

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
-----X
CBS BROADCASTING INC.,

Plaintiff,

05 Civ. 7946 (DAB)
ORDER

-against-

COUNTERR GROUP and J.K.IDEMA,

Defendant.

-----X
COUNTERR GROUP and J.K. IDEMA,

Counter-Plaintiffs,

-against-

CBS NEWS, et al.,

Counter-Defendants.

-----X
DEBORAH A. BATTS, United States District Judge.

On September 12, 2005, CBS Broadcasting Inc. ("CBS" or "Counter-Defendant") filed suit against Counterr Group and Jonathan Keith Idema ("Idema" or "Counter-Plaintiffs") seeking declaratory relief pursuant to 28 U.S.C. § 2201. CBS seeks a declaration that its use of certain video footage provided to it by Idema was not in breach of an agreement between the Parties. (See Compl. ¶¶ 13-18.)

On September 15, 2005 Counter-Plaintiffs filed an Answer and seven counterclaims against CBS¹ ("Counterclaim"). On

¹ In their Counterclaim against CBS Broadcasting, Inc., Counter-Plaintiffs named CBS News, CBS 60 MINUTES, CBS 60 MINUTES II, CBS Worldwide Inc., and CBS Inc. as additional Counter-Defendants.

October 11, 2005, CBS filed an Answer to the Counterclaims. The first six Counterclaims filed by Counter-Plaintiffs allege breach of contract -- the very claim upon which CBS seeks a declaratory judgment -- and a number of economic torts. Counter-Plaintiffs' seventh Counterclaim alleges defamation against CBS. On May 12, 2006, pursuant to the Court's permission, CBS filed two separate motions for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c): the first motion seeks judgment on the pleadings with respect to Counterclaims One through Six ("Motion on Counterclaims 1-6") and the second motion seeks judgment on the Counterclaim Seven ("Motion on Counterclaim 7"). Counter-Plaintiffs oppose both Motions.

For the reasons stated herein, CBS' Motion on Counterclaims 1-6 and its Motion on Counterclaim 7 are both GRANTED. Moreover, as explained below, Counter-Plaintiffs' breach of contract claim concerning the use of Idema's video footage is preempted by federal copyright law. Idema and Counterr Group therefore do not have an actionable breach of contract claim against CBS with respect to the use of that footage. Accordingly, CBS' Complaint, which solely seeks a

(Countercl. ¶ 26.) However, with the exception of CBS Worldwide Inc., none of the proposed Counter-Defendants exist as a legal entity separate from CBS Broadcasting, Inc. (Counter-Def.'s Answer at 1 n.1.)

declaration that it did not breach its agreement with Idema and Counterr Group, is DISMISSED WITH PREJUDICE as moot.

I. BACKGROUND

Idema alleges that, in 2001, while he was in Afghanistan, “[he] and his Panjshir commandos obtained and captured al-Qaida terrorist training tapes which were designated and referred to as the *8mm VideoX al-Qaida Terrorist Training Tapes*” [the “VideoX tapes”]. (*Id.* ¶ 36.) In late 2001 and early 2002, CBS requested that Idema provide it with a preview of the contents of the VideoX tapes, with an eye towards possibly using the tapes in its broadcast news programs. (*Id.* ¶ 38-39.) On January 2, 2002, CBS “entered into a letter contract with Idema and Counterr Group” pursuant to which CBS would be permitted to preview the tapes. (*Id.* at 40.) That letter, addressed, “To Whom It May Concern”, provided as follows:

CBS News and “60 Minutes” hereby promise[] not to broadcast or in any other way disseminate any of the material being provided to us today . . . unless and until we reach an agreement with [Idema] which provides for its broadcast. Should we violate this agreement, intentionally or unintentionally, we will pay the sum of \$100,000 in penalties and damages.

(Sproul Decl. Ex. A.)

Following CBS' preview of the tapes, Idema and CBS "continually negotiated for the broadcast rights" of the tapes; however, Idema also made offers to various other television networks and intended to hold an auction for the broadcast rights to the tapes on January 9, 2002. (Countercl. ¶ 46-48.) On or about January 8, 2002, CBS allegedly offered Idema \$60,000 for a one-time use of the VideoX tapes. (Id. ¶ 49-50.) Shortly thereafter, amidst rumors allegedly begun by competitor networks questioning the tapes' authenticity, CBS reduced its offer to \$25,000. (Id. ¶ 51.) Some days after the reduced offer, Idema alleges that CBS told him that "if he did not accept the offer of \$25,000 from CBS 60 MINUTES, CBS would publicly take the position that CBS passed on the tapes because they were rumored to be fake." (Id. ¶ 53.) Idema alleges that CBS used this tactic, and also perpetrated rumors that the tapes were fake, in order to obtain the VideoX tapes at a bargain price. (Id. ¶¶ 53-54.) CBS's offer -- at one point dropping down to \$10,000 -- continued to drop "almost daily as rumors spread through the networks that the tapes were fake." (Id. ¶ 59.)

Eventually, as negotiations continued, CBS offered to pay \$30,000 to license the tapes without "library rights", which CBS explained meant that it could only air the tapes twice. (Id. ¶

65.) Idema alleges that CBS made the offer to purchase the tapes without library rights to secure the footage at a reduced price. (Id. ¶ 66.) Idema contends that CBS assured him that "because their [sic] were no library rights, ALL COPIES of the *8mm VideoX al-Qaida Tapes* would be erased or destroyed, and the originals would be returned to Idema's office after the original 60 MINUTES II show aired." (Id. ¶ 66.) Idema further alleges that CBS assured him that by not selling library rights to CBS he could resell the tapes to other networks immediately after the 60 MINUTES II broadcast and "CBS would continue to license the tapes and pay new licensing fees each time." (Id. ¶¶ 67-68.) Idema also contends CBS assured him that "the January 2, 2002 letter outlining specific damages per incident would remain in full force" and that CBS "repeatedly stated [it] would have 'no problem' paying the \$100,000 per violation if CBS NEWS or 60 MINUTES used the footage in violation of the contracts." (Id. ¶ 70.)

On January 11, 2002² Idema and CBS finally reached an agreement with respect to CBS' right to broadcast the *VideoX*

² In his pleadings, Idema alleges that he and CBS entered into the broadcast rights contract on January 13, 2002. However, the copy of the contract submitted in support of Motion on Counterclaims 1-6 bears a January 11, 2002 as the date of the agreement.

tapes, which totaled approximately seven hours of footage, purportedly of members of Al-Qaida conducting training exercises. (Sproul Decl. Ex. B.) Under their agreement, CBS paid Idema \$30,000 for the right to air footage on (1) a 60 MINUTES II segment; (2) during all CBS News programming from 6:30 PM on January 16, 2002 until midnight on January 17, 2002; (3) in advertising for the 60 MINUTES II segment and the CBS News programming; and (4) on the CBS website for twenty years. (Id.) CBS was permitted to re-air the original 60 MINUTES segment, with updates, in the United States in perpetuity, but could not air additional footage. (Id.) CBS agreed that neither it nor its licensees and affiliates would sell, distribute, show, or loan the acquired footage to any other organization, acknowledging that it had "no library rights to unused footage." (Id.) CBS further agreed that all broadcasts of the footage would carry an embedded CBS logo and that it would mail copies of "each broadcast that includes the Footage" to Idema's wife in North Carolina. (Id.) Both parties agreed California law would govern the contract. (Id.) Though the contract contains no damages provision, Idema contends CBS repeatedly agreed that it would pay \$100,000 per violation "should a subsidiary, affiliate, CBS News, or 60 MINUTES air any portion of expert of the counter-

plaintiff's [tapes] without obtaining a licensing agreement."

