

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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CATHERINE CONRAD and RODNEY RIGSBY,

Plaintiffs,

v.

JAMES BENDEWALD, MARIA VEDRAL  
and SILVER EDGE SYSTEMS SOFTWARE, INC.,

Defendants.  
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OPINION and ORDER

11-cv-305-bbc

This case arises out of a singing telegram that pro se plaintiff Catherine Conrad performed and defendant James Bendewald videotaped on behalf of defendants Maria Vedral and SilverEdge Systems Software, Inc. at an event they sponsored. The song was called "As Strong as I Can Be" and plaintiffs Conrad and Rodney Rigsby own the copyright to the song. Although Vedral and SilverEdge initially had plans to use the video on their website, they declined to enter into a licensing agreement with Conrad when she asked for \$40,000 and they deny that they ever used or even obtained the videotape from Bendewald .

There is no dispute that plaintiff Conrad was paid for her performance. The questions in this case relate to the videotaping of that performance. After screening the amended complaint under 28 U.S.C. § 1915, I allowed plaintiffs to proceed on two alternative claims: (1) defendants videotaped Conrad's performance without her permission, in violation of federal copyright law; or (2) to the extent Conrad gave permission for the

recording, it was contingent on defendants Vedral and SilverEdge's using it on their website and paying plaintiffs a licensing fee, so retention of the videotape by defendants violated the terms of the license plaintiff granted. Dkt. ##7 and 30. I dismissed plaintiffs' claim for violation of Conrad's state law right of publicity because the amended complaint included no allegations that defendants used her likeness for a commercial purpose, as required by Wis. Stat. § 995.50(1); I dismissed her claim for tortious interference with a prospective contract against defendant Bendewald because the claim was premised on the obviously incorrect view that Bendewald violated the law by informing Vedral that she did not have to use plaintiffs' copyrighted material.

Defendants have filed motions for summary judgment. Dkt. ##91 and 92. With respect to plaintiffs' first claim, defendant Bendewald argues that he cannot be sued for infringement both because he is a coauthor of the videotaped performance and because Conrad gave him permission to record it. Defendants Vedral and SilverEdge also argue that they cannot be held liable for contributory infringement because Conrad gave Bendewald permission to make the videotape. With respect to the alternative claim, defendant Bendewald argues that Conrad did not qualify her permission to videotape the performance with a requirement to return any videotapes in the event defendants Vedral and SilverEdge declined to license the performance and put it on their website. Defendants Vedral and SilverEdge argue that they cannot be held liable under plaintiffs' alternative theory because they never were in possession of the videotape.

I am granting defendants' motion for summary judgment. Both claims are resolved

easily in defendants' favor because plaintiffs admit that Conrad gave permission to Bendewald to videotape her performance and plaintiffs point to no evidence that a condition of permission was for defendants to return the videotapes in the event that defendants decided not to use the videotape for any commercial purpose. This makes it unnecessary to decide whether defendant Bendewald is a coauthor of the videotaped performance and whether defendants Vedral and SilverEdge received or retained a copy of the videotape.

In their briefs, plaintiffs make conclusory assertions that defendants videotaped Conrad's performance without permission, but this is puzzling in light of plaintiffs' admission in their responses to defendants' proposed findings of fact that (a) Vedral's and SilverEdge's staff told plaintiff Conrad in advance that they were interested in videotaping the performance and Conrad offered to help them find a videographer, Plts.' Resp. to Dfts.' PFOF ¶¶ 18-19, dkt. #100; (b) Conrad knew before the performance that the event would be videotaped, id. at ¶ 27; (c) Conrad gave instructions to Bendewald regarding how the performance should be videotaped, id. at ¶ 34; and (d) Conrad consented to wearing a microphone during the performance to assist in recording the event. Id. at ¶¶ 35-37. See also Plts.' Br., dkt. #98 at 3 ("Conrad obviously saw the video equipment Bendewald had and did not object to the placement of the microphone, angle of the camera and so forth because she knew he was paid to take a video of the telegram for Vedral.").

Plaintiffs' admissions are sufficient to show as a matter of law that defendants had permission to videotape the performance. ITOFCA, Inc. v. MegaTrans Logistics, Inc., 322 F.3d 928, 940 (7th Cir. 2003) ("A copyright owner can grant a nonexclusive license orally,

or [one] may even be implied from conduct. In fact, consent given in the form of mere permission or lack of objection is also equivalent to a nonexclusive license and is not required to be in writing.”) (internal quotations and alterations omitted); see also Jacob Maxwell, Inc. v. Veeck, 110 F.3d 749, 752 (11th Cir.1997) (holding that nonexclusive license was created by copyright owner’s “giving permission” and “failing to object despite his knowledge” of use of his song), cited in ITOFCA, 322 F.3d at 940. (Plaintiffs say that Bendewald videotaped Conrad’s face, even though she told him not to do so. However, as I explained in the screening order, Conrad’s likeness is not entitled to copyright protection, only her performance of the song. Toney v. L’Oreal USA, Inc., 406 F.3d 905, 910 (7th Cir. 2005)). In addition, plaintiffs admit that Conrad told defendants Vedral’s and SilverEdge’s staff that she would require an additional fee only if defendants were going to use the videotape for a commercial purpose. Plts.’ Br. dkt. #99, at 5.

