claim fails and must be dismissed.

Plaintiff’s claim for tortious interference with prospective business relationship also fails because its allegations of intent fall short of the required standard. Plaintiff’s reliance on *Sheppard v. Dickstein, Shapiro, Morin & Oshinsky*, 59 F. Supp. 2d 27, 34 (D.D.C. 1999) is puzzling because that case supports the dismissal of Plaintiff’s claim. Plaintiff asserts that merely alleging that conduct was intentional and willful is enough to satisfy the “intent” element of the cause of action. Opp. at p. 29. However, that is not accurate. “To establish a claim of improper interference with contract or business relations, the plaintiff must demonstrate that the defendant engaged in conduct that is ‘egregious; for example, it must involve libel, slander, physical coercion, fraud, misrepresentation, or disparagement.’” *Modis, Inc. v. InfoTran Sys., Inc.*, 893 F. Supp. 2d 237, 241 (D.D.C. 2012) (quoting *Sheppard*, 59 F.Supp.2d at 34). In *Sheppard*, the plaintiff’s tortious interference claim was dismissed because it failed to allege any facts that could support a finding of egregiousness. *See Sheppard*, 59 F. Supp. 2d at 34; *see also Modis*, 893 F. Supp. 2d at 241. For the same reason, Plaintiff’s claim must be dismissed.

¹¹ The cases identifying specific anticipated transactions in the *Jankovic* case were: *Browning v. Clinton*, 292 F.3d 235, 352 U.S. App. D.C. 4 (D.C. Cir. 2002) (prospective book deal); *Kimmel v. Gallaudet Univ.*, 639 F. Supp. 2d 34, 45 (D.D.C. 2009) (three potential sources of prospective employment); *Carr v. Brown*, 395 A.2d 79, 82-84 (D.C. 1978) (development of a specific property in the District of Columbia); *Dem. State Comm. of D.C. v. Bechick*, 706 A.2d 569 (D.C. 1998) (the opportunity to represent a trustee in a specific litigation). *Jankovic*, 593 F.3d at 29.

CONCLUSION

For all of the above-stated reasons, and with regard to each and every count of the Amended Complaint, Plaintiff has failed to state claims upon which relief can be granted. In addition, Plaintiff's state law claims also are preempted by the Copyright Act. Accordingly, Defendants respectfully request that Plaintiff's Amended Complaint be dismissed in its entirety with prejudice.

Respectfully submitted,



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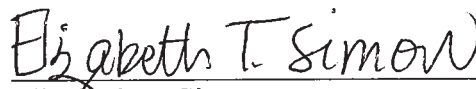
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CERTIFICATE OF SERVICE

I certify that on this 18th day of April 2016, a copy of the foregoing Defendants' Reply in Further Support of Their Motion to Dismiss the Amended Complaint was served through the Court's CM/ECF electronic filing system upon the following:

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