

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION

CVENT, INC.,

Plaintiff,

v.

EVENTBRITE, INC.,

and

STEPHAN FOLEY,

Defendants.

ECF CASE

Civil Action No. 1:10-cv-00481-LMB-IDD

**MOTION TO DISMISS FIRST AMENDED COMPLAINT AND  
MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**

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**Rules**

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Defendant Eventbrite, Inc. (“Eventbrite”) moves to dismiss Claims for Relief Two through Eight of Plaintiff Cvent, Inc.’s (“Cvent”) First Amended Complaint (“FAC”) pursuant to Fed. R. Civ. P. 12(b)(6). For the reasons set forth below, those Claims for Relief fail to state a cause of action. Eventbrite further moves to strike Cvent’s prayers for attorneys’ fees, statutory damages, punitive damages, and treble damages, as those forms of relief are not available pursuant to Cvent’s First Claim for Relief. This Motion is based on this Memorandum and the accompanying Request for Judicial Notice, the First Amended Complaint, the argument of counsel, and such other materials as the Court shall choose to consider.

## **I. INTRODUCTION AND STATEMENT OF FACTS**

This is a simple and trivial case.<sup>1</sup> Two years ago, a former employee of Eventbrite set out to create a set of pages on Eventbrite’s website containing a collection of publicly available information about hotels, restaurants, bars, and meeting venues in various cities. These pages were collateral to the central function of Eventbrite’s website, which was and is to allow people who are running events to promote and sell tickets to those events; the purpose of the “venue pages” was to introduce Eventbrite’s website to new users searching for venue information from search engines.

Most or all of the information in Eventbrite’s Venue Directory is publicly available: most of it is simply “cut and pasted” verbatim from the website of each hotel and restaurant. But rather than go to that effort himself, the former employee hired defendant Stephen Foley to “scrape” (i.e., copy) the information from Cvent’s website, strip out the parts that Cvent had added, and pass it over to Eventbrite. Eventbrite then formatted the material into its own layouts, and made it available on the Eventbrite website, where it sat virtually unused and forgotten for over a year.

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<sup>1</sup> The allegations by Cvent set forth herein are drawn from the First Amended Complaint, Docket Entry 35, which for purposes of this motion only are presumed to be true.

When Cvent discovered the Eventbrite pages, it made no effort to contact Eventbrite: no phone call, no e-mail, no cease-and-desist letter. Instead, the first Eventbrite knew of Cvent's claims was service of this suit and the accompanying motions for TRO and preliminary injunction. Upon receiving the complaint, Eventbrite immediately removed all of the allegedly infringing content *within three hours*, and agreed never to use any of it again. Stipulation and Consent Order, Docket Entry 24. Eventbrite did not profit off the content, and Cvent cannot articulate any harm it has suffered.

Notwithstanding those facts, Cvent has now filed an amended complaint, purporting to state no fewer than eight separate causes of action. There is considerable doubt whether Cvent can state a copyright claim against either defendant, *inter alia* for the fundamental reason that the material Cvent accuses Defendants of copying wasn't written by Cvent to begin with. And because Cvent did not register its purported copyrights until the eve of filing, it is barred from recovering either statutory damages or attorneys' fees. Eventbrite is therefore moving to strike Cvent's demand under the Copyright Act for attorneys' fees and statutory damages; the more fundamental defects in the copyright claim are for another day.

What is clear, as a matter of law, is that none of Cvent's seven *other* causes of action belong here, and should be dismissed. Lanham Act claims of "reverse passing off" of copyrighted works are barred by controlling U.S. Supreme Court precedent. *Dastar Corp v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003). Cvent's claim of "unjust enrichment" is preempted by the Copyright Act, as it alleges no act other than copyright infringement. Cvent's CFAA claims fail because there is no allegation that anyone improperly accessed Cvent's public website, and claims of subsequent misuse of lawfully accessed material do not give rise to CFAA claims. Cvent's Virginia Computer Crimes Act claims are preempted by federal law. Cvent's conspiracy claims fail because it is black letter law that one cannot conspire with one's own agent, and Cvent's complaint alleges that Mr. Foley was acting as Eventbrite's agent. And Cvent's contract claims fail against Eventbrite because (1) no contract was formed (2) by its own

terms that alleged contract does not apply to Eventbrite, and (3) the contract claim is preempted by copyright law.

