

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 11-08351 RGK (JCx)	Date	November 15, 2012
Title	<i>MERIDIAN TEXTILES INC. v. TOPSON DOWNS OF CALIFORNIA, et al</i>		

Present: The Honorable	R. GARY KLAUSNER, U.S. DISTRICT JUDGE
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Sharon L. Williams (Not Present)

Not Reported

Deputy Clerk

Court Reporter / Recorder

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

Not Present

Not Present

Proceedings: (IN CHAMBERS) Order re: Plaintiff’s Motion for Reconsideration (DE 78)

I. FACTUAL BACKGROUND

On October 7, 2011, Meridian Textiles, Inc. (“Plaintiff”) filed a copyright action against Topson Downs, Inc. (“Topson”), Target Corp. (“Target”), and Wal-Mart Stores, Inc. (“Wal-Mart”) (collectively, “Defendants”). The Complaint alleges two claims for relief: (1) Copyright Infringement, and (2) Contributory and/or Vicarious Copyright Infringement.

On July 20, 2012, Plaintiff filed a Motion for Partial Summary Judgment. On August 24, 2012, the Court issued an order granting in part and denying in part Plaintiff’s motion (“Order”). Specifically, the Court (1) denied Plaintiff’s motion as to the validity of its copyright in the Zebra Design; (2) granted Plaintiff’s motion as to the validity of its copyright in the Animal Print, Burnout, and Lace Designs; and (3) denied Plaintiff’s motion as to all of its claims for infringement. The Court then, *sua sponte*, granted summary judgment in favor of Defendants as to the invalidity of the Zebra Design, and non-infringement of the Animal Print, Burnout, and Lace Designs.

Currently before the Court is Plaintiff’s Motion for Reconsideration of the Court’s Order. For the following reasons, the Court **denies** Plaintiff’s motion.

II. JUDICIAL STANDARD

Under Rule 60(b), a party may bring a motion for relief from a judgment due to “mistake, inadvertence, surprise, excusable neglect... or misconduct by an opposing party... [or] any other reason that justifies relief.” Fed. R. Civ. P. 60(b). Absent unusual circumstances, reconsideration is appropriate only where the court is presented with newly discovered evidence, the court committed clear error or the decision was manifestly unjust, or there was an intervening change in controlling law. *Sch. Dist. No. 1J, Multnomah Cnty. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). A motion for reconsideration should not be used to reargue the motion or present evidence that should have been presented previously. *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 881 (9th Cir.

2009) (citing *Kona Enters, Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000)) (internal quotation marks omitted). However, the basis for relief may “include mistake and inadvertence by the judge.” *Kingvision Pay-Per-View Ltd. v. Lake Alice Bar*, 168 F.3d 347, 350 (9th Cir. 1999). Motions under Rule 60(b) are within the sound discretion of the district court. *Price v. Seydel*, 961 F.2d 1470, 1473 (9th Cir. 1992).

Local Rule 7-18 of the Central District of California supplements the Federal Rules, and states:

A Motion for Reconsideration of the decision on any motion may be made only on the grounds of (a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision. No motion for reconsideration shall in any manner repeat any oral or written argument made in support of or in opposition to the motion.

C.D. Cal. L.R. 7-18.

III. DISCUSSION

Plaintiff argues that the Court erred and seeks reconsideration on the following grounds: (1) the Court failed to provide Plaintiff a full and fair opportunity to address the issues on which the Court granted summary judgment *sua sponte*; (2) the Court violated the primary jurisdiction doctrine and misapplied the law when it found Plaintiff’s copyright of the Zebra Design invalid; (3) the Court improperly considered only samples from the exhibits of the Deutchman Declaration; (4) the Court applied a “dissimilarly analysis” when considering substantial similarity; and (5) the Court ignored the inverse ratio rule, which would have reduced Plaintiff’s burden of showing substantial similarity. The Court disagrees and addresses each argument in turn.

A. The Court’s Sua Sponte Ruling

As an initial matter, Plaintiff argues that the Court’s *sua sponte* motion was inappropriate because the Court did not afford Plaintiff adequate notice.

As stated by the U.S. Supreme Court, “district courts are widely acknowledged to possess the power to enter summary judgments *sua sponte*, so long as the losing party was on notice that she had to come forward with all of her evidence.” *Celetox Corp. v. Catrett*, 477 U.S. 317, 326 (1986) (citations omitted).” *Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 311-12 (9th Cir.1982).