(Countercl. ¶ 82.)

On January 16, 2002, CBS broadcast footage from the *VideoX* tapes on its 60 MINUTES special titled "Hearts of Darkness." (Id. ¶ 84.) Idema alleges that CBS thereafter "failed to erase, destroy, or return" his tapes following broadcast, in violation of their agreement. (Id.) He contends that "[o]n or after May 17, 2002, at 6:37 pm EST CBS Nightly News aired the *VideoX Tapes* and then again on May 20th, 21st, and/or 22nd." (Id. ¶ 93.) On June 4, 2002, footage from *VideoX* tapes aired on CNN's "Larry King Live" during a segment on former CBS correspondent Dan Rather's career highlights. (Id. ¶ 96.)

Idema further alleges that CBS provided CNN with all the *VideoX* tapes, which CNN in turn retained in its archives and began using in its own broadcasts. (Id. 96-97.) As a result, many third parties, including the History Channel, the Discovery Channel and foreign news agencies were able to broadcast the content of the tapes without having to obtain licensing from Idema. (Id. ¶ 156.) Idema alleges that "[t]hroughout 2003, CBS continued to broadcast the *VideoX Tapes* and denied their use without video proof." (Id. ¶ 108.)

In April 2004, Idema and his privately organized and operated "counter-terrorist team", which he calls "Task Force SABER 7", returned to Afghanistan. (Id. ¶ 129.) In mid-June 2004, Idema allegedly allowed CBS to enter the SABER 7 compound in Kabul, Afghanistan's capital, to "discuss the airing of a special broadcast on al-Qaida plots." (Id. ¶ 134.) Idema allegedly permitted CBS' Kabul Bureau Chief to enter restricted areas where he and his fellow mercenaries had detained individuals whom they claimed were al-Qaida terrorists. (Id.) Other CBS reporters allegedly witnessed the interrogation of the purported al-Qaida terrorists at the compound and allegedly saw "each of the terrorists in custody." (Id. ¶ 138.) Counter-Plaintiffs allege that "CBS employees saw the methods of interrogation, the physical condition of the terrorists, and the conditions of the terrorists' detention, and knew that no torture was occurring." (Id. ¶ 138.)

In July 5, 2004, Afghan officials arrested Idema "at the request of Interior Minister Ahmad Ali Jalali." (Id. ¶ 140.) Idema and his team were accused of "'running a torture chamber,' 'torturing innocent Afghans,' and other illegal conduct." (Id.) The Afghan Interior Minister claimed Idema had "'innocent Afghans hanging from the ceiling in his basement,' that the terrorists

were being 'abused tortured, and starved,' and that Idema and his men were simply 'rounding up innocent Muslims with long beards.'"

(Id.)

Idema alleges that CBS had videotapes in its possession that confirmed that no torture had occurred in the SABER 7 compound and that Idema and his men were innocent of the charges against them. (Id. ¶ 143.) Nonetheless, according to the Counterclaims, "when the story started to break after July 6, 2004, CBS withheld this exculpatory information and continued to falsely report the same story that other news agencies were reporting." (Id. ¶ 144.) Ultimately, an Afghan court convicted Idema and ordered that he be incarcerated. (Id. ¶ 150.)

On or about August 5, 2005, Idema initiated an action against CBS in North Carolina state court, which he subsequently withdrew.³ (Compl. ¶ 10.) On September 12, 2005, CBS filed the

³ Idema is no stranger to the courts. He has brought several suits in state and federal court against various media organizations. see, e.g., Idema v. Dreamworks, Inc., 162 F. Supp. 2d 1129 (C.D. Cal. 2001) (dismissing, among other claims, plaintiff's copyright infringement, breach of contract, and civil conspiracy allegations), aff'd, 2003 U.S. App. LEXIS 26354 (9th Cir. 2003); Idema v. Wagner, 120 F. Supp. 2d 361 (S.D.N.Y. 2000) (dismissing plaintiff's tort claims including libel, defamation, and civil conspiracy). Idema has also been sanctioned by courts in the past. See, e.g., Idema v. Fox News Network LLC, No. BC 296228 (Los Angeles Super. Ct. Feb. 6, 2004) (order awarding defendants \$20,000 in attorney's fees); Glosson v. Equifax Credit Info. Servs., No. 5:95-CV-104 (E.D.N.C. Apr. 28, 1997) (ordering Rule 11 sanctions against Idema "in the amount of reasonable costs

instant Complaint seeking declaratory relief. (Id. ¶ 4.) Idema subsequently counterclaimed, alleging the following causes of action against CBS: (1) breach of contract; (2) interference with prospective economic advantage; (3) interference with contract; (4) civil conspiracy; (5) fraud; (6) unfair and deceptive trade practices; and (7) defamation.⁴

II. DISCUSSION

A. Legal Standard

Rule 12(c) of the Federal Rules of Civil Procedure allows parties to move for "judgment on the pleadings" after pleadings are closed. Fed. R. Civ. P. 12(c). Rule 12(c) motions are governed by the same standard as motions under Fed. R. Civ. P. 12(b)(6), whereby the court accepts the allegations contained in

and fees incurred by defendants" after Idema failed to follow a court order to show cause why sanctions should not be imposed against him).

⁴ In his opposition papers, Idema requests leave to amend his counterclaim to plead conversion. (Opp'n to Mot. #1 at 14 n.10.) Idema also seeks leave to clarify his two tortious interference claims. (Opp'n. at 15.) However, the Court declines to grant Idema's requests, as "a party may not amend pleadings in its opposition to a motion to dismiss." Am. Fun & Toy Creators v. Gemmy Indus., No. 96 Civ. 0799 (AGS)(JCF), 1997 U.S. Dist. LEXIS 12419, at *22 (S.D.N.Y. Aug. 20, 1997); see also Citibank, N.A. v. K-H Corp., 745 F. Supp. 899, 902 (S.D.N.Y. 1990) ("[T]his Court has dismissed a complaint where the necessary factual allegations . . . were contained in the plaintiff's memorandum of law, but were not adequately pled in the complaint.").

the complaint as true, drawing all reasonable inferences in favor of the nonmoving party. Burnette v. Carothers, 192 F.3d 52, 56 (2d Cir. 1999). Judgment on the pleadings may be granted pursuant to Rule 12(c) only if it appears beyond doubt that the nonmoving party cannot prove a set of facts that would entitle him to relief. See Byrd v. City of New York, No. 04-1369-CV, 2005 U.S. App. LEXIS 10820, at *2 (2d Cir. June 8, 2005). "Rule 12(c) motions generally are limited to the facts alleged in the complaint and must be converted into a motion for summary judgment if the court considers materials outside the pleadings." Id. at *2-3. However, a court may, without converting the motion into one for summary judgment, "consider documents that are attached to, incorporated by reference in, or integral to the complaint; and it may also consider matters that are subject to judicial notice." Id. at *3.