Finally, the Court should strike any prayer for statutory damages, treble damages, punitive damages, or attorneys' fees, as no surviving claim can support any of those prayers.

## **II. ARGUMENT**

### **A. Cvent's Lanham Act Claim is Barred**

Cvent's Fourth Cause of Action, "Reverse Passing Off," purports to state a trademark claim based on Eventbrite's branding of its own website pages with its own trademark. Under Cvent's theory, because portions of that website were allegedly copied from Cvent's website, this constitutes "reverse passing off" of Cvent's products as originating from Eventbrite.

Under controlling Supreme Court precedent, and an unbroken line of subsequent authority, such claims are prohibited. Where the allegedly "passed off" product is intellectual property (such copyrighted works, patentable ideas, or trade secrets), the Lanham Act does not reach the alleged conduct.

In *Dastar*, the defendant had purchased videotapes of a 1948 World War II documentary, the Crusade in Europe. The copyright on that work had expired, and the defendant copied the tapes, edited them, and repackaged them as "World War II Campaigns in Europe," which it sold without attributing any credit to the Crusade television series. The owners of rights to the Crusade series sued, claiming reverse passing off.

The Supreme Court rejected that claim, holding that the Lanham Act reached only goods and services, and not the underlying ideas or expression, which are the exclusive province of patent and copyright law respectively. "[A]s used in the Lanham Act, the phrase 'origin of goods' is in our view incapable of connoting the person or entity that originated the ideas or communications that the 'goods' embody or contain." *Dastar*, 539 U.S. at 32. Thus the term "origin of goods" in 15 U.S.C. §1125(a)(1)(A) of the Lanham Act "refers to the producer of tangible goods that are offered for sale, and not to the author of any idea, concept, or communication embodied in those goods. . . . in accordance with the Act's common-law

foundations (which were *not* designed to protect originality and creativity) and . . . the copyright and patent laws (which *were*.” *Id.* at 37 (emphasis in original).

Following *Dastar*, courts have consistently rejected claims of reverse passing-off based on copying the work (copyrighted or otherwise) of others and passing it off as one’s own. For example, in *Smartix International Corp. v. MasterCard International LLC*, No. 06-cv-05174-GBD, 2008 WL 4444554 (S.D.N.Y. Sept. 30, 2008), the court rejected Lanham Act claims based on the allegation that the defendant “stole, from plaintiff’s computer server, plaintiff’s confidential and proprietary materials relating to the sports marketing program it was developing . . . replicated plaintiff’s marketing system, and are presently using and holding out such replicas as their own. *Id.* at \*1. The court rejected that claim, holding that “the unattributed copying of another’s designs and ideas does not give rise to a reverse passing off claim. *Id.* at 5. Similarly, in *Bob Creeden & Associates, Ltd. v. Infosoft, Inc.*, 326 F. Supp. 2d 876, 879 (N.D. Ill. 2004), the court rejected a Lanham Act claim based on selling order processing software “*directly derived from [plaintiff’s] system* and giving the false impression . . . that the system was its own.” (emphasis in original). And in *General Universal Systems, Inc. v. Lee*, 379 F.3d 131, 148-49 (5th Cir. 2004) the court held that defendant’s copying a freight tracking software program and marketing it as it own did not give rise to a Lanham Act claim. Myriad of other cases uniformly reach the same result. *See, e.g., Larkin Group, Inc. v. Aquatic Design Consultants, Inc.*, 323 F. Supp. 2d 1121 (D. Kan. 2004) (copied designs and marketing materials); *Align Technology, Inc. v. Orthoclear, Inc.*, No. 3:05-cv-02948-MMC, 2006 WL 2374608, at \*3 (N.D. Cal. Aug. 16, 2006); *Tao of Systems Integration, Inc. v. Analytical Services & Materials, Inc.*, 299 F. Supp. 2d 565, 572 (E.D. Va. 2004) (technical information and knowhow); *McArdle v. Mattel Inc.*, 456 F. Supp 2d 769, 783-84 (E.D. Tex. 2006); *J.B. Oxford & Co. v. First Tennessee Bank National Association*, 427 F. Supp. 2d 784 (M.D. Tenn. 2006) (copyrighted characters).