Here, the Court found no genuine issues of material fact as to the very issues that Plaintiff, itself, raised in its motion for summary judgment. It stands to reason that Plaintiff was, therefore, on notice that these issues were subject to adjudication, and it was incumbent upon Plaintiff to come forward with all its arguments and evidence in support of its position. As such, the Court finds that Plaintiff had adequate opportunity to ventilate the issues on which the Court granted summary judgment, and Plaintiff’s challenge to the Order on this ground fails. *See Cool Fuel*, 685 F.2d at 311-12; *see also Lanard Toys, Ltd. v. Novelty, Inc.*, 511 F.Supp. 2d 1020, 1026 (C.D. Cal. 2007).

B. Invalidity of Zebra Design

Plaintiff contends that the Court violated Ninth Circuit authority and the primary jurisdiction doctrine when it found the Zebra Design invalid.

As to Ninth Circuit authority, Plaintiff relies on *North Coast Indus. v. Jason Maxwell, Inc.*, 972 F.2d 1031 (9th Cir. 1992). Specifically, Plaintiff argues that *North Coast* stands for the proposition that summary judgment on this issue is appropriate “only where no reasonable trier-of-fact could find even trivial differences in the designs. . .” (Pl.’s Mot., 4:22-215 (quoting *North Coast*, 972 F.2d at 1034).) As the law pertains to originality, the key factor in determining copyrightability, Plaintiff’s assertion is specious. Plaintiff relies on an excerpt of the opinion that addresses substantial similarity, an issue appropriate for determination only *after* the issue of copyrightability has been determined. Here, the Court’s finding concerned only the threshold issue of copyrightability. With regard to copyrightability, *North Coast* states (and subsequent Ninth Circuit cases echo):

Originality is the indispensable prerequisite for copyrightability . . . “Original” in reference to a copyright work means that the particular work “owes its origin” to the “author”. . . All that is needed . . . is that the “author” contributed something more than a “merely trivial” variation, something recognizably “his own.”

572 F.2d at 1033 (internal citations and quotations omitted). In this matter, the Court found that any variation found in the Zebra Design was merely trivial, lending nothing recognizable as the artist’s own design. This was a correct application of the law. Plaintiff’s disagreement with the outcome does not form a legitimate basis for reconsideration.

As to Plaintiff’s primary jurisdiction doctrine challenge, the Court also finds this basis for reconsideration unconvincing. According to Plaintiff, under the doctrine, the Court should defer to the U.S. Copyright Office’s determination of the Zebra Design’s copyrightability. Keeping in mind that the issue is the underlying validity of the copyright, not validity of the registration, the Court finds that Plaintiff has failed to cite any authority on point. It is well-established that registration of a copyright affords the copyright holder a presumption of validity that is rebuttable. *See Lamps Plus, Inc. v. Seattle Lighting Fixture Co.*, 345 F.3d 1140, 1144 (9th Cir. 2003); *see also Hamil America, Inc. v. GFI*, 193 F.3d 92, 98 (9th Cir. 1999). Here, the Court found that Defendants successfully rebutted that presumption.

In light of the foregoing, the Court finds that reconsideration based on these issues is unwarranted.

C. Consideration of the Evidence

Plaintiff argues that the Court erred by considering only photographs of the designs at issue, rather than also considering the actual garments lodged as evidence in support of its motion.

Court records show that the actual garments were lodged as evidence on August 6, 2012, the same date Plaintiff filed its Reply, over two weeks after the motion had been filed. More significantly, however, nowhere in Plaintiff’s briefs does Plaintiff cite to this evidence. Rather, when referencing evidence of the designs, Plaintiff cites only to the photographic exhibits contained in the Deutchman Declaration.¹ Plaintiff’s argument implies that it is the Court’s responsibility to hunt through the docket and files in search of possible other evidence in support of Plaintiff’s motion. That is simply incorrect. *See U.S. v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (per curiam) (“Judges are not like pigs, hunting for truffles buried in briefs.”). It is incumbent on the parties to submit their “best evidence” in an

¹ Plaintiff argues that it repeatedly referenced the evidence throughout its Complaint and moving papers. Plaintiff’s argument is unavailing. The garments and whether they infringe are the subject matter and issue of the action. While true that Plaintiff, necessarily, refers to the subject matter in its pleadings and briefs, it is too far a stretch to find that referencing a subject matter automatically places that subject matter into evidence.

effective manner, and more importantly, to reference such evidence, rather than relying on that evidence to make itself known.

