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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Suzanne Powers,
10 Plaintiff,

No. CV-17-03923-PHX-SMB

ORDER

11 v.

12 Caroline's Treasures Incorporated, Ronald D
13 Rutherford, Jr., and Walter Dennis Knight,
14 Defendants.

15 At issue is Defendants' Motion for Summary Judgment (Doc. 43, "Mot."). Plaintiff
16 responded to the motion (Doc. 53, "Resp."), and Defendants replied. (Doc. 60). For the
17 reasons that follow, Defendants' motion is denied in part and granted in part.

18 **I. Background**

19 Suzanne Powers ("Powers" or "Plaintiff") created 56 drawings entitled "Dogs of the
20 West aka Dog Country" in 1997 and 1998. In 2002, Powers entered into an agreement with
21 Caroline Treasure's, Inc. ("CTI") to license these works for use on CTI's products for two
22 years (the "2002 License"). (Resp. at Exh. B). CTI is an Alabama Corporation that retails
23 home items. (Doc. 31 ¶ 64). Defendants Ronald Rutherford ("Rutherford") and Walter
24 Knight ("Knight") are officers of CTI. (Doc. 31 ¶¶ 65–66). The 2002 License included a
25 clause that said the agreement could be renewed in one-year increments if both parties
26 agreed. (Resp. at Exh. B). The 2002 License ended on May 29, 2004.

27 Nevertheless, after the license expired, the parties stayed in contact and Defendants
28 continued to use Plaintiff's works and their business relationship continued under the same

1 terms. (Mot. at 4; Resp. at 1). In November 2006, Powers and CTI entered into a new two-
2 year licensing agreement (the “2006 License”). The 2006 License had a same renewal
3 clause as the 2002 License. (Resp. at Exh. D). When the license lapsed in November 2008,
4 CTI continued selling licensed products. (Mot. at 5). In November 2009, Powers contacted
5 CTI requesting a payment for royalties, which CTI paid by check. (*Id.*). In the memo line
6 for that check, it noted it was for royalties from October 2008 to October 2009.

7 The parties present different characterizations of their business relationship between
8 2002 and 2009. Defendants argue that it was established practice that they would pay
9 Powers royalties whenever she requested. (Mot. at 3–6). Powers argues this was a constant
10 frustration for her, and she attaches emails from 2003, 2004, and 2007 asking for payment.
11 (Resp. at 9, Exh. E, F, G). In a May 30, 2007, email, Powers wrote, “If you are not going
12 to send me what is owed on a timely basis without me hounding you . . . I wish to terminate
13 our relationship” (Resp. at Exh. F). A week later, she seems to walk back her demand
14 in another email: “I would like to not have to ask to be paid, that’s all. As far as pulling the
15 designs, that is up to you. As long as you don’t disappear into the night on me!” (Resp. at
16 Exh. G).

17 Powers claims she thought the agreement lapsed November 26, 2008, and
18 Defendants would stop selling her works at that point. (Resp. at Declaration of Suzanne
19 Powers, “Powers Decl.,” ¶ 14). She further alleges that even though the last check for her
20 royalties went through “Oct. 2009,” she thought it was just for October 2008 and November
21 2008, the last two months of the license agreement. (*Id.* ¶¶ 15–16). She alleges she only
22 found out about the continued use of her images in June 2017 and immediately contacted
23 CTI. (*Id.* ¶ 21). When she contacted CTI at that time, they sent her a check for post-October
24 2008 royalties. (Mot. at 8, Exh. M-1). She did not deposit the check, because she “decided
25 to look into a lawsuit.” (*Id.* at M-1).

26 Defendants argue that Powers impliedly consented to continuing the license by
27 following the same course of conduct that followed the 2002 License’s lapse. Plaintiff
28 contends that she believed their business relationship was over once the 2006 License

1 ended and Defendants continuing to sell past the expiration date of the 2006 License
2 constitutes breach of contract and copyright infringement. Powers also alleges violations
3 of the Digital Millennium Copyright Act. Pub. L. No. 105-304, 112 Stat. 2860 (1998)
4 (codified in scattered sections of Title 17). Powers alleges she sent all 56 of the copyrighted
5 works to Defendants digitally with her signature and the copyright symbol (©), which
6 constitutes copyright management information (“CMI”) under 17 U.S.C. § 1202. (Resp. at
7 5). When the images were posted online to sell the goods, the signature and copyright
8 symbol were not shown. Defendants say they posted the images as they received them and
9 did not remove a signature or copyright symbol, and they provide website archives from
10 June 2002 through April 2004 and June 2004 through May 2006 that show the images
11 without a signature or copyright symbol on their website and crediting Powers as creating
12 the artwork. (Reply at 2; Doc. 56). Powers notes that when she saw her images replaced
13 with a new background on various websites in June 2017, none of the sites credited her and
14 instead had references to Caroline’s Treasures. (Resp. at 6, Exh. H).

