

1 **WO**

2

3

4

5

6

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

7

8

9

Tom Bean, et al.,

) CV 11-8030-PCT-PGR

10

Plaintiffs,

)

ORDER

11

v.

)

12

Pearson Education, Inc.,

)

13

Defendant.

)

14

15

Before the Court is Plaintiff Bean’s Motion to Certify Interlocutory Appeal. (Doc. 49.)

16

The Court previously granted in part Defendant’s motion to dismiss. (Doc. 46.) Plaintiff

17

seeks certification of the portion of that Order dismissing Plaintiff’s copyright infringement

18

claims with respect to the images contained in six compilations of photographs. Defendant

19

opposes the motion. (Doc. 54.) For the reasons set forth below, the motion is denied.

20

DISCUSSION

21

A district court in its discretion may certify an issue for interlocutory appeal under 28

22

U.S.C. § 1292(b) where (1) there is a “controlling question of law,” (2) on which there are

23

“substantial grounds for difference of opinion,” and (3) “an immediate appeal may materially

24

advance the ultimate termination of the litigation.” *In re Cement Antitrust Litig.*, 673 F.2d

25

1020, 1026 (9th Cir. 1982)). Because § 1292(b) is a departure from the normal rule that only

26

final judgments are appealable, the statute “must be construed narrowly,” *James v. Price*

27

Stern Sloan, Inc., 283 F.3d 1064, 1067 n.6 (9th Cir. 2002), and “applied sparingly and only

28

in exceptional cases,” *United States v. Woodbury*, 263 F.2d 784, 788 n.11 (9th Cir. 1959)

1 (noting longstanding federal policy against “piecemeal appeals”). *See United States Rubber*
2 *Co. v. Wright*, 359 F.2d 784, 785 (9th Cir. 1966) (“The legislative history of subsection (b)
3 of section 1292 . . . indicates that it was to be used only in extraordinary cases where decision
4 of an interlocutory appeal might avoid protracted and expensive litigation. It was not
5 intended merely to provide review of difficult rulings in hard cases.”) (footnotes omitted).
6 The party seeking certification of an interlocutory appeal has the burden to show the presence
7 of exceptional circumstances. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 474–75 (1978).

8 Plaintiff contends that he has satisfied that burden. In response, Defendant contends
9 that certification is unnecessary because the issue is already under consideration by the Ninth
10 Circuit, whose resolution of the matter will bind this Court. (Doc. 54 at 3.) The cases before
11 the Court of Appeals are *Alaska Stock, LLC v. Houghton Mifflin Harcourt*, No. 10-36010
12 (9th Cir.), and *Bean v. Houghton Mifflin Harcourt*, No. 10-16771 (9th Cir.). The latter case
13 concerns the same six photo compilations at issue in this Court’s Order.¹ In his reply,
14 however, Plaintiff states that “since Bean filed the motion to certify in this case, both of the
15 parallel cases on appeal were settled in principle by mediation on June 8, 2011. The parties
16 will move for dismissal of those appeals after the settlement agreements are finalized, which
17 the parties expect to occur within 30 days.” (Doc. 57 at 2.) Under these circumstances,
18 Plaintiff states, “the issue presented in the interlocutory appeal will not be pending before
19 any appellate court.” (*Id.*)

20 If Plaintiff is correct and the issue will not ultimately be addressed in *Alaska Stock* or
21 *Bean v. HMMH*, then arguably the first two criteria under § 1292(b) are satisfied, in that there
22 is a controlling question of law as to which there remain substantial grounds for difference

23
24 ¹ The photographs are contained in compilations registered by Corbis Corporation, a
25 stock photography licensing agency. A court in this district dismissed infringement claims
26 based on images in these compilations, ruling that registration of the compilations was not
27 sufficient to register the individual photographs under § 409 of the Copyright Act. *Bean v.*
28 *Houghton Mifflin Harcourt Publishing Co.*, CV 10-8034-PCT-DGC, 2010 WL 3168624 (D.
Ariz. August 10, 2010). This Court relied on that ruling in dismissing Plaintiff’s copyright
infringement claims with respect to the photos in the compilations. (Doc. 46 at 4–5.)

1 of opinion. (See Doc. 49 at 3–4.) However, Plaintiff has not shown that immediate appeal
2 with respect to that single issue will materially advance the termination of this litigation.
3 Regardless of the outcome of the appeal, further litigation will be required to resolve
4 Plaintiff’s remaining copyright infringement claims. *See Costar Group Inc. v. LoopNet, Inc.*,
5 172 F.Supp.2d 747, 750 (D.Md. 2001) (denying interlocutory appeal based on “general
6 policy against piecemeal appeals in the course of ongoing litigation, especially where even
7 a resolution in [plaintiff’s] favor on appeal would not prevent a trial as to other issues still
8 outstanding”); *Negrete v. Allianz Life Ins. Co. of N. America*, Nos. CV 05-6838 CAS
9 (MANx), CV 05-8908 CAS (MANx), 2010 WL 4536779, at *7 (C.D.Cal. November 01,
10 2010); *Jackson v. Placer County*, No. CIV. S-05-79 FCD KJM, 2007 WL 2127528, at *3
11 (E.D.Cal. July 24, 2007).

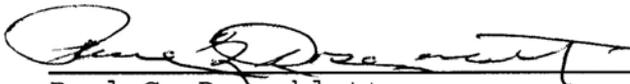
12 Plaintiff states that if the Court of Appeal reverses, he “will only require additional
13 discovery on the specific textbooks at issue in the revived claims, which should not delay any
14 trial date the Court sets.” (*Id.*) However, speculation that an interlocutory appeal will not
15 delay resolution of the case falls short of showing that an appeal will materially advance the
16 termination of the litigation.

17 In sum, Plaintiff has not satisfied his burden of establishing that the issue on which
18 he seeks interlocutory appeal is the type of exceptional circumstances that would warrant
19 departure from the basic policy of postponing appellate review until after the entry of a final
20 judgment.

21 Accordingly,

22 **IT IS ORDERED** denying Plaintiff’s Motion to Certify Interlocutory Appeal (Doc.
23 49).

24 DATED this 27th day of June, 2011.

25
26 
27 Paul G. Rosenblatt
28 United States District Judge