

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

THE TRUSTEES OF COLUMBIA UNIVERSITY IN
THE CITY OF NEW YORK,

Plaintiff,

v.

ENCYCLOPAEDIA IRANICA FOUNDATION, INC.,

Defendant.

Case No.: 1:19-cv-07465-AT-KNF

ENCYCLOPAEDIA IRANICA FOUNDATION, INC.,

Plaintiff,

v.

THE TRUSTEES OF COLUMBIA UNIVERSITY IN
THE CITY OF NEW YORK, ELTON DANIEL, AND
BRILL USA, INC.,

Defendants.

Case No.: 1:19-cv-08562-AT-KNF

**ENCYCLOPAEDIA IRANICA FOUNDATION, INC.'S OPPOSITION TO
DEFENDANTS' POST-HEARING BRIEF**

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I. INTRODUCTION

Through Dr. Yarshater's and EIF's collective efforts, they created, operated, managed, and provided financial stewardship of the *Encyclopaedia Iranica* for over 40 years and 30 years, respectively. Dr. Yarshater, a world renown and pre-eminent Persian scholar, authored and published hundreds of articles and edited scholarly works on Iranian history, heritage and culture, including the world renown *Encyclopaedia*. All of his work was self-funded from his own donations and grants and he raised millions of dollars in donations both personally and through his extensive connections throughout the world. He further had the foresight to create his Foundation, EIF, in 1990 to oversee the publication and funding of this work and to ensure that his vision and mission for the *Encyclopaedia* continued into the future—always with the understanding that Columbia was never a necessary or integral part to the past, present or future of the *Encyclopaedia*.

Despite these indisputable facts, Defendants begin their post-hearing brief by accusing EIF of lying to the Court concerning ownership of EIF's trademark ENCYCLOPÆDIA IRANICA. But it is Defendants who have mislead the Court by mischaracterizing the relevance of the terms “Center for Iranian Studies” and “Project of Columbia University,” neither of which has any significance as a matter of law in evaluating trademark ownership. Defendants have further mischaracterized many other facts and have disregarded the law regarding the creation and maintenance of trademark rights. Instead of addressing the merits, Defendants repeatedly use pejoratives, such as “laughable,” “spurious,” “brazen,” “ludicrous,” “Wall Street bankers,” and other allegations (e.g., “demonstrably false,” “falsely,” “lie,” and “flat-out lie”). However, these terms are more applicable to Defendants' attempts to justify their trademark counterfeiting, infringement, cybersquatting, false designation of origin, conversion, theft, and the unlawful withholding of EIF's property. Indeed, at its heart, this action is all about endowment money for Columbia and not the integrity and ownership of the *Encyclopaedia*.

II. STATEMENT OF FACTS

A. Misleading statements on the “Center for Iranian Studies” and the “Project.”

Columbia mischaracterizes the term “Center for Iranian Studies,” by equating it with itself, even though repeatedly admitting that the term does not identify a legal entity. *See* Ex. G at 2 (admitting that “[t]he Center is not a separate legal entity”); Ex. RRR at 2 ¶ 4; Tr. 189:25-190:6; ECF No. 1 at 3 ¶ 7.¹ The term actually refers to a physical location consisting of a few rooms in a Columbia-owned residential building at 450 Riverside Drive. Dr. Yarshater lived in this building and he independently developed the vision and mission for his *Encyclopaedia* project there. He selected and first used the ENCYCLOPÆDIA IRANICA trademark there and conducted his independent research and writing on all of his publications in this building—without any compensation, supervision, or control from or by Columbia. *See* Ex. 34 at 2 ¶ 6; Tr. 223:10-13. Later, he hired other editors, such Ashraf and Brunner, who were directed and paid by Dr. Yarshater or his Foundation, EIF. *See* Tr. 28:5-15, 49:16-17, 49:22-50:4. Indeed, testimony establishes that salaries and benefits of those who worked on the *Encyclopaedia* at all times were paid by Dr. Yarshater directly or through his foundations. Tr. 27:20-28:4, 29:3-30:4, 34:10-12, 35:6. Before 1997, Columbia was not involved in paying salaries, even though people like Kasheff began assisting Dr. Yarshater in 1974. Ex. VV (Kasheff CV) at 69.

In 1997, EIF paid Columbia to process payrolls and benefits for Ashraf and Ashtiany, who worked under Dr. Yarshater’s supervision. *See* Ex. KK. Looking at Ex. KK, Columbia overstates the role of the Center. Before 1990, the Center had no “employees”—although 4 volumes and 28 fascicles of the *Encyclopaedia* were created, published, and paid for by Dr. Yarshater. Exs. 13-15, S, JJ. Then according to Columbia, from 1990–2000 (when 6 volumes and 48 fascicles were published), the Center had only 3 “employees” (and 2 joining in 1997). *See* Ex. KK. Thus, if the term “Center for Iranian

¹ Unless otherwise noted, ECF references are to Case No. 19-cv-07465.

Studies” signifies anyone or anything, it identifies Dr. Yarshater himself and EIF, which operated independently with Columbia’s full knowledge and consent. *See* Ex. ZZ.

Dr. Yarshater (independent of Columbia) created and distributed his multi-volume publication under the trademark ENCYCLOPÆDIA IRANICA. While working from his “Center,” he created other works, such as his 20-volume Persian Literature Series, without any compensation, supervision, or control from or by Columbia from this location. *See* Tr. 223:2-8. The fact that Columbia owns the building where Dr. Yarshater conducted his independent work gives Columbia no ownership rights in the intellectual property created at that location.

The phrase “Center for Iranian Studies, Columbia University, New York” on the cover of fascicles merely denoted the address where Dr. Yarshater worked. *See* Tr. 42:6-16. There is no evidence that anyone, other than Dr. Yarshater, worked at this address in 1982, when he alone first placed the mark on the publication and sold it. *See* Exs. S, JJ. Thus, Dr. Yarshater himself was the “Center” and, as acknowledged by Columbia, the Center does not identify a legal entity. Because Columbia did not pay or control Dr. Yarshater’s publication work (Tr. 31:10-17, 155:14-18), any reference to the “Center” just denotes the place where he worked independently. Using the phrase as an address on contracts and fascicles does not now somehow result in trademark ownership. *See* Exs. 11, HHH, S; Tr. 183:7-19. Nor does the fact that this address was in a Columbia-owned building equate to trademark ownership.

Indeed, Dr. Yarshater was fiercely independent and never worked under the supervision or control of anyone at Columbia. *See* Tr. 167:23-168:13. The fact that Columbia bestowed the title “Director of the Center for Iranian Studies” on Dr. Yarshater, does not alter the fact that Columbia never compensated, supervised, or controlled any of his work on the *Encyclopaedia*—with or without this Director title. *See* Tr. 55:2-5, 167:23-168:13.

Dr. Yarshater’s reference to the *Encyclopaedia* as a “project of Columbia University” merely

indicates that Dr. Yarshater used the University as an administrator of funds and grants that he received to support the work that he created. The word “project” is not a term of art in trademark or copyright law and does not alter the fact that Dr. Yarshater and his successor-in-interest (EIF) qualified for trademark ownership by affixing the mark ENCYCLOPÆDIA IRANICA to the publication and selling it. *See* Tr. 37:4-21; Ex. S.

Per Dr. Yarshater’s vision, his “project” could be located at any university. He even specified in EIF’s By-Laws that EIF was solely responsible to select, at its own discretion, the institutional base of the *Encyclopaedia*. *See* Ex. 5 at § 1.1(D); Ex. 6 at § 1.1(D); Ex. C at 9.

B. Misleading statements about Columbia’s relationship with Dr. Yarshater.

Edsall claimed that Dr. Yarshater was employed continuously by Columbia until 2016. *See* ECF No. 99 at 2-3. Notably, she conceded, and various exhibits confirm, that Dr. Yarshater was never paid as “Director of the Center for Iranian Studies” from 1977–2010 and that he retired as a professor more than thirty years ago in 1990. *See* Exs. JJ, OO, SS, VV; ECF No. 99 at 2 ¶ 4; Tr. 220:16-22. Between 1990 and 2002, he was paid as a “Special Lecturer (part-time)” for 9 of the 12 years. *See* Ex. JJ; Tr. 219:5-24. Whether “special lecturer” means he was an independent contractor or employee is unclear. However, he worked on the *Encyclopaedia* from his retirement in 1990 until just prior to his death in 2018. Ex. JJ; Tr. 166:3-7. Even Edsall did not allege that any portion of the 40 years dedicated to the *Encyclopaedia* was within the scope of his employment as a professor or lecturer at Columbia. And no evidence was offered that Columbia controlled or directed his work on the *Encyclopaedia*. Thus, work on the *Encyclopaedia* was outside the scope of his employment at Columbia. The Court even questioned Edsall’s claim that Dr. Yarshater’s unpaid appointment as Director of a center made him an employee. *See* Tr. 223:10-224:5.