B. Motion on Counterclaims 1-6: Breach of Contract, Tortious Interference with Contract; Civil Conspiracy; Interference with Prospective Economic Advantage; and Fraud

CBS contends that Counter-Plaintiffs' First Counterclaim, alleging breach of contract with respect to the VideoX tapes, is preempted by federal copyright law. CBS contends that the Second through Sixth Counterclaims fail to state claims for which relief

can be granted. It thus seeks entry of judgment on the pleadings as to those six Counterclaims.

1. Choice of Law

Idema and CBS do not agree on which states' laws the Court should apply in resolving CBS' Motion on Counterclaims 1-6. Idema contends that his breach of contract, tortious interference with prospective economic advantage and tortious interference with contract claims should be determined "under the laws of North Carolina, California, and Afghanistan." (Countercl. ¶¶ 165, 172, 175.) Idema does not identify which laws govern his civil conspiracy, fraud and defamation claims, but claims that his unfair and deceptive trade practices claim arises under North Carolina law. (Id. ¶¶ 182, 188, 192, 204.) The Court therefore clarifies the choice of law issues raised by Counter-Plaintiffs before reaching the substance of their Counterclaims.

a. Choice of law on the breach of contract counterclaim

It has long been hornbook law that federal courts exercising diversity jurisdiction, when determining what law to apply, must follow the choice of law rules prevailing in the forum state. See Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 494 (1941); Norlin Corp. v. Rooney, Pace Inc., 744 F.2d 255, 263 (2d Cir. 1984). "The principles compelling a forum state to

apply foreign law come into play only when a legitimate and substantial interest of another state would thereby be served." Norlin, 744 F.2d at 263. "New York law is unambiguous in the area of express choice of law provisions in a contract. Absent fraud or violation of public policy, contractual selection of governing law is generally determinative so long as the State selected has sufficient contacts with the transaction." Int'l Minerals & Res., S.A. v. Pappas, 96 F.3d 586, 592 (2d Cir. 1996); RLS Assocs., LLC v. United Bank of Kuwait PLC, 464 F. Supp. 2d 206, 214 (S.D.N.Y. 2006). In line with this principle, the Court finds that Idema's breach of contract claim is governed by California law, as expressly agreed to by the Parties in their January 11, 2002 agreement. (See Sproul Decl. Ex. B.)

Idema, however, contends that California law not only governs the state law contract claim, but that "California's approach to [copyright] preemption of breach of contract claims is on point." (Mem. in Opp'n to Motion on Counterclaims 1-6 [hereinafter "Opp'n to Mot. #1"] at 7.) (emphasis added). Idema's contention is erroneous. It is widely understood and accepted that, under 28 U.S.C. § 1338(a), federal district courts have original and exclusive jurisdiction over civil actions "arising under" any Congressional act relating to patents, plant

variety protection, copyrights, and trademarks. 28 U.S.C. § 1338(a); see also Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc., 373 F.3d 296, 303 (2d Cir. 2004). Thus, this Court applies only the precedent which is binding within this circuit in deciding whether, as CBS contends, Counter-Plaintiffs' breach of contract Counterclaim, and the other Counterclaims related to it, are preempted by federal copyright law.

b. Choice of law on the tort counterclaims

Where there is conflict over the choice of law in tort actions, New York applies a so-called "interest analysis" test. See Schultz v. Boy Scouts of Am., Inc., 65 N.Y.2d 189, 197 (N.Y. 1985); Istim, Inc. v. Chemical Bank, 78 N.Y.2d 342, 347 (N.Y. 1991). "The law of the jurisdiction having the greatest interest in the litigation will be applied and . . . the [only] facts or contacts which obtain significance in defining State interests are those which relate to the purpose of the particular law in conflict." Schultz, 65 N.Y.2d at 197 (quoting Miller v. Miller, 22 N.Y.2d 12, 15-16 (N.Y. 1968)). The Schultz Court found that under this definition the two most important factors for a court to consider are domicile and the locus of the tort. Id.

The Court rejects Idema's contention that his Counterclaims alleging tortious interference with economic advantage and his deceptive trade practice cause of action are governed by laws other than the State of New York. The allegations contained in Idema's Counterclaims do not establish a sufficient nexus with North Carolina or California which would compel the application of those states' laws.⁵ New York is clearly the state with the greatest interest in this litigation. Not only is CBS headquartered in New York, (Compl. ¶ 1), but much of the correspondence between Idema and CBS, at issue in this

⁵ Idema also makes the odd suggestion that Afghan law applies to some of his Counterclaims, even as he disparages the Afghan legal system as one "which does not meet any standards of international law". (Mem. in Opp'n to Mot. #2 [hereinafter "Opp'n to Mot. #2"] at 2.) The Court declines to consider whether Idema's tortious interference claims arise under the laws of Afghanistan. Under Rule 44.1 of the Federal Rules of Civil Procedure, a court's determination of an issue concerning the law of a foreign country "shall be treated as a ruling on a question of law." Fed. R. Civ. P. 44.1. "Rule 44.1(1) requires parties to give written notice of their intention to assert foreign law and where no or insufficient information has been provided about the foreign law, the forum will usually decide [the] case in accordance with its own local law." Shaw v. Rizzoli Int'l Publs., Inc., No. 96 Civ. 4259 (JGK), 1999 U.S. Dist. LEXIS 3233, at*18 (S.D.N.Y. Mar. 19, 1999) (citing Restatement (Second) of Conflicts § 136 cmt. h (1971)); see also Bartsch v. Metro-Goldwyn-Mayer, Inc., 391 F.2d 150, 155 nt.2 (2d Cir. 1968), cert. denied, 393 U.S. 826 (1968) (noting that although Rule 44.1 "establishes that courts may, in their discretion, examine foreign legal sources independently, it does not require them to do so . . ."). Idema has provided no information regarding the Afghan laws under which he seeks relief and thus his tortious interference Counterclaims will be decided under New York law.

matter, originated from CBS executives in New York. (Countercl. ¶¶ 43, 45, 58, 60, 61, 64, 68, 79, 100.) Accordingly, the Court applies New York law to Counter-Plaintiffs' s civil conspiracy, fraud, deceptive trade practices and defamation claims.

2. Copyright Pre-emption of Counter-Plaintiffs' Counterclaims One Through Six

CBS argues that Counter-Plaintiffs' breach of contract Counterclaim concerning the January 11, 2002 agreement to license broadcasting rights to the VideoX tapes is preempted by federal copyright law and that it must therefore be dismissed.

Section 301 of the Copyright Act provides, in relevant part, that:

[A]ll legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright . . . in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright . . . are governed exclusively by this title. Thereafter, no 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).

The Second Circuit has derived from this statute a two-part test to determine whether a claim under state law is subject to preemption by the Copyright Act. See Sharp v. Patterson, No. 03 Civ. 8772 (GEL), 2004 U.S. Dist. LEXIS 22311, at *20 (S.D.N.Y. Nov. 3, 2004). A state law claim is preempted when: (1) the

particular work to which the claim is being applied falls within the type of works protected by the Copyright Act under 17 U.S.C. §§ 102 and 103 and (2) the claim seeks to vindicate legal or equitable rights that are equivalent to one of the bundle of exclusive rights already protected by copyright law. See Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc., 373 F.3d 296, 305 (2d Cir. 2004); NBA v. Motorola, Inc., 105 F.3d 841, 848 (2d Cir. 1997). The first prong of this test is called the "subject matter requirement" and the second prong is called the "general scope requirement". See NBA, 105 F.3d at 848.

