IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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CATHERINE CONRAD,

OPINION and ORDER

Plaintiff,

11-cv-305-bbc

v.

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

Defendants.

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This case arises out of a singing telegram performance that plaintiff Catherine Conrad gave in March 2011. She asserts claims for copyright infringement, tortious interference with a prospective contract, violation of her right of publicity and "willful intent."

In an order dated May 11, 2001, I concluded that plaintiff had failed to allege enough facts to allow a determination whether she stated a claim upon which relief may be granted under federal copyright law. I gave plaintiff an opportunity to file an amended complaint to include more information. Because jurisdiction over plaintiff's state law claims is contingent on her federal claim under 28 U.S.C. § 1367, I declined to consider the merits of her state law claims until I determined whether plaintiff was going forward on her

copyright claim.

Plaintiff has filed an amended complaint in response to the court's order. Having reviewed the amended complaint, I conclude that plaintiff may proceed on her claim under copyright law, but her state law claims must be dismissed. In addition, because plaintiff has not included Kathleen Bendewald in her amended complaint, the complaint will be dismissed as to this defendant.

In her amended complaint, plaintiff fairly alleges the following facts.

ALLEGATIONS OF FACT

On February 23, 2011 defendant Maria Vedral hired plaintiff for a "singing telegram performance" to take place on March 4, 2011. On March 2, Vedral's assistant told plaintiff that they would be videotaping the performance. Plaintiff told the assistant that, "if the videotaped was used, they would be responsible for releases and fees to use Catherine Conrad's image, voice and likeness and for use of any copyrighted material including music." The same day, she repeated this information to defendant James Bendewald, the person Vedral hired to videotape the performance.

On the day of the performance, plaintiff told Bendewald that, "since [Vedral] did not get permission to use her image, . . . he was only to videotape the reactions of the singing telegram recipient." She told him that "her image, voice, likeness and music were all

copyrighted."

Plaintiff performed the song "As Strong as I Can Be." She wrote the music and lyrics for the song and has registered her copyright. Defendant Bendewald videotaped plaintiff's performance of this song.

After the performance, plaintiff asked Vedral how she intended to use the videotape. Vedral said it would be used as "a sales tool" on a website for "Silver Edge Consulting" and that a copy would be given to the recipient of the telegram.

Plaintiff and her business partner met with Bendewald to view the tape. After doing so, plaintiff's business partner told Bendewald that "he could get into trouble by videotaping the footage of the employees that day, the compan[y's] patents on the wall and all their prototypes."

After the meeting, Bendewald told Vedral that "she could produce her 'ad' without any music from" plaintiff. Plaintiff sent Vedral "a copy of the Right of Publicity statute and the fees for the use of Catherine Conrad's image and voice and the fee for the copyrighted music/song that was used in the performance." In response, Vedral told plaintiff that she was not going to use her image and voice on the website.

On March 7, plaintiff again met with Bendewald. She attempted to "discuss the damages James Bendewald had caused when he interfered with [her] business by emailing Maria Vedral, informing her that she didn't have to use Catherine Conrad's image, voice and

music." Bendewald asked plaintiff to leave.

Over the next few weeks, plaintiff attempted to contact Bendewald again "to resolve the matter," but he did not respond to her letters or phone calls.

OPINION

A. Copyright

A plaintiff alleging copyright infringement must establish two elements: "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." Feist Publications Inc. v. Rural Telephone Servive Co., 499 U.S. 340, 361 (1991). Material may be protected by copyright if it is an "original wor[k] of authorship fixed in any tangible medium of expression." 17 U.S.C. § 102(a). "Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity." Feist Publications, Inc., 499 U.S. at 345.

In the May 11 order, I noted that plaintiff's image and voice are not entitled to protection under the copyright laws. Toney v. L'Oreal USA, Inc., 406 F.3d 905, 910 (7th Cir. 2005) ("A person's likeness—her persona—is not authored and it is not fixed."); Midler v. Ford Motor Co., 849 F.2d 460, 462 (9th Cir. 1988) ("A voice is not copyrightable. The sounds are not 'fixed.' What is put forward as protectible here is more personal than any

work of authorship."). However, music and lyrics may be protected. E.g., BMG Music v. Gonzalez, 430 F.3d 888 (7th Cir. 2005). Plaintiff alleges that defendants videotaped her performance of a song she wrote and that they did so without her permission. This is sufficient to state a claim upon which relief may be granted under copyright law.

In the May 11 order, I cited Janky v. Lake County Convention And Visitors Bureau, 576 F.3d 356, 361 (7th Cir. 2009), for the proposition that "[a]n individual 'copies' another's work for purposes of copyright law if he plays it publicly or distributes copies without the copyright owner's authorization." Although plaintiff says she does not know whether defendants have made copies of the videotape, posted the performance on the internet or otherwise played it publicly, I do not read Janky as establishing an exclusive definition for the meaning of "copy" under the copyright law. Under 17 U.S.C. § 106(1) and (2), "the owner of copyright . . . has the exclusive rights . . . to reproduce the copyrighted work in copies or phonorecords" and "to prepare derivative works based upon the copyrighted work." This may include making videotapes of a performance of a copyrighted song. E.g., Armstrong v. Eagle Rock Entertainment, Inc., 655 F. Supp. 2d 779, 790 (E.D. Mich. 2009). It is premature at this stage to consider whether defendants may have a valid defense, such as fair use, 17 U.S.C. § 107, or whether they may own a joint copyright in the videotape because of any creativity used in recording the performance. E.g., Easter Seal Society for Crippled Children and Adults of Louisiana, Inc. v. Playboy

Enterprises, 815 F.2d 323, 336 (5th Cir. 1987).