Columbia’s own exhibits show that it was Dr. Yarshater (not Columbia), who dealt with contributors to the *Encyclopaedia* and controlled the quality of their work. *See* Ex. AA (quality standards

for articles and honoraria paid by EIF); Ex. BB (assigning article topics).

C. Misleading statements about payment and control of EIF employees.

Employees who assisted Dr. Yarshater with the *Encyclopaedia* were paid by EIF. Dr. Yarshater and EIF paid their salaries and benefits and controlled their activities. *See* Tr. 27:20-28:4, 29:3-30:4, 34:10-12, 35:6. EIF’s Board Minutes show that EIF transferred funds to Columbia on a monthly basis for the payroll service Columbia provided and that EIF even remunerated Columbia for part-time employees. *See* Ex. 7 at 3 § 2(e), 6 § 5; Ex. 8 at 5, 6. The Board Minutes also show that the Executive Director, Ashraf, was employed by and reported to EIF’s Board and, at its direction, took positions adverse to Columbia. *See* Ex. 7 at 6-7.

EIF paid not only Ashraf’s salary but also Daniel’s salary while he reported to EIF’s Board up until the moment he decided to help Columbia take control of the *Encyclopaedia* away from EIF. *See* Ex. 201 (Daniel asking for EIF’s guidance regarding the *Encyclopaedia*’s book inventory); Tr. 181:13-16. Because those who worked on the *Encyclopaedia* were paid for and worked under the control of Dr. Yarshater and EIF, they were EIF’s employees. *See* Tr. 31:18-24; Ex. 7 at 3 § 2(e), 6; Ex. 8 at 5, 6. The fact that they received a payroll check from Columbia is irrelevant because the money came from EIF. *See* Tr. 27:20-29:7. Indeed, EIF’s Board Minutes provide confirmation that EIF paid salaries (e.g., Daniel, McCrone, and others), expenses, and costs to Columbia to fund the operations of the *Encyclopaedia*. *See* Ex. C-1 at 3 (noting that EIF’s budget covered “two new positions of Daniel and Ms. McCrone” and “\$78,000 in lease expense projections”).

D. Misleading statements about EIF’s ownership of the trademark.

Columbia has not even attempted to show that it met the affixation and sale requirements for proving ownership of the ENCYCLOPÆDIA IRANICA mark. Instead, Columbia claims that it executed the *Encyclopaedia*’s first printing contract instead of Dr. Yarshater. Yet, Dr. Yarshater hired Routledge & Kegan to print the *Encyclopaedia*. *See* Ex. HHH. “Center for Iranian Studies, Columbia

University, New York, USA” appears below his name and title. *Id.* Dr. Yarshater signed the agreement in his individual capacity because: (1) he did not sign as a representative of Columbia; (2) he had no authority to bind Columbia in a contract (Tr. 43:8-9, 13-18); (3) Columbia had no control over Dr. Yarshater (Tr. 167:23-168:13); (4) Dr. Yarshater (not Columbia) paid Routledge; (5) Dr. Yarshater (not Columbia) met the affixation and sale requirements for claiming common law trademark rights in the mark ENCYCLOPÆDIA IRANICA; and (6) Dr. Yarshater was the first person to “use” the mark in connection with an established trade or business within the meaning of 15 U.S.C. § 1127.

Dr. Yarshater also contracted with subsequent printers through his Foundations. First, he used Persian Heritage Foundation (PHF), and then he used EIF to affix the mark on the products and sell them. *See* Ex. 10; Tr. 156:24-157:4. Dr. Yarshater also controlled the content of the articles in the *Encyclopaedia*, as shown by EIF’s “Guidelines for Author” page. Ex. 2.16; Tr. 31:10-13. These Dr. Yarshater-written guidelines (Tr. 52:25-53:8, 12-13) show that EIF (not Columbia) controlled the use of the mark. He later assigned all pre-2004 rights in the trademark to EIF,² as evidenced by EIF’s By-Laws that he created and approved. *See* Ex. 5 at 1 § Sec 1.1 (C); Ex. 6 at 4 § 1.1(C); Tr. at 137:24-138:4. Dr. Yarshater was able to assign the mark because there was unity of control between Dr. Yarshater and his two Foundations, PHF and EIF, which he founded, owned, and controlled. Ex. 2.8; Tr. 53:15-1878:7-11. As a result, their use and his own use of the mark denoted a single source of origin and he could assign all prior rights established through his use and PHF’s use to EIF. Therefore, as a matter of law, EIF is the owner of all right, title, and interest in the mark, and is the successor to all rights Dr. Yarshater and PHF owned. For priority purposes, EIF stands in the shoes of and can claim Dr. Yarshater’s and PHF’s use dating back to at least 1982 as EIF’s first use date in connection with the printed *Encyclopaedia*. Ex. S.

² This assignment was proper. *See McCarthy on Trademarks and Unfair Competition* § 18:4 (5th ed.); *Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 43 F. App’x 408, 412–13 (2d Cir. 2002).

EIF's trademark rights also extend to the *Encyclopaedia* digital version, which first launched in 1996 at www.iranica.com and then moved to www.iranicaonline.org in 2009–10. Tr. 169:7-13, 171:9-15; Ex. 9; Ex. 2.19. The history page in www.iranicaonline.org confirms that EIF (not Columbia) acquired common law rights by displaying the ENCYCLOPÆDIA IRANICA mark on the website and distributing content at least as early as 1996 until the present. *See* Exs. 2.9, 2.20.

EIF's ownership of the ENCYCLOPÆDIA IRANICA trademark can be seen on its web site (www.iranicaonline.org), where EIF has placed the mark on a web page where the goods can be purchased and sold,³ i.e., printed volumes, within the meaning of 15 U.S.C. § 1127. *See* Ex. 2.15. Prior to Columbia's hostile takeover of EIF's web site, Columbia never displayed the mark on any such page and had never sold any products. Thus, it never used the mark.

The history page on EIF's website confirms its longstanding commitment to Dr. Yarshater's vision and mission: the development and dissemination of the *Encyclopaedia* in print and digital formats. *See* Ex. 2.9 (excerpted below).

2018, the online version comprised about 7300 entries, of which more than 850 entries are available only on the Internet. The Encyclopaedia Iranica Foundation is committed to the on-going development of the print and digital versions of

E. Misleading statements about EIF's mission and control of the *Encyclopaedia*.

Columbia claims that EIF's sole function was to fund the *Encyclopaedia* and that it is run by "Wall Street types" who know nothing about Iranian scholarship and that the creation of the *Encyclopaedia* was done at the Center by Columbia employees. This ignores the fact that Dr. Yarshater was not only a member of EIF's Board but also its Founder and President. Ex. 4 at 2. His employment at

³ Evidence of EIF's sales of the *Encyclopaedia* and related costs include Ex. C (2008 Annual Report) at 23 (Sales of *Encyclopaedia Iranica*/Costs of Goods Sold \$122,467/\$47,874 in 2008 and \$101,425/\$38,295 in 2007); EIF Financial Statement 2017/2018 at 4 (Book sales, net of costs of goods sold \$19,157). Available at www.iranicaonline.org/uploads/pdfs/2018-eif-financial-statements.pdf (Sept. 17, 2020).

Columbia never covered his work as Editor-In-Chief of the *Encyclopaedia*. Cf. Ex. LL. In addition, EIF's By-Laws specifically define its Board's composition as including "members from academia" as well as members from "diverse fields, such as business, law, finance, communication and media, arts and information technology." Exs. 5 at 6-7 § 2.3(D); 6 at 5 § 2.2(D)(i). Employees who assisted Dr. Yarshater were paid and controlled by EIF, directly or indirectly, through Dr. Yarshater.

