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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Margaret Morris,)	CV 08-5321 RSWL (JCx)
)	
Plaintiff,)	
)	
vs.)	ORDER RE: DEFENDANTS'
)	MOTION FOR SUMMARY
)	JUDGMENT OR, IN THE
)	ALTERNATIVE, PARTIAL
)	SUMMARY JUDGMENT[116]
Kenneth Atchity; Atchity)	
Entertainment)	
International, John Reid,)	
Sonic Age Ltd., The)	
Writer's Lifeline Inc.,)	
Defendants.)	

On October 5, 2010, Defendants' Motion for Summary Judgment or, in the alternative, Partial Summary Judgment [116] came on for regular calendar before this Court.

The Court having reviewed all papers submitted pertaining to this Motion and having considered all arguments presented to the Court, **NOW FINDS AND RULES AS FOLLOWS:**

///

1 The Court hereby **DENIES IN PART AND GRANTS IN PART**
2 Defendants' Motion for Summary Judgment, or in the
3 alternative, Partial Summary Judgment.

4 Summary judgment is appropriate when the pleadings,
5 affidavits, and other supporting papers demonstrate
6 that there are no genuine issues of material fact, and
7 the moving party is entitled to prevail as a matter of
8 law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett,
9 477 U.S. 317, 322 (1986). When making this
10 determination, the Court must view the record in the
11 light most favorable to the non-moving party. Anderson
12 v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). A
13 "genuine" dispute is one that is supported by evidence
14 sufficient to permit a reasonable jury to find in favor
15 of the nonmoving party. Id. at 247-48.

16 Defendants first assert Summary Judgment as to all
17 claims against Defendant John Reid on the grounds that
18 the Court lacks personal jurisdiction. As to all
19 Defendants, seven grounds are asserted for Summary
20 Judgment, or in the alternative, Partial Summary
21 Judgment: 1) As to Plaintiff's claim for Copyright
22 Infringement, no reasonable juror could find
23 substantial similarity between Plaintiff's Work, "Jesus
24 Augustus: From Imperial Cult to Christianity"
25 (hereinafter, "Work"), and the novel based on the Work,
26 "The Ashes of Christ / The August God" (hereinafter,
27 "Derivative Work"), 2) as to Plaintiff's claim for
28 Breach of Implied Contract, the claim is preempted by

1 the Copyright Act, 3) as to Plaintiff's claim for
2 Fraud, no reasonable juror could find that Defendants
3 acted with fraudulent intent or that Plaintiff suffered
4 any damage as a result of any misrepresentation, 4) as
5 to Plaintiff's claim for Interference with Prospective
6 Economic Advantage, Plaintiff cannot establish each
7 element of the claim as a matter of law, 5) as to
8 Plaintiff's claim for Accounting, Plaintiff has failed
9 to establish any basis for Defendants' liability that
10 entitles her to such a remedy, 6) as to Plaintiff's
11 claim for Declaratory Relief, there is no genuine issue
12 of material fact as to Plaintiff's lack of ownership of
13 the copyright in the Derivative Work, and 7) as to
14 Defendants' counterclaims for Fraud on the Copyright
15 Office, Declaratory Judgment for Non-Infringement, and
16 Defamation against Defendant Dr. Kenneth Atchity, there
17 are no genuine issues of material fact precluding
18 judgment in favor of Defendants on these counterclaims.

19 1. Personal Jurisdiction

20 The exercise of personal jurisdiction over a
21 nonresident Defendant requires the presence of two
22 factors: 1) the forum state's laws must provide a basis
23 for exercising personal jurisdiction, and 2) the
24 assertion of personal jurisdiction must comport with
25 due process. Hirsch v. Blue Cross, Blue Shield, 800
26 F.2d 1474, 1477 (9th Cir. 1986). The California long-
27 arm statute permits the exercise of jurisdiction "on
28 any basis not inconsistent with the Constitution . . .

1 of the United States." Cal. Civ. Proc. Code § 410.10.
2 This statute renders the state and federal limits of
3 jurisdiction coextensive. Roth v. Garcia Marquez, 942
4 F.2d 617, 620 (9th Cir. 1991). Thus, only a due
5 process analysis is required.

6 Due process requires that a defendant have "certain
7 minimum contacts with [the forum] such that the
8 maintenance of the suit does not offend traditional
9 notions of fair play and substantial justice." Int'l
10 Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). The
11 defendant's contacts must be "such that the [defendant]
12 should reasonably anticipate being haled into court
13 there." World-Wide Volkswagen Corp. v. Woodson, 444
14 U.S. 286, 297 (1980). Depending upon the nature and
15 scope of the defendant's contacts with the forum,
16 jurisdiction may be general or specific to the cause of
17 action. Roth, 942 F.2d at 620 (citing Data Disc v.
18 Sys. Tech. Assoc., 557 F.2d 1280, 1287 (9th Cir.
19 1977)).