15 Defendants also raise a statute of limitations defense. Defendants believe Powers
16 was on notice that they were continuing to use the images based on their previous business
17 dealings and the royalty check noting it went through October 2009. Thus, any damages
18 that accrued more than three years prior to filing suit are time-barred. Additionally,
19 Defendants believe Knight and Rutherford should be granted summary judgment on the
20 breach of contract claim even if CTI is not, because only the corporate entity is liable. The
21 Court will take each argument in turn.

22 II. Legal Standard

23 Summary judgment is appropriate when “there is no genuine dispute as to any
24 material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.
25 56(a). A material fact is any factual issue that might affect the outcome of the case under
26 the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).
27 A dispute about a fact is “genuine” if the evidence is such that a reasonable jury could
28 return a verdict for the nonmoving party. *Id.* “A party asserting that a fact cannot be or is

1 genuinely disputed must support the assertion by . . . citing to particular parts of materials
2 in the record” or by “showing that materials cited do not establish the absence or presence
3 of a genuine dispute, or that an adverse party cannot produce admissible evidence to
4 support the fact.” Fed. R. Civ. P. 56(c)(1)(A), (B). The court need only consider the cited
5 materials, but it may also consider any other materials in the record. *Id.* 56(c)(3). Summary
6 judgment may also be entered “against a party who fails to make a showing sufficient to
7 establish the existence of an element essential to that party’s case, and on which that party
8 will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

9 Initially, the movant bears the burden of demonstrating to the Court the basis for the
10 motion and “identifying those portions of [the record] which it believes demonstrate the
11 absence of a genuine issue of material fact.” *Id.* at 323. If the movant fails to carry its initial
12 burden, the nonmovant need not produce anything. *Nissan Fire & Marine Ins. Co. v. Fritz*
13 *Cos.*, 210 F.3d 1099, 1102–03 (9th Cir. 2000). If the movant meets its initial responsibility,
14 the burden then shifts to the nonmovant to establish the existence of a genuine issue of
15 material fact. *Id.* at 1103. The nonmovant need not establish a material issue of fact
16 conclusively in its favor, but it “must do more than simply show that there is some
17 metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co. v. Zenith Radio*
18 *Corp.*, 475 U.S. 574, 586 (1986). The nonmovant’s bare assertions, standing alone, are
19 insufficient to create a material issue of fact and defeat a motion for summary judgment.
20 *Liberty Lobby*, 477 U.S. at 247–48. Additionally, the Ninth Circuit “has refused to find a
21 ‘genuine issue’ where the only evidence presented is ‘uncorroborated and self-serving’
22 testimony.” *Villarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002)
23 (quoting *Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1481 (9th Cir. 1996)). “If the evidence
24 is merely colorable, or is not significantly probative, summary judgment may be granted.”
25 *Liberty Lobby*, 477 U.S. at 249–50 (citations omitted). However, in the summary
26 judgment context, the Court believes the nonmovant’s evidence, *id.* at 255, and construes
27 all disputed facts in the light most favorable to the nonmoving party, *Ellison v. Robertson*,
28 357 F.3d 1072, 1075 (9th Cir. 2004). If “the evidence yields conflicting inferences

1 [regarding material facts], summary judgment is improper, and the action must proceed to
2 trial.” *O’Connor v. Boeing N. Am., Inc.*, 311 F.3d 1139, 1150 (9th Cir. 2002).

3 **III. Analysis**

4 1. The DMCA Claim Under 17 U.S.C. § 1202(b)—Removal of CMI

5 Section 1202(b) states:

6 No person shall, without the authority of the copyright owner or the law—

7 (1) intentionally remove or alter any [CMI],

8 (2) distribute or import for distribution [CMI] knowing that the [CMI] has
9 been removed or altered without authority of the copyright owner . . .

10 knowing or . . . having reasonable grounds to know that it will induce,
11 enable, facilitate or conceal an infringement of any right under this title.

12 CMI is “information conveyed in connection with” a work. 17 U.S.C. § 1202(c). It
13 includes the name of and identifying information about the author of a work. *Id.*
14 § 1202(c)(2). Powers alleges Defendants removed her signature and a copyright symbol
15 from the copyrighted works and replaced them with a notation that said “Caroline’s
16 Treasures.” She argues this constitutes two DMCA violations regarding CMI—one for
17 removing her CMI and one for adding false CMI.

18 Neither party has submitted the original images, which were sent electronically to
19 the Defendants in 2002.¹ The only evidence Powers presented that her signature and a
20 copyright symbol were on the images when Defendants received them is her statement that
21 it was her business practice to put them on her copyrighted works. (Resp. at 5; Powers
22 Decl. ¶ 5). Defendants do not contest that a signature and copyright symbol are CMI.
23 Rather they allege they received the images without the signature and copyright symbol on
24 them. Therefore, they could not have removed them. Defendants have also presented
25 website archives showing the alleged CMI missing from the images they posted on their
26 store website while the licensing agreement was still in place. (Mot. at Exh. M-4 & M-5).

27 ¹ In Plaintiff’s Response, Exhibit C contains the copyrighted works. They contain her
28 signature and a copyright symbol on each page. She does not allege that Exhibit C is the
form in which Defendants received the works, but rather that it is her business practice to
display her signature with a copyright symbol on the bottom right-hand portion of her
artwork. (Resp. at 5).

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