Dr. Yarshater gave EIF control over all aspects of the *Encyclopaedia*. EIF's governing mission has always been "to manage, control and direct the affairs and property of the Foundation," and "as the ultimate responsible body for the Foundation," EIF is "the custodian of . . . intellectual property." Exs. 5 at 6 § 2.3; 6 at § 2.2. This mission includes not only fundraising but also the responsibility to conduct research and to promote, perpetuate, publish, distribute, and disseminate the *Encyclopaedia*. See Exs. 3–6. Dr. Yarshater repeatedly confirmed that EIF's purpose was more than fundraising through his writings, EIF Annual Reports, and interviews. For example, he donated his entire library to EIF. See Ex. 7 at 2 § 2(b). Ex. 31; Ex. C at 8. This shows that EIF's purpose was not only to publish, but also to oversee the research for the *Encyclopaedia*. *Id.*

F. Misleading statements about EIF's funding of the *Encyclopaedia*.

Columbia claims that EIF's purpose was only to raise funds and that it was the third-largest contributor of funds to the *Encyclopaedia*. Ex. SS at 22; Tr. 272:18-22. The incomplete spreadsheet on which it bases this claim is deceptive. See Ex. LL.

Columbia offered no evidence of expenditures or monetary contributions from its own funds for the *Encyclopaedia* work done by Dr. Yarshater. Moreover, it mischaracterized reimbursements from EIF as "gifts." Ex. LL. None of these transfers were intended for use by Columbia. Rather, Columbia was merely a vendor of payroll services, similar to the printers hired by EIF. Payments made to Columbia were reimbursements from EIF for administrative services that it asked Columbia to provide. Tr. 28:22-30:4.

Dr. Yarshater used EIF to raise grant money for the *Encyclopaedia* from NEH. Columbia was the administrator of the grants, but any university could have filled that role. If EIF moves, the grant money moves. And Columbia even admits that its processing of grants does not give it intellectual property rights stating: “In fact, most federal grants do not require that the University hold copyright in works created as a result of the grant.”⁴ Columbia also admits: “Is any work created under a grant processed by the University considered to have been created with substantial use of University resources beyond the common level provided to faculty? No.”⁵

The NEH Grant Confirmation further shows that such funds were solicited by and intended for the use of Dr. Yarshater (Editor-in-Chief) and EIF (Publisher) and recognized: (1) Dr. Yarshater (not Columbia) as the “principal investigator and applicant for the grant;” (2) EIF (not Columbia) as the publisher of the *Encyclopaedia*; (3) EIF’s website (not Columbia’s) as the source of the *Encyclopaedia* content; (4) that the grant money was intended for use by EIF in publishing the *Encyclopaedia*; and (5) that there would be no grant but for the efforts of Dr. Yarshater and EIF in creating and publishing the *Encyclopaedia*. See Ex. 2.14.

The *Columbia College Today* Fall 2012 issue confirmed that Dr. Yarshater was the primary fundraiser for the *Encyclopaedia* and that he (not Columbia) successfully lobbied NEH for grants and used his personal assets to support the *Encyclopaedia*. See Ex. 2.7 (excerpted below).

Kevorkian Professor Emeritus of Iranian Studies, also has been the project’s primary fundraiser, successfully lobbying individual donors and the National Endowment for the Humanities (NEH) as well as contributing art and rare books for sale from his personal collection. Most recently, with the economy down and funding becoming scarce, he let go of a prized Rodin sculpture to support the cause.

....

“Within a matter of weeks, the money was fed into our account, and our editors and other staff could be paid,” Yarshater says. “Rodin came to our rescue.” The sale

⁴ Answers to Some Frequently Asked Questions About the Columbia University Copyright Policy (April 19, 2000) #7 (www.columbia.edu/cu/provost/docs/copyrightfaq.html) (Sept. 17, 2020).

⁵ *Id.* #8.

allowed the encyclopedia staff to expand by two editors; it now has eight. Yarshater, 92, works full-time as the project's volunteer general editor.

EIF in turn not only raised money for the *Encyclopaedia*, it also paid to publish the work. Tr. 27:20-30:4. This included, for example, the salaries of persons who assisted Dr. Yarshater (not just persons listed in Ex. KK), and payments to printing companies (Eisenbrauns), website hosts (Electric Pulp), and the ScholarOne software vendor (Clarivate). Tr. 171:9-17, 178:20-179:1; Exs. I, J. Columbia's incomplete summary (Ex. LL) vastly understates the money EIF contributed to the *Encyclopaedia*. It is unclear what records Columbia used to calculate EIF's so-called contributions to the *Encyclopaedia*. The records run from 1993–2017, and while they may show some transfers from EIF to cover, for example, payroll and benefits for some of the individuals working under Dr. Yarshater's direction, Ex. KK does not mention Ashraf, Brunner, and others whose payrolls were not outsourced to Columbia. Tr. 28:5-21; 49:22-50:4. When a correct accounting is done, EIF is the largest donor to the *Encyclopaedia*, as shown on the History page of EIF's website. *See* Ex. 2.13 (excerpted below).

In the course of the past two decades, the Encyclopædia Iranica Foundation has been the largest financial supporter of the Iranica project. It has also successfully augmented its Endowment Fund, and will continue to serve as the main source of financial support for the Encyclopædia Iranica.

Together, Dr. Yarshater and EIF successfully raised millions from numerous donors over the years to create an endowment to support the *Encyclopaedia*. EIF often gave these donors the option of contributing directly to EIF or sending funds indirectly earmarked for the *Encyclopaedia* to Columbia. But the donations to Columbia were not free money and the university could not use them as it saw fit, nor could it take credit for the donations. Rather, these funds passed through Columbia's hands on the way to EIF and the *Encyclopaedia*.

G. Defendants' inequitable conduct.

Defendants offer no justification for the fact that they have misappropriated and denied EIF access to its own assets, library, records, files, and confidential databases. These were created and

accumulated by Dr. Yarshater, EIF, and its employees over thirty years, while EIF operated from 450 Riverside Drive. Yet, this is but one small aspect of Defendants' inequitable conduct that is causing the irreparable harm suffered by EIF and injury to the public interest in avoiding confusingly similar names and marks.

As part of its plan to take over the *Encyclopaedia*, Columbia tried unsuccessfully to take over EIF's site. It tried to persuade the website host, Electric Pulp, that Columbia (not EIF) actually entered into the contract. Tr. 170:10-171:8; Ex. 9. When that failed, Columbia copied EIF's website and posted it on another site at www.encyclopaediairanica.com, unlawfully using the domain name (encyclopaediairanica.com) that EIF had owned since 1996. *See* Exs. 2.1, 2.3. Columbia's counterfeit website copied EIF's trademark, trade name, trade dress, imagery, articles, and other content hosted at www.iranicaonline.org. *See* Exhibit 2.11. Columbia now tries to conceal this copying by restricting access to its site. *See* Ex 2.2.

EIF had also registered the domain name "iranica.com" in 1996 and used this domain name for its first website from at least 1998–2010. It then used it to redirect to its www.iranicaonline.org site until early 2019, when Columbia fraudulently gained control of this domain name. *See* Exs. 2.5, 2.6. Columbia has cybersquatted this domain name, and continues to redirect visitors to its www.cfis.columbia.edu page, which displays the counterfeit mark and a counterfeit fascicle, offers fascicles for sale, and includes a donation button diverting money from EIF. *See* Ex. 2.4.

