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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ADRIAN BOOT,

Plaintiff(s),

v.

RHAPSODY INTERNATIONAL INC.,

Defendant(s).

CASE NO. C23-0470-KKE

ORDER DENYING CROSS-MOTIONS
FOR SUMMARY JUDGMENT

This matter comes before the Court on the parties’ cross-motions for summary judgment. Dkt. Nos. 17, 18. The Court has considered the parties’ briefing¹ and heard the oral argument of counsel. For the following reasons, the Court denies both motions.

I. BACKGROUND

Plaintiff Adrian Boot is a British music photographer who, in 1979, photographed Jamaican musician Lincoln Barrington “Sugar” Minott. Dkt. No. 17-1 ¶ 9. In 2005, Boot licensed a photograph of Sugar Minott (“the photograph”) to Soul Jazz Records for use as album artwork, and two other photographs for use inside the album booklet. *Id.* ¶ 11; Dkt. No. 20-4 at 11. Boot registered the photograph with the United States Copyright Office in June 2018. Dkt. No. 17-2.

In March 2022, Boot observed the photograph (alone, not with the album cover graphics) on the website of Napster, a music streaming service operated by Defendant Rhapsody

¹ This order refers to the parties’ briefing using the CM/ECF page numbers.

1 International, Inc. *See* Dkt. No. 17-1 ¶ 16 (referencing Dkt. No. 1-2). Boot then filed this lawsuit
2 alleging copyright infringement. *See* Dkt. No. 1. The parties conducted discovery and have cross-
3 moved for summary judgment. *See* Dkt. Nos. 14, 17, 18. Those motions are now ripe for
4 resolution.

5 II. ANALYSIS

6 A. Legal Standard

7 Under Federal Rule of Civil Procedure 56(a), summary judgment is appropriate “if the
8 movant shows that there is no genuine dispute as to any material fact and the movant is entitled to
9 judgment as a matter of law.” A principal purpose of summary judgment “is to isolate and dispose
10 of factually unsupported claims[,]” so that “factually insufficient claims or defenses [can] be
11 isolated and prevented from going to trial with the attendant unwarranted consumption of public
12 and private resources.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24, 327 (1986). In resolving
13 a motion for summary judgment, the court considers “the threshold inquiry of determining whether
14 there is the need for a trial—whether, in other words, there are any genuine factual issues that
15 properly can be resolved only by a finder of fact because they may reasonably be resolved in favor
16 of either party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). “[T]here is no issue
17 for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a
18 verdict for that party.” *Id.* at 249.

19 B. There Are Factual Disputes as to Whether Rhapsody’s Use of the Photograph Was 20 Authorized by an Implied or Express License, and Therefore Neither Party is Entitled 21 to Summary Judgment on the Infringement Claim.

21 Boot’s complaint alleges that Rhapsody infringed his copyright in the photograph by
22 displaying it on the Napster website. Dkt. No. 1 ¶¶ 43–52. A copyright claim has two elements:
23 “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are
24 original.” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361 (1991).

1 Rhapsody does not dispute that Boot satisfies those elements, but argues that its display of
2 the photograph was licensed, which is a complete defense to an infringement claim. *See* Dkt. No.
3 18 at 11 (citing *Great Minds v. Office Depot, Inc.*, 945 F.3d 1106, 1110 (9th Cir. 2019) (“[A claim
4 for copyright infringement] fails if the challenged use of the work falls within the scope of a valid
5 license.”)). Thus, the Court must consider whether Rhapsody’s use of the photograph was licensed
6 in order to determine whether either party is entitled to summary judgment on the claim for
7 copyright infringement.

8 As noted *supra*, Boot licensed the photograph to Soul Jazz Records for use of the image as
9 album artwork. *See* Dkt. No. 20-4 at 11. According to Rhapsody, that license to Soul Jazz Records
10 included an implied, non-exclusive license to distribute the photograph along with the album, and
11 Soul Jazz Records conferred that right to content aggregator Play It Again Sam (“PIAS”), which
12 then conferred that right to Rhapsody via written contract. Dkt. No. 18 at 13–15. Rhapsody also
13 argues that the license it holds to the *Sugar Minott at Studio One* album, via its contract with PIAS,
14 grants it license to display the photograph. *See id.* at 15–16. Under either of these theories,
15 Rhapsody argues that it is entitled to summary judgment on the infringement claim.