Under *Dastar* and its progeny, Cvent’s reverse passing off claim fails. Cvent’s sole basis for its claim is that Eventbrite has copied electronic material appearing on Cvent’s website, and then displayed copies of that material on its own website. Such conduct is actionable—if at all—

only via the Copyright Act.<sup>2</sup> Under clear Supreme Court precedent, the Lanham Act has no application here.

**B. Cvent’s Computer Fraud and Abuse Act Claims Fail**

Cvent next tries to elevate the alleged copying of publicly available, unprotected text from its website into a criminal hacking claim, purporting to state a claim under the Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (“CFAA”). This attempt fails. As literally dozens of courts (including this one) have now held, the CFAA does not prohibit unauthorized *use* of material to which the user had legitimate *access*. Rather, it prohibits only hacking or other unauthorized *access* to computer files. As all of the material at issue here was publicly available to the world, without even requiring a login or password, Cvent’s CFAA claims fail.<sup>3</sup>

This Court has recently addressed precisely this distinction, in *State Analysis, Inc. v. American Financial Services Association.*, 621 F. Supp. 2d 309 (E.D. Va. 2009). In that case, the Court was presented with CFAA claims against two defendants. One was accused of accessing a website using passwords that did not belong to it, while the other—just as Defendants here—was accused of using material to which it had lawful access in ways that violated the contract governing that access: “StateScape alleges that AFSA was ‘without authorization’ because it breached its contract with StateScape in which it agreed to provide access to StateScape’s services only to AFSA members.” *Id.* at 317. While sustaining the claim against the defendant using an unauthorized password, this Court rejected the claim against the other defendant (AFSA):

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<sup>2</sup> Cvent refers to its allegedly copied Destination Guide as containing “both copyrightable and non-copyrightable elements,” (Complaint at ¶81), but that distinction is irrelevant for Lanham Act purposes. Even if those “elements” such as “look and feel” are protectable at all other than by copyright (and it is unclear how they would be), Cvent’s claim is that Eventbrite has labeled those ideas or expression as its own—a claim that cannot stand under *Dastar*.

<sup>3</sup> Indeed, Cvent’s FAC does not allege that Eventbrite (as opposed to Foley) accessed the material at issue *at all*. The cause of action is stated against “Defendants” generally, but the factual allegations of access are all by Foley.

[T]he CFAA explicitly defines "exceeds authorization" as "to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter." 18 U.S.C. § 1030(e)(6). Nowhere in the Complaint does StateScape allege that AFSA obtained or altered any information it was not entitled to; rather, the allegation is that AFSA used the information in an inappropriate way. Such allegations do not state a claim for a violation of § 1030(a)(2).