B. Right of Publicity

Wisconsin recognizes a right of publicity under both statutory and common law. Hirsch v. S.C. Johnson & Son, Inc., 90 Wis. 2d 379, 397-98, 280 N.W.2d 129, 138 (1979); Heinz v. Frank Lloyd Wright Foundation, 1986 WL 5996, *7 (W.D. Wis. Feb. 24, 1986). Wisconsin's privacy statute, Wis. Stat. § 995.50(2)(b), prohibits the "use, for advertising purposes or for purposes of trade, of the name, portrait or picture of any living person, without having first obtained the written consent of the person." An individual whose privacy is "unreasonably invaded" is entitled to equitable relief, compensatory damages and attorney fees. Wis. Stat. § 995.50(1). Similarly, the common law tort of misappropriation protects the "property interest in the publicity value" of one's identity (name, portrait or picture) from commercial exploitation by others. Hirsch, 90 Wis. 2d at 387; see also Hannigan v. Liberty Mutual Insurance Company, 1999 WL 667303, at *10 (Wis. Ct. App. Aug. 26, 1999) (nonprecedential) (summarizing Hirsch and comparing case to later enacted statute).

Plaintiff's claim for a violation of her right of publicity fails for the simple reason that she does not allege that any of the defendants used her name, picture or any other aspect of her identity for any commercial purpose. Although her allegations suggest that defendants

may have been *interested* in using her image or voice on a website, they told her that they were not going to do so after she objected and she does not give any reason to question those statements. (Plaintiff asks for damages rather than an injunction, so I need not consider whether any of the defendants are likely to violate plaintiff's right of publicity in the future.) Accordingly, the complaint must be dismissed as to this claim.

C. Tortious Interference with a Prospective Contract

Plaintiff's primary contention seems to be that defendant Bendewald interfered with a potential licensing agreement that she could have had with defendant Vedral. To succeed on a claim for tortious interference, the plaintiff must prove the following elements: (1) a prospective contractual relationship on behalf of the plaintiff; (2) knowledge by the defendant of the existence of the relationship; (3) intentional acts on the part of the defendant to disrupt the relationship; (4) actual disruption of the relationship causing damages; and (5) lack of privilege or justification for the defendant's interference. Burbank Grease Services, LLC v. Sokolowski, 2006 WI 103, ¶ 44, 294 Wis. 2d 274, 717 N.W.2d 781; Anderson v. Regents of the University of California, 203 Wis. 2d 469, 490, 554 N.W.2d 509 (Ct. App. 1996).

Plaintiff cannot prevail on an argument that Bendewald acted improperly. Briesemeister v. Lehner, 2006 WI App 140, 295 Wis. 2d 429, 453, 720 N.W.2d 531, 543

("Interference alone . . . does not establish the tort; in addition, the interference must be improper."). Plaintiff's allegations do not suggest that Bendewald was trying to harm her or enrich himself, only that he was giving his client advice on how to stay within the law without incurring an additional financial obligation. Id. at ¶ 54 ("A party has a right to protect what he believes to be his legal interest."). Further, plaintiff's allegations do not suggest that Vidral ever intended to enter into a licensing agreement with her, so she cannot meet the element of causation either. Shank v. William R. Hague, Inc., 192 F.3d 675, 689 (7th Cir. 1999) ("[A] tortious interference claim cannot stand without a showing by the plaintiff that the defendant has interfered with some bargained-for right of his or, at a bare minimum, a sufficiently certain, concrete and definite prospective relationship between the plaintiff and the third party.") (internal quotations omitted).

D. Willful Intent

Finally, plaintiff's claim for "willful intent" is not a claim at all. Rather, a showing that a violation of a particular law was "willful" may entitle the plaintiff to additional remedies. For example, under copyright law, a showing of willfulness may support an award of attorney fees, JCW Investments, Inc. v. Novelty, Inc., 509 F.3d 339, 342 (7th Cir. 2007), or prejudgment interest. McRoberts Software, Inc. v. Media 100, Inc., 329 F.3d 557, 572 (7th Cir. 2003). If plaintiff prevails on her copyright claim, she may seek damages for a

willful violation at that time.

ORDER

IT IS ORDERED that

1. Plaintiff Catherine Conrad is GRANTED leave to proceed on her claim that defendants James Bendewald, Maria Vedral and Silver Edge Systems Software, Inc. infringed plaintiff's copyright in her song, "As Strong as I Can Be."

2. Plaintiff's amended complaint is DISMISSED as to all other claims.

3. The complain is DISMISSED as to defendant Kathleen Bendwald.

4. For the remainder of the lawsuit, plaintiff must send defendants a copy of every document that she files with the court. Once plaintiff has learned what lawyer will be representing each defendant, she should serve the lawyer directly rather than defendants. The court will disregard any documents submitted by plaintiff unless she shows on the court's copy that she has sent a copy to defendants or to defendants' attorney.

5. Plaintiff should keep a copy of all documents for her own files. If she does not have access to a photocopy machine, she may send out identical handwritten or typed copies of her documents.

6. A copy of plaintiff's amended complaint, this order, summons for the defendants and a United States Marshal service form will be forwarded to the United States Marshal for

service on all of the defendants.

Entered this 9th day of June, 2011.

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