UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ICOPYRIGHT, INC.,

Plaintiff,

-against-

THE ASSOCIATED PRESS and
PRESS ASSOCIATION, INC.,

Defendants.

Civil Action No. 10 CV 8860

MEMORANDUM OF LAW
IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION AND
REQUEST FOR TEMPORARY RESTRAINING ORDER

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I. RELIEF REQUESTED

Plaintiff iCopyright, Inc. ("iCopyright") requests that the Court enter a preliminary injunction and temporary restraining order requiring Defendants the Press Association Inc. and The Associated Press (collectively, the "AP") to fulfill its obligations under the iCopyright Content Services Agreement executed April 15, 2008 ("CSA") between iCopyright and the Press Association, Inc. Under the CSA, AP is obligated to place iCopyright's software on its online display of news and news-related content and to provide a feed of AP content to iCopyright, among various other obligations. Since November 18, 2010, Defendant has failed to fulfill these and other obligations required of it by contract in a way that threatens the very existence of iCopyright's business. iCopyright is seeking injunctive relief to maintain the status quo that existed prior to Defendant's breach.

II. INTRODUCTION

iCopyright seeks the Court's immediate assistance in ordering AP to restore iCopyright's access to the AP's content under the CSA that AP purports to have terminated. iCopyright provides copyright services that allow users lawfully to license news articles and other copyrighted content on the Internet. In particular, iCopyright provides a toolbar that is placed at the top and bottom of news articles that allows users to print, post, email, and take other actions – *lawfully* – with respect to content found on the Internet. An important source of this content comes from AP, which is a dominant provider of news content to users through its 1,300-plus member organization.

Without any advance notice, on November 15, 2010, an employee of AP abruptly sent an email to iCopyright, purportedly terminating the CSA effective immediately in contravention of the terms of the Agreement, which require 90 days notice of termination and notice via certified mail or overnight delivery. Elston Decl. ¶ 16. Through counsel, iCopyright responded that same day stating, among other things, that AP's purported termination was inappropriate. In response to letters from iCopyright's counsel, AP's counsel subsequently sent three letters, each of which sought to delay addressing the immediate concerns caused by AP's breach and in the final letter, AP's counsel stated that the company would not discuss the matter further prior to November 29, 2010, two weeks after AP sent notice of termination. Compl. ¶¶ 80-81; Elston Decl. ¶ 17.

Meanwhile, AP itself was acting irreparably to harm iCopyright. Despite the AP's email "terminating" the CSA immediately, AP continued to display iCopyright's toolbars on its content. Compl. ¶ 75. However, at some point, AP began disabling the links to iCopyright's services established by the toolbars, effectively denying its functionality. Although iCopyright's toolbars still appeared on content on AP's website, without access to AP's server, iCopyright cannot fulfill user requests. AP's actions thus ensured end users would have a negative experience while attempting to use iCopyright's tools. Elston Decl. ¶ 19. After discovering the broken link, iCopyright's counsel contacted AP and demanded that access be restored. Compl. ¶ 80. But instead of restoring the link, AP chose to remove entirely iCopyright's tags from its new content (and leaving broken the tags on content that was already in existence). AP's initial action and its response to iCopyright's demand to fix the broken tags has caused and will continue to cause reactions harmful to iCopyright by customers. Moreover, AP's actions harm iCopyright's reputation with respect to potential customers who are members of AP, making it more difficult for iCopyright to enter into service agreements with those publishers.

iCopyright has tried in vain to get AP's attention long enough to address the issues that give rise to this request for emergency relief, but AP has instead repeated – on three separate occasions – that it will not even consider iCopyright's concerns until December. This is a callous response that has been typical of AP's performance under its agreement with iCopyright, but in this instance the harm is irreparable because it directly impacts third parties. AP's purported termination of the agreement with iCopyright – by way of *an email* – is plainly in violation of the requirement in the contract that requires notice by certified mail or overnight delivery. Further, the contract has a three year term, which will end April 15, 2011 and automatically renews for one year unless a party provides the other 90-days written notice of termination at least 90 days prior to the end of the term. AP's stated reason for termination is a claim that iCopyright failed to pay amounts AP contends are owed to it. iCopyright disputes this claim but, importantly for purposes of this emergency action, there is no doubt that AP is merely requesting monetary relief whereas iCopyright needs injunctive relief to restore the status quo otherwise it will suffer irreversible harm to its reputation and good will with customers.

iCopyright is asking only that the contractual obligations between the parties remain in place until the parties' dispute is resolved.[1] In balancing AP's claim of monetary damages against iCopyright's claim of harm to its good will and reputation, it is clear that the equities weigh strongly in iCopyright's favor and temporary relief should be granted to iCopyright.[2]

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[1] To this end, iCopyright has deposited funds in escrow that would be available for the duration of any relief granted as part of a temporary restraining order.