*Id.*

The overwhelming weight of authority supports this Court's reading of the CFAA. For example, in the widely-cited case *LVRC Holdings LLC v. Brekka*, 581 F.3d 1127 (9th Cir. 2009), the court held that the CFAA did not reach the actions of an employee who misappropriated trade secrets by e-mailing them out of the company via his company e-mail account, rejecting an argument that acting without "authorization" under the CFAA extends to unauthorized uses of material to which the employee had authorized access. *See also University Sports Publications Co. v. Playmakers Media Co.*, \_\_\_ F. Supp. 2d \_\_\_, No. 09-cv-08206-RJH, 2010 WL 2802322, at \*3 (S.D.N.Y. July 14, 2010) ("Plaintiff's theory runs afoul of a persuasive line of recent precedent. [A]n employee with authority to access his employer's computer system does not violate the CFAA by using his access privileges to misappropriate information"); *Orbit One Communications, Inc. v. Numerex Corp.*, 692 F. Supp. 2d 373, 383 (S.D.N.Y. 2010) (misuse of information to which access was freely given does not violate CFAA); *Lewis-Burke Associates LLC v. Widder*, \_\_\_ F. Supp. 2d \_\_\_, No. 09-cv-00302-JMF, 2010 WL 2926161 at \*5-6 (D.D.C. July 28, 2010) *and cases cited therein* ("I am persuaded by the *Brekka* line of cases, which have recently gained critical mass . . . 'exceeds authorized access' should not be confused with 'exceeds authorized use.'").

Eventbrite is not alleged to have gained unauthorized access to any materials at issue in this case: all of the allegedly copied works were and are openly and anonymously available to the entire world on Cvent's public, unprotected website, from which Mr. Foley (or anyone else) is free to access them without restriction. Cvent's claim that Foley and Eventbrite thereafter made use of those materials in ways of which Cvent did not approve cannot convert a copyright

claim into a CFAA violation. Accordingly, Cvent cannot state a claim under the CFAA, and that purported claim must be dismissed.

**C. Cvent’s Virginia Computer Crimes Act Claim is Preempted by Federal Law**

Section 301 of the Copyright Act provides that “all legal or equitable rights that are equivalent to any of the exclusive rights [of copyright] are governed exclusively by this title.” 17 U.S.C. §301(a). Where a “claim under the Virginia Computer Crimes Act (‘CCA’) does not require proof of elements beyond those necessary to prove copyright infringement,” *Rosciszewski v. Arete Associates Inc.*, 1 F.3d 225, 230 (4th Cir. 1993), that claim is preempted.

In *Rosciszewski*, the Fourth Circuit rejected claims on all fours with this case, holding that a CCA claim alleging copying of a computer program without authority and in breach of an employment contract was preempted:

[W]e hold that the protection of computer programs from unauthorized copying granted under [the CCA] is equivalent to the exclusive right of the copyright owner to reproduce a copyrighted work under the Copyright Act. Therefore, *Rosciszewski*’s cause of action under this section is preempted to the extent that it is based on reproduction of the copyrighted computer program.

*Id.* at 230.

More recently, this Court has found copyright preemption of CCA claims in similar circumstances, where the defendant repeatedly accessed the plaintiff’s computer systems using an unauthorized password and downloaded copyrighted works. *State Analysis*, 621 F. Supp. 2d at 309 (E.D. Va. 2009).

The result here is no different. Because the elements of the copyright and CCA claims here are the same (copying of Cvent’s allegedly copyrighted works from its website without authority), the Copyright Act preempts Cvent’s CCA claim.

**D. Cvent’s Unjust Enrichment Claim is Preempted by the Copyright Act**

Cvent’s “unjust enrichment” claim fares no better: it is also preempted by the Copyright Act. Cvent’s purported claim is based entirely on its allegation that Eventbrite copied material from Cvent’s website and “sold” it as its own. As that allegation contains no elements other than bare copying and distribution, it is preempted. *See, e.g., Briarpatch Limited, L.P. v. Phoenix*

*Pictures, Inc.*, 373 F.3d 296 (2d Cir. 2004) (unjust enrichment claim based on derivative work preempted); *Microstrategy, Inc. v. Netsolve, Inc.*, 368 F. Supp. 2d 533 (E.D. Va. 2005) (unjust enrichment claim for exceeding software license preempted); 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 1.01[B][1]g (2003) (“a state law cause of action for unjust enrichment [is] pre-empted insofar as it applies to copyright subject matter”).