Moreover, Defendants needed content to publish the counterfeit Fascicles 4 and 5 quickly. Instead of the protocol of soliciting authors, paying honoraria, and editing articles as in years past, Columbia took a shortcut—it simply plagiarized articles published years earlier on EIF's www.iranicaonline.org website. A review of the articles in Columbia's "new" fascicles shows that dozens of articles were plagiarized from EIF. *Cf.* Ex. C-1 at 2 (Daniel preparing Fascicle 4 at EIF's

direction). A Table cross-referencing Columbia's plagiarized articles with hyperlinks to EIF's earlier published articles is provided below:

Article Title	Page(s)	Link to EIF's Website – Article and Original Publication Date	Link to Archived EIF Version ⁶
VOLUME XVI, FASCICLE 4 – LIST OF PLAGIARIZED ARTICLES			
Kesā'i Marvazi	338-40	04/07/2008	04/29/2011
Keşāli	340	01/01/2000	05/17/2014
Ketāb al- 'Ālem wa'l-Ġolām	346-47	04/11/2017	05/17/2017
Ketāb al-Eşlāḥ	347-48	03/24/2017	05/14/2017
Ketāb al-Naqẓ	356-58	02/20/2015	05/17/2015
Ketāb al-Riāẓ	358-59	04/11/2017	05/07/2017
Ketāb al-Tadwin	359-61	01/19/2016	04/11/2016
Ketāb-Kāna-ye Melli-e Tājikestān	366-68	01/01/2000	05/17/2014
Keṭāy-Nāma	368-69	01/01/2000	11/17/2011
Keyvānlu	372	01/01/2000	04/29/2011
Keẓr	372-77	07/15/2009	04/29/2011
Khachikian, Samuel	377-79	10/01/2010	04/29/2011
Khademi, Ali Mohammad	379-81	03/06/2009	04/29/2011
Khadiv Jam, Hossein	381-83	08/22/2014	11/17/2014
Khagan	383-84	08/25/2017	09/14/2017
Khalesi, Mehdi	391-93	03/04/2016	05/17/2016
Khan	405-07	08/25/2017	09/05/2017
Khanlari, Zahra	416-18	04/20/2016	05/17/2016
Khansari Dehkordi, Mohammad	418-19	08/07/2014	11/17/2014
Kharg ii. Archeology and History	426-29	07/20/2004	11/17/2015
Kharg iii. Developments Since 1950	430-31	09/15/2015	11/17/2015
Kharga Oasis	431-34	08/07/2017	11/17/2017
Kharijites in Persia	434-35	07/20/2009	04/29/2011
Khatlon	437-39	07/01/2015	09/10/2015
Khavaran-nama i. The Epic Poem	439-44	08/08/2017	10/26/2017
Khavaran-nama ii. The Illustrated Manuscripts	444-50	08/28/2017	10/24/2017

⁶ These Internet Archive snapshots confirm that the listed articles were originally published on EIF's website (www.iranicaonline.org) by the corresponding dates shown in this column.

VOLUME XVI, FASCICLE 5 – LIST OF PLAGIARIZED ARTICLES			
Khayyam iii. Impact on Literature and Society in the West	462-64	12/15/2008	08/27/2017
Khayyam v. Illustrations of English Translations of the Rubaiyat	470-75	07/15/2009	08/27/2017
Khayyam viii. Italian Translations of the Rubaiyat	484-88	09/10/2014	08/27/2017
Khayyam xiii. Musical Works Based on the Rubaiyat	494-98	07/15/2009	08/27/2017
Khayyam xiv. As Mathematician	498-09	05/07/2014	08/27/2017

This inequitable conduct, combined with the fact that EIF’s property is still being held by Columbia more than a year since this litigation was filed, shows that Columbia has benefited from its one-sided access to **all** of EIF’s property and assets. Defendants will continue to engage in their unlawful acts unless the preliminary injunction is granted.

H. Defendants have misled the Court about the end of relations with EIF.

Columbia claims that PHF is the largest donor to the *Encyclopaedia*. It bases this claim on the incomplete Exhibit LL, which purports to summarize (without any underlying documents) the contributions for the *Encyclopaedia*. The summary, however, does not cover the expenses that EIF has incurred. And a review of Exhibit LL shows that over \$10 million was endowed from June–July 2018 by PHF, before the dispute between EIF and Defendants. This came about despite Daniel’s clear conflict of interest in negotiating a donation between Columbia and PHF while involved with both sides and his personal interest in taking over the *Encyclopaedia*. Prior to this time period, PHF had contributed only \$1.6 million since 1989.

In the 40+ years that Dr. Yarshater worked on the *Encyclopaedia*, there is no evidence that he transferred money directly to Columbia—except as reimbursements for payroll and other services directed to the creation and operation of the *Encyclopaedia*. Rather Dr. Yarshater showed concern that Columbia would someday attempt to gain control of the large endowments he had vested in his two Foundations. Tr. 124:9-25. After founding EIF to supervise the research and publication of the

Encyclopaedia, he would have never turned over control to Columbia.

When Dr. Yarshater and EIF published the *Encyclopaedia*, there was never a written agreement with Columbia. Tr. 151:5-11. EIF was advised by its auditors to obtain a detailed agreement to comply with regulations and best practices for charitable foundations. Ex. C-1 at 3. In 2018, Columbia wanted an endowment of at least \$5.5 million with no “strings attached” and shrugged off EIF’s requests for a formal agreement. Tr. 56:19-57:7. In retrospect, this was likely a stall tactic while Columbia tried to persuade the ailing Dr. Yarshater and PHF to donate \$10 million. By then, Dr. Yarshater and other PHF Board members had been forced to resign due to conflicts and misconduct by other PHF Board members. At the same time, Daniel was in the right place at the right time, taking a PHF Board appointment after Dr. Yarshater stepped down.

This appears to all be part of a plan hatched by Defendants to take EIF’s assets and control of the *Encyclopaedia*. Columbia gladly pocketed the money that Dr. Yarshater personally raised via PHF for decades. Based on his actions, Daniel likely violated his fiduciary obligations to PHF because he personally benefitted from the \$10 million donation, which allowed him to secure an editor position at Columbia, while EIF sought someone to replace Dr. Yarshater as Editor in Chief. Exs. O, R; Tr. 56:8-13, 179:9-23.

Thus, under the guise of honoring Dr. Yarshater, Daniel facilitated a \$10 million endowment to Columbia. All of this happened while EIF was trying to negotiate in good faith with Columbia in July 2018 to work out a detailed agreement. After repeated efforts failed, EIF’s counsel sent letters to Columbia’s President formally terminating the relationship and informing Brill to cease and desist its unauthorized and infringing activities in April 2019. *See* Exs. 32, 33.

III. ARGUMENT

A. A preliminary injunction will preserve the *status quo ante*.

It is indisputable that the *status quo* changed when Columbia and Daniel published counterfeit Fascicle 4 of Volume XVI of the *Encyclopaedia* in December 2018 with Brill. All prior editions of the *Encyclopaedia* from Volume I, Fascicle 1 through Volume XVI, Fascicle 3 were published and owned by Dr. Yarshater and then assigned to his successor-in-interest, EIF. Because confusion arose only after the posthumous publications of Fascicles 4 and 5, an injunction should be issued to preserve the *status quo ante* of EIF as the sole and only publisher and owner of the *Encyclopaedia*. See *Gen. Mills, Inc. v. Champion Petfoods USA, Inc.*, No. 20-CV-181 (KMK), 2020 WL 915824, at *8 (S.D.N.Y. Feb. 26, 2020) (“for purposes of granting a preliminary injunction, the ‘status quo’” relates not to “the moment before relief is granted” but rather “the last actual, peaceable uncontested status which preceded the pending controversy”) (citing *N. Am. Soccer League, LLC v. U.S. Soccer Fed’n, Inc.*, 883 F.3d 32, 37 (2d Cir. 2018)). “The ‘status quo’ in preliminary-injunction parlance is really a ‘status quo ante’ . . . shut[ting] out defendants seeking shelter under a current ‘status quo’ precipitated by their wrongdoing.” *Soccer League*, 883 F.3d at 37 n.5. Here, the *status quo ante* is vital for EIF and its existence.

B. Columbia has failed to rebut EIF’s grounds for the preliminary injunction.

1. Columbia failed to rebut EIF’s showing of likelihood of success.

EIF established a strong likelihood of success on the merits by offering unrebutted evidence of its ownership of common law and registered rights in the trademark ENCYCLOPÆDIA IRANICA and evidence that Defendants are selling and marketing a counterfeit version of the *Encyclopaedia* featuring a spurious mark that is indistinguishable from EIF’s registered mark. 15 U.S.C. § 1127; Exs. 1.1, 1.2, 1.3, 2.4, 2.17. EIF further showed that Dr. Yarshater was the first to place the trademark on a printed publication in 1982 and that EIF used the mark under his control. EIF has also shown that Dr. Yarshater transferred his ownership of the trademark to EIF, as evidenced by: (1) EIF’s By-Laws confirming this

transfer (and Columbia cannot complain about missing evidence because it has stolen EIF's records); and (2) using EIF to enter into contracts with printers, distributors, and website vendors to create and sell products bearing the mark. Exs. 5, 6, 9, 10, 11. This conduct demonstrates continued and notorious use of the mark by EIF and provides a basis for EIF's federal registrations.

