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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EVOX PRODUCTIONS, LLC, a Delaware limited liability company, Plaintiff-Appellant, v. VERIZON MEDIA, INC., a Delaware corporation; et al., Defendants-Appellees.	No. 21-56046 D.C. No. 2:20-cv-02852-CBM-JEM MEMORANDUM*

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

Argued and Submitted October 19, 2022
Pasadena, California

Before: WATFORD and HURWITZ, Circuit Judges, and VITALIANO,** District Judge.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Eric N. Vitaliano, United States District Judge for the Eastern District of New York, sitting by designation.

Evox Productions, LLC, a creator and distributor of digital automobile images, appeals from the dismissal of its federal trademark and copyright infringement claims against Verizon Media Inc., Yahoo! Inc., and Oath Inc., collectively, "Verizon." The district court dismissed all claims pursuant to Rule 12 of the Federal Rules of Civil Procedure. Our appellate jurisdiction rests on 28 U.S.C. § 1291. We review the dismissal of these claims *de novo*. *See Cervantes v. Countrywide Home Loans*, 656 F.3d 1034, 1040 (9th Cir. 2011).

Evox's operative complaint plausibly alleged that, through its Yahoo Autos and Tumblr platforms, Verizon continued to reproduce, display, and distribute Evox's photos from Verizon's servers to website visitors more than 90 days after the termination of a licensing agreement between Evox and Verizon. So long as the images were saved to Verizon's servers and linked to Verizon's websites, visitors to these websites could directly view and download Evox's images from the site, link the images to other websites, or download and copy them. Evox alleged that it sent a cease-and-desist demand to Verizon, and that, in reply, Verizon falsely asserted that it no longer displayed the images. It was only after receiving a second cease-and-desist letter in June 2019, Evox contended, that Verizon disengaged public access to the Evox images it had stored on its servers.

For the copyright claim, the pleaded digital context provides the imperative for decision. *Perfect 10* controls the case before us. In *Perfect 10*, we held that an

entity "displays a photographic image" within the meaning of the copyright law when it "us[es] a computer to fill a computer screen with a copy of the photographic image fixed in the computer's memory" or "communicate[s] the stored image electronically to another person's computer." *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1160 (9th Cir. 2007). The server test requires an image to be both stored on the infringer's servers and delivered by the infringer to website viewers' screens. Simply linking to an image stored on a different server, or storing (without serving) the image on one's own server does not qualify as public display under copyright laws. *Id.* at 1160–62.

In this light, whether or not it meets its ultimate evidentiary burden, Evox has plausibly pleaded its copyright claim within the bounds of *Perfect 10*. The facts alleged by Evox support its contention that Verizon actually displayed Evox's images on Yahoo's Tumblr blog and Yahoo Autos—both of which were accessible to anyone with an Internet connection—even though Verizon was no longer its licensee. Appellant pleaded in the complaint that visitors to various Verizon platforms could actually fill their computer screens with images of its copyrighted material publicly displayed on the Verizon platform, and that the images were publicly distributed to Verizon viewers from Verizon websites. The well-pleaded allegations of Evox's complaint are sufficient to make out the claim that while unlicensed, Verizon not only saved Evox's images on its servers but also displayed

and distributed them directly to visitors to its websites. Consequently, the district court's Rule 12 threshold dismissal of the copyright claim was error.[1]

The trademark claim is specifically grounded on Evox's allegations that Verizon continued to display photographs bearing Evox's registered mark on Yahoo websites after the termination of the license, creating associational confusion forbidden by the Lanham Act. 15 U.S.C. § 1114. Congruence with its copyright claim, however, sounds the death knell for Evox's trademark infringement claim. When an alleged Lanham Act claim over a trademark embedded in a product is more appropriately the subject of a copyright claim, we have held that the copyright infringement claim is superseding and exhaustive. *Slep-Tone Ent. Corp. v. Wired for Sound Karaoke & DJ Servs*., *LLC*, 845 F.3d 1246, 1248 (9th Cir. 2017) (per curiam); *see also Dastar Corp. v. Twentieth Century Fox Film Corp*., 539 U.S. 23, 34 (2003). The trademark infringement claim, therefore, was properly dismissed by the district court.

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[1] Evox advances *Bell v. Wilmott Storage Services, LLC*, 12 F.4th 1065 (9th Cir. 2021) as additional support for reversal. *Bell* held, essentially, that an entity violates the public display prohibition and infringes a copyright simply by making an image available online without "serving" the image. In its counterattack, Verizon argues that *Bell's* "making available" standard is at odds with the Supreme Court's decision in *Am. Broad. Cos. v. Aereo, Inc.*, 573 U.S. 431, 448 (2014) and various precedents of this court. Since we hold that Evox has plausibly pleaded that Verizon's website users actually viewed Evox's images on Verizon's platforms, we need not, and do not, consider whether the holding in *Bell* affords an additional basis for reversal.

Upon *de novo* review, that portion of the district court's judgment dismissing appellant's trademark infringement claim is affirmed while that portion of the judgment dismissing appellant's copyright claim is reversed.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED. Each party shall bear its own costs on appeal.