[2] iCopyright appears before the Court for immediate, temporary relief that is necessary due to AP's refusal to deal with iCopyright in contravention of the plain terms of the parties' agreement. It is important to emphasize, however, that iCopyright anticipates filing an amended complaint that includes allegations giving rise to several other claims relating to AP's position in the market and its theft of iCopyright's intellectual property and know-how. It is AP's abrupt and unlawful termination of the

III. STATEMENT OF FACTS

With the rise of the Internet, content publishers, such as newspapers, have seen a steady decrease in their revenues, a fact that Defendant AP attributes at least in part to the unauthorized use of copyrighted material. Compl. ¶ 8. As explained more fully in the Complaint, iCopyright has developed a suite of software tools that provides publishers with a solution to this problem: a variety of digital means that allows publishers to protect, promote, and profit from content. Specifically, the iCopyright platform is a suite of software tools that an Internet publisher can use to permit Internet users to obtain proper copyright licenses efficiently and seamlessly. Compl. ¶ 12.

For publishers electing to use the iCopyright platform, iCopyright affixes a unique tag (a type of identifier similar to a bar code on consumer goods) to the articles displayed on the publishers' sites. When this tag is clicked, the user is linked to a page that identifies the content's owner and the terms according to which a user may re-use the content; the user is presented with the opportunity to purchase a license to re-use the content. Compl. ¶ 16. When the content is redistributed, iCopyright's "License Verification Tag" shows the recipient whether the distributor has a proper license to distribute the content. The iCopyright "Discovery Service" mechanism scans the Internet for copyrighted material without a valid tag, and when identified, permits the user to obtain a proper license. iCopyright's Clip&Copy service delivers articles to subscribers on topics they have specified, along with an embedded toolbar facilitating the licensed reuse of that content.

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parties' agreement, however, that necessitates immediate action by iCopyright and its plea for assistance from the Court.

Publishers using iCopyright's service place iCopyright tools at the top of each article. For example, in Section 1.5 of the CSA, AP agreed to insert this toolbar at the top of each article on AP's hosted websites in this exact format and to promote it with its members:

E-Mail | Print | Save | Post | Get Photos | Get Reprints | Reuse Options

Similarly, AP agreed to place an iCopyright identifier containing iCopyright's trademark clearinghouse symbol and providing access to the iCopyright tools at the bottom of each article. Compl. ¶¶ 13-14. These tools provide the publisher with a means to monetize its content by offering would-be licensees various licensing options to print, email, save, post to a different website, and republish the content on the publisher's prices and terms. Compl. ¶ 17. The iCopyright platform also has a reporting system that allows the publisher to analyze a variety of data to determine, among other things, who uses its content, where it is posted, and what is most popular. Compl. ¶ 24.

A. The Content Services Agreement

Recognizing the value of the iCopyright platform, AP entered into an iCopyright Content Services Agreement ("CSA" or "Agreement"), effective April 15, 2008, with iCopyright. Elston Decl. ¶ 3. Under the CSA, AP has the obligation to "affix, or arrange or approve to have affixed," iCopyright tags and tools (properly linked to iCopyright servers) on all of its articles. Among other things, AP also agreed: (1) to provide a feed of AP content to iCopyright in order for iCopyright to fulfill its obligations; (2) to utilize exclusively iCopyright as its agent for managing its Internet copyright services; (3) to promote iCopyright as AP's "preferred" agent to its membership; (4) not to use iCopyright's confidential information (including proprietary technology, business practices, and future plans and services) for any purpose other than to perform under the CSA; and (5) to use "commercially reasonable efforts" to ensure the CSA is performed in accordance with its terms. The CSA also includes a term and termination clause, providing for a three (3) year term, which automatically renews for one (1) year unless a party provides written notice of its intention to terminate the CSA at least 90 days prior to the end of the term. Compl. ¶¶ 27-35.

Although AP has explicitly acknowledged the need for, and usefulness of, iCopyright's services, AP did not fulfill its obligations under the CSA from the outset. Specifically, AP did not properly institute the iCopyright services and failed to provide the proper interconnections. AP also failed to update its website with the most up-to-date tag formats as supplied by iCopyright. Moreover, AP failed to promote iCopyright's services to its member newspapers as required by the CSA. In fact, numerous AP representatives have admitted these failures and have expressly stated that AP has not "upheld their part of the agreement." Compl. ¶¶ 37-45; Elston Decl. ¶¶ 5-7.