20 The Court finds there is no genuine issue of
21 material fact as to whether this Court has personal
22 jurisdiction over Defendant John Reid. First, the
23 Court finds no genuine issue of material fact exists as
24 to whether Reid possesses sufficient minimum contacts
25 with the state of California in order to support a
26 finding that this Court has either general or specific
27 jurisdiction over Reid. Second, the Court finds that
28 Reid is not an alter-ego of Defendant Sonic Age Ltd.

1 (hereinafter, "Sonic Age"), and accordingly personal
2 jurisdiction over Reid cannot be supported on this
3 alternate basis.

4 A. *Minimum Contacts*

5 The Court finds that Reid does not possess
6 sufficient "minimum contacts" with California to
7 support a finding that this Court has personal
8 jurisdiction over Reid. Plaintiff's arguments that
9 Reid has minimum contacts with the state stemming from
10 his business and personal relationships are
11 unpersuasive. Plaintiff fails to put forth sufficient
12 evidence to show that Reid, who the Court finds has
13 resided in and been domiciled in the United Kingdom his
14 entire life, maintained substantial contacts with
15 California in his individual capacity such that he
16 could reasonably expect to be haled into Court in this
17 state. The evidence offered by Plaintiff is
18 insufficient to raise a triable issue of fact as to
19 whether he possesses the constitutionally required
20 minimum contacts with California, and accordingly this
21 Court's personal jurisdiction over Reid cannot be
22 supported on this basis.

23 B. *Alter-Ego*

24 Plaintiff asserts an alternate basis for this
25 Court's personal jurisdiction over Defendant Reid: that
26 Reid is an alter-ego of his company, Sonic Age.

27 The existence of a relationship between a parent
28 and its subsidiaries is not sufficient alone to

1 establish personal jurisdiction over the parent on the
2 basis of the subsidiaries' minimum contacts with the
3 forum. See Transure, Inc. v. Marsh & McLennan, Inc.,
4 766 F.2d 1297, 1299 (9th Cir. 1985). Nonetheless,
5 under the alter-ego exception "if the parent and
6 subsidiary are not really separate entities ... the
7 local subsidiary's contacts with the forum may be
8 imputed to the foreign parent corporation." Doe I v.
9 Unocal Corp., 27 F.Supp.2d 1174, 1186 (9th Cir. 1998)
10 (quotation omitted). "To satisfy [this] alter ego
11 exception ... the plaintiff must make out a prima facie
12 case 1) that there is such unity of interest and
13 ownership that the separate personalities no longer
14 exist and 2) that failure to disregard their separate
15 identities would result in fraud or injustice." Harris
16 Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd.,
17 328 F.3d 1122, 1134 (9th Cir. 2003). The plaintiff
18 must show that "the parent exercises such control over
19 the subsidiary so as to render the latter the mere
20 instrumentality of the former." Id. (quotation
21 omitted).

22 The Court finds that the underlying facts support a
23 finding that Defendants Reid and Sonic Age are distinct
24 and not alter-egos of one another. Plaintiff has
25 failed to put forth any evidence or facts to support a
26 finding that Reid is using Sonic Age solely to shield
27 himself from personal liability or that he has taken
28 any actions suggesting that the required unity of

1 interest is present. Therefore, Plaintiff's arguments
2 fail to establish that a genuine issue of material fact
3 exists as to whether Defendants Reid and Sonic Age are
4 alter-egos of one another.

5 Accordingly, Defendants' Motion for Summary
6 Judgment as to all claims against Defendant Reid is
7 **GRANTED.**

8 2. Copyright Infringement of the Original Work
9 (First Cause of Action)

10 To establish copyright infringement, a plaintiff
11 must prove two elements: 1) ownership of a valid
12 copyright, and 2) copying of protected elements of the
13 plaintiff's work. See Feist Publ'ns, Inc. v. Rural
14 Tel. Serv. Co., 499 U.S. 340, 361 (1991).

15 Copying may be established by showing that the
16 works in question are "substantially similar in their
17 protected elements" and that the infringing party had
18 access to the copyrighted work. Metcalf v. Bochco, 294
19 F.3d 1069, 1072 (9th Cir. 2002).