Federal registrations are *prima facie* evidence of EIF's superior rights and its probability of success. *See* 15 U.S.C. § 1115(a). This alone is enough to grant the present motion and to preserve the *status quo* without delving into the disputes raised by Defendants. *See, e.g., Safeway Stores, Inc. v. Safeway Props., Inc.*, 307 F.2d 495, 498 (2d Cir. 1962) (“[A] prior use of a trademark gives one a superior right to continue its use.”); *Hills Bros. Coffee, Inc. v. Hills Supermarkets, Inc.*, 428 F.2d 379, 381 (2d Cir. 1970) (extending preliminary injunction after noting long-time trademark use in New York City area). In contrast, no employee of Columbia ever created a fascicle nor did anyone from Columbia enter into contracts with printers or distributors of the marked products prior to the present dispute. As a result, Columbia cannot meet the statutory definition of trademark “use” because it never placed the mark on any products, nor did it sell or distribute the products. Consequently, Defendants cannot rebut EIF's use of the mark.

To cast doubt on EIF's longstanding use of its trademark, Columbia points to the mention of the “Center for Iranian Studies, Columbia University” on the cover of the fascicles. This argument is unavailing because the “Center” is just the address where Dr. Yarshater could be contacted. This Court has rejected similar arguments. *See A.V.E.L.A., Inc. v. Est. of Marilyn Monroe, LLC*, No. 12-cv-4828, 2018 WL 1273343, at *8 (S.D.N.Y. Mar. 5, 2018) (finding that federal registrant was trademark owner, not the entity identified in its mailing address). The Court's analysis in *A.V.E.L.A.* is instructive because it recognized that an address on a marked product was insufficient to call into question ownership of a registered mark:

The mere fact that the Monroe Estate’s address references ABG does not, and could not, establish that ABG owns the trademarks. It establishes only that the Monroe Estate—the entity named on the trademark registration—lists its address in ‘care of’ ABG, presumably because it shares office space with ABG. ***That fact alone cannot reasonably be understood to suggest that ABG is the trademark owner.***

Id. (emphasis added). Here, EIF owns a federal registration for the trademark, and has been prominently listed as the copyright owner on ***all fascicles and volumes*** of the marked work since at least 2003. *See* Exs. S, 13–27. The reference to the actual phrase used, “the Center for Iranian Studies, Columbia University, New York” or even just “Columbia University” on only the fascicles—and ***nowhere*** in Volumes I–VI—is recognized merely as an address, as was the case in *A.V.E.L.A.*, and Columbia has cite no facts or case law that support a finding to the contrary.⁷ *See* Exs. 13–18.

2. Columbia failed to rebut EIF’s proof of trademark ownership.

Prior to the present dispute, Columbia never suggested that it owned or had any claim to the ENCYCLOPÆDIA IRANICA mark or that Dr. Yarshater and EIF did not own the mark. Indeed, EIF offered un rebutted evidence of its ownership of federal and state registrations of the marks based on EIF’s longstanding use of these marks, and the prior use by Dr. Yarshater, which inures to EIF’s benefit as his successor-in-interest. Exs. 1.1, 1.2. EIF’s federal registrations for ENCYCLOPÆDIA IRANICA and ENCYCLOPÆDIA IRANICA FOUNDATION were both filed on July 20, 2018, ***more than one year prior*** to the present litigation. They were both published for 30-day opposition periods, but ***none of Defendants*** opposed either mark. As a matter of law, these federal registrations are *prima facie* evidence of EIF’s ownership of and exclusive right to use these marks. 15 U.S.C. § 1057. And the state registrations provide independent causes of action. Ex. 1.3; N.Y. Gen. Bus. Law §§ 349, 360-k, 360-l.

Columbia’s later decision to petition to cancel EIF’s registration of the ENCYCLOPÆDIA

⁷ Only one person with experience in academic publishing testified: Mr. Eisenbraun. *See* Tr. 147–48. With no skin in the game and retired years ago, he testified that “Columbia is listed as the location of Professor Yarshater, right under his name.” Tr. 157.

IRANICA mark has not proceeded beyond the pleading stage and is now suspended. Moreover, Columbia has neither petitioned to cancel nor challenged the validity of EIF's Federal Registration No. 5,921,137 for the mark ENCYCLOPÆDIA IRANICA FOUNDATION or any of EIF's state registrations. And it has no basis for doing so.

EIF's Registration No. 5,921,137, lists several services including those related to its website, i.e., "providing an online research tool in the nature of an online search platform to allow users to research Iranian civilizations, history and culture." Ex. 1.2. Defendants are jointly liable for infringing and using counterfeit imitations of the ENCYCLOPÆDIA IRANICA FOUNDATION mark on the unauthorized www.encyclopaediairanica.com site. The fact that Defendants omitted the word "Foundation" from their infringing mark does not allow them to escape liability for both counterfeiting and infringing the unchallenged registered mark. Courts have long recognized that "[i]t is not necessary to constitute an infringement that every word of a trademark would be appropriated. It is sufficient that enough be taken to deceive the public in the purchase of a protected article." *Saxlehner v. Eisner & Mendelson Co.*, 179 U.S. 19, 33 (1900); *see also McCarthy on Trademarks & Unfair Competition* § 23:20 (5th ed.).

Columbia seeks to justify its acts of counterfeiting and infringement by citing its petition for cancellation filed against EIF's registration of the mark ENCYCLOPÆDIA IRANICA. *See* Ex. G. However, EIF is likely to defeat this petition because it fails to state a claim on which relief can be granted. Columbia did not even plead ownership of the mark and it also failed to plead the requisite elements of fraud. "Fraud in procuring a trademark registration . . . occurs when an applicant knowingly makes false, material representations of fact in connection with his application." *In re Bose Corp.*, 580 F.3d 1240, 1243 (Fed. Cir. 2009). The party seeking cancellation on the basis of fraud must establish five factors: (1) the registrant misrepresented a material fact, (2) the registrant knew or should have known that its representation was false, (3) the registrant intended to induce the Trademark Office to act in

reliance thereon, (4) the Trademark Office reasonably relied on the misrepresentation, and (5) damages proximately resulted from that reliance. *See Patsy's Italian Rest., Inc. v. Banas*, 658 F.3d 254, 270–71 (2d Cir. 2011). Columbia's failure to plead ownership of EIF's mark is fatal to its fraud claim. *See Privado Mktg. Grp. LLC v. Eleftheria Rest Corp.*, No. 13-cv-3137, 2014 WL 3377107, at *6 (S.D.N.Y. July 7, 2014) (“Here, without a plausible claim that Counterclaim Plaintiffs were the first to use the Mark, the allegations that [Plaintiff] was not the first user of the Mark, did not personally use the Mark, and misrepresented the date of first use of the Mark do not rise above the level of speculation.”).

Columbia invented its frivolous “address use as trademark use claim” after the motion for a TRO was filed. Mere appearance of a name on a publication is not enough to give Columbia trademark rights because it never placed the ENCYCLOPAEDIA IRANICA mark on any goods nor did it sell or distribute those goods. *See A.V.E.L.A.*, 2018 WL 1273343, at *8.