#### **E. Cvent’s Conspiracy Claims Fail**

Cvent’s conspiracy claims also fail. Simply put, one cannot conspire with oneself. “Acts of corporate agents are acts of the corporation itself.” *ePlus Technology, Inc. v. Aboud*, 313 F.3d 166, 179 (4th Cir. 1997) (citing *Bowman v. State Bank of Keysville*, 331 S.E. 2d 797, 801 (Va. 1985)); *see generally Fox v. Deese*, 362 S.E. 2d 699, 708 (Va. 1987) (adopting intracorporate immunity doctrine for Virginia conspiracy laws). As a result, a claim that one has conspired with one’s own agent fails. The only exception is when the agent has a personal stake in the corporation’s illegal objectives—a stake independent of the agent’s relationship to the corporation. *See ePlus*, 313 F.3d at 179.

Cvent alleges conspiracy between two actors only: Eventbrite and Foley. Specifically, Cvent alleges that Eventbrite hired and paid Foley to scrape data from Cvent’s website for use on Eventbrite’s website. Cvent does not—and cannot—allege that Foley had any reason to do this apart from the fact that Eventbrite hired him to do so.

Cvent repeatedly and correctly alleges that Foley was an “outside contractor” to Eventbrite, not an employee. But this makes no difference under Virginia law. Agency is determined by the substance—not the form—of the relationship between the corporation and the individual. *See American Chiropractic Ass’n, Inc. v. Trigon Healthcare, Inc.*, 367 F.3d 212, 223-24 (4th Cir. 2004) (citing *Oksanen v. Page Memorial Hospital*, 945 F.2d 696, 703 (4th Cir. 1991)) (both applying Virginia law). The *Oksanen* Court found that a hospital lacked the legal capacity to conspire with members of an independent peer review committee despite the fact that the two were legally distinct entities. *Id.* The Court reasoned that the corporation and the individuals had the same general objective, that the corporation had delegated its own tasks to

the individuals, and that the corporation kept control over ultimate decisionmaking. *Id.*; *see also American Chiropractic*, 367 F.3d at 223-25 (following *Oksanen* substance over form test to find intracorporate immunity). Similarly here, Cvent alleges that Eventbrite hired Foley to mine data for Eventbrite (and Eventbrite alone) and that Eventbrite and Foley had a common purpose in so doing. Given those allegations, Cvent cannot allege a conspiracy between Eventbrite and Foley.

**F. Cvent Cannot State a Breach of Contract Claim Against Eventbrite**

**1. No Contract Exists**

Cvent's final attempt to dress up its copyright claim as something more is a claim for breach of contract, based on Cvent's Terms of Use. This effort also fails, for several reasons.

First, no contract was ever formed between Cvent and Eventbrite. There is no allegation of a written or oral contract, and none exists. Instead, Cvent relies entirely on its "Terms of Use." But unlike many other websites, Cvent does not require users to assent to its Terms of Use in order to use its website: there is no "click through" agreement typical of such transactions, where the user is presented with the terms of the agreement and must click "I agree" or the like in order to proceed.

Instead, Cvent relies entirely on the provisions of the Uniform Computer Information Transactions Act ("UCITA"). UCITA is a prolix set of proposed uniform terms governing electronic transactions, which has been adopted into law in Virginia and Maryland (but nowhere else). UCITA provides that, in certain circumstances, a computer user may be deemed to have agreed to a contract by continuing to use a website after having been made aware of the terms, thus manifesting assent to those terms. In order to form such a contract, however, certain conditions must be met, none of which are met here.