In recent weeks, AP has become increasingly less cooperative to the point of plainly trying to force iCopyright to walk away from the Agreement. Elston Decl. ¶ 12. As the dominant distributor of newspaper content, AP provides the critical method of delivery throughout its 1,300-plus member network. iCopyright realized AP's important position, and recognized the fact that terminating the CSA would be detrimental to iCopyright and, given the substantial investment iCopyright had devoted to its work with AP and its members, could irreparably harm iCopyright. For this reason, iCopyright sought to work with AP to bring it into compliance with its obligations under the CSA at nearly every instance where AP had not fully performed under the Agreement. Internal communications among iCopyright employees and officials demonstrate that iCopyright chose to move forward and obtain AP's performance through business initiative rather than through legal proceedings.

AP's repeated and persistent failures, however, ultimately led to the parties revisiting provisions of the CSA. In particular, Section 2.5 of the CSA contemplates that iCopyright collect the revenues paid by end users for licensed content and each month distribute a share of that revenue to AP. In recognition of AP's dominant position, and in light of AP's promise to promote iCopyright's service to its vast membership, Section 2.5 of the CSA also stated that iCopyright would pay monthly minimum payments to AP instead of the revenue share during those months where the revenue share due to AP did not exceed the monthly minimum. In light of AP's repeated and admitted failures to perform under the CSA, AP stifled the revenue that iCopyright was able to generate, and thereby caused the share of revenue due AP under the CSA to remain below the monthly minimum payments contemplated by Section 2.5. Accordingly, a dispute arose over whether iCopyright was obligated to continue to pay amounts in excess of AP's revenue share in light of AP's persistent failure to meet its obligations under the CSA. In an effort to get the attention of AP's management and to induce AP to live up to its end of the bargain, iCopyright withheld payment of those excess amounts and AP acquiesced. Elston Decl. ¶¶ 9-10. Indeed, only three weeks prior to the date it unlawfully terminated the CSA, AP's representative to iCopyright stated that AP would not seek back payment from iCopyright. AP's representative stated that AP would "continue with the status quo, because [AP] have not upheld their part of the agreement." Compl. ¶¶ 49-51; Elston Decl. ¶ 10.

B. AP's Development of a Competing Service

Instead of fulfilling its obligations under the CSA, AP has been actively developing a software product that apparently will compete with the iCopyright platform. AP has developed its product – called "The Registry" – during the period of time that AP had access to iCopyright's proprietary and confidential information, including iCopyright's software and business plan.[3] iCopyright believes AP seeks to misappropriate iCopyright's business model and technology and to displace iCopyright's services with The Registry. Elston Decl. ¶¶ 11-13. iCopyright believes that AP intends to do this by excluding iCopyright – in breach of the CSA – from its hosted sites and from its members' sites and by refusing to deal with iCopyright. Compl. ¶¶ 52-55. On March 26, 2010, understandably concerned about its exposure to an antitrust attack by the Department of Justice, AP filed a Letter with the Antitrust Division at the Department of Justice describing The Registry and seeking approval from the Antitrust Division concerning the potential antitrust implications of its conduct. Notably, AP failed to disclose the existence of iCopyright or of AP's agreement with iCopyright. Compl. ¶ 56.

According to the description given in AP's Letter, The Registry's functions are almost identical to iCopyright's. Most notably, AP describes The Registry as "a more efficient . . . means of licensing content," permitting content owners to "specify the types of uses others may make" of their content, "specify the terms on which such use may be made," and "affix unique tags . . . to each content item registered." Compl. ¶¶ 56-59.

Not only is AP developing a product with features virtually identical to the product it had contracted to use from iCopyright, but it misled the Department of Justice into thinking The Registry was necessary because no such product already existed in the marketplace. Indeed, AP stated in its letter that "**there is today no ready way (let alone an automated way)** for a content

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[3] Subsequently, AP indicated it may also be involved in an initiative to create a clearing house by others in the industry. This project, too, will be a source of discovery in this case.

owner to ascertain all interested republishers as news stories break and develop and to communicate terms and conditions for use of its content, and because there is similarly no ready way for a republisher to quickly determine the terms applicable to licensing of content." Compl. ¶ 63 (emphasis supplied). As described above, iCopyright does exactly these things.

C. AP's Improper Termination

AP has been evasive when iCopyright has asked about The Registry. For example, on September 14, 2010, an internal email between Bruce Glover of AP to Srinandan Kasi (AP's General Counsel and the employee who, on information and belief, was leading the development of The Registry) discussed iCopyright's concerns:

> Andrew Elston [the CEO of iCopyright] called me scratching his head about a content monetization – industry initiative he heard, through the grapevine, that we (you and Tom C. particularly) are working on and will present to the board . . . . I told him I didn't know any details. Obviously, he feels that [iCopyright] has put in place a significant piece of this puzzle – as we reviewed when they were in last year. I told him that I'd let you know about his call and pass along his belief that [iCopyright] should be part of the plan that they are very willing to be flexible. Compl. ¶ 66.