16 In opposition, Boot contends that Rhapsody’s implied-license argument is improperly
17 raised because “no such defense was asserted in [its] Answer.” *Id.* at 17 (citing Dkt. No. 7).
18 Rhapsody did, however, assert an affirmative defense of license: “Plaintiff’s claims are barred in
19 whole or part because any alleged use of the image by Rhapsody was licensed by or through a
20 third party.” Dkt. No. 7 at 6. This is sufficient to notify Boot of Rhapsody’s defense on an implied-
21 license theory. *See, e.g., McElroy v. Courtney Ajinça Events LLC*, 512 F. Supp. 3d 1328, 1336
22 (N.D. Ga. 2021) (“Plaintiffs’ argument that the absence of the word ‘implied’ in Defendants’
23 affirmative defenses waives Defendants’ right to assert the existence of an *implied* license is
24 unpersuasive.”). Boot also contends that Rhapsody does not have an express license to display the

1 photograph because Rhapsody has not sufficiently shown a chain of licenses that starts with Boot
2 and ends with Rhapsody. Dkt. No. 24 at 9–10. The Court will therefore turn to consider whether
3 Rhapsody’s use of the photograph was authorized by either an implied or an express license that
4 would defeat Boot’s infringement claim.

5 1. There is a Question of Fact as to Whether Boot’s License to Soul Jazz Records Included
6 an Implied, Non-Exclusive License to Display the Photograph When Distributing the
7 Sugar Minott at Studio One Album.

8 Rhapsody argues that when Boot licensed the photograph to Soul Jazz Records for use as
9 album art, the nature of the transaction objectively indicated an implied understanding that the
10 photograph would be distributed with the album. Dkt. No. 31 at 9. According to Rhapsody, “when
11 a person licenses a photograph for use ‘on the cover artwork’ for an album, the *only objective*
12 *conclusion* is the photograph would be distributed with the album.” *Id.* at 10.

13 Rhapsody cites no evidence or authority that supports that argument and has failed to
14 establish that this is the only objective conclusion as a matter of law. It is not clear why Boot
15 should have assumed that when distributing the album, Soul Jazz Records would not only
16 distribute the album cover, but also the photograph used to create the album cover. Rhapsody
17 emphasizes that the court should look to the totality of the transaction between the creator and the
18 licensee to determine whether their course of conduct creates an implied license. *See* Dkt. No. 31
19 at 9–10 (citing *inter alia Effects Assocs., Inc. v. Cohen*, 908 F.2d 555, 558–59 (9th Cir. 1990)).
20 However, Rhapsody does not identify anything about the transaction between Boot and Soul Jazz
21 Records that would support its interpretation of the parties’ intent.

22 In *Effects*, a movie producer hired Effects Associates to create certain special effects for a
23 movie entitled “The Stuff,” which was eventually distributed by a third party. *Id.* at 555. Although
24 the film footage containing the special effects was used without obtaining a written license, the
Ninth Circuit found that Effects had granted an implied license to the movie producer because the

1 footage was created at the producer’s request with the intent that it be used in the film and with no
2 warning that use of the footage would constitute infringement. *Id.* at 558–59. The court
3 determined that Effects had

4 created a work at defendant’s request and handed it over, intending that defendant
5 copy and distribute it. To hold that Effects did not at the same time convey a license
6 to use the footage in “The Stuff” would mean that plaintiff’s contribution to the
7 film was “of minimal value,” a conclusion that can’t be squared with the fact that
8 defendant paid plaintiff almost \$56,000 for this footage.

9 *Id.* Relying on *Effects*, in *Asset Marketing Systems, Inc. v. Gagnon*, the Ninth Circuit identified
10 three factors relevant to determining the parties’ intent to grant a license:

11 (1) whether the parties were engaged in a short-term discrete transaction as opposed
12 to an ongoing relationship; (2) whether the creator utilized written contracts ...
13 providing that copyrighted materials could only be used with the creator’s future
14 involvement or express permission; and (3) whether the creator’s conduct during
15 the creation or delivery of the copyrighted material indicated that use of the material
16 without the creator’s involvement or consent was permissible.

17 542 F.3d 748, 756 (9th Cir. 2008) (quoting *John G. Danielson, Inc. v. Winchester-Conant Props.,*
18 *Inc.*, 322 F.3d 26, 41 (1st Cir. 2003)). The *Asset Marketing* court found that an implied license is
19 granted where “(1) a person (the licensee) requests the creation of a work, (2) the creator (the
20 licensor) makes that particular work and delivers it to the licensee who requested it, and (3) the
21 licensor intends that the licensee-requestor copy and distribute his work.” *Id.* at 754–55. But
22 where, as here, the work at issue was not commissioned by the licensee, “district courts examine
23 whether ‘totality of the parties’ conduct indicates an intent to grant’ a license to the work.” *Evox*
24 *Prods. LLC v. Yahoo, Inc.*, No.:2:20-cv-02907-MEMF-JEMx, 2023 WL 5506894, at *4 (C.D. Cal.
July 28, 2023) (quoting *Montwillo v. Tull*, 632 F. Supp. 2d 917, 924 (N.D. Cal. 2008)).

Here, there is scant evidence of parties’ intent when Boot licensed the photograph to Soul
Jazz Records for use as album artwork: the only documentary evidence of the license is an invoice
instructing Soul Jazz Records to pay licensing fees to Boot for the right to reproduce three images

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