IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

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AMY LEE SULLIVAN d/b/a DESIGN KIT,

Plaintiff,

v.

FLORA, INC.,

Defendant.

OPINION and ORDER

15-cv-298-jdp

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Plaintiff Amy Lee Sullivan is suing defendant Flora, Inc. for copyright infringement of 33 illustrations that she created for Flora as part of two advertising campaigns. All issues regarding infringement, including willfulness, were resolved in a previous trial. The case is scheduled for trial on August 12 to decide the issue of statutory damages. The first jury decided that issue too, but the court of appeals vacated that decision—twice—because the district court decided as a matter of law when it should have allowed the jury to decide the question whether the illustrations were 33 individual works or two compilations. *Sullivan v. Flora, Inc.*, 936 F.3d 562 (7th Cir. 2019); *Sullivan v. Flora, Inc.*, 63 F.4th 1130 (7th Cir. 2023).[1] The court of appeals referred to the 2019 decision as *Flora I* and the 2023 as *Flora II*, so this court will do the same.

This order addresses the pending motions before the court, resolving some of the motions and reserving a ruling on others for further discussion during the final pretrial conference.

[1] After the second remand, the case was reassigned to a different judge.

ANALYSIS

**A. Sullivan's motions in limine**

**1. Motion regarding communications between Joseph Silver and Tricia Terpstra**

Joseph Silver was the production specialist Flora hired to develop two animated videos for its products "7-Sources" and "Flor-Essence." Tricia Terpstra was a marketing executive for Flora. Sullivan wishes to exclude any testimony and exhibits regarding communications from Silver to Terpstra in which Silver expressed opinions that he was a joint author of the 33 illustrations at issue, that Sullivan performed work for hire, or that Sullivan did not have a valid copyright for any other reason. Sullivan contends that such evidence is no longer relevant because the court of appeals already affirmed the jury's determination that Flora willfully infringed Flora's copyrights. Sullivan also contends that the testimony is improper expert testimony, hearsay, and unfairly prejudicial. Sullivan lists numerous exhibits from the first trial that she says should be excluded.

Flora does not dispute that infringement and willfulness were resolved in the first trial, it says it does not intend to call Silver as a witness, and it does not seek to offer most of the exhibits on Sullivan's list. But it says that it should be permitted to offer Exhibit 603, which is an email from Silver to Terpstra that includes the following statements:

> We double-checked and have confirmed that the Flora videos do not violate any copyrights. All illustrators and animators we use are For Hire, and none have been granted copyrights either by written or verbal contract. Furthermore, all illustrators and animators, including the one who emailed Flora, have been paid in full for their services.
>
> It's unclear to me why the vendor in question decided to contact you in this fashion. But I wanted to assure you that everything is in order regarding copyrights. If she continues to contact Flora, please feel free to let me know so that I can handle the situation for you.

Flora contends that the email is relevant to showing the "circumstances of infringement," which is one of the factors for assessing the amount of statutory damages. Seventh Circuit Pattern Jury Instruction 12.8.4. Flora does not explain what it means by this, but the only apparent relevance of the email is to show that Terpstra relied on Silver's representation when deciding to use Sullivan's illustrations without Sullivan's permission.[2] So the only "circumstances of infringement" this email shows are related to willfulness. Allowing Flora to present this exhibit would likely only confuse the jury regarding how they should consider the evidence in light of the instruction that defendant's infringement was willful.

The court's tentative conclusion is to exclude Exhibit 603 and any related testimony. But this ruling could work both ways. If Flora cannot present evidence undermining a finding of willfulness, then it may follow that Sullivan cannot present evidence supporting a finding of willfulness. If Sullivan believes that she should be allowed to present additional evidence beyond that instruction to show the *degree* of willfulness, it raises the question whether Flora should be allowed to do the same, and, if so, what evidence is permissible.