20 In analyzing whether the two works are
21 substantially similar, the court must first distinguish
22 between the protectable and unprotectable material
23 because a party claiming infringement may place "no
24 reliance upon any similarity in expression resulting
25 from unprotected elements." Apple v. Microsoft, 35
26 F.3d 1435, 1446 (9th Cir. 1994) (quotation omitted).
27 Then, a two-part test is used to determine whether the
28 two works are substantial similar: an "intrinsic" and

1 "extrinsic" test. The extrinsic test "objectively
2 considers whether there are substantial similarities in
3 both ideas and expression, whereas the intrinsic test
4 ... measure[s] expression subjectively." Id. at 1442.

5 Generally, "only the 'extrinsic' test is ...
6 employed at summary judgment, as the 'intrinsic' test
7 should generally be reserved for the ultimate finder of
8 fact." Idema v. Dreamworks, Inc., 162 F.Supp.2d 1129,
9 1177 (2001). If a court concludes, after analyzing the
10 objective criteria under the extrinsic test, that
11 "reasonable minds might differ as to whether there is
12 substantial similarity between the protected expression
13 of ideas in two literary works, and the record supports
14 the district court's conclusion, there is a triable
15 issue of fact that precludes summary judgment." Shaw
16 v. Lindheim, 919 F.2d 1353, 1361. (9th Cir. 1990).

17 Defendants contend the two works are similar only
18 in their use of a historical theory and the underlying
19 facts of this theory, both of which fall outside the
20 scope of copyright protection. See Benay v. Warner
21 Bros. Entm't Inc., 607 F.3d 620, 624 (9th Cir. 2010)
22 ("[H]istorical facts are ... unprotected by copyright
23 law"); see also Feist Publ'ns, Inc. v. Rural Tel. Serv.
24 Co., 499 U.S. 340, 344-45 (1991) (quoting Harper & Row,
25 Publishers, Inc. v. Nation Enters., 471 U.S. 539, 559
26 (1985)) ("The most fundamental axiom of copyright law
27 is that 'no author may copyright his ideas or the facts
28 he narrates.'"). Defendants argue no reasonable juror

1 could conclude that the Derivative Work is
2 substantially similar to any protected expression in
3 Plaintiff's Work.

4 The Court finds that genuine issues of material
5 fact remain on this cause of action. Plaintiff puts
6 forth sufficient evidence to rebut Defendants' claim
7 that the two works share only a historical theory and
8 that theory's underlying facts, and the Court finds
9 that based on the facts presented reasonable minds
10 might differ as to whether there are substantial
11 similarities between the two works with respect to the
12 protected expression of ideas contained in Plaintiff's
13 literary work.

14 Accordingly, this Court **DENIES** Defendants' Motion
15 for Summary Judgment as to Plaintiff's first cause of
16 action for Copyright Infringement.

17 3. Breach of Implied Contract (Seventh Cause of
18 Action)

19 The Ninth Circuit has incorporated a two prong test
20 to determine whether a state law claim is preempted by
21 the Copyright Act, 17 U.S.C. § 301. First, the work at
22 issue must fall within the subject matter of copyright.
23 See Del Madera Props. v. Rhodes & Gardner, Inc., 820
24 F.2d 973, 976 (9th Cir. 1987), overruled on other
25 grounds recognized by Downing v. Abercrombie & Fitch,
26 265 F.3d 994, 1003 (9th Cir. 2001). Second, the state
27 law claim must be "equivalent to any of the exclusive
28 rights within the general scope of copyright as

1 specified by Section 106 [of the Copyright Act]." Id.

2 Defendants contend Plaintiff's state law claim for
3 breach of implied contract meets this two prong test
4 and is preempted by the Copyright Act because
5 Plaintiff's claim asserts rights based on her Work,
6 which falls within the subject matter of copyright, and
7 is only seeking to protect her exclusive rights to use
8 and authorize use of the Work.

9 Defendants fail to present sufficient evidence to
10 support this argument, and the Court finds that genuine
11 issues of material fact still remain as to whether
12 Plaintiff's claim meets the two prong test for
13 preemption.

14 Specifically, Defendants fail to show that no
15 genuine issues of material fact remain as to whether
16 Plaintiff's claim is based on the submission of her
17 idea to Defendants, which is not protected by
18 copyright, or if the claim is instead asserting rights
19 based on her copyright protected Work. See Grosso v.
20 Miramax Film Corp., 383 F.3d 965, 968 (9th Cir. 2004),
21 amended 400 F.3d 965 (9th Cir. 2005), cert denied 126
22 S.Ct. 261 (2005).