Columbia also alleges that EIF listed 2003 as its first use date and that Columbia has an earlier use date. However, a registrant is not bound by the use date listed in a registration and seeking an earlier use date is not a ground for cancellation nor is it a basis for a claim of fraud. *See McCarthy on Trademarks & Unfair Competition* § 31:74 (5th ed.) (“Fraud has sometimes been alleged because a trademark registrant claimed a date of first use in a use-based application which was earlier than the actual date of first use. Such an attack has always failed on the facts, the courts saying that the falsity was either not fraudulent or not material.”); *see also Rick v. Buchansky*, 609 F. Supp. 1522 (S.D. N.Y. 1985), *appeal dismissed*, 770 F.2d 157 (2d Cir. 1985) (erroneous date of claimed first use later than actual first use is not fraud because not material and not intentional). A use date can also be amended. *See Trademark Manual of Examination Procedure* § 1609.07 (“The USPTO will accept a correction request changing the dates of use, even if the corrected dates are later than the dates originally set forth in the registration.”). In this case, EIF has provided clear and convincing evidence that it is entitled to rely on the first use date

of its predecessor, Dr. Yarshater, who assigned all of his rights as well as any PHF rights to EIF. As a result, EIF stands in the shoes of its predecessors and Dr. Yarshater's 1982 first use date is EIF's first use date. *See 4 Pillar Dynasty LLC v. Saucony, Inc.*, No. 1:16-cv-2824, 2017 WL 1906868, at *5 (S.D.N.Y. May 8, 2017) (“[A] user can rely on [its] predecessor-in-interest's first use to establish seniority (and superiority) of rights over a junior user.”); 37 C.F.R. 2.38 (confirming that trademark applicants may claim a predecessor's earlier date of first use).

3. Columbia failed to rebut proof of counterfeiting and infringement.

EIF has provided un rebutted evidence that Defendants are using a counterfeit imitation of EIF's federally registered mark on their unauthorized fascicles. *See, e.g.*, ECF No. 118 at ¶ 39 (side-by-side comparison and review). Under the Lanham Act, a “counterfeit” mark is defined as “a spurious mark which is identical with, or substantially indistinguishable from, a registered mark.” 15 U.S.C. § 1127. It is therefore unnecessary to conduct a step-by-step analysis of the *Polaroid* factors when the accused product uses a counterfeit mark, as is the case here. *See Gucci Am., Inc. v. Duty Free Apparel, Ltd.*, 286 F. Supp. 2d 284, 287 (S.D.N.Y. 2003) (“In this case . . . the Court need not undertake a factor-by-factor analysis . . . because counterfeits, by their very nature cause confusion.”); *Topps Co. v. Gerrit J. Verburg Co.*, No. 96-cv-07302, 1996 WL 719381, at *6 (S.D.N.Y. Dec. 13, 1996) (finding no need to engage in a complete discussion of the *Polaroid* factors “[w]here the marks are identical, and the goods are also identical and directly competitive”); *see also Ontel Prods. Corp. v. Auto Mall*, No. 1:17-cv-05190, at *4 (S.D.N.Y. November 20, 2017) (holding *Polaroid* factor consideration unnecessary because counterfeits “by their very nature, cause confusion.”).

Defendants have cybersquatted EIF's domain names “encyclopaediairanica.com” and “iranica.com,” and displayed and/or display and offer for sale counterfeit imitations of EIF's registered mark on an unauthorized website at www.encyclopaediairanica.com and web pages at cfis.columbia.edu, respectively. Under 15 U.S.C. § 1125(d), EIF is entitled to statutory damages and other relief. *Mamiya*

Am. Corp. v. HuaYi Bros., Inc., No. 09-cv-5501, 2011 WL 1322383, at *6 (E.D.N.Y. Mar. 11, 2011), *R. & R. adopted*, 2011 WL 1253748 (E.D.N.Y. Mar. 31, 2011) (“[A] victim of a violation of section 1125(d) may recover the damages sustained by the plaintiff, the costs of the action, and in certain circumstances, the defendant's profits.”); *see also* 15 U.S.C. § 1117(a); *George Basch Co. v. Blue Coral, Inc.*, 968 F.2d 1532, 1540 (2d Cir.1992); *Gidatex, S.r.L. v. Campaniello Imports, Ltd.*, 82 F. Supp. 2d 136, 141 (S.D.N.Y. 2000); *Cartier v. Aaron Faber, Inc.*, 512 F. Supp. 2d 165, 172–73 (S.D.N.Y. 2007).

Defendants have also violated both the false advertising and false designation of origin prongs of 15 U.S.C. § 1125(a). They have copied the trade dress used on EIF’s site (Exs. 2.1, 2.11), which was created by Dr. Yarshater with assistance from Dr. Brunner—who was paid directly by EIF—and later maintained by Electric Pulp under contract with EIF.

Use of infringing trade dress with an infringing mark also enhances the likelihood of confusion. *Emmpresa Cubana Del Tabaco v. Culbro Corp.*, 213 F. Supp. 2d 247, 261 (S.D.N.Y. 2002) (“use of the [Plaintiff’s] trade dress could increase the potential for [Plaintiff] being able to show likelihood of confusion regarding [Plaintiff’s] mark based upon its ‘prior existing reputation for the Cuban [infringed] mark.’”).

4. EIF has failed to rebut EIF’s proof of copyright ownership.

All of the copyright registrations for authorized volumes and fascicles of the *Encyclopaedia* issued by the U.S. Copyright Office since at least Volume XI, Fascicle 6 (published on August 30, 2003) list EIF as the claimant. *See* Tr. 47:9-48:2; Ex. 1, ¶ 14; Ex. 1.4. As confirmed by testimony from Mr. Eisenbraun, Dr. Yarshater instructed Eisenbrauns to file copyright applications on EIF’s behalf for the *Encyclopaedia* fascicles and volumes that it distributed pursuant to its contracts with EIF, while he was Editor-in-Chief. *See* Tr. 160:17-22; Ex. 1, ¶ 14; Ex. 1.4. Columbia has never challenged EIF’s copyright registrations. *See* Tr. 159:4-10. Nor has Columbia provided credible evidence that anyone at Columbia controlled Dr. Yarshater’s work on the *Encyclopaedia*. Moreover, Dr. Yarshater retired as a tenured

professor in 1990 and Columbia has admitted that he never received compensation as the Director of the Center for Iranian Studies. Ex. JJ; Tr. 223:2-12. Columbia has also failed to produce an employment agreement or any other documentary evidence showing that Dr. Yarshater's work on his *Encyclopaedia* fell within the scope of his employment as a professor. As such, Columbia cannot prevail on any claim that the work-for-hire doctrine applies to this case.

Furthermore, any attempt by Columbia to challenge ownership of EIF's copyright registrations for the *Encyclopaedia* fascicles and volumes published more than three years before the present dispute is barred by the U.S. Copyright Act's statute of limitations, which mandates that "[n]o civil action shall be maintained . . . unless it is commenced within three years after the claim accrued." 17 U.S.C. § 507(b). The three-year period starts when "a reasonably diligent plaintiff would have been put on inquiry as to the existence of a right." *Kwan v. Schlein*, 634 F.3d 224, 229 (2d Cir. 2011) (citation omitted). EIF has been openly and notoriously listed in the copyright notice of every volume and on the back cover of every fascicle of the *Encyclopaedia* published and reprinted since 2003. As such, Columbia has had actual and constructive notice sufficient to trigger the statute of limitations.

C. Columbia has failed to rebut EIF's proof of irreparable harm.

Columbia's efforts to deny the palpable and pervasive irreparable harm that EIF will continue to experience, if a preliminary injunction does not issue, all fail. As established through the briefing, the testimony, and evidence presented: (1) EIF timely pursued the preliminary injunction and any delay is excusable; and (2) EIF is facing significant existing and imminent irreparable harm, including due to actual confusion, a likelihood of confusion, damage to its intellectual property and trademark goodwill, in addition to (*not solely* due to) damage to its fundraising efforts and ability to maintain its status as a non-profit.

1. Columbia's laches argument fails under the law and the facts.

Columbia strangely characterizes EIF's alleged delay as anywhere between 1 week and 2.5 years

yet insists the delay is fatal, wherever it falls in that spectrum. ECF No. 117 at 21. Columbia is incorrect. Courts in this Circuit have held that delay alone does not require denial of a preliminary injunction. *See, e.g., Marks Org., Inc. v. Joles*, 784 F. Supp. 2d 322, 333 (S.D.N.Y. 2011) (“The Court declines to take the position that delay alone requires denial of a preliminary injunction motion.”). Delay may be excused for a myriad of reasons, including, as is the case here, “if the plaintiff does not know how severe the infringement is,” delay “caused by a plaintiff’s good faith efforts to investigate an infringement,” or settlement discussions. *Fisher-Price, Inc. v. Well-Made Toy Mfg. Corp.*, 25 F.3d 119, 124–25 (2d Cir. 1994) (excusing 6-month delay due to investigating claim and infringement); *see also Marks*, 784 F. Supp. at 334.

