NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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U.S. COURT OF APPEALS

COSMOS JEWELRY, LTD., a Hawaii corporation, Plaintiff - Appellee, v. PO SUN HON CO., a California corporation; et al., Defendants - Appellants.	No. 06-56338 D.C. No. CV-03-00753-CBM MEMORANDUM*
COSMOS JEWELRY, LTD., a Hawaii corporation, Plaintiff - Appellant, v. PO SUN HON CO., a California corporation; et al., Defendants - Appellees.	No. 06-56420 D.C. No. CV-03-00753-CBM
COSMOS JEWELRY, LTD., a Hawaii	No. 07-55333

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

corporation, Plaintiff - Appellee, v. PO SUN HON CO., a California corporation; et al., Defendants - Appellants.	D.C. No. CV-03-007553-CBM

Appeal from the United States District Court
for the Central District of California
Consuelo B. Marshall, District Judge, Presiding

Argued and Submitted July 16, 2008
Pasadena, California

Before: FERNANDEZ, RYMER, and KLEINFELD, Circuit Judges:

Unlike many copyright and trade dress cases, this one went to trial. We therefore review the findings of fact only to determine whether they are clearly erroneous, and do not review de novo as we would for summary judgment. In the hyperbolic language we first used in a trademark case, "[t]o be clearly erroneous, a decision must . . . strike us as wrong with the force of a five-week old, unrefrigerated dead fish." Ocean Garden, Inc. v. Marktrade Co., 953 F.2d 500, 502 (9th Cir. 1991) (citation omitted). The standard of review, and not any determinations on the law, compels our affirmance.

Regarding copyright, Cosmos cross-appeals the adverse determination. The district judge held Cosmos's and Hon's jewelry in her hand, examined them closely, and said they do not look alike. That factual finding is not clearly erroneous. Data E. USA, Inc. v. Epyx, Inc., 862 F.2d 204, 206 (9th Cir. 1988) ("The issue[] of . . . substantial similarity [is a] finding[] of fact reviewable for clear error.").

That both designs resemble the plumeria flower is not enough for a copyright violation under Herbert Rosenthal Jewelry Corp. v. Kalpakian, 446 F.2d 738, 742 (9th Cir. 1971) (finding no copyright protection for jewelry in the shape of a bee because the idea and expression of the bee were inseparable), and Satava v. Lowry, 323 F.3d 805, 810-11 (9th Cir. 2003) (finding no copyright protection for glass in glass sculpture of a jellyfish because of an insufficient quantum of original ideas). The district court considered whether Cosmos's unprotectable design elements could be protected in combination, finding that the sand-blast finish on the body of the petals and high polish finish on their edges "either individually or in combination are 'standard, stock or common' to the medium of gold jewelry making—i.e. they are 'scenes a faire.'" The finding is not clearly erroneous.

Regarding trade dress, Hon appeals the adverse determination, and we again affirm, again because the case went to trial and our standard of review limits us to considering whether the findings were clearly erroneous. Though it is a stretch to compare identifying characteristics of jewelry to the green cover on an ironing board, Qualitex Co. v. Jacobson Prods. Co., Inc., 514 U.S. 159 (1995), the jewelry characteristics are not like the springs on a traffic sign, TrafFix Devices, Inc. v. Mktg. Displays, Inc., 532 U.S. 23 (2001). The district court found Cosmos's trade dress, "plumeria flowers in yellow gold in a specific size and shape with a sand-blasted matte finish on the petals and high-polished shiny edges," to be distinctive. Our precedents allow for the findings the district court made. E.g., Clicks Billiards Inc. v. Sixshooters Inc., 251 F.3d 1252 (9th Cir. 2001) (holding that the appearance of a pool hall can be trade dress, and noting that functionality, secondary meaning, and likelihood of confusion are issues of fact).

The district court's finding of non-functionality is not clearly erroneous. Cosmos's distinctive use of common techniques, such as shiny edges and sandblasting, were not functional in the sense of providing a means for hanging the earrings securely on the ear or attaching other jewelry, which might be analogous to the springs in TrafFix, but merely for creating the distinctive aesthetic

appearance of Wong jewelry. Au-Tomotive Gold, Inc. v. Volkswagen of America, Inc., 457 F.3d 1062, 1072 (9th Cir 2006), does not help Hon, because Hon can avoid "a significant non-reputation-related competitive disadvantage" by making and selling plumeria jewelry that does not look like Cosmos's. There is evidence in the record supporting the district court's finding that the Cosmos flowers were identified with the source, Wong's design, and not merely with plumeria flowers, so had acquired secondary meaning. Clicks, 251 F.3d at 1264; Clamp Mfg. Co. v. Enco Mfg. Co., 870 F.3d 512, 517 (9th Cir. 1989). Hon does not challenge the finding of a likelihood of confusion.

Because we affirm the finding of trademark infringement, we also affirm the finding of unfair competition. Cleary v. News Corp., 30 F.3d 1255, 1263 (9th Cir. 1994).

The record supports the district court's finding that this was an "exceptional case" under 15 U.S.C. § 1117(a), because Hon's actions were willful and deliberate, and the award of attorneys fees was not an abuse of discretion. Earthquake Sound Corp. v. Bumper Indus., 352 F.3d 1210, 1216 (9th Cir. 2003).

Damages are troubling, because Hon's evidence showed that it sold at least some jewelry that did not infringe Cosmos's trade dress, yet there was no deduction from Hon's sales to account for that. Nevertheless, the district court found Hon's testimony to be unreliable, and the records he produced were limited, illegible, and of course subject to a credibility determination themselves. Evidence that the finder of fact finds unreliable need not be treated as though it established the point that, if believed, it would tend to prove. "The plaintiff has . . . the burden of establishing the defendant's gross profits from the infringing activity with reasonable certainty." Lindy Pen Co., Inc. v. Bic Pen Corp., 982 F.2d 1400, 1408 (9th Cir. 1993). Though the district court's articulation of the burden of proof may have been inexact, the determination at trial does not require reversal in light of the plaintiff's evidence that the court accepted as credible, and its adverse credibility determination regarding the defendant's damages evidence. Hon had several opportunities to isolate his profits from the sales of plumeria jewelry with a credible accounting, but failed to do so. Since both Cosmos and the district court could not reasonably account for Hon's profits or sales from infringing jewelry less non-infringing jewelry, Cosmos, unlike the plaintiff in Lindy, is entitled to the award of the total amount of profits from the infringing period. See id. (noting that Lindy had access to records from which a reasonable estimate could be made).

"[T]o hold otherwise would give the windfall to the wrongdoer." Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co., 316 U.S. 203, 207 (1942); see also Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 261 (1916).

AFFIRMED.