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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

8 AFL Telecommunications LLC,
9 Plaintiff,

No. CV11-1086-PHX-DGC

ORDER

10 vs.

11 SurplusEZ.com, Inc., Tech Sales, LLC, and
12 Daniel Parsons and Jane Doe Parsons,

13 Defendants.
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15 Plaintiff, AFL Telecommunications LLC (“AFL”) filed a motion seeking to enjoin
16 Defendants from advertising and selling the Fujikura brand of fusion splicers in
17 competition with AFL, pending resolution of AFL’s unfair competition, false
18 advertisement, and copyright infringement claims. Doc. 6. This action was originally
19 assigned to Judge Frederick J. Martone. Judge Martone denied the motion on the basis
20 that Plaintiff had not shown “irreparable harm.” Doc. 32 at 6. This action has since been
21 transferred to this Court, where AFL is involved in another action alleging similar claims
22 against Defendants Fiberoptic Hardware, LLC and George Kyrias. *See* Doc. 34 at 16.

23 AFL has now filed a motion for reconsideration of Judge Martone’s order denying
24 its motion for a preliminary injunction. Doc. 39. Defendants have filed a response.
25 Doc. 44. For the reasons set forth below, the Court will deny Plaintiff’s motion to
26 reconsider.

27 **I. Legal Standard.**

28 Motions for reconsideration are disfavored and should be granted only in rare

1 circumstances. *See Stetter v. Blackpool*, No. CV 09-1071-PHX-DGC, 2009 WL
2 3348522, at *1 (D. Ariz. Oct. 15, 2009). A motion for reconsideration will be denied
3 “absent a showing of manifest error or a showing of new facts or legal authority that
4 could not have been brought to [the Court’s] attention earlier with reasonable diligence.”
5 LRCiv 7.2(g)(1); *see Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003). Mere
6 disagreement with an order is an insufficient basis for reconsideration. *See Ross v.*
7 *Arpaio*, No. CV 05-4177-PHX-MHM, 2008 WL 1776502, at *2 (D. Ariz. 2008). Nor
8 should reconsideration be used to ask the Court to rethink its analysis. *Id.*; *see N.W.*
9 *Acceptance Corp. v. Lynnwood Equip., Inc.*, 841 F.2d 918, 925-26 (9th Cir. 1988).

10 **II. Discussion.**

11 AFL is a wholly-owned subsidiary of Fujikura Ltd. and is the exclusive licensed
12 distributor of the Fujikura fusion splicer (a machine used to fuse together separate lengths
13 of fiber-optic cables) and its accompanying copyrighted software in North America. This
14 action arises from AFL’s allegations that Defendants have engaged in unfair competition,
15 false advertising, and copyright infringement by importing Fujikura fusion splicers
16 manufactured for sale outside the United States – and containing foreign software – and
17 selling altered versions of them to domestic consumers on the Internet. Plaintiff sought
18 to preliminarily enjoin Defendants from advertising and selling the Fujikura brand of
19 fusion splicers pending resolution of these claims.

20 To obtain preliminary injunctive relief, Plaintiff must show that it is likely to
21 succeed on the merits, that it is likely to suffer irreparable harm in the absence of
22 preliminary relief, that the balance of equities tips in its favor, and that an injunction is in
23 the public interest. *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008).

24 The Court denied Plaintiff’s motion for a preliminary injunction because it found
25 that the Ninth Circuit’s presumption of irreparable harm no longer applies to trademark
26 cases. Doc. 32 at 6. The Court also found that Plaintiff had not alleged sufficient facts to
27 make a claim of irreparable harm absent the presumption. *Id.* Plaintiff alleges legal
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1 error: “Specifically, the Court failed to follow Ninth Circuit law recognizing a
2 presumption of irreparable harm where the plaintiff shows a likelihood of success on [a
3 trademark claim].” Doc. 39 at 1-2.

