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CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

George S. Chen Corp. v. Cadona International, Inc., 06-55536

B. FLETCHER, Circuit Judge, dissenting.

I respectfully dissent.

The defendant Cadona International, Inc. ("Cadona") concedes, and the district court found, that Cadona's frog, dolphin, and moon/star ornaments are identical to those made by the plaintiff George S. Chen Corp. ("GSC"). GSC owns copyright registrations for the works that Cadona has copied. Yet the majority holds that we should affirm summary judgment for Cadona because GSC failed to sufficiently identify any original elements of its works. That is not the law of this circuit or any other.

GSC's valid copyright registrations entitle its works to a presumption of originality. 17 U.S.C. § 410(c). Our law requires that to rebut this presumption of originality, there must be "*a showing on the part of the defendant* that the plaintiff's work is not original." *North Coast Indus. v. Maxwell, Inc.*, 972 F.2d 1031, 1033 (9th Cir. 1992) (emphasis added).[1] Cadona did not offer any evidence of its own to rebut that presumption, relying instead on the bare legal argument that

[1]It is for this reason that the majority's reliance on *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 740 (9th Cir. 1971) is seriously misplaced. *Rosenthal* was decided well before the passage of the Copyright Act of 1976, Pub. L. 94-553, 90 Stat. 2541 (1976), which brought into law the rebuttable presumption of originality conferred on registered copyrights by § 410(c).

under our decision in *Satava v. Lowry*, GSC's works do not merit copyright protection because they are based on items that exist in nature. 323 F.3d 805 (9th Cir. 2003). *Satava*, which was not a summary judgment case, does not so hold. *Id.* at 812 ("We do not hold that realistic depictions of live animals cannot be protected by copyright."). It is true that in *Satava* the court found that copyright protection for items from nature does not extend to aspects of a work "resulting from [an animal's] physiology." *Id.* at 810. But this language from *Satava* does not empower the district court, nor this court, to act as fact-finder and arbiter of originality on summary judgment. *North Coast*, 972 F.2d at 1035 ("The plaintiff was entitled to have the validity of its copyright determined by a trier-of-fact."). That is especially the case where, as here, we are dealing with admitted knock-offs. 3 Melville B. Nimmer & David Nimmer, NIMMER ON COPYRIGHT, § 12.10 (2007) ("What if copying is found or assumed, but the defense is that plaintiff's work itself lacked originality because copied from prior sources? That inquiry *almost always involves a triable issue of fact*, therefore precluding summary disposition when one party seeks trial on the issue.") (emphasis added).

Even if Cadona had carried its burden on summary judgment–and it did not–contrary to the majority's suggestion, GSC placed in the record a declaration from GSC's president identifying artistic choices made in creating the ornaments

sufficient to raise a triable issue of fact on originality. *Feist Publications, Inc. v. Rural Telephone Serv. Co.*, 499 U.S. 340, 345 (1991) ("The vast majority of works make the grade quite easily, as they possess some creative spark, 'no matter how crude, humble or obvious' it might be.") (citation omitted).

The majority apparently shares the district court's subjective opinion that the plaintiff's works are simply too "stereotypical" to warrant copyright protection. Maj. op. at 2. But the Copyright Act does not allow copyright registrations to be invalidated on nothing more than a failure to conform to a particular judge's idiosyncratic notions of creativity. An artist or craftsperson can create a work based on an animal using his skill and artistry and imagination that is "original." He can copyright his creation. And if a defendant makes an exact copy of that work, that artist is entitled to have a jury decide whether or not his work is original enough. I respectfully dissent.