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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH  
CENTRAL DIVISION

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VICTORIA SETHUNYA,

Plaintiff,

v.

TIKTOK INC.; C3780792 TIKTOK, INC.;  
META PLATFORMS, INC.; and  
FACEBOOK, INC.,

Defendants.

**REPORT AND RECOMMENDATION  
TO GRANT TIKTOK'S MOTION TO  
DISMISS (DOC. NO. 36)**

Case No. 2:22-cv-00678

District Judge Jill N. Parrish

Magistrate Judge Daphne A. Oberg

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Pro se Plaintiff Victoria Sethunya filed this action against TikTok, Inc., and C3780792 TikTok, Inc., on October 21, 2022.<sup>1</sup> With leave of court, Ms. Sethunya filed a second amended complaint adding Meta Platforms, Inc. as a defendant.<sup>2</sup> The thrust of Ms. Sethunya's claim is that TikTok and Meta failed to remove users' reproductions of her copyrighted content, which Ms. Sethunya alleges amounts to copyright infringement and harassment. TikTok has now filed a motion to dismiss for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil

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<sup>1</sup> (See Compl., Doc. No. 13.) TikTok, Inc. claims C3780792 TikTok Inc. does not exist as an entity. (See Reply 9 n.2, Doc. No. 59.) Where Ms. Sethunya has not obtained a summons or attempted to serve this defendant separately, the court presumes C3780792 TikTok Inc. is the same entity as TikTok, Inc.

<sup>2</sup> (See Second Am. Compl., Doc. No. 20.) Ms. Sethunya's second amended complaint is the operative complaint in this case.

Procedure.<sup>3</sup> Where Ms. Sethunya has failed to state any cognizable claim against TikTok, the undersigned<sup>4</sup> recommends the district judge grant TikTok’s motion to dismiss.

### LEGAL STANDARDS

Rule 12(b)(6) of the Federal Rules of Civil Procedure permits dismissal for failure to state a claim.<sup>5</sup> To avoid dismissal under Rule 12(b)(6), a complaint must allege “enough facts to state a claim to relief that is plausible on its face.”<sup>6</sup> The court accepts well-pleaded factual allegations as true, viewing them in the light most favorable to the plaintiff and drawing all reasonable inferences in the plaintiff’s favor.<sup>7</sup> But the court need not accept a plaintiff’s conclusory allegations as true.<sup>8</sup> “[A] plaintiff must offer specific factual allegations to support each claim.”<sup>9</sup> This court also has an “independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party.”<sup>10</sup>

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<sup>3</sup> (See Def. TikTok Inc.’s Mot. to Dismiss Second Am. Complaint and Mem. in Supp. (“Mot. to Dismiss”), Doc. No. 36.)

<sup>4</sup> On November 15, 2022, this case was referred to the undersigned magistrate judge pursuant to 28 U.S.C. § 636(b)(1)(B). (Doc. No. 10.)

<sup>5</sup> See Fed. R. Civ. P. 12(b)(6).

<sup>6</sup> *Hogan v. Winder*, 762 F.3d 1096, 1104 (10th Cir. 2014) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547 (2007)).

<sup>7</sup> *Wilson v. Montano*, 715 F.3d 847, 852 (10th Cir. 2013).

<sup>8</sup> *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

<sup>9</sup> *Kan. Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1214 (10th Cir. 2011).

<sup>10</sup> *Image Software, Inc. v. Reynolds & Reynolds Co.*, 459 F.3d 1044, 1048 (10th Cir. 2006) (internal quotation marks omitted).

Because Ms. Sethunya proceeds pro se, her filings are liberally construed and held “to a less stringent standard than formal pleadings drafted by lawyers.”<sup>11</sup> Still, pro se plaintiffs must “follow the same rules of procedure that govern other litigants.”<sup>12</sup> Importantly, a pro se plaintiff “still has the burden of alleging sufficient facts on which a recognized legal claim could be based.”<sup>13</sup> While the court must make some allowances for a pro se plaintiff’s “failure to cite proper legal authority, [her] confusion of various legal theories, [her] poor syntax and sentence construction, or [her] unfamiliarity with pleading requirements,”<sup>14</sup> the court “will not supply additional factual allegations to round out a plaintiff’s complaint or construct a legal theory on a plaintiff’s behalf.”<sup>15</sup>

### ANALYSIS

The allegations in Ms. Sethunya’s second amended complaint relate to a video Ms. Sethunya created on the social media platform, TikTok, in response to the deportation of her son.<sup>16</sup> Ms. Sethunya contends the video became so popular, she trimmed it into a sound clip—the “I am Doing Blasphemy” sound clip—which other TikTok users could use.<sup>17</sup> Ms. Sethunya also alleges she registered the “Blasphemy sound” with the United States Copyright Office.<sup>18</sup>

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<sup>11</sup> *Hall*, 935 F.2d at 1110.