- a. The VideoX tapes satisfy the subject matter requirement for copyright preemption

Although Idema has alleged copyright infringement in his Counterclaims -- and it is doubtful that it would have been possible for him to copyright the alleged terrorist training videos he claims to have "obtained and captured" in Afghanistan -- the Second Circuit Court of Appeals has determined that:

As long as a work fits within one of the general subject matter categories of sections 102 and 103, the [Act] prevents the States from protecting it even if it fails to achieve Federal statutory copyright because it is too minimal or lacking in originality to qualify, or because it has fallen into the public domain.

NBA, 105 F.3d at 849 (citing H.R. No. 94-1476 at 131); ATC Distrib. Group, Inc. v. Whatever It Takes Transmissions & Parts,

Inc., 402 F.3d 700, 713 (6th Cir. 2005); see also Briarpatch, 373 F.3d at 304 (holding plaintiffs' unjust enrichment claim to be preempted by the Copyright Act although "plaintiffs have not expressly pleaded copyright violations anywhere in their complaint"). "It is well established . . . that the scope of preemption under § 301 is not the same as the scope of copyright protection, and the former is in fact broader than the latter." Katz Dochtermann & Epstein, Inc. v. HBO, 1999 U.S. Dist. LEXIS 3971, at *5 (S.D.N.Y. 1999). The scope of preemption includes state law claims with respect to un-copyrightable as well as copyrightable material, precisely because if the law were otherwise, "states would be free to expand the perimeters of copyright protection to their own liking, on the theory that preemption would be no bar to state protection of material not meeting federal statutory standards." Id. at *6 (quoting Harper & Row, Publishers, Inc. v. Nation Enters., 723 F.2d 195, 200 (2d Cir. 1983)).

The Court finds that the *VideoX* tapes fall within the general type of works protected by the Copyright Act. See 17 U.S.C. § 102(a) ("works of authorship include . . . (6) motion pictures and other audiovisual works"). Thus, each of Counter-

Plaintiffs' Counterclaims that relate to the VideoX tapes satisfy the "subject matter requirement" of the preemption test.

- b. The VideoX tapes satisfy the general scope requirement for copyright preemption

The second prong of the preemption analysis requires a "close review" of a plaintiff's state law claims. See Am. Movie Classics Co. v. Turner Entm't Co., 922 F. Supp. 926, 930 (S.D.N.Y. 1996). Section 301 of the Copyright Act preempts those state law claims that "may be abridged by an act which, in and of itself, would infringe one of the exclusive rights" provided by federal copyright law. Harper & Row, 723 F.2d at 200. "In other words, state law claims that are substantively redundant of Copyright Act claims are preempted." Sharp, 2004 U.S. Dist. LEXIS at *22; see also Am. Movie Classics, 922 F. Supp. at 930 ("when Congress revised the copyright laws in 1976, it specifically provided for preemption of all state rights equivalent to those within the scope of federal copyright law"). However, "when a state law violation is predicated upon an act incorporating elements beyond mere reproduction or the like, the rights involved are not equivalent and preemption will not occur." Harper & Row, 723 F.2d at 200 (citing Factors Etc., Inc. v. Pro Arts, Inc., 496 F. Supp. 1090, 1099 (S.D.N.Y. 1980)).

To succeed under the so-called "extra element" test, Mayer v. Josiah Wedgwood & Sons, Ltd., 601 F. Supp. 1523, 1535 (S.D.N.Y. 1985), and save an action from preemption, a party must do more than simply plead "additional elements . . . not part of a copyright infringement claim" - it must "establish qualitatively different conduct on the part of the infringing party" or demonstrate "a fundamental non-equivalence between the state and federal rights implicated." Harper & Row, 723 F.2d at 201; see also Mayer, 601 F. Supp. at 1535 ("[e]lements such as awareness or intent, which alter the action's scope but not its nature, will not save it from preemption under § 301").

To determine whether a claim is qualitatively different, courts look at "what [the] plaintiff seeks to protect, the theories in which the matter is thought to be protected and the rights sought to be enforced." Computer Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 716 (2d Cir. 1992). Moreover, courts take a restrictive view of what extra elements transform an otherwise equivalent claim into one that is qualitatively different from a copyright infringement claim.⁶ See NBA, 105

⁶ Examples of state law rights that the Second Circuit has recognized satisfy the extra element test and are not preempted include: unfair competition claims based upon breach of confidential relationship, breach of fiduciary duty and trade secrets. See Computer Assocs., 982 F.2d at 717 (2d Cir. 1992). "Passing off" claims are also not preempted by the Copyright Act

F.3d at 851. Accordingly, the Court considers each of Idema's six state law causes of action separately to determine whether they are preempted by copyright law.

3. Breach of Contract Counterclaim is Pre-empted

Having already determined that the subject matter of the contract dispute -- the *VideoX* tapes -- is among the types of works protected by the Copyright Act, the Court considers whether Idema's claim seeks to vindicate rights "that are equivalent to one of the bundle of exclusive rights already protected by copyright law." See Briarpatch, 373 F.3d at 305. Section 106 of the Copyright Act affords a copyright owner the exclusive right to: (1) reproduce the copyrighted work; (2) prepare derivative works; (3) distribute copies by sale, rental, lease, lending, or otherwise; and, with respect to certain artistic works, (5) to perform the work publicly; and (6) to display the work publicly. 17 U.S.C. § 106(1)-(5); see also Computer Assocs., 982 F.2d at 716.

"Under California law, there are four elements of a breach of contract claim: (1) a valid contract between the parties; (2) performance by the plaintiff (3) an unjustified or

because they involve an element of misrepresentation or deception, which is not an element of copyright claims. See Warner Bros. v. Am. Broad. Co., 720 F.2d 231, 247 (2d Cir. 1983).

unexcused failure to perform by the defendant; and (4) damages to plaintiff caused by the breach." Bezuszka v. L.A. Models, Inc., No. 04 Civ. 7703 (NRB), 2006 WL 770526, at *8 (S.D.N.Y. Mar. 24, 2006) (citing Bhari Info. Tech. Sys. Pvt., Ltd. v. Allied Boston Bank Inc., No. C 05-01223 SI, 2005 WL 3481473, at *5 (N.D.Cal. Dec. 20, 2005)). State law breach of contract claims are "generally not preempted by the Copyright Act," so long as the claim is "based on allegations of a contractual right not existing under copyright law." Logicom Inclusive, Inc. v. W.P. Stewart & Co., No. 04 Civ. 0604, 2004 U.S. Dist. LEXIS 15668, at *52 (S.D.N.Y. Aug. 10, 2004); see also Am. Movie Classics, 922 F. Supp. at 931 ("if the breach of contract claim is based on allegations that the parties' contract creates a right not existing under copyright law - a right based upon a party's contractual promise - and the plaintiff is suing to protect that contractual right, then the claim is not preempted"). However, "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." Am. Movie Classics, 922 F. Supp. at 931.