Mr. Kasi responded approximately ten minutes later stating "Thanks. Will explain tomorrow." Elston Decl. ¶ 14. However, despite its questioning, iCopyright never received an explanation and Mr. Glover explained that although he had meetings with Mr. Kasi, he could provide no explanation to iCopyright. Elston Decl. ¶ 15..

A communication from Mr. Glover to iCopyright after Mr. Kasai's cryptic response to Mr. Glover was more problematic: Mr. Glover stated that "its best to end the current agreement – which wasn't favorable to iCopyright." Compl. ¶ 68. Over the next few weeks, AP continued to attempt to induce iCopyright to "terminate" the agreement, by for example advising iCopyright to "notice termination if you felt that AP had failed to meet its obligations." Compl. ¶ 70.

Eventually, AP took matters into its own hands. Contrary to the explicit terms of the CSA, and without any advance notice, on November 15, 2010, Mr. Glover emailed the CEO of iCopyright and stated "AP must terminate the agreement today." Elston Decl. ¶ 16. AP's attempt to "terminate" the CSA immediately by way of an email is not a process contemplated by the CSA and is a violation of the terms of the agreement. In fact, Section 3.1 of the CSA permits termination only upon notice ninety days prior to the end of the three-year term of the CSA or ninety days prior to the end of a renewal term. Compl. ¶ 35.

Through counsel, iCopyright responded the same day stating, among other things, that AP's purported termination was inappropriate. In response to letters from iCopyright's counsel, AP's counsel subsequently sent three letters, each of which sought to delay addressing the immediate concerns caused by AP's breach and in the final letter, AP's counsel stated that the company would not discuss the matter further prior to November 29, 2010, two weeks after AP sent notice of termination. Compl. ¶¶ 80-81; Elston Decl. ¶ 17.

Meanwhile, AP itself was acting irreparably to harm iCopyright. Despite Mr. Glover's November 15 email, ostensibly (and impermissibly) "terminating" the CSA immediately, AP continued to publish content with iCopyright's tags. Compl. ¶ 75. However, at some point, AP began disabling the links to iCopyright's services established by the tags, effectively breaking iCopyright's tags. Although iCopyright's toolbars still appeared on content on AP's website, without access to AP's server, iCopyright cannot fulfill user requests. In this manner, AP's actions caused end users – there are many million views of iCopyright tags per month – to have a negative experience while attempting to use iCopyright's tools and trademarks. Elston Decl. ¶ 19. Once this issue was discovered by iCopyright, through counsel it notified AP and demanded that access to its tagged content be restored. Compl. ¶ 80. Rather than restore the link, AP chose to compound its breach by beginning to remove entirely iCopyright's tags from its new content (and leaving broken the tags on content that was already in existence). AP's initial action and its response to iCopyright's demand to fix the broken tags has caused – and in the absence of action from this Court will continue to cause – reactions harmful to iCopyright by customers of iCopyright that are also AP members. Equally important, publishers that have agreed to use iCopyright's tags and tools for AP content displayed on their site will have to remove those tags. Compl. ¶ 78. Moreover, iCopyright has agreements with several AP members to provide services relating to content that those members produce. As these AP members realize AP no longer supports iCopyright services, they may stop using iCopyright for their own content, Compl. ¶ 79; Elston Decl. ¶¶ 20-21.

IV. ARGUMENT

A. Standard for Granting a Preliminary Injunction or Temporary Restraining Order

In this Circuit, "[a] party seeking injunctive relief ordinarily must show: (a) that it will suffer irreparable harm in the absence of an injunction and (b) either (i) a likelihood of success on the merits or (ii) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the movant's favor." *Tom Doherty Assocs., v. Saban Entm't, Inc.*, 60 F.3d 27, 33 (2d Cir. 1995). "[T]he traditional standards which govern consideration of an application for a temporary restraining order…are the same standards as those which govern a preliminary injunction." *Local 1814 v. N.Y. Shipping Ass'n*, 965 F.2d 1224, 1228 (2d Cir. 1992) (quoting district court opinion).

Here, iCopyright is requesting preliminary relief designed only to continue AP's obligation to place iCopyright tags on AP hosted content and to restore those tags' access to the related content on AP servers as required by the CSA which was the case before AP's purported termination of the CSA. Thus, iCopyright's request for preliminary injunctive relief is the typical request for the Court to order the parties to maintain the status quo while the parties resolve their dispute through litigation. *See Tom Doherty*, 60 F.3d at 34 ("The typical preliminary injunction is prohibitory and generally seeks only to maintain the status quo pending a trial on the merits."). By contrast, a movant requesting preliminary relief is required "to meet a higher standard where: (i) an injunction will alter, rather than maintain, the status quo, or (ii) an injunction will provide the movant with substantially all the relief sought and that relief cannot be undone even if the defendant prevails at a trial on the merits." *Tom Doherty*, 60 F.3d at 33-34. This is not the case here, where iCopyright is asking for nothing more by way of this preliminary relief.