First, UCITA requires that the user must have an opportunity to review the relevant terms. However, under UCITA a person "has an opportunity to review a record or term only if it is made available in [a] manner that ought to call it to the attention of a reasonable person and permit review." UCITA § 112(e)(1). As this section makes clear, this requires the relevant terms to be presented by "displaying prominently and in close proximity to a description of the

computer information, or to instructions or steps for acquiring it, the standard terms or a reference to an electronic location from which they can readily be obtained; or” by “disclosing the availability of the standard terms in a prominent place on the site from which the computer information is offered and promptly furnishing a copy of the standard terms on request before the transfer of the computer information.” *Id.* § 211(1)(A-B). As the comments to that section make clear, “the intent of the close proximity standard is that the terms or the reference to them would be called to the attention of an ordinarily reasonable person.” *Id.* § 211 cmt. 3.

Cvent’s Terms of Use utterly fail this standard. When a user visits Cvent’s website, she is presented with a page with dozens of choices, most prominently a means to search the Cvent Supplier Network to “find event venues.” [www.cvent.com](http://www.cvent.com), Request for Judicial Notice, Exh. 4.<sup>4</sup> There is no sign-in procedure, no requirement of agreement to anything, no notice that proceeding onward requires assent to a contract. Only by scrolling down to the next screen can the user see a list of tiny links among dozens of others under the heading “Company Info,” titled “Terms of Use.”<sup>5</sup> On all but the largest computer monitor, that link will never even appear at all—much less “prominently”—to a user searching for venue information. Following that link, in turn, will take the user to a series of subsequent pages where she will have to figure out which of three different Terms of Use apply to her, and follow the links to the appropriate agreement. *Id.*

When terms of service are not visible to the user without scrolling downward, courts reject claims that the user should be presumed to know of (and agree to) those terms. As the

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<sup>4</sup> We attach to the Request for Judicial Notice “screenshots” of the relevant pages from Cvent’s website. In each instance, we include both an example of how the page appears on a typical computer and browser, and a printout of the entire content of the webpage (which in some instances takes multiple printed pages). There is, however, no such thing as a “correct” printout of any webpage, as what the user sees will depend on the size of her monitor and the choice and settings of her browser. The best way to see what a user sees is to visit the website itself, at [www.cvent.com](http://www.cvent.com).

<sup>5</sup> Although not attached to the FAC, the allegedly relevant portions are recited (and thus incorporated by reference) at ¶¶18-21.

Second Circuit recently held (on much stronger facts than Cvent's), "[r]easonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility. [A] reasonably prudent offeree in plaintiffs' position would not have known or learned . . . of the reference to [the] license terms hidden . . . on the next screen." *Specht v. Netscape Comm'ns Corp.*, 306 F.2d 17, 35 (2d Cir. 2002)<sup>6</sup>; *see also Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393 (2d Cir. 2004) ("We ruled against Netscape . . . because the users would not have seen the terms Netscape exacted without scrolling down their computer screens . . .").

Once a Cvent user searches for venue information, by selecting a city in the search box, she is taken to another page, which presents data about hotels and other venues in the selected city. [www.cvent.com](http://www.cvent.com), Request for Judicial Notice, Exh. 4. Again, the tiny link to the Terms of Use does not appear at all unless the user scrolls down through pages of individual hotel listings, and then once again only as a link buried in "Company Information." At no point is the user asked to review the Terms of Use, or told that use of the website is conditioned upon those Terms of Use, or anything else. Under no stretch of the imagination can those terms be described as "prominently displayed."

Neither does Cvent's website satisfy the independent requirement that a user manifest assent to the contractual terms. Although UCITA allows assent to be manifested by continued use of the service, such assent requires that the user "intentionally engages in conduct or makes statements *with reason to know that the other party or its electronic agent may infer from the conduct or statement that the person assents to the record or term.*" UCITA §112(a)(2) (emphasis added). Thus, for example, if the Terms of Use or website said something like "by

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<sup>6</sup> Interestingly, *Specht* appears to be the only published judicial discussion of UCITA's notice and assent provisions, even though it is not from a UCITA jurisdiction. The principles under UCITA are the same, as they are drawn from existing common law. *See* Official Comment to Section 114 ("The term "manifesting assent" comes from *Restatement (Second) of Contracts* § 19.").