The question of whether the promise inherent in any agreement, by itself, provides the extra element necessary to

make a breach of contract claim qualitatively different from a copyright infringement claim remains unsettled in the Second Circuit. See eScholar, LLC v. Otis Educ. Sys., 387 F. Supp. 2d 329, 332 (S.D.N.Y. 2005). Judges in this district have come to different conclusions when faced with this issue. See, e.g., Am. Movie Classics, 922 F. Supp. at 932 (finding preemption where alleged breach of contract is equivalent to Copyright Act's exclusive right of public performance); Wolff v. Inst. of Elecs. & Elec. Eng'rs, Inc., 768 F. Supp. 66, 69 (S.D.N.Y. 1991) (finding preemption where alleged breach of contract was infringement of exclusive copyright); eScholar, 387 F. Supp. 2d at 333 (breach of contract claim is not preempted "to the extent it seeks to enforce contractual rights to audit books and receive royalty fees"); Sharp, 2004 U.S. Dist. LEXIS at *25 (breach of contract claim is not preempted because plaintiff's right to financial proceeds from book's sale "constitutes a privately created right distinct from [plaintiff's] rights under copyright law"); Architectronics, Inc. v. Control Sys., 935 F. Supp. 425, 441 (S.D.N.Y. 1996) (breach of contract claim based on confidentiality and licensing agreements is not preempted because "breach of contract claims are qualitatively different from claims for copyright infringement"); Brignoli v. Balch Hardy &

Scheinman, Inc., 645 F. Supp. 1201, 1205 (S.D.N.Y. 1986) (breach of contract claim is not preempted because it "involve[s] an element beyond unauthorized reproduction and use - a promise to pay plaintiff for use of his product").

With respect to Idema's breach of contract claim, the gravamen of his Counterclaim is based on allegations of "illegal loaning and distribution." (Countercl. ¶ 157.) There is no allegation that CBS breached any provisions of the licensing agreement other than those providing it the right to broadcast the video footage in the manner and during the window of time specified in the agreement. In other words, CBS allegedly violated what would, under copyright law, be Idema's exclusive right to "perform the work publicly." 17 U.S.C. § 106(5); see also Am. Movie Classics, 922 F. Supp. at 932 (holding plaintiff's contractual right to exclusivity to be equivalent to its exclusive right of public performance under the Copyright Act).

Idema suggests that some courts have found that a contractual promise to pay provides the "extra element" necessary to defeat preemption and argues that CBS's failure to pay him \$100,000 in liquidated damages for its allegedly unauthorized uses makes his breach of contract claim qualitatively different from one for copyright infringement. Idema's reliance on those

cases is misplaced, as they all involved breach of contract claims where the party that had allegedly breached the contract had done so by completely failing to pay the consideration -- e.g. royalty fees or a percentage of profits -- that the parties had agreed to the original consideration was not provided. See, e.g., Architectronics, 935 F. Supp at 430; Brignoli, 645 F. Supp. at 1203. Idema, on the other hand, does not allege CBS failed to pay him the \$30,000 licensing fee that that January 11, 2002 agreement provided. Moreover, the plain text of the Parties' agreement forecloses Idema's claim that CBS failed to meet its contractual obligation to pay as it states: "[CBS] shall have fully discharged [its] obligations hereunder by payment" of the original \$30,000 licensing fee. (Sproul Decl. Ex. B.) The Court finds, therefore, that Counter-Plaintiffs' breach of contract Counterclaim against CBS is preempted by federal copyright law.

Accordingly, CBS' Motion for Judgment on the Pleadings as to Counter-Plaintiffs' breach of contract Counterclaim is GRANTED.

4. Tortious Interference with Contract Counterclaim is Pre-empted

Under New York law, the elements of a tortious interference with contract claim are that (1) a valid contract

exists; (2) a third party had knowledge of the contract; (3) the third party intentionally and improperly procured the breach of the contract; and (4) the breach resulted in damages to the plaintiff. Finley v. Giacobbe, 79 F.3d 1285, 1294 (2d Cir. 1996). Idema alleges that CBS' allegedly wrongful use of the VideoX tapes caused other news networks, with which he had separate contracts, "to violate their contracts and broadcast [his] 8mm VideoX al-Qaida Tapes without licensing the tapes." (Countercl. ¶ 175.)

The Second Circuit has held claims for tortious interference based on unauthorized publication of a work protected by the Copyright Act to be preempted. See Harper & Row, 723 F.2d at 201, accord, Kamakazi Music Corp. v. Robbins Music Corp., 522 F. Supp. 125, 137 (S.D.N.Y. 1981) (holding tortious interference with contract claim preempted because it "does not afford plaintiffs rights 'different in kind' from those protected by the copyright laws), aff'd, 684 F.2d 228 (2d Cir. 1982). "The fact that a tortious interference claim contains additional elements of awareness and intentional interference, not part of the copyright infringement claim, goes merely to the scope of the right; it does not establish qualitatively different conduct on the part of the infringing party, nor a fundamental

nonequivalence between the state and federal rights implicated.” Harper & Row, Publishers, Inc. v. Nation Enters., 501 F. Supp. 848, 853-54 (S.D.N.Y. 1980); see Am. Movie Classics, 922 F. Supp. at 932 (tortious interference with contract claim preempted); see also 1-1 Nimmer on Copyright § 1.01[B][1][a][ii] (“[T]he fact that the tort, unlike copyright infringement, requires awareness of the conflicting contract and an intentional interference with it merely means the state-created right is narrower than its copyright counterpart, not that it is qualitatively different so as to preclude preemption”). Interference with contractual relations claims differ from interference with prospective economic advantage in that “malice -- the intent to injure the plaintiff -- is not a requirement” of the former. See Harper & Row, 501 F. Supp. 848, 853 n.12 (S.D.N.Y. 1980), aff’d, 723 F.2d 195 (2d Cir. 1983).

The Court finds that since Idema’s claim of tortious interference appears to be rooted in the alleged impairment of his right to prepare derivative works and distribute them, it is preempted by the Copyright Act. Accordingly, CBS’ Motion for Judgment on the Pleadings as to Counter-Plaintiffs’ tortious interference with contract Counterclaim is GRANTED.

5. Civil Conspiracy Counterclaim is Pre-empted

Idema alleges the CBS "and their agents and employees" engaged in wrongful conduct as part of a conspiracy to "exercise dominion and control over property to which CBS had no rights and deprive counter-plaintiffs of income derived from their *8mm VideoX Tapes*." (Countercl. ¶ 179.) CBS allegedly spoiled evidence and documents and made intentionally false statements "to conceal the genesis of the *VideoX Tapes*[,] . . . CBS' use of counter-plaintiff's property[,], and CBS' violations of contract." (*Id.* ¶ 180.)

Although "several cases have held civil conspiracy claims pre-empted," 1-1 Nimmer on Copyright § 1.01[B][1][j] n.185, the Court need not address that issue, as New York does not recognize an independent cause of action for civil conspiracy. In re Houbigant, Inc., 914 F. Supp. 964, 989 (S.D.N.Y. 1995); Innovative Networks, Inc. v. Satellite Airlines Ticketing Ctrs., Inc., 871 F. Supp. 709, 731 (S.D.N.Y. 1995). "Since civil conspiracy is a derivative claim under New York law, a claim for conspiracy should be dismissed if the underlying tort claim either is not adequately pleaded or has been dismissed." Briarpatch Ltd., L.P. v. Geisler Roberdeau, Inc., 2007 U.S. Dist. LEXIS 27001, at *75-76 (S.D.N.Y. 2007). The Court finds that

Counter-Plaintiffs' civil conspiracy Counterclaim is a mere reiteration of their breach of contract Counterclaim and therefore also preempted by federal copyright law. Accordingly, CBS' Motion for Judgment on the Pleadings as to Counter-Plaintiffs' civil conspiracy Counterclaim is GRANTED.