B. iCopyright will Suffer Irreparable Harm Absent Injunctive Relief

As the Second Circuit has observed, "[p]erhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered. Irreparable harm means injury for which a monetary award cannot be adequate compensation." *See Jayaraj v. Scappini*, 66 F.3d 36, 39 (2d Cir. 1995) (internal citations and quotation marks omitted). One of the plainest forms of such an injury is harm to reputation, which extends beyond the parties to the dispute and paints in the eyes of third parties – including, as is the case here, customers – a view of the injured party that cannot be restored merely through monetary payments. *See Register.com v. Verio*, 356 F.3d 393, 404 (2d Cir. 2004); *CRP/Extell Parcel I v. Cuomo*, No. 10-1929-cv., 2010 WL 3784214, at *2 (2d Cir. Sept. 30, 2010); *Nat'l Elevator Cab & Door Corp. v. H & B, Inc.*, 07-1562, 2008 WL 207843, at *6 (E.D.N.Y. Jan. 24, 2008) *aff'd Nat'l Elevator Cab & Door v. H&B, Inc.*, 282 F. App'x 885, 887 (2d Cir. 2008).

Here, in light of AP's dominant position, AP's display of defective iCopyright's tags and its removal of iCopyright tags on new content damages iCopyright's good will and reputation in the eyes of AP's members and threatens iCopyright's ability to provide its services to AP's members, even if iCopyright prevails in this litigation. *See Nemer Jeep-Eagle, Inc. v. Jeep-Eagle Sales Corp.*, 992 F.2d 430, 435 (2d Cir. 1993) ("[A] *threat* to the continued existence of a business can constitute irreparable injury" (internal citation omitted)); *see also Rosa-Lino Beverage Distributors, Inc. v. Coca-Cola Bottling Co. of N.Y., Inc.*, 749 F.2d 124, 125-26 (2d Cir. 1984) (the loss of "an ongoing business representing many years of effort and the livelihood of its . . . owners, constitutes irreparable harm"). Furthermore, the fact that AP's unlawful termination of the CSA prohibits publishers that have agreed to use iCopyright's tags and tools for AP generated content on their site from displaying those tags exacerbates this harm. Compl. ¶ 78.

The Agreement requires AP to utilize iCopyright as its exclusive agent for copyright services. As a result of AP's obligations pursuant to the Agreement, the appearance of iCopyright tags on AP hosted websites is very public. The tags are viewed several million times each month. Elston Decl. ¶ 19. Many users accustomed to seeing these tags on AP hosted sites will notice their disappearance and question why the service is no longer being provided.

Likewise, and critical to iCopyright's immediate business concerns, members of AP that rely upon iCopyright to provide copyright services, will attribute AP's actions to iCopyright. In particular, the Agreement authorizes AP's 1,300-plus members to utilize iCopyright's tags on their own sites - indeed, AP is required to promote these tags on its members' sites. Compl. ¶ 32. By virtue of AP removing its iCopyright tags on AP-generated content, such content displayed on member sites will no longer feature iCopyright tags, and users of those sites will have no available copyright service to download content legally – at least not until AP attempts to roll out "The Registry," or a similar initiative, which appears to be a blatant rip off of iCopyright's service based on a misappropriation by AP of iCopyright's intellectual property to which AP had access under the CSA. Elston Decl. ¶ 13. Moreover, AP's actions harm iCopyright's reputation with respect to potential customers who are members of AP, making it more difficult for iCopyright to enter into service agreements with those publishers.

It is of no surprise that AP dominates the distribution of news stories and related content on the Internet. In many instances, the only choice is AP's content or no content at all. As a result, AP is an absolutely critical source of content to third-party websites. By cutting off iCopyright and refusing to deal with it by eliminating iCopyright's access to AP's content, AP is intentionally sending a signal to its members also not to deal with iCopyright, effectively destroying iCopyright's reputation among the members of AP. Such an impact on iCopyright's reputation is doubly devastating because during the term of the CSA, AP has taken steps to prevent iCopyright from promoting its services directly to AP's members. Elston Decl. ¶¶ 19-22.

Moreover, once newspaper sites become aware that they can no longer use iCopyright services for AP content displayed on their sites – which is imminent now that AP has cut access to iCopyright it will become instantly less attractive for such newspaper sites to use iCopyright tags on their own content. Regardless of the outcome of the decision on the merits in this case, iCopyright's reputation will be permanently tarnished in the eyes of third parties as a result of AP's acts, and it will be extremely difficult – if possible at all – to reestablish good will with customers. Elston Decl. ¶ 22. The Second Circuit has established that "loss of reputation, good will, and business opportunities" support a finding that, in the absence of an injunction, a business will suffer irreparable harm. *Register.com*, 356 F.3d at 404 (upholding district court's decision to grant preliminary injunction). AP's conduct unambiguously threatens iCopyright's reputation, good will, and business opportunities irrevocably, and the imminent harm it faces will result in irreparable damage to its business.