Under this framework, courts in this Circuit have granted preliminary injunctions and excused delays of months or years. *See, e.g., Kuklachev v. Gelfman*, 361 F. App’x 161, 163 (2d Cir. 2009) (excusing 18-month delay because of “need to investigate the nature of the infringement and to explore what legal recourse was possible,” “difficulty of locating suitable attorneys,” and “the absence of immediate threat of harm, given that there were no shows scheduled after January 2008”); *Marks*, 784 F. Supp. 2d 322, 333–34 (S.D.N.Y. 2011) (excusing 16-month delay due to “good faith efforts to investigate the facts and law” and “Defendant’s delays occasioned by the pursuit of a meritless personal jurisdiction motion to dismiss, by settlement discussions, and by delay from the transfer of the case”); *Abbott Labs. v. Adelpia Supply USA*, No. 15-cv-5826, 2015 WL 10906060, at *11–12 (E.D.N.Y. Nov. 6, 2015), *aff’d*, 670 F. App’x 6 (2d Cir. 2016) (excusing 10-year delay because “at no time was Abbott sleeping on its rights and delaying suit without reason. Instead, it actively pursued good-faith, non-judicial actions to cease the infringement up until the point where it became clear that its trademark could not be protected without judicial intervention.”). Even without an excuse, delay is merely a factor in the decision of whether to grant a preliminary injunction. *See Marks*, 784 F. Supp. at 334–34. Ultimately, “it

is not the length of the delay that is determinative, but its reasonableness.” *Abbott*, 2015 WL 10906060, at *10. In “all events, avoidance of consumer confusion remains a paramount goal, even if . . . there is a delay.” *Kuklachev v. Gelfman*, 629 F. Supp. 2d 236, 250 (E.D.N.Y. 2008). Here, actual confusion due to Columbia’s infringement and counterfeiting is extraordinarily high if an injunction does not issue.

Any alleged delay by EIF was reasonable and should be excused because it was only due to: (1) good-faith investigation of the nature, scope, and extent of infringement; (2) attempts to resolve the matter; (3) Columbia’s refusal to return EIF’s documents, property and other assets that are essential to its claims and defenses in this case; and (4) Columbia’s ensuing months of obstruction and disobedience of the Inventory Order, starting in the fall of 2019, which also put EIF at a severe evidentiary disadvantage and created further delay, while draining EIF’s (and the Court’s) resources and attention. *See* ECF Nos. 46, 48, 49, 51–53, 56–58, 64, 68–69, 72–74.

EIF’s pursuit of a TRO prior to the publication of Fascicle 6 and Volume XVI was reasonable and does not support Columbia’s claims of laches. The publication of Fascicle 6 and a new Volume are a far more serious concern. Because sales of complete volumes exceed individual fascicle sales, a new Volume XVI would cause a significant loss of goodwill associated with EIF’s registered trademarks and represents a milestone that would dilute EIF’s intellectual property. *See Abbott*, 2015 WL 10906060, at *11–12 (finding failure to immediately take legal action, including against small-scale infringements, was reasonable).

The cases Columbia cites are distinguishable and inapplicable to the facts at hand. Columbia cites *Gidatex, S.r.L. v. Campaniello Imports, Ltd.*, 13 F. Supp. 2d 417, 419 (S.D.N.Y. 1998), to suggest there is a two-month delay bar. ECF No. 117 at 16. But “Courts have not imposed rigid deadlines by which a request for preliminary injunctive relief must be made” and “much longer delays may be excused.” *Id.* at 419. In fact, *Gidatex* found that ***two of the years*** of delay were “excused in light of the

parties’ extended litigation concerning the validity of their contract,” but ultimately denied the preliminary injunction because the additional eight months delay reflected an anti-competition motivation in the suit. *Id.* at 419–20. In contrast, EIF’s motivation is to avoid ongoing damage to its intellectual property and the goodwill that it has accumulated after decades of using its asserted mark.

Columbia’s overbroad citation to *Tough Traveler, Ltd. v. Outbound Prod.* omits the Second Circuit’s critical caveats that “delay may not negate the presumption of irreparable harm if the delay was caused by the plaintiff’s ignorance of the defendant’s competing product or the plaintiff’s making good faith efforts to investigate the alleged infringement.” 60 F.3d 964, 968 (2d Cir. 1995). Indeed, *Tough Traveler*’s reversal was due only to a specific finding that such delay was unexcused because “[t]here has been no suggestion that these delays were attributable to Tough Traveler’s pursuit of further investigation of the alleged infringement.” *Id.*

Columbia also wrongly cites *Citibank, N.A. v. Citytrust*, 756 F.2d 273 (2d Cir. 1985), to suggest that a delay of more than ten weeks results in automatic denial of an injunction. ECF No. 117 at 16–17. But in vacating the preliminary injunction, the Second Circuit found that the trial court’s one-sentence “perfunctory comment provided insufficient consideration to the factor of irreparable harm.” *Citibank*, 756 F.2d at 275. The court also distinguished cases granting preliminary injunctions for identical products bearing identical marks (as in this case) because “[h]ere, we have not identical, but merely similar names, used by long established banking institutions.” *Id.* at 276. Furthermore, the narrow scope of *Citibank*’s injunction request (limited to enjoining operation of a Long Island branch, while solicitation of New York business continued from Connecticut) also undercut arguments of irreparable harm. *Id.* at 277. The law and facts do not fall in Columbia’s favor; any alleged delay was justified.

2. There is actual confusion, harm to EIF’s intellectual property and goodwill, and damage to its fundraising efforts and non-profit status.

Columbia narrows EIF’s irreparable harm as damage to fundraising efforts. This overlooks

evidence of harm due to actual confusion, likelihood of confusion, and harm to EIF’s intellectual property and trademark goodwill. Columbia also tries to confuse the Court with arguments of *its own* alleged harm, if an injunction *does issue*—an irrelevant argument considering that Columbia did not cross-move for a preliminary injunction. Columbia cannot rebut the evidence of the significant irreparable harm that EIF faces if an injunction does not issue. Instead, Columbia demonstrates that further irreparable harm is imminent as it brazenly admits that, without an injunction, it intends to move forward with willful trademark infringement, counterfeiting, and copyright infringement. It also does not dispute the actual harm already caused to EIF from publication and advertising of Fascicles 4 and 5, advertised publication of Fascicle 6 and Volume XVI, and false public statements that slander and attack the credibility of EIF and its ownership of the *Encyclopaedia* intellectual property and project. ECF Nos. 1, 118; Ex. 2.19.

“Irreparable harm exists in a trademark case when the party seeking the injunction shows that it will lose control over the reputation of its trademark . . . because loss of control over one’s reputation is neither ‘calculable nor precisely compensable.’” *U.S. Polo Ass’n, Inc. v. PRL USA Holdings, Inc.*, 800 F. Supp. 2d 515, 540 (S.D.N.Y. 2011) (converting a request for a preliminary injunction to a permanent injunction and finding irreparable harm when “absent an injunction, given the likelihood of confusion . . . the reputation and goodwill cultivated by [the mark owner] would be out of its hands. . . .[and] cannot be quantified”); *see also New York City Triathlon*, 704 F. Supp. 2d at 325 (“Every day that Defendant operates with Plaintiff’s name, the ability of Plaintiff to signify its services and its reputation by its [] Marks is lessened.”); *Abbott*, 2015 WL 10906060, at *8 (“In the trademark context, irreparable harm can arise from injuries to consumer goodwill or a trademark holder’s reputation or to the trademark holder’s control over that reputation.”). Thus, a demonstration of a likelihood of success on a trademark claim often supports a finding of irreparable harm because of the inherent reputational nature of the claims. *See Marks*, 784 F. Supp. 2d at 334–35 (noting that “although a likelihood of confusion does not create a

presumption of irreparable injury, a particularly strong likelihood of confusion should weigh in favor of finding irreparable injury,” “[a] plaintiff may also show a threat of irreparable injury by showing a threatened loss of good will and loss of ability to control its reputation”).