continuing to use this service, you agree to these terms,” the user might have “reason to know” that Cvent viewed this as assent. The problem is that nowhere—either on the website or within the Terms of Use—does Cvent make any such statement. The *only* thing a user sees—assuming that user does a lot of hunting—is a tiny link to “Terms of Use,” leading indirectly to a document that gives no indication how one would assent to it if one wished. On this basis as well, Cvent’s UCITA-based formation argument fails. *Specht*, 306 F.2d at 35 (“unambiguous manifestation of assent to those terms by consumers are essential”); *see also Southwest Airlines Co. v. BoardFirst L.L.C.*, No. 3:06-cv-00891-JJB, 2007 WL 4823761, at \*5 (N.D. Tex. Sept. 12, 2007) (“[T]he validity of a browsewrap license turns on whether a website user has actual or constructive knowledge of a site’s terms and conditions prior to using the site”); Mark A. Lemley, *Terms of Use*, 91 Minn. L. Rev. 459, 477 (2006) (“Courts may be willing to overlook the utter absence of assent only when there are reasons to believe that the defendant is aware of the plaintiff’s terms.”).

## 2. Eventbrite is Not a Party to the Alleged Contract

Even if Cvent’s Terms of Use could be deemed to have been assented to by conduct, Eventbrite would not be a party to them, for at least two distinct reasons. First, there is no allegation in the FAC that Eventbrite—as opposed to Foley—ever assented to them. Although the FAC details repeated acts of access and copying by Foley (*see, e.g.*, FAC ¶¶ 33, 37, 40), there are no such allegations regarding Eventbrite. Thus even if Foley could be shown to have knowingly assented to the contract by accessing the Cvent website (and as asset forth above, he cannot), that is not sufficient to make *Eventbrite* a party to a contract with Cvent.

More fundamentally, the Cvent Terms of Use by their express terms do not apply to either Foley or Eventbrite at all. Rather, the Terms of Use appear to define “Parties” (under the heading of “Responsibilities of the Parties”) as “Registered Users and Suppliers.” Those two terms, although capitalized, are not defined elsewhere, but it is undisputed that neither Foley nor Eventbrite was ever a registered user of Cvent’s services. The agreement contains a separate definition of “Users” (which it does not include within “parties”) as “meeting and event

planners,” neither of which applies to either Foley or Eventbrite. And in still other places, the agreement purports to set forth rules for “You” (undefined) and “competitors and future competitors.” But unless such competitors such as Eventbrite are parties to the agreement (and they plainly are not), then they cannot be deemed to have entered into a *contract* with Cvent, and an expression of Cvent’s desires as to their conduct, even if contained in Cvent’s form contract with *other* parties, is of course not binding on them. Eventbrite is not a party to any contract with Cvent.

### **3. Any Contract Claim Against Eventbrite is Preempted**

Finally, even if Cvent could overcome all of these issues, its breach of contract claims against Eventbrite still conflate back into nothing more than a claim of copyright infringement, which is preempted. The allegations against Eventbrite are simple: that it copied content from Cvent’s website, and displayed it as its own. This claim is preempted. “Where a plaintiff’s breach of contract claim only asserts that a defendant violated a promise not to use a certain work, that breach of contract claim is preempted.” *Firoozye v. EarthLink Network, Inc.*, 153 F. Supp. 2d 1115, 1126 (N.D. Cal. 2001), *citing Wrench LLC v. Taco Bell Corp.*, 256 F.3d 446, 457-9 (6<sup>th</sup> Cir. 2001); *see also Selby v. New Line Cinema Corp.*, 96 F. Supp. 2d 1053, 1061-62 (C.D. Cal. 2000) (promise not to use plaintiff’s ideas “does not prohibit any conduct beyond that prohibited by the Copyright Act”); *Endemol Entertainment B.V. v. Twentieth Television Inc.*, No. 98-cv-00608-ABC, 1998 WL 785300 (C.D. Cal. Sept. 29, 1998).<sup>7</sup>