C. The Balance of Equities Tips Decidedly in Favor of iCopyright

The equities in this case unambiguously favor preliminary injunctive relief and a temporary restraining order. First, as explained above, in the absence of an injunction, iCopyright's business will be irrevocably damaged.

Second, AP will not suffer any cognizable harm should the Court issue preliminary relief. iCopyright is merely asking the Court to restore the *status quo* until the parties' legal and contractual disputes are resolved or the Court enters a preliminary injunction. For AP, this requires only that it to restore iCopyright tags and provide access to its content. AP can restore the tags in a very short period, as it managed to remove them only days after iCopyright noted that AP was displaying non-functioning tags on its hosted sites. Compl. ¶¶ 75-77. It is also indisputable that AP has no qualms about the display of iCopyright logo or tags on its site – indeed, it left those tags on its content even *after* its claimed termination. Compl. ¶ 75. It was not until iCopyright demanded AP to provide access to content as required under the Agreement that AP began to eliminate the tags from its site. Compl. ¶ 77. The Second Circuit has held that requiring a party to continue performing a contract it has performed for some time is not a sufficient hardship necessary to defeat a motion for a preliminary injunction. *Reuters Ltd. v. United Press Int'l*, 903 F.2d 904, 909 (2d Cir. 1990) ("Reuters need do only what it has done for the past five years – provide UPI with newspictures. The hardship, if any, for Reuters that may result from continuing its relationship under the agreement pending the outcome of the litigation is, on the basis of the record, insignificant in comparison to the hardships that UPI faces absent a preliminary injunction.").

Moreover, even if AP could make a colorable claim that it suffers harm from continuing to perform under the Agreement (which it cannot), that harm is easily cognizable in monetary terms. Indeed, to demonstrate its good faith in filing this request for immediate injunctive relief, iCopyright has placed funds in an escrow account to satisfy the amount AP claims it is owed by iCopyright under the CSA. The Second Circuit has held that in balancing the equities in determining whether to grant preliminary relief, the prospect of monetary harm does not outweigh harm to good will, which is the type of harm iCopyright is likely to suffer absent preliminary relief. *Random House, Inc. v. Rosetta Books LLC*, 283 F.3d 490, 492 (2d Cir. 2002) (weighing harm to goodwill more heavily than monetary injury because, if the party suffering monetary harm "ultimately prevails on the merits, [it] can recover money damages for any lost sales"); *cf. Jayaraj*, 66 F.3d at 39 ("'[I]t seems clear that the temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury . . . . The key word in this consideration is *irreparable*. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.'") (quoting *Sampson v. Murray*, 414 U.S. 61, 90 (1974)). There is no remedy that can be awarded to iCopyright should it prevail on the merits that will correct the injury it will suffer to its reputation in the eyes of third parties if preliminary relief is not awarded.

D. Likelihood of Success on the Merits

iCopyright is able to demonstrate a likelihood of success on the merits on both of its substantive claims. First, iCopyright's breach of contract claim is likely to succeed because AP has breached the contract in numerous ways. For starters, AP's termination of the Agreement is not in accordance with the procedures for termination set forth in the CSA itself and is therefore improper. Compl. ¶ 72. Its failure to perform in accordance with the terms of the CSA after the improper termination is therefore a breach of the contract. In addition, AP breached the contract in numerous ways prior to its efforts to terminate the Agreement.

Second, iCopyright is likely to succeed on its claim of unfair competition because AP has acted in bad faith to misappropriate iCopyright's labor, skills, expenditures, and good will in developing its The Registry.

1. AP was not Permitted to Terminate under the Contract

AP purports to have terminated immediately the Agreement through *an email* by one of its employees to the CEO of iCopyright. Elston Decl. ¶ 16. The plain text of the Agreement requires a party to provide *written* notice at least ninety (90) days prior to the end of either the initial three year term or any subsequent one year renewal term. *See* Sec. 3.1.[4] There is no dispute that AP provided no such notice. Instead, AP purports to have terminated *immediately* the Agreement, and all of AP's obligations, by way of an email. Compl. ¶¶ 71-72. Failure to terminate an agreement in accordance with the procedures set forth in the agreement itself is wrongful and ineffectual. *See MCK Bldg. Assocs. v. St. Lawrence Univ.*, 754 N.Y.S.2d 397, 398-99 (N.Y. App. Div. 2003) (holding invalid termination letter declaring termination effective immediately when contract required ten days written notice prior to termination); *see also Johnston v. MGM Emerald Enters., Inc.*, 893 N.Y.S.2d 176, 178 (N.Y. App. Div. 2010) ("written agreement that is complete, clear, and unambiguous on its face must be enforced according to the plain meaning of its terms").