In light of these facts, the Court does not consider the uncited evidence, lodged August 6, 2012, as part of the body of evidence submitted with Plaintiff's Motion for Partial Summary Judgment. Therefore, the Court finds that its failure to consider such evidence was not clear error, and denies Plaintiff's motion as to this challenge.

D. Substantial Similarity Analysis

Plaintiff contends that the Court, in its analysis, improperly focused on dissimilarities between the subject designs, which is not the proper approach to determine substantial similarity.

To prevail on a copyright infringement claim, a plaintiff must prove substantial similarity under both the extrinsic and intrinsic tests. *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485 (9th Cir. 2000). The first test, the extrinsic analysis, is objective and based on "specific criteria which can be listed and analyzed." *Funky Films, Inc. v. Time Warner Entertainment, Co.*, 462 F.3d 1072, 1077 (9th Cir. 2006) (citing *Kouf v. Walt Disney Pictures & Television*, 16 F.3d 1042, 1164 (9th Cir. 1994)). In performing the extrinsic analysis, courts examine the similarities between the copyrighted and challenged works, then determine whether the similar elements are protectable or unprotectable. *Mattel, Inc. v. MGA Entm't, Inc.*, 616 F.3d 904, 913 (9th Cir. 2010). Where there exists no substantial similarity between the protectable elements, summary judgment is appropriate. *Aliotti v. R. Dakin & Co.*, 831 F.2d 898, 902 (9th Cir. 1987).

Contrary to Plaintiff's assertions, the Court did not focus on the dissimilarities of the designs in reaching its conclusion. Rather, the Court pointed out the similarities in the protectable elements, then found that those similarities were not substantial, and in fact, eclipsed by significant differences. Plaintiff has failed to set forth any authority for the proposition that the Court may not look to major differences, and articulate such differences as a means of expressing how *not* substantially similar the protectable elements are. Therefore, Plaintiff has failed to satisfy its burden of showing clear error warranting reconsideration.

E. Inverse Ratio Rule

Plaintiff finally argues that it erred by not considering the inverse ratio rule.

In its Order, the Court found no dispute that Defendants had access to Plaintiff's designs. The Ninth Circuit has stated, "where proof of access is offered, the required degree of similarity may be somewhat less than would be necessary in the absence of such proof." *Shaw v. Lindham*, 919 F.2d 1353, 1361 (9th Cir. 1990) (quoting *Sid & Marty Krofft Television Prods. Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1163 (9th Cir. 1977) (quoting 2 M. Nimmer, *Nimmer on Copyright* § 143.4, at 634 (1976) (citations omitted))).

The Court did not conduct its analysis under the lens of the inverse ratio rule. While Plaintiff did not raise this argument in its Motion for Summary Judgment, the Court nonetheless reconsiders the issue of substantial similarity within the context of the inverse ratio rule.

In *Krofft*, the Ninth Circuit did not articulate a clear test under the rule. It merely held that the required degree of similarity *may be somewhat less* where there is proof of access. *Id.* Subsequent Ninth Circuit decisions have provided more clarity, indicating that a lower standard of proof of substantial similarity is required when a high degree of access is shown. *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485 (9th Cir. 2000).

In its Motion for Summary Judgment, Plaintiff introduced evidence that samples of the subject designs were sent from Plaintiff to Defendant Topson in April 2009. Defendants did not dispute this fact. Even if this evidence establishes a high degree of access, there is still no triable issue of material fact using a lower standard of proof of substantial similarity. As stated in the Order, the similarities of the designs' protectable elements were sparse, and the differences were significant. This analysis remains unchanged. Even with a lower standard of proof, the Court still finds no triable issue with regard to the extrinsic test for the reasons articulated in its Order.

IV. CONCLUSION

Based on the foregoing, the Court **DENIES** Plaintiff's Motion for Reconsideration.

IT IS SO ORDERED.

Initials of Preparer _____ : _____