<sup>12</sup> *Garrett v. Selby, Connor, Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005).

<sup>13</sup> *Jenkins v. Currier*, 514 F.3d 1030, 1032 (10th Cir. 2008) (internal quotation marks omitted).

<sup>14</sup> *Hall*, 935 F.2d at 1110.

<sup>15</sup> *Smith v. United States*, 561 F.3d 1090, 1096 (10th Cir. 2009) (internal quotation marks omitted).

<sup>16</sup> (Second Am. Compl. 3, Doc. No. 20.)

<sup>17</sup> (*Id.* at 3–4.)

<sup>18</sup> (*Id.* at 6.)

However, Ms. Sethunya soon discovered other TikTok users were using the sound clip for comedic purposes instead of her intended use (promoting her efforts to reunite with her son).<sup>19</sup>

Ms. Sethunya claims she (and a private copyright enforcement company she hired) notified TikTok of videos allegedly infringing her copyright, but TikTok only removed some of the videos from its website and refused to remove others.<sup>20</sup> Ms. Sethunya asserts TikTok is allowing its users to use her copyrighted sound without her permission and “she is requesting the court take remedial action to hold TikTok responsible for [its] members’ harmful conduct.”<sup>21</sup> She also claims TikTok’s conduct amounts to “racial and sexual harassment” and “PTSD retraumatization.”<sup>22</sup> Ms. Sethunya seeks punitive damages and injunctive relief.<sup>23</sup>

In its motion to dismiss, TikTok makes three arguments. First, TikTok argues Ms. Sethunya granted TikTok and its users a license to use her content on TikTok.<sup>24</sup> Second, TikTok contends the Communications Decency Act<sup>25</sup> bars Ms. Sethunya from holding TikTok liable for the actions of its users.<sup>26</sup> Third, TikTok argues that where Ms. Sethunya cannot show TikTok

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<sup>19</sup> (*Id.* at 3–4.)

<sup>20</sup> (*Id.* at 4–6.)

<sup>21</sup> (*Id.* at 3–4.)

<sup>22</sup> (*Id.* at 2.)

<sup>23</sup> (*Id.* at 8.)

<sup>24</sup> (*See* Mot. to Dismiss 7–9, Doc. No. 36.)

<sup>25</sup> 47 U.S.C. § 230.

<sup>26</sup> (*See* Mot. to Dismiss 9–12, Doc. No. 36.)

had a legal duty or acted with intent to cause injury, her tort claims fail.<sup>27</sup> According to TikTok, providing Ms. Sethunya another opportunity to amend her complaint would be futile.<sup>28</sup>

Ms. Sethunya responds that the license was contrary to federal law, she lacked capacity to agree to TikTok's Terms of Service, the Communications Decency Act does not protect TikTok because TikTok amplified users' conduct, and TikTok may be liable in tort because it acted intentionally and recklessly.<sup>29</sup>

As explained below, Ms. Sethunya fails to state a cognizable claim for copyright infringement, and the district judge should dismiss that claim with prejudice. Since no federal claims remain and Ms. Sethunya did not allege any independent basis for subject-matter jurisdiction over her tort claims, the tort claims should be dismissed without prejudice.

**I. Ms. Sethunya granted TikTok a license to use her recording, which negates her claim of copyright infringement.**

"To establish copyright infringement, a plaintiff must prove (1) ownership of a valid copyright and (2) *unauthorized* copying of constituent elements of the work."<sup>30</sup> A copyright owner who grants a license to use her material waives his right to sue the licensee for infringement of that copyright.<sup>31</sup>

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<sup>27</sup> (*See id.* at 12–13.)

<sup>28</sup> (*Id.* at 13.)

<sup>29</sup> (*See* Opp'n to Mot. to Dismiss ("Opp'n") 6–18, Doc. No. 54.)

<sup>30</sup> *Palladium Music, Inc. v. EatSleepMusic, Inc.*, 398 F.3d 1193, 1196 (10th Cir. 2005) (emphasis added).

<sup>31</sup> *See, e.g., Boatman v. U.S. Racquetball Ass'n*, 33 F. Supp. 3d 1264, 1271 (D. Colo. 2014).

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