Here the irreparable harm due to reputational damage and loss of goodwill is palpable. For example, donor confusion regarding Defendants’ publication and advertising of Fascicles 4 and 5 has resulted in widespread apprehension about EIF’s future ability to publish the *Encyclopaedia*, leading to donor hesitation and a dramatic reduction in donations to EIF. Tr. 63:14-25, 64:6-16. The confusion here is not speculative—it is **admitted**. See ECF No. 118 at 12 (SOF ¶ 40). In trademark law, actual confusion is the gold standard for proof of irreparable harm. *Dial-A-Mattress Operating Corp. v. Mattress Madness, Inc.*, 841 F. Supp. 1339, 1359 (E.D.N.Y. 1994) (holding actual confusion precipitated by continued infringing conduct “implores a finding of probable irreparable harm.”).

Again, the cases that Columbia cites are distinguishable and do not alter the clear evidence of irreparable harm here. For example, in *Hello I Am Elliot, Inc. v. Sine*, No. 19-cv-6905, 2020 WL 3619505 (S.D.N.Y. July 2, 2020), this Court denied the preliminary injunction **and** granted the motion to dismiss because the trademark claims were defective as a matter of law. The unregistered mark was descriptive, had no secondary meaning, and was therefore unprotectable. *Id.* at *8–10. In contrast, here, the ENCYCLOPÆDIA IRANICA mark is protectable, registered, and is strong, as Columbia implicitly concedes. See ECF No. 117 at 10–11; Exs. 1.1, 1.3.

Putting aside the fact that EIF’s harm is by no means limited to fundraising damage, Columbia’s citation to two out-of-circuit cases (*Potomac Conference Corp. of Seventh-Day Adventists v. Takoma Acad. Alumni Ass’n, Inc.*, No. 13-cv-1128, 2014 WL 857947 (D. Md. Mar. 4, 2014) and *Villanova Univ. v. Villanova Alumni Educ. Found., Inc.*, 123 F. Supp. 2d 293 (E.D. Pa. 2000)) does not support its hyperbolic argument that “in trademark cases, courts have **consistently** rejected the arguments of

nonprofits based on mere harm to their ability to raise funds.” ECF No. 117 at 22–23 (emphasis added). Those cases involved infringement actions against disaffiliated alumni organizations and are readily distinguishable. In *Potomac*, the school and association were non-profit organizations, and both alleged that a preliminary injunction would harm their fundraising efforts.⁸ Thus, Columbia’s claim that *Potomac* “rejected the arguments of nonprofits based on mere harm to their ability to raise funds” is wrong. ECF No. 117 at 22–23. The Maryland court simply aligned with one of the nonprofits’ arguments of fundraising harms and found that the other non-profit’s claims of fundraising harms were insufficient to tilt the equities in its favor in light of the other facts.

Likewise in *Villanova*, the Pennsylvania court acknowledged the defendant-association’s argument that an injunction “taking away its name would seriously prejudice and hamper the [] charitable mission.” 123 F. Supp. 2d at 311. But the court determined this “inconvenience” “would not be greater than the hardship suffered by the University through the continued loss of control over its name, marks and goodwill.” *Id.* Here too, Columbia’s suggestion that the court outright rejected the defendant’s position that fundraise troubles are a legitimate harm is again wrong. Rather, *Villanova* simply aligned with the mark owner and ruled that “[w]here both parties may suffer harm, but that harm was a result of defendant’s own conduct, it follows that issuance of an injunction would not impose a greater hardship on defendant than denial would impose on plaintiff.” *Id.* Columbia’s narrow view of the facts and law fails to meet its burden.

D. Columbia has failed to rebut EIF’s proof on the balance of hardships.

Columbia’s argument that the balance of hardships “tips overwhelmingly” in its favor fails under

⁸ See *Potomac*, 2014 WL 857947, at *20–21 (referencing the plaintiff’s testimony that infringement “has hurt fundraising and contributions to the” school, and defendant’s argument that “[i]f [they] are enjoined from fundraising in alumni connections, [the] organization dies” and “that using a different name would hinder its ability to advertise to its members’ and consequently its existence,” which “would be ‘devastating’”).

the weight of the law and the facts. Indeed, Columbia’s circuitous argument that “entry of a preliminary injunction would irreparably damage the *Encyclopaedia*’s reputation and have the practical effect of permanently ending its publication after an uninterrupted 40-year run” (ECF No. 117 at 28) effectively concedes that this factor can *only* tip in Columbia’s favor *if* it can establish ownership of the mark and intellectual property. However, Columbia cannot make that showing and certainly has not done so.

In contrast, the record supports a finding that EIF has suffered and will continue to suffer irreparable harm, not just to its viability as a non-profit organization, but also as to the goodwill and reputation that it built with the ENCYCLOPÆDIA IRANICA mark due to Defendants’ willful sales, advertising and distribution of their counterfeit *Encyclopaedia*, their deliberate false advertising and cybersquatting and their theft of EIF’s business records, its library, confidential databases and other assets essential to the continuation of EIF’s business, EIF’s preservation of its reputation and EIF’s ongoing publication of the *Encyclopaedia*.⁹ “If left unremedied, the immediate and irreparable harm to [movant] resulting from [infringer’s] unlawful acts would far exceed any theoretical harm to [infringer] from an improvidently granted injunction.” *New York City Triathlon*, 704 F. Supp. 2d at 326. Enjoining Defendants from counterfeiting EIF’s ENCYCLOPÆDIA IRANICA mark will simply preserve the *status quo ante* until a decision on the ownership dispute and the merits can be resolved at trial. *See AIM*, 188 F. Supp. 2d at 387. An injunction will not prevent Columbia or any author from publishing articles on Persian culture or heritage. Rather, it will only prevent Columbia from publishing those articles under counterfeit imitations of EIF’s marks. After knowingly and repeatedly infringing EIF’s intellectual property, Columbia cannot legitimately claim prejudice at having to refrain from unlawful and unauthorized acts during the pendency of this case. ECF No. 117 at 30. On balance, the potential harm

⁹ Even with this litigation and Columbia withholding EIF’s property, EIF published Volume 16 in August 2020, dedicated to Dr. Yarshater. *Cf.* TRO Hr’g Tr. 32:6-14 (July 31, 2020).

to EIF's trademarks, goodwill, and reputation if an injunction does not issue, exceeds the potential harm to Columbia in using a different mark while the merits of this dispute are litigated.

This case is akin to *U.S. Polo*, where this Court granted an injunction because the equities weighed in the mark holder's favor when it had sold products using the mark for decades, owned trademark registrations, and in light of "[t]he substantial likelihood of consumer confusion and potential loss . . . both in terms of sales and reputation." *U.S. Polo*, 800 F. Supp. 2d at 541. This Court found that the defendant's creation of 10,000 units and sales of 3,500 units was "not so great as to outweigh the harm that would be done to the [mark owner] absent an injunction." *Id.*

E. Columbia has failed to rebut EIF's proof regarding the public interest.

There is a strong public interest to prevent consumer confusion caused by trademark, trade dress, trade name counterfeiting and infringement and cybersquatting. *See Pearson Educ., Inc. v. Labos*, No. 19-cv-487, 2019 WL 1949820, at *7 (S.D.N.Y. Apr. 23, 2019), *aff'd*, 511 F. App'x 81 (2d Cir. 2013) ("The consuming public has a protectable interest in being free from confusion, deception and mistake."). An injunction "'would not disserve the public interest'" because "'it would prevent the proliferation of counterfeit works,'" such as counterfeit Fascicles 4–6, Volume XVI, and the entire *Encyclopaedia* both in print and online. *John Wiley & Sons, Inc. v. Book Dog Books, LLC*, 327 F. Supp. 3d 606, 637 (S.D.N.Y. 2018). An injunction would further serve the public interest by maintaining free access to the *Encyclopaedia* consistent with the goodwill and practice of Dr. Yarshater and EIF. This stands in contrast to Defendants' plan to convert the *Encyclopaedia* into a "cash cow" available only to paying customers.

On a practical level, the academic community would benefit from an injunction because further publication of counterfeit fascicles or volumes will cause only more actual confusion by bifurcating the *Encyclopaedia* into two competing publications.

IV. CONCLUSION

For these reasons, EIF respectfully requests that the Court grant the relief requested.

Dated: September 17, 2020

New York, New York

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 17, 2020, a copy of the foregoing document was served by the Court's ECF system on counsel for Defendants, as follows:

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Dated: September 17, 2020

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