6. Interference with Prospective Economic Advantage Counterclaim Fails to State a Claim

In his Counterclaim for tortious interference with prospective economic advantage, Idema alleges that CBS harmed his relationship with various U.S. and foreign news networks by allowing other networks to obtain footage of the VideoX tapes without licensing. (Countercl. ¶¶ 168-70.) CBS allegedly "had knowledge of most if not all" of Idema's purported business relationships and sought intentionally to harm Idema's relationships with these "third parties." (Id. ¶¶ 169-70.) Idema further alleges that had it not been for CBS "falsely reporting the facts of [his] Afghan criminal case" and thereby inducing "other news agencies to refrain from entering into licensing contracts with Counterr Group and Idema," his licensing contracts with other U.S. news networks "would have continued and/or ensued." (Id. ¶¶ 171-72.)

Under New York law, to state a claim for tortious interference with prospective economic advantage, the plaintiff

must allege that "(1) it had a business relationship with a third party; (2) the defendant knew of that relationship and intentionally interfered with it; (3) the defendant acted solely out of malice, or used dishonest, unfair, or improper means; and (4) the defendant's interference caused injury to the relationship." Kirch v. Liberty Media Corp., 449 F.3d 388, 400 (2d Cir. 2006) (quoting Carvel Corp. v. Noonan, 350 F.3d 6, 17 (2d Cir. 2003)). "To properly plead this claim, 'the complaint must allege interference with a specific identified business relationship with a third party.'" RBS Holdings, Inc. v. Wells Fargo Century, Inc., 485 F.Supp.2d 472, 479-80 (S.D.N.Y., 2007) (quoting Camp Summit of Summitville v. Visinski, No. 06 Civ. 4994, 2007 WL 1152894, at *14 (S.D.N.Y. Apr. 16, 2007); see also Gianni Versace S.P.A. v. Versace, No. 01 Civ. 9645, 2003 WL 470340, at *2 (S.D.N.Y. Feb. 25, 2003) ("A properly pleaded counterclaim for this tort must allege relationships with specific third parties with which the respondent interfered."). Idema does not allege with what organizations he had a business relationship, claiming broadly to have had connections with "each of the major US news networks[] and numerous foreign news networks." (Countercl. ¶ 168.)

Even if Idema did properly identify specific news agencies with whom he carried on a business relationship, he has failed to make a showing of "malice" or "improper means." "Because 'greater protection is accorded an interest in an existing contract . . . than to the less substantive, more speculative interest in a prospective relationship,' courts require 'proof of more culpable conduct on the part of the interferer' to impose liability on defendants who interfere with prospective business relationships than they require to impose liability on defendants who interfere with existing contracts." Vinas v. Chubb Corp., 06 Civ. 10233 (HB), 2007 WL 1741858, at *5 (S.D.N.Y. June 14, 2007) (quoting Masefield AG v. Colonial Oil Indus., 2006 U.S. Dist. LEXIS 5792, at *25-26 (S.D.N.Y.2006)). Idema has not made a showing that CBS acted "solely out of malice." In fact, it is likely that the alleged rebroadcasts of the tapes on CBS programs and on a CNN show devoted to celebrating the work of a CBS correspondent (Countercl. ¶¶ 93, 96) were motivated by the network's economic self-interest, and it is clear that "economic motivation, even if somewhat attenuated . . . counsels against such a finding of malice." Vinas, 2007 WL 1741858 at *5. Further, Idema has failed to allege properly "improper" conduct, which "must amount to a crime

or an independent tort” Id. The Court therefore finds that Counter-Plaintiffs have failed to state a Counterclaim for interference with prospective economic advantage.

Accordingly, CBS’ Motion for Judgment on the Pleadings as to Counter-Plaintiffs’ interference with prospective economic advantage Counterclaim is GRANTED.

7. Fraud Counterclaim is Duplicative of the Breach of Contract Counterclaim

Idema’s fraud Counterclaim alleges that “CBS never intended to destroy their copies of the *8mm VideoX al-Qaida Tapes* even though [CBS] repeatedly promised this would be done, and even though they later assured [Idema] that it was done.”

(Countercl. ¶ 71.) CBS also allegedly never had “any intention of ever paying licensing fees again,” despite assurances by two CBS executives that CBS “would continue to license the tapes and pay new licensing fees each time” it wanted to air the *VideoX* tapes. (Id. ¶¶ 67, 71.) Moreover, CBS allegedly assured Idema “that the January 2, 2002 letter outlining specific damages per incident would remain in full force and effect if CBS New or 60 MINUTES were to air any of the footage . . . in violation of the contract.” (Id. ¶ 70.) CBS moves to dismiss this Counterclaim on the grounds that it fails to satisfy the special pleading requirements of Fed. R. Civ. P. 9(b) and that it is duplicative

of the breach of contract Counterclaim. (CBS Mem. in Supp. Mot. on Counterclaims 1-6 [hereinafter "CBS Mem. Mot. #1"] at 21-22.)

To state a claim for fraud in New York, a plaintiff must allege "(1) a material, false representation; (2) an intent to defraud thereby; (3) reasonable reliance on the representation; and (4) damage to the plaintiff." Roso v. Saxon Energy Corp., 758 F. Supp. 164, 168 (S.D.N.Y. 1991) (citing Katara v. D.E. Jones Commodities, Inc., 835 F.2d 966 (2d Cir. 1987)). "A fraud claim should be dismissed as redundant when it merely restates a breach of contract claim." First Bank of Ams. v. Motor Car Funding, Inc., 690 N.Y.S.2d 17, 20-21 (1st Dept. 1999); see also Sudul v. Computer Outsourcing Servs., 868 F. Supp. 59, 62 (S.D.N.Y. 1994) ("[W]here a fraud claim arises out of the same facts as plaintiff's breach of contract claim, with the addition only of an allegation that defendant never intended to perform the precise promises spelled out in the contract between the parties . . . plaintiff's sole remedy is for breach of contract."). To maintain a claim of fraud alongside one for breach of contract, a plaintiff must either: "(i) demonstrate a legal duty separate from the duty to perform under the contract . . . or (ii) demonstrate a fraudulent misrepresentation collateral or extraneous to the contract." Bridgestone/Firestone, Inc. v.

Recovery Credit Servs., Inc., 98 F. 3d 13, 20 (2d Cir.

1996) (citations omitted).