23 Moreover, genuine issues of material fact remain
24 regarding whether Plaintiff's state law claim meets the
25 second test for preemption. Plaintiff presents
26 sufficient evidence to raise a triable issue of fact
27 regarding whether her claim seeks to protect her right
28 to use and authorize use of the Work or if it instead

1 involves the submission of her idea to Defendants with
2 the expectation of compensation, and therefore alleges
3 an "extra element" that aims to protect rights
4 qualitatively different from those protected by the
5 Copyright Act. See id. (holding that a state cause of
6 action is not preempted by the Copyright Act if it
7 "alleges an 'extra element' that changes the nature of
8 the action").

9 Accordingly, as Defendants' have failed to
10 demonstrate that no genuine issues of material fact
11 remain regarding whether Plaintiff's state law breach
12 of implied contract claim is preempted by the Copyright
13 Act, Defendants' Motion for Summary Judgment on this
14 cause of action is **DENIED**.

15 4. Fraud (Eighth Cause of Action)

16 To state a claim for fraud, a plaintiff must
17 allege: 1) misrepresentation, 2) knowledge of its
18 falsity, 3) intent to defraud, 4) justifiable reliance,
19 and 5) damages. See Lazar v. Superior Court, 12 Cal.
20 4th 631, 638 (1996); see also Vess v. Ciba-Geigy Corp.
21 USA, 317 F.3d 1097, 1005 (9th Cir. 2003).

22 Plaintiff argues that Defendants made multiple
23 misrepresentations by telling Plaintiff they would work
24 on her behalf without revealing their true intentions
25 of moving ahead on a new deal without her, and points
26 to later events as proof that these statements were
27 fraudulent.

28 The Court finds that Plaintiff fails to present

1 affirmative evidence to support a finding that
2 Defendants made these alleged statements with an intent
3 to defraud Plaintiff at the time that they were made.
4 Plaintiff's allegations that the end result proves the
5 statements were fraudulent is insufficient to raise a
6 triable issue of fact regarding Defendants' intent, as
7 mere nonperformance of a promise is insufficient to
8 show intent to defraud and "affirmative evidence of
9 [this intent] is necessary to avoid summary judgment."
10 Fanucchi & Limi Farms v. United Agri Products, 414 F.3d
11 1075, 1088 (9th Cir. 2005); see also Conrad v. Bank of
12 America, 53 Cal. Rptr. 2d 336 ("[I]n order to support a
13 claim of fraud based upon the alleged failure to
14 perform a promise, it must be shown that the promisor
15 did not intend to perform at the time the promise was
16 made.").

17 Accordingly, Defendants have shown that no genuine
18 issue of material fact exists as to the elements of
19 Plaintiff's claim for fraud, specifically as to whether
20 Defendants' possessed the requisite fraudulent intent
21 at the time the alleged statements were made.
22 Defendants' Motion for Summary Judgment as to
23 Plaintiff's eighth cause of action for Fraud is hereby
24 **GRANTED.**

25 5. Intentional Interference with Prospective
26 Economic Advantage (Ninth Cause of Action)

27 The elements of a cause of action for intentional
28 interference with prospective economic advantage are:

1) an economic relationship between the plaintiff and another, containing a probable future economic benefit or advantage to plaintiff, 2) defendant's knowledge of the existence of the relationship, 3) defendant's intentional conduct was designed to interfere with or disrupt the relationship, 4) defendant's intentional conduct was wrongful by some legal measure other than the fact of interference itself, 5) actual disruption of the relationship, and 6) damage to the plaintiff as a result of defendant's acts. See Marin Tug & Barge, Inc. v. Westport Petroleum, Inc., 271 F.3d 825, 831 (9th Cir. 2001) (citing Della Penna v. Toyota Motor Sales, U.S.A., Inc., 11 Cal. 4th 376, 392-393).

Defendants have shown no genuine issue of material fact exists as to Defendants' liability on this cause of action. Plaintiff has failed to present facts to raise a triable issue of fact regarding whether she had a prospective economic relationship that was intentionally interfered with by Defendants.

Plaintiff argues in her Opposition that Defendants interfered with two prospective economic relationships: 1) plans to promote and pitch Plaintiff's Work to the top executive editors at each of the major publishing houses with whom Defendant Atchity allegedly had professional contacts, and 2) an offer to option Plaintiff's film rights that was allegedly made by filmmaker Brian Flemming.