So the court will reserve a ruling on this motion to allow further discussion during the final pretrial conference on the following issues: (1) whether Sullivan plans to offer evidence regarding the fact or degree of willfulness; (2) if so, whether Sullivan should be permitted to offer such evidence; and (3) if so, whether Exhibit 603 or other similar evidence is admissible to rebut Sullivan's evidence.

[2] For this reason, the court disagrees with Sullivan's objections that the exhibit is improper expert testimony or inadmissible hearsay. The exhibit is not being offered for the truth, but for the effect that it had on Flora.

**2. Motion regarding Dennis Kleinheinz testimony**

Dennis Kleinheinz is a financial evaluation expert. Among other things, his report calculates Flora's net profits on 7 Sources, Flor-Essence, and Floradix between 2013 and 2016. Dkt. 134.[3] As with Mager, Sullivan includes Kleinheinz on her witness list, Dkt. 390, but this motion is not about Kleinheinz's testimony at trial. Rather, Sullivan wishes to present Kleinheinz's calculations to the jury as "undisputed facts." Dkt. 397, at 2. She does not explain the purpose of the evidence.

Flora does not dispute the accuracy of Kleinheinz's figures, but Flora says that its net profits are not relevant. It acknowledges that the Seventh Circuit pattern jury instructions list "the expenses that Defendant saved and the profits that he earned because of the infringement" as a relevant factor in determining statutory damages. Seventh Circuit Instruction 12.8.4. But Flora says that is a different question from the amount of net profits, and Kleinheinz did not offer any opinions on the effect that Sullivan's illustrations had on Flora's sales. Without the causal connection, Flora says that Sullivan cannot rely on Flora's profits as a measure of damages.[4]

As Flora points out, the factor identified in the pattern instruction is not about all profits; it is about profits earned "because of the infringement." It does not appear that

[3] Floradix is another Flora product. Sullivan produced evidence in the first trial that Flora used her illustrations in videos to promote that product. Dkt. 327, at 18.

[4] Flora also says that the factor in the pattern jury instructions about lost profits is not discussed in Seventh Circuit case law, suggesting it is not actually a factor the jury should consider. But the district court used the pattern jury instructions during the first trial, *see* Dkt. 254, at 3, and Flora did not object to them on appeal. So Flora forfeited any objections on remand. *Sullivan*, 63 F.4th at 1138 ("[A]ny issue that could have been but was not raised on appeal is waived.").

Kleinheinz gave an opinion about the portion of Flora's profits that are attributable to the infringement.

The court cannot rule on it without knowing the purpose of the evidence or whether Sullivan has other admissible evidence showing what portion of Flora's profits were attributable to the infringement. The parties should be prepared to discuss these issues during the final pretrial conference.

Flora objects to Kleinheinz's testimony on two other grounds as well. First, Flora says that Judge Conley excluded Kleinheinz's testimony from the first trial, and it cites one of Judge Conley's pretrial rulings. Dkt. 411, at 1 (citing Dkt. 203). That is misleading. The order Flora cites did not exclude evidence about Flora's profits. Rather, Judge Conley concluded that Kleinheinz's testimony was not needed because there was no factual dispute about Kleinheinz's figures, so the parties could stipulate to Flora's net profits. Dkt. 203, at 8. Second, Flora says that Sullivan did not disclose Kleinheinz as an expert on "statutory damages." But Sullivan is not offering Kleinheinz as an expert on statutory damages; she just wants to present his calculations on Flora's profits, which Flora does not dispute. So the only question is whether those figures are relevant to any issue the jury will consider in light of other evidence that Sullivan intends to offer. That should be the focus of the discussion during the final pretrial conference.

**3. Motion to permit Sullivan to use a computer while testifying**

Sullivan says that she created the illustrations at issue on an Apple computer, but "[t]he computer systems used by Sullivan's attorneys and the related trial software are Windows-based systems." Dkt. 398, at 1. Sullivan asks for permission "to show things, if necessary, on her Apple computer in order to adequately present evidence to the jury." *Id.*

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