Plaintiffs raise two new claims in their opposition brief: (1) defendants infringed plaintiffs’ copyright by editing the videotape; and (2) defendants Vedral and SilverEdge infringed plaintiffs’ copyright by posting the video on SilverEdge’s website. Both of these claims fail at the outset because plaintiffs did not include either of them in their complaint and I did not allow them to proceed on either claim. In fact, in the order screening the complaint, I noted expressly that plaintiffs had failed to include allegations that any of the defendants had used the video on a website or for any other commercial purpose. It is well established that plaintiffs may not amend their complaint in the context of a brief in opposition to a motion for summary judgment. Grayson v. O’Neill, 308 F.3d 808, 817 (7th

Cir. 2002).

Even if I considered these untimely claims, plaintiffs could not prevail on them. With respect to the alleged editing, plaintiffs fail to cite any evidence that defendants *did* edit the videotape. With respect to the alleged posting of the performance on Vedral's and SilverEdge's website, those defendants deny that they ever posted plaintiffs' video and they submitted a declaration to that effect from their website developer along with a time record of all the edits made to the website in 2011. Dkt. #81.

The only evidence plaintiffs cite to support a contrary view is deposition testimony from plaintiff Conrad. In that deposition, taken on December 28, 2011, Conrad answered "yes" when defense counsel asked her whether her performance was used on SilverEdge's website. Dkt. #86 at 36. When counsel asked her when, she first said "this summer" and then changed her testimony to "late spring, early summer." Id. at 36-37. She could not be more specific despite requests by counsel to do so. Although she said that the video was posted on the website for four months, she did not take a screen capture of the posting or print out the page because, she said, she could not figure out how. Id. at 38-39.

Plaintiff Conrad's testimony does not create a genuine issue of material fact for two reasons. First, it contradicts the allegations in plaintiffs' first amended complaint and second amended complaint, filed on May 26, 2011 and October 3, 2011. Dkt. ##5 and 34. In both complaints, plaintiffs alleged that "[i]t is not known whether a copy of the videotape is being used on the SilverEdge website." Dkt. #5 at 6; dkt. #34 at 5. At least the October 3 complaint and perhaps the May 26 complaint were filed *after* Conrad says she saw the

performance on defendants' website, so it is not clear why plaintiffs would be alleging that they did not know whether defendants had posted the video if in fact plaintiff Conrad knew that they had. It is a "well-settled rule that a party is bound by what it states in its pleadings." Soo Line Railroad Co. v. St. Louis Southwestern Railway Co., 125 F.3d 481, 483 (7th Cir. 1997). Particularly because plaintiffs do not even attempt to explain the inconsistency, I conclude that Conrad's later testimony is not admissible.

Second, plaintiff Conrad was unable to testify in any detail about what she saw, where on the website she saw the video or even when she saw it. "It is well-settled that conclusory allegations . . . do not create a triable issue of fact." Hall v. Bodine Electric Co., 276 F.3d 345, 354 (7th Cir. 2002). Rather, under Fed. R. Civ. P. 56, parties must point to specific evidence to support their claims. Cedar Farm, Harrison County, Inc. v. Louisville Gas and Electric Co., 658 F.3d 807, 812 (7th Cir. 2011); Knight v. Wiseman, 590 F.3d 458, 463-64 (7th Cir. 2011). Conrad's testimony is so vague that it does not meet that test.

A review of plaintiffs' summary judgment materials suggests that it was not the videotaping of the performance or any failure to return the videotapes that plaintiffs are concerned about, but rather defendants Vedral's and SilverEdge's decision not to enter into a licensing agreement with Conrad. However, plaintiffs cannot force potential customers to do business with them, as much as it seems plaintiffs would like to. It should not have surprised Conrad when defendants declined a license after she demanded \$40,000. Regardless whether that amount was, as plaintiffs suggest, simply a figure to begin negotiations, it was reasonable for defendants to conclude at that point that seeking a license

from plaintiffs was not worth the trouble or expense. Although plaintiffs suggest that Conrad was hoodwinked into performing the song because she believed it would lead to a licensing fee, it is undisputed that none of the defendants ever entered into a licensing agreement with her and made any promises that they would do so. If Conrad wanted to condition her performance on a more comprehensive agreement, she was free to do so.

Because plaintiffs have failed to adduce any admissible evidence that defendants infringed plaintiffs' copyright or violated a licensing agreement, defendants are entitled to summary judgment.

#### ORDER

IT IS ORDERED that the motions for summary judgment filed by defendant James Bendewald, dkt. #91, and defendants Maria Vedral and SilverEdge Systems Software, Inc., dkt. #92, are GRANTED. The clerk of court is directed to enter summary judgment in favor of defendants and close this case.

Entered this 17th day of July, 2012.

BY THE COURT:  
/s/  
BARBARA B. CRABB  
District Judge