However, Defendants successfully show that no

1 genuine issue of material fact exists as to whether
2 Plaintiff had a potential economic relationship with
3 either the top editors or Brian Flemming. Plaintiff
4 does not present evidence of existing contracts or any
5 type of existing economic relationship, and thus fails
6 to raise a triable issue of fact as to whether she had
7 a relationship with these third parties that contained
8 a probable future economic benefit or advantage. See
9 Herman v. United Broth. of Carpenters & Joiners of Am.,
10 Local Union No. 971, 60 F.3d 1375, 1386 (9th Cir. 1995)
11 (holding that plaintiff "cannot survive summary
12 judgment on her [intentional interference with
13 prospective] economic advantage claim because she has
14 failed to allege any facts tending to show she had a
15 prospective contractual relationship with a third
16 party").

17 Moreover, the Court finds there is an absence of
18 evidence that Defendants intentionally took any action
19 that interfered with the alleged relationships.
20 Plaintiff's allegations, that Defendants knew about
21 these potential relationships and took action to cut
22 her out of any potential business deals, are purely
23 speculative and lack supporting evidence sufficient to
24 create a genuine issue of fact.

25 As such, Plaintiff's arguments cannot support a
26 finding that Defendants intentionally interfered with
27 any of Plaintiff's alleged prospective economic
28 relationship. No genuine issue of material fact exists

1 as to this claim, and Defendants' Motion for Summary
2 Judgment on this cause of action is hereby **GRANTED**.

3 6. Accounting (Eleventh Cause of Action)

4 The right to an accounting is dependent on the
5 validity of the underlying claims for relief. See
6 Duggal v. G.E. Capital Comm'cns Servs., Inc., 81 Cal.
7 App. 4th 81, 95 (2000). Because the Court has **DENIED**
8 Summary Judgment on two of the four preceding causes of
9 action, this Court **DENIES** Defendants' Motion for
10 Summary Judgment on the eleventh cause of action for
11 Accounting.

12 7. Declaratory Relief (Twelfth Cause of Action)

13 The Court **DENIES** Defendants' Motion for Summary
14 Judgment on the twelfth cause of action for Declaratory
15 Relief. A genuine issue of material fact remains as to
16 the respective rights of the parties in the Derivative
17 Work, as the Court has **DENIED** Defendants' Motion for
18 Summary Judgment on Plaintiff's first cause of action
19 for copyright infringement.

20 8. Defendants' Counterclaims

21 Defendants finally move for Summary Judgment on the
22 three counterclaims: 1) Fraud on the Copyright Office,
23 2) Declaratory Judgment for Non-Infringement, and 3)
24 Defendant Atchity's counterclaim for Defamation.

25 A. *Fraud on the Copyright Office*

26 With regard to Defendants' Motion for Summary
27 Judgment on the counterclaim for Fraud on the Copyright
28 Office, the Court **DENIES** Summary Judgment. The Court

1 finds that Defendants do not satisfy their burden of
2 showing there is no genuine issue of material fact as
3 to whether Plaintiff had the required intent to defraud
4 the Copyright Office at the time she filed her
5 copyright pre-registration application that stated she
6 was both the author and copyright holder to the
7 Derivative Work. Plaintiff raises a triable issue of
8 fact as to whether she filed this application in a good
9 faith belief that she owned the rights to the
10 Derivative Work at the time, and accordingly
11 Defendants' Motion is **DENIED**.

12 B. *Declaratory Judgment*

13 As the Court has **DENIED** Defendants' Motion for
14 Summary Judgment on Plaintiff's first cause of action
15 for Copyright Infringement, the Court also **DENIES**
16 Defendants' Motion for Summary Judgment on the
17 Counterclaim for Declaratory Judgment for Non-
18 Infringement.

19 C. *Defamation*

20 Defamation under California law "involves the
21 intentional publication of a statement of fact that is
22 false, unprivileged, and has a natural tendency to
23 injure or which causes special damage." Smith v.
24 Maldonado, 72 Cal. App. 4th 637, 645 (1999).

25 The Court finds that genuine issues of material
26 fact still exist as to whether Plaintiff's statement in
27 the application for pre-registration with the Copyright
28 Office constitutes defamation per se, as Plaintiff has

1 raised a triable issue of fact regarding the truth of
2 the statement. See Raghavan v. Boeing Co., 133 Cal.
3 App. 4th 1120, 1132 (2005) (noting that in all cases of
4 alleged defamation, "the truth of the offensive
5 statements ... is a complete defense against civil
6 liability, regardless of bad faith or malicious
7 purpose").

8 Therefore, this Court **DENIES** Defendants' Motion for
9 Summary Judgment on Defendant Atchity's counterclaim
10 for Defamation.

11
12 **IT IS SO ORDERED.**

13 Dated: October 15, 2010

14 RONALD S.W. LEW

15 **HONORABLE RONALD S.W. LEW**

16 Senior, U.S. District Court Judge
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