Counter-Plaintiffs do not allege that CBS owed them a separate legal duty outside of the January 11, 2002 agreement for the broadcast rights to the VideoX tapes. Idema alleges that he "read the contract in detail," (Countercl. ¶ 78), as is apparent from the four handwritten alterations made to the licensing agreement and initialed by both Idema and a CBS executive. (See Sproul Decl. Ex. B.) Idema felt compelled to write-in the "no library rights" clause, which was also originally proffered to him orally by CBS executives, but apparently felt no such compulsion to include the \$100,000 liquidated damages provision he alleges was promised to him. (Countercl. ¶ 70.) The Court therefore finds that Idema's "claim that he was fraudulently induced by pre-contractual promises is defeated by the stark fact that it was within his power to incorporate those promises-in enforceable terms-into the [agreement]." Alter v. Bogoricin, No. 97 Civ. 0662 (MBM), 1997 WL 691332, at *9 (S.D.N.Y. Nov. 6, 1997). Idema's "failure to do so reflects either his own inconvenient candor or his lack of foresight, but not fraud." Id. The Court therefore finds that Counter-Plaintiffs' allegations that CBS never intended to destroy or to re-license

the tapes are merely duplicative of their breach of contract Counterclaim. (Countercl. ¶¶ 66-67.)

Accordingly, CBS' Motion for Judgment on the Pleadings as to Counter-Plaintiffs' fraud Counterclaim is GRANTED.

C. Motion on Counterclaim 7: Defamation

Counter-Plaintiffs' Seventh Counterclaim alleges that CBS defamed them by having "intentionally misreported the facts of Idema's arrest in July 2004 [in Afghanistan by Afghan government authorities] and thereafter by repeatedly making and republishing false statements." (Countercl. ¶¶ 195-96.) Specifically, Idema alleges that CBS reported that he and his team of mercenaries abused eight Afghan prisoners, which allegedly CBS knew to be false because its reporters had been to Idema's compound the week of his arrest and had "seen the conditions and treatment of all prisoners." (Id. ¶ 198.) The accusations of torture that underlie Idema's defamation claim originated from Afghan Interior Minister Ahmad Ali Jalali. Jalali allegedly accused Idema and his team of "running a torture chamber" and of "torturing innocent Afghans." (Id. ¶¶ 140-41.) CBS also allegedly reported -- although it is unclear exactly when and through what medium it is alleged to have done so -- that the Interior Minister had said that Idema had had

"innocent Afghans hanging from the ceiling of his basement," that Idema's prisoners were being "abused, tortured, and starved" and that Idema and his men were simply "rounding up innocent Muslims with long beards." (Id. ¶ 140.)

On July 8, 2004, CBS reported on Idema's arrest and quoted an anonymous official as saying that Idema's eight prisoners were "hanging upside down." (Woods Decl. Ex. A.) In a July 14, 2004 story, CBS reported that "an Afghan security official has told the [Associated Press] that prisoners were found hanging from their feet in the private jail and showed signs of being beat." (Id. Ex. B.) On July 21, 2004, CBS reported on the courtroom testimony of three "ex-detainees" of Idema's compound. (Id. Ex. C.) The first witness was quoted as having testifying to the court that Idema and his team poured boiling water on him. (Id.) Another witness had testified that "his head was forced repeatedly under the surface of a basin of water and that he was beaten on the feet and stomach . . . He said he was fed two pieces of bread in seven days." (Id.) A third witness had testified that "he wasn't allowed to go to the toilet for 24 hours and was also beaten." (Id.) On August 24, 2004 CBS published another story on Idema's trial, in which they quoted an un-sworn statement from the first witness described in the July 21, 2004 story reiterating his earlier testimony that he

was tortured with "hot water." (Id. Ex. E.) Idema alleges that CBS reporters had been present during that particular prisoner's interrogation and that they knew that the prisoner was in fact "well-treated," but reported the allegation of mistreatment nonetheless. (Countercl. ¶ 200.) Idema and his men were eventually "convicted of running a private prison, [and] illegally arresting and torturing suspected terrorists." (Sproul Decl. Ex. A at 21.)

CBS moves for a judgment on the pleadings as to Counter-Plaintiffs' defamation Counterclaim on the grounds that the statements allegedly published by CBS "accurately chronicle Idema's arrest, trial, and incarceration and are therefore fully protected by New York's fair report privilege, regardless of whether the underlying charges against Idema are true." (CBS Mem. Mot. #2 at 1.) CBS argues, therefore, that its reporting regarding Idema was protected by New York's "fair reporting privilege", codified at Section 74 of the New York Civil Rights Law. Idema contends that the fair reporting privilege does not apply to foreign court proceedings, that CBS' report on the statements made by the Afghan Interior Minister prior to the trial and the testimony of witnesses at trial are not "official proceedings" for the purposes of the

fair reporting privilege and that CBS' stories do not constitute "fair and true" reports.

1. The Fair Reporting Privilege

Section 74 of the New York Civil Rights Law provides, in pertinent part, that:

A civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding . . .

N.Y. Civ. Rights Law § 74. The fair reporting privilege applies only where (1) the allegedly defamatory statement is connected to a judicial proceeding; and (2) the statement fairly and accurately reports the judicial proceeding. See Wenz v. Becker, 948 F. Supp. 319, 322 (S.D.N.Y. 1996) (citing Phillips v. Murchison, 252 F. Supp. 513, 516 (S.D.N.Y. 1966), rev'd on other grounds, 383 F.2d 370 (2d Cir. 1967)); see also Williams v. Williams, 23 N.Y.2d 592, 599 (N.Y. 1969) ("The purpose of section 74 of the Civil Rights Law . . . is the protection of reports of judicial proceedings . . .").

"Allegedly defamatory statements are protected by Section 74 only where the statements report on a judicial proceeding." Wenz, 948 F. Supp. at 323. If the context in which the statements are made make it "impossible for the ordinary viewer to determine whether defendant was reporting on a trial or simply from interviews and independent research, the absolute statutory

privilege does not attach.” Id. (quoting Corporate Training Unlimited, Inc. v. NBC, 868 F. Supp. 501, 509 (E.D.N.Y 1994)).

“New York courts and federal courts employing New York law have liberally interpreted the meaning of fair and true.” Easton v. Pub. Citizens, Inc., No. 91 Civ. 1639 (JSM), 1991 WL 280688, at *3 (S.D.N.Y. Dec. 26, 1991); see Holy Spirit Assoc. for Unification of World Christianity v. New York Times Co., 399 N.E.2d 1185, 1187 (N.Y. 1979) (“[w]hen determining whether an article constitutes a ‘fair and true’ report, the language used therein should not be dissected and analyzed with a lexicographer’s precision.”). “For a report to be ‘fair and true’ within the meaning of [Section 74] . . . it is enough that the substance of the article be substantially accurate.” Holy Spirit, 399 N.E.2d at 1187; Karedes v. Ackerley Group, Inc., 423 F.3d 107, 119 (2d Cir. 2005).

“A report is ‘substantially accurate’ if, despite minor inaccuracies, it does not produce a different effect on a reader than would a report containing the precise truth.” Zerman v. Sullivan & Cromwell, 677 F. Supp. 1316, 1322 (S.D.N.Y.1988). The test for determining whether a report is substantially accurate is “whether the published account of the proceeding would have a different effect on the reader’s mind than the actual truth, if published. If the published account, along with the rest of the

article, suggests more serious conduct than that actually suggested in the official proceeding, then the privilege does not attach, as a matter of law." Daniel Goldreyer, Ltd. v. Van De Wetering, 217 A.D.2d 434, 436 (1st Dep't 1995) (citations omitted), accord, Calvin Klein Trademark Trust, 129 F.Supp.2d 248, 253 (S.D.N.Y. 2001); see also Karedes, 423 F.3d at 119. Nor are statements privileged if a "reasonable viewer" would not understand such statements to be reports of a judicial proceeding. See Gonzalez v. Gray, 69 F. Supp. 2d 561, 570 (S.D.N.Y. 1999).