AP's breach of the termination provision is a blatant attempt to evade its remaining obligations under the Agreement. As discussed above, AP did not want iCopyright to become the prevailing service for lawfully licensing copyrighted content on the Internet and on AP's content specifically. Instead, AP's subsequent (and surreptitious) acts indicate it had been planning to replace iCopyright with The Registry, a blatant knock-off of iCopyright's service based on iCopyright's technology that was available to AP from iCopyright pursuant to the CSA. Compl. ¶¶ 52-55. In any event, AP used its purported breach to refuse to deal with iCopyright by cutting access to AP's content in contravention of the terms of the CSA. AP's continued failure to perform the contract in accordance with its terms constitutes a further breach of the

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[4] Section 3.1 of the Agreement, titled "Term and Termination," establishes the exclusive procedure by which a party may terminate the Agreement. The Agreement states that it "shall continue for three (3) years and automatically renew for additional terms of one (1) year unless either party provides written notice of termination to the other party ninety (90) days prior to the automatic renewal date."

contract. *See Coizza v. 164-50 Crossbay Realty Corp.*, 900 N.Y.S.2d 416, 421 (N.Y. App. Div. 2010) (improper cancelation of a contract constitutes unlawful anticipatory breach).

Running afoul of an unambiguous provision of a contract, and using that breach to evade a party's ongoing obligations under the contract, certainly establishes a likelihood of success on the merits.

2. Other Breaches

AP's strategy for justifying its purported termination of the Agreement is to claim that iCopyright failed to make certain payments under the Agreement. This is no justification at all, however, because AP has acknowledged, first, that it failed fully to perform its obligations under the Agreement and, second, that it would continue to work with iCopyright to implement iCopyright's services. Compl. ¶¶ 38-45. Indeed, there is abundant evidence that AP realized it was not living up to the requisite performance standards in the Agreement and had agreed to cure its non-performance. Compl. ¶¶ 44-45. In particular, AP has breached the terms of the CSA by, among other things, failing to institute iCopyright tags and tools on its website, Compl. ¶ 37, failing to promote iCopyright as required by the CSA, Compl. ¶ 41; Elston Decl. ¶ 6, violating confidentiality provisions, Compl. ¶ 54, and cutting off iCopyright's access to AP's servers, Elston Decl. ¶ 19. These breaches of the CSA caused injury to iCopyright by denying the functionality of the iCopyright service, thereby making it a less attractive product to content users and inhibiting iCopyright's ability to generate revenue and grow its brand.

The failures by AP to perform under the Agreement constitute numerous breaches of contract, but, notwithstanding those breaches, both parties agreed to continue to work to improve the relationship - at least until AP abruptly, and without notice, purported to have terminated the

Agreement. AP made clear that its election was not to terminate the CSA, but to maintain its existing relationship with iCopyright. Indeed, Mr. Glover assured iCopyright on October 22, 2010, that iCopyright was not being "turned off" and that the status quo under the CSA was being maintained. Compl. ¶ 51. Moreover, notwithstanding AP's failure to perform critical obligations it assumed by entering the Agreement, iCopyright desired to continue to work with AP. iCopyright hardly had another choice, as AP is by far the dominant provider of content that would utilize copyright services such as those provided by iCopyright. iCopyright was led to believe, and did believe, that AP intended to work in good faith to increase the value of iCopyright's services. For its part, it is now clear that AP had no such plan and that its early breaches would never be cured, notwithstanding AP's statements to the contrary. AP's breaches, however, do not form the basis for its termination of the Agreement in violation of the plain text of its terms.

3. AP has Engaged in Unfair Competition

There is also a substantial likelihood iCopyright will succeed on its claim that AP has violated New York's common law cause of action for unfair competition. To sustain a claim of common law unfair competition, the plaintiff "must show that the defendants misappropriated the plaintiff[']s labors, skills, expenditures, or good will and displayed some element of bad faith in doing so." *Abe's Rooms, Inc. v. Space Hunters, Inc.*, 833 N.Y.S.2d 138, 140 (N.Y. App. Div. 2007). In interpreting New York's unfair competition law, the Second Circuit has observed:

> New York courts have noted the "incalculable variety" of illegal practices falling within the unfair competition rubric, *Ronson Art Metal Works, Inc. v. Gibson Lighter Manufacturing Co.*, 3 A.D.2d 227, 230-31, 159 N.Y.S.2d 606, 609 (1957), calling it a "broad and flexible doctrine" that depends "more upon the facts set forth . . . than in most causes of action," *Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp., supra*, 199 Misc. at 792, 101 N.Y.S.2d at 488,

> 489. It has been broadly described as encompassing "any form of commercial immorality," *id.* at 796, 101 N.Y.S.2d at 492, or simply as "endeavoring to reap where [one] has not sown," *International News Service v. Associated Press*, *supra*, 248 U.S. at 239, 39 S.Ct. at 72; it is taking "the skill, expenditures and labors of a competitor," *Electrolux Corp. v. Val-Worth, Inc.*, 6 N.Y.2d 556, 567, 190 N.Y.S.2d 977, 986, 161 N.E.2d 197, 203 (1959), and "misappropriati[ng] for the commercial advantage of one person . . . a benefit or 'property' right belonging to another," *Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.*, *supra*, 199 Misc. at. 793, 101 N.Y.S.2d at 489. The tort is adaptable and capacious.