### **G. Cvent’s Prayers for Statutory Damages, Treble Damages, and Attorney’s Fees Should be Stricken**

Cvent’s Prayer for Relief includes a number of elements that are not recoverable as a matter of law. Similarly, to the extent this Court dismisses the various causes of action discussed

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<sup>7</sup> In contrast, if a contract also includes an obligation to *pay* for use of a work, such as in *Firoozye*, it can escape preemption. But there is no such additional element to Cvent’s contract or claim.

above, it should correspondingly strike the prayers for relief available only via those dismissed claims, as discussed below.

**1. Cvent's prayer for statutory damages and attorney's fees for its Copyright Act claim must be stricken**

Cvent seeks both statutory damages and attorney's fees in connection with its Copyright Act claim. However, section 412 of the Copyright Act bars any award of either statutory damages or attorneys fees if the work at issue was not registered at the time the infringement commenced.<sup>8</sup>

Curiously, Cvent's First Amended Complaint does not attach any copyright registration of the relevant work. Those registrations, however, are public records subject to judicial notice. There appear to be three copyright registrations by Cvent, each of which was filed in late April this year. Request for Judicial Notice, Exhs. 1-3. Two of those registrations purport to cover the entire "CVENT.COM" website, while the third purports to cover the "Cvent Supplier Network; published updates from August 1, 2008 to November 1, 2008."

Cvent's First Amended Complaint is unequivocal as to the dates of the alleged copying, stating that the acts occurred "between August 2008 and October 2008." FAC ¶ 32. Because Cvent did not register its purported copyrights until April, 2010, it is barred from recovering either statutory damages or attorney's fees.

**2. Cvent's treble damages, punitive damages, and attorney's fees prayers must be stricken**

Cvent also prays for treble damages "pursuant to the Lanham Act, 15 U.S.C. § 1117 and Va. Code Ann. § 18.2-500." FAC Prayer at D. As set forth above, both of those underlying claims are barred, and must be dismissed. Accordingly, the prayer for treble damages must also be stricken.

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<sup>8</sup> With certain exceptions (for registrations within three months of first publication and the like) not applicable here.

Similarly, to the extent this Court dismisses all Cvent's claims save for its Copyright Act claim, the prayer for fees must also be stricken, because attorney's fees are not available under that claim. Neither are punitive damages available under the Copyright Act. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 431 (1984) (the "remedies for infringement 'are only those prescribed by Congress.'"); *Nintendo of America, Inc. v. Aeropower Co., Ltd.*, 34 F.3d 246 (4th Cir. 1994) (no punitive damages under Copyright Act); *Oboler v. Goldin*, 714 F.2d 211, 213 (2d Cir. 1983) ("punitive damages are not available under the Copyright Act of 1976").

Because the alleged copyrights at issue were not registered at the time of infringement, the only permissible prayer for relief is for actual damages, if any. The remaining prayers are unsupported, and must be stricken.

### **III. CONCLUSION**

Cvent's First Amended Complaint states a bare claim for copyright infringement. Regardless of the factual failings of that claim, it survives a Rule 12(b)(6) motion. But because Cvent failed to register its purported copyright timely, that claim can only support a claim for actual damages, and there are none to recover. Cvent has therefore loaded up its complaint with seven additional claims, in hopes that one of them will open a door to statutory damages, treble damages, punitive damages, or attorney's fees—anything to disguise the fact that Cvent has suffered no compensable harm. As set forth above, none of those causes of action states a claim, and each should be dismissed. Moreover, the defects with those claims are inherent and incurable, so dismissal should be with prejudice. Finally, the Court should strike the elements of Cvent's prayer which are unavailable under its copyright claim.

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Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 10th day of August, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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