2. New York's Fair Reporting Privilege Bars Counter-Plaintiffs' Defamation Counterclaim

Although New York courts have not expressly so held, it appears that the New York fair reporting privilege includes within its ambit, fair reporting on the acts of foreign governments, agencies or officials. See, e.g., Sharon v. Time, Inc., 599 F. Supp. 538, 542-43 (S.D.N.Y. 1984) (noting in dicta that fair reporting privilege would apply to statements contained in an official Israeli government report); Saenz v. New York Tribune, 290 N.Y.S. 316, 324 (N.Y. Sup. Ct. - N.Y. Co. 1936) (court held a report on an indictment issued by the Cuban government to be privileged under the common law fair reporting privilege); Kyu Ho Youm, Republication of Foreign Government Statements: The Fair Report Privilege in U.S. Libel Law Reexamined, 6 Comm. L. & Pol'y

393, 441 (2001) ("New York courts have since 1936 almost invariably accepted the applicability of the privilege to republication of foreign government statements"); but see Corporate Training Unlimited, Inc. v. NBC, 868 F. Supp. 501, 508-09 (E.D.N.Y 1994) (noting that the issue of whether New York's fair reporting privilege applies to foreign court proceedings "must await determination in another forum," since the defendant's news report did "not even purport to be a report of [an] Icelandic trial"); Sack on Defamation: Libel, Slander & Rel. Prob. § 7.3.2, 7-28 Protections for Reporting False Statements (2006) ("Case law as to whether reports of the proceedings of foreign courts and other agencies fall within the privilege is sparse and contradictory"). In Sharon, plaintiff Ariel Sharon had filed a defamation suit against Time magazine for republishing an Israeli Commission's conclusion that he had been partially responsible for the infamous massacre of Palestinian refugees at the Sabra and Shatila refugee camps outside of Beirut, Lebanon during Israel's invasion of that country in 1982. Judge Sofaer noted in dicta that the plaintiff "did not base his suit on the overall thrust of Time's critical article, most of which is absolutely protected either as opinion or as the fair report of a judicial proceeding." 599 F. Supp. at 542-43 (emphasis added). Moreover, in the most recent case where the

application of the fair reporting privilege to a foreign proceeding was presented to a New York court, the Appellate Division, First Department held that a Time magazine article referring to a report issued by the Dutch Ministry of Justice was absolutely privileged under Section 74. See Goldreyer, 217 A.D.2d at 435. The Court therefore holds that, in light of Sharon, Saenz and Goldreyer, and in the absence of any controlling authority to the contrary, New York's fair reporting privilege, as codified in N.Y. Civ. Rights Law § 74, applies to CBS' reports on Idema's criminal proceedings in Afghanistan, provided that those reports constituted accurate reports thereof.

a. Statements by the Interior Minister

Idema argues the statements made by Interior Minister Jalali that CBS had republished were "made as informal accusations, [] not part of any official proceeding," and therefore are not privileged. (Mem. Opp'n Mot. #2 at 2.) Idema further contends that even if the statements do qualify as a report on an official proceeding, CBS' stories do not constitute "fair and true" reports within the meaning of N.Y. Civ. Rights Law § 74 because "torture [was] not a part of [his] record, indictment, or conviction." (Id. at 3.)

Although the Interior Minister's alleged accusations were not made during an official proceeding, they pertained to a pending judicial proceeding that commenced with Idema's arrest. It is clear that statements made in connection with official police conduct are privileged as reports on official proceedings. See, e.g., Law Firm of Daniel P. Foster, P.C. v. Turner Broad. Sys., Inc., 844 F.2d 955 (2d Cir. 1988) (CNN report on an FBI statement concerning the execution of a warrant to be absolutely privilege as report on official proceedings); Kramer v. News Syndicate Co., 20 N.Y.S.2d 700, 701-02 (1st Dep't 1940) (article setting forth charges against arrested plaintiff, although exaggerated, was privileged as official report).

The Court also finds that CBS' reports on the Afghan Interior Minister's statements were "substantially accurate" and that they did not suggest conduct more serious than that for which Idema was eventually tried and convicted. That the Interior Minister accused Idema of torturing Afghan detainees is nothing more than a recitation of the allegations eventually put forth at Idema's trial --allegations that the Afghan court had ultimately found. (See Sproul Decl. Ex. A.) The Interior Minister's only novel contention was that Idema had detainee's "hanging from the ceiling of his basement." (Countercl. ¶ 140.) However, as

demonstrated in civil cases applying fair reporting privilege, even if a party makes an accusation not incorporated into the complaint, the court will consider the statement "in light of the totality of the circumstances" to determine whether "it constitutes background to the misconduct attributed to the [defendant] in the complaint rather than a separate and independently defamatory accusation." Ford v. Levinson, 454 N.Y.S.2d 846, 848 (1st Dep't 1982) (claim made by attorney, though not part of complaint, is privileged). The Interior Minister's alleged statement may thus fairly be considered background information on the misconduct for which Idema and his men eventually stood trial and were convicted. That Idema alleges CBS knew the statements it published were false is of no consequence, as malice does not defeat the privilege accorded by Section 74 to reports of judicial proceedings. See Phillips v. Murchison, 252 F. Supp. 513, 521 (S.D.N.Y. 1966). Accordingly, the Court finds that CBS' republication of the Interior Minister's statements was privileged.

b. Testimony of the witnesses

A party's "statements at trial, and the republication of those statements, are protected by the absolute privilege New York grants pertinent statements made in the course of judicial proceedings." Cipolla v. County of Rensselaer, 129 F. Supp. 436,

458 (N.D.N.Y. 2001) (holding false testimony made during criminal trial to be absolutely privileged). "Under New York law, statements that arise during the course of a judicial proceeding are absolutely immune from prosecution for defamation so long as they are reasonably related to that proceeding." Lehman Bros. Commercial Corp. v. China Int'l United Petroleum Chemicals Co., Ltd., No. 94 Civ. 8304, 1995 WL 608313, at *5 (S.D.N.Y. Oct. 16, 1995). Thus, CBS' reporting on the testimony of witness at Idema's trial was absolutely privileged.

Accordingly, CBS' Motion for Judgment on the Pleadings as to Counter-Plaintiffs' defamation Counterclaim is GRANTED.

III. CONCLUSION


For the foregoing reasons, Plaintiff CBS' Motion for Judgment on the Pleadings, pursuant to Fed. R. Civ. P. 12(c), with respect to each of Counter-Plaintiffs' Counterclaims, One through Six, is hereby GRANTED. Plaintiff's Motion for Judgment on the Pleadings on Counter-Plaintiffs' Seventh Counterclaim is also hereby GRANTED.

Plaintiff's Complaint seeks only a declaration that it had not breached its contractual obligations to Defendants Idema and

Counterr Group. As discussed above, the Court finds that the contract dispute at issue in Plaintiff's Complaint for declaratory relief is preempted by federal copyright law. Plaintiff's Complaint is therefore moot and is hereby DISMISSED WITH PREJUDICE. The Clerk of Court is directed to close the docket in this case. SO ORDERED.

Dated: New York, New York

August 26, 2008



DEBORAH A. BATTIS
United States District Judge