4 The Court, citing to *Flexible Lifeline Systems Inc. v. Precision Lift, Inc.*, 654 F. 3d
5 989, 995 (9th Cir. 2011), stated that “[i]rreparable harm is no longer presumed in a
6 trademark or copyright case upon a showing of a likelihood of success on the merits.”
7 Doc. 32 at 6. Plaintiff argues that *Flexible Lifeline* was a copyright case and that it did
8 not deal with the presumption of irreparable harm in a trademark case. Doc. 39 at 3.
9 Plaintiff also states that *Flexible Lifeline* did not overrule *El Pollo Loco, Inc. v. Hashim*,
10 316 F. 3d 1032, 1038 (9th Cir. 2003), or *Marlyn Nutraceuticals Inc. v. Mucos Pharma*
11 *GmbH & Co.*, 571 F. 3d 873, 877 (9th Cir. 2009), both of which Plaintiff cited as
12 supporting the Ninth Circuit’s presumption of irreparable harm in a trademark
13 infringement action. Doc. 39 at 4; *see* Doc. 6 at 13.

14 Plaintiff is technically correct. In *Flexible Lifeline*, the Ninth Circuit based its
15 holding on the Supreme Court holding in *eBay Inc. v. Mercexchange, L.L.C.*, 547 U.S.
16 388 (2006), which found a presumption of irreparable harm invalid in patent
17 infringement cases. 654 F. 3d at 995-96. The Court in *eBay* drew parallels between the
18 equitable analyses required for issuing injunctions in the Patent Act and the Copyright
19 Act, leading the Ninth Circuit to conclude that “under *eBay*, a presumption of irreparable
20 harm is equally improper in a case based on copyright infringement as it is in a case
21 based on patent infringement.” 654 F. 3d at 996. Accordingly, the Ninth Circuit
22 overruled *Elvis Presley Ents., Inc. v. Passport Video*, 349 F. 3d 622 (9th Cir. 2003),
23 stating that “the ‘King’ [the *Elvis Presley* case] is dead . . . to the extent that it supported
24 the use of presumption of irreparable harm in issuing injunctive relief.” 653 F. 3d at 995
25 (cited in Judge Martone’s order, Doc. 32 at 6). *Flexible Lifeline*’s precise holding,
26 however, was limited to overruling the presumption of irreparable harm in the copyright
27 context: “we hold that even in a copyright infringement case, the plaintiff must
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1 demonstrate a likelihood of irreparable harm as a prerequisite for injunctive relief,
2 whether preliminary or permanent.” 654 F. 3d at 998.

3 The Ninth Circuit’s analysis in *Flexible Lifeline*, as well as the Supreme Court
4 cases on which *Flexible Lifeline* relied, however, suggests a lack of favor with *any*
5 presumption of irreparable harm when issuing preliminary or permanent injunctions. In
6 *eBay*, the Supreme Court rejected taking a categorical approach to injunctive relief and
7 reaffirmed the practice of applying “traditional equitable considerations.” 547 U.S. at
8 393-94. The adherence to equitable considerations that the Court noted in the language
9 of both the Copyright Act and the Patent Act (547 U.S. at 392-93 (quoting 35 U.S.C. §
10 283, 17 U.S.C. § 502(a))) is consistent with the Lanham Act’s provisions regarding
11 injunctive relief in the trademark context. *See* 15 U.S.C. §§ 1116(a) (stating that “[t]he
12 several courts . . . shall have power to grant injunctions according to the principles of
13 equity and upon such terms as the court may deem reasonable”), 1125(c)(1) (referring to
14 the issuance of injunctive relief “subject to the principles of equity”), 1125 (c)(5) (same).
15 On the basis of this analysis, *Flexible Lifeline*’s extension of *eBay*’s rejection of
16 presumptions in a patent case to a rejection of presumptions in a copyright case supports
17 a like extension to the trademark context.

18 In *Flexible Lifeline*, the Ninth Circuit also discussed the Supreme Court’s ruling in
19 *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008). 654 F. 3d at
20 996-97. This analysis also suggests that *Flexible Lifeline*’s rejection of presumptions of
21 irreparable harm applies broadly to all actions for injunctive relief. In *Winter*, the Court
22 found that the Ninth Circuit’s use of a “possibility” of irreparable harm standard was “too
23 lenient” and that a plaintiff must show that irreparable harm is “likely.” 654 F. 3d at 996
24 (citing to *Winter*, 555 U.S. at 22). The court opined that “[i]f our past standard, which
25 required a plaintiff to demonstrate at least a possibility of irreparable harm, is ‘too
26 lenient,’ then surely a standard which presumes irreparable harm without requiring any
27 showing at all is also ‘too lenient’” 654 F. 3d at 997.

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