Roy Exp. Co. Establishment of Vaduz v. Columbia Broad. Sys., Inc., 672 F.2d 1095, 1105 (2d Cir. 1982).

As the March 26, 2010 letter from AP's counsel to the Antitrust Division at the Department of Justice unequivocally demonstrates, AP itself is misappropriating the labor, skills, expenditures, and good will of iCopyright (and is also concerned about the antitrust consequences of its actions). AP has communicated to the DOJ that it is creating

> an affiliate of a voluntary registry available to the owners of rights in news content in which individual owners can list their news content, specify the types of uses others may make of their registered content, and specify the terms on which such use may be made. The Registry will offer content owners and content users a more efficient (but non-exclusive) means of licensing content.

Letter at 1. As explained above and in the Complaint, the Letter then goes on to describe a registry it is developing that will have precisely the same features iCopyright provides today.

- AP has previously characterized iCopyright services as "giv[ing] people an easy way to enter into a license if they feel it is warranted." Similarly, AP had previously noted that the iCopyright deal makes "widely available an efficient, user friendly mechanism to license AP content whenever necessary, in multiple reuse formats." Compl. ¶ 57.

- As with iCopyright's tagging system, AP states The Registry will "work with a voluntary presentation format . . . for the coding of news content with standardized metadata that would provide specific information about each news item's attributes." Compl. ¶ 58.

- Like iCopyright, The Registry "will be designed to provide content owners and publishers with a system to," among other things "specify the types of uses others may make of all or portions of the registered content" and "specify the terms on which such use may be made" and "affix unique tags . . . to each content item registered . . . to connect the content item as it is being published and/or consumed with the . . . Registry." Compl. ¶ 59.
- Like iCopyright, The Registry "will also . . . specify the terms on which they offer to license that content from content owners." Compl. ¶ 60.
- Similarly, "AP plans to support the . . . Registry activities by assessing fees on each participant for the services that the participant elects to receive pertaining to the . . . Registry." Compl. ¶ 61.

Apart from whether AP's conduct is anticompetitive or a violation of iCopyright's intellectual property rights, it is obvious from the content of its letter to the DOJ that it has misappropriated iCopyright's labors, skills and expenditures in seeking to develop its news registry or involving itself in a similar initiative.

AP's suggestion in its letter to the Antitrust Division that the need for its news registry is the result of a "market failure" evidences its bad faith in misappropriating iCopyright's service. AP has the audacity to state that "[i]t has proven infeasible for republishers of content to negotiate in advance with all of the[] thousands of rights owners regarding the terms on which their content may be used . . . [and] given that stale news is of limited value, it has not been feasible for republishers to contact and contract with content owners only after learning of content that could be republished." Letter at 6. There is no market failure because *iCopyright has entered the market to cure precisely the problem articulated by AP.* Indeed, there is communication between iCopyright and AP discussing the issues raised in AP's 2010 Letter to the DOJ for years before the parties entered into their business relationship. It took iCopyright *five* years to convince AP that its method for reducing the costs associated with licensing news content disseminated over the Internet was useful to implement. Yet, several years after iCopyright first communicated its ideas to AP and while in business with iCopyright, AP told the DOJ that it was necessary for AP to establish a product substantially identical to iCopyright's existing product and requesting approval from antitrust regulators for doing so. These facts render it substantially likely that iCopyright will be able to demonstrate at trial that AP acted in bad faith.

IV. Conclusion

AP's duplicitous conduct toward iCopyright - terminating the CSA despite providing assurances that the contractual relationship would remain intact and contracting to use iCopyright's service while simultaneously developing its own service to replace iCopyright's will irreparably harm iCopyright unless the Court intervenes. Though preliminary injunctive relief is an extraordinary remedy, iCopyright is seeking it because its business is at stake. As the case law demonstrates, preliminary injunctive relief is designed precisely for the circumstances at issue in this case: iCopyright will be irreparably harmed and is there is a substantial likelihood that it will succeed on the merits of its underlying claims of breach of contract and unfair competition. Moreover, the equities weigh in favor of preliminary injunctive relief, as iCopyright's business and reputation are threatened by AP's conduct and any harm AP faces is cognizable in purely monetary terms.

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