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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RICHARD REINSDORF, an individual,)	Case No. CV 10-07181 DDP (SSx)
)	
Plaintiff,)	
)	AMENDED ORDER RE: DEFENDANT'S
v.)	MOTION FOR SUMMARY JUDGMENT,
)	MOTIONS IN LIMINE, AND OBJECTIONS
)	TO EVIDENCE
SKECHERS U.S.A, a Delaware corporation; SKECHERS U.S.A., INC., II, a Delaware corporation,)	
)	[Dkt. No. 198]
Defendants.)	
)	

Presently before the court is Defendant Skechers U.S.A. ("Skechers")'s Motion for Summary Judgment. Having considered the submissions of the parties and heard oral argument, the court grants the motion in part, denies the motion in part, and adopts the following amended order.¹

I. Background

As explained in this court's earlier order denying Defendant's Motion to Dismiss, Skechers is a shoe company. (Declaration of

¹ This order supercedes the court's October 9, 2012 Order Denying Summary Judgment (Dkt. No. 196) and addresses the issues raised, briefed, and argued by the parties in relation to Skechers' subsequent Motion for Clarification (Dkt. No. 198).

1 Robert Welsh in support of Motion ("Welsh Dec.") Ex.19.) Beginning
2 in 2005, Skechers hired Plaintiff Richard Reinsdorf ("Reinsdorf"),
3 a photographer, to conduct several photo shoots. (Undisputed Fact
4 ¶ 6). Between 2006 and 2009, Skechers engaged Reinsdorf to conduct
5 five photo shoots at issue here, in connection with Skechers's
6 marketing efforts. (Complaint ¶¶ 14-15, 18-19, 22-23, 25, 29-30.)
7 Prior to each photo shoot, Skechers explained to Reinsdorf the type
8 of images Skechers hoped to capture. (Welsh Dec., Ex. 44 ¶¶
9 10,12.) These explanations included storyboards and photographic
10 examples, as well as drawings depicting particular poses for
11 Skechers' selected models. (Id. ¶¶ 12, 14.) During the shoots,
12 Reinsdorf posed models, arranged lighting and props, and otherwise
13 directed the photography sessions. (Compl. ¶ 23.) Reinsdorf
14 delivered raw photographs ("the photographs") to Skechers at the
15 conclusion of each photo shoot. (UF ¶ 22.)

16 Upon receiving the photographs from Reinsdorf, Skechers
17 proceeded to modify the images for use in Skechers advertisements.
18 (Welsh Dec., Ex. 44 ¶ 17.) The alterations varied with each image,
19 and ranged from slight modifications in models' skin tone to the
20 substitution of models' body parts and the addition of substantial
21 graphic effects. (Id. ¶¶ 17, 21.) These enhanced images were then
22 used in Skechers advertisements ("the advertisements"). (Id. ¶
23 16.) No raw, unaltered photograph was ever incorporated into a
24 finished advertisement. (Id.)

25 Reinsdorf submitted invoices to Skechers for his services, and
26 contends that he granted Skechers a limited license to use the
27 photographs. (Compl. ¶¶ 442; Statement of Genuine Issues ¶¶ 16-20,
28 22). Reinsdorf brought suit in this court alleging copyright

1 infringement, as well as state law causes of action for breach of
2 contract and unfair competition, alleging that Skechers utilized
3 his copyrighted images as part of Skechers' marketing efforts in
4 violation of the temporal and geographic limits of the use
5 licenses. (Compl. ¶ 6.) Skechers now moves for summary judgment.

6 **II. Legal Standard**

7 Summary judgment is appropriate where the pleadings,
8 depositions, answers to interrogatories, and admissions on file,
9 together with the affidavits, if any, show "that there is no
10 genuine dispute as to any material fact and the movant is entitled
11 to judgment as a matter of law." Fed. R. Civ. P. 56(a). A party
12 seeking summary judgment bears the initial burden of informing the
13 court of the basis for its motion and of identifying those portions
14 of the pleadings and discovery responses that demonstrate the
15 absence of a genuine issue of material fact. See Celotex Corp. v.
16 Catrett, 477 U.S. 317, 323 (1986). All reasonable inferences from
17 the evidence must be drawn in favor of the nonmoving party. See
18 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 242 (1986).
19 If the moving party does not bear the burden of proof at trial, it
20 is entitled to summary judgment if it can demonstrate that "there
21 is an absence of evidence to support the nonmoving party's case."
22 Celotex, 477 U.S. at 323.

23 Once the moving party meets its burden, the burden shifts to
24 the nonmoving party opposing the motion, who must "set forth
25 specific facts showing that there is a genuine issue for trial."
26 Anderson, 477 U.S. at 256. Summary judgment is warranted if a
27 party "fails to make a showing sufficient to establish the
28 existence of an element essential to that party's case, and on

1 which that party will bear the burden of proof at trial." Celotex,
2 477 U.S. at 322. A genuine issue exists if "the evidence is such
3 that a reasonable jury could return a verdict for the nonmoving
4 party," and material facts are those "that might affect the outcome
5 of the suit under the governing law." Anderson, 477 U.S. at 248.
6 There is no genuine issue of fact "[w]here the record taken as a
7 whole could not lead a rational trier of fact to find for the non-
8 moving party." Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,
9 475 U.S. 574, 587 (1986).

10 It is not the court's task "to scour the record in search of a
11 genuine issue of triable fact." Keenan v. Allan, 91 F.3d 1275,
12 1278 (9th Cir. 1996). Counsel has an obligation to lay out their
13 support clearly. Carmen v. San Francisco Sch. Dist., 237 F.3d
14 1026, 1031 (9th Cir. 2001). The court "need not examine the entire
15 file for evidence establishing a genuine issue of fact, where the
16 evidence is not set forth in the opposition papers with adequate
17 references so that it could conveniently be found." Id.

18 **III. Discussion**

19 A. Procedural History

20 Skechers previously brought a Motion to Dismiss for lack of
21 jurisdiction, arguing that the advertisements at issue in this case
22 are joint works created by both Reinsdorf and Skechers.
23 Because the jurisdictional issues were inextricably entwined with
24 the merits of the case, this court applied the more rigorous
25 standard applicable to motions for summary judgment under Federal
26 Rule of Civil Procedure 56. (See March 9, 2012 Order Denying
27 Defendant's Motion to Dismiss ("Order"), Dkt. No. 28.)

28

1 As explained in the court's earlier Order, a joint work is a
2 copyrightable work prepared by (1) two or more authors who (2) make
3 independently copyrightable contributions and (3) intend that those
4 contributions be "merged into inseparable or interdependent parts
5 of a unitary whole." Richlin v. Metro-Goldwyn-Mayer Pictures,
6 Inc., 531 F.3d 962, 969 (9th Cir. 2008). Co-authors in a joint
7 work cannot be held liable to one another for infringement of the
8 copyright in the joint work. Oddo v. Ries, 743 F.2d 630, 632-33
9 (9th Cir. 1984); Thomson v. Larson, 147 F.3d 195, 199 (2d Cir.
10 1998).

11 This court found that the first two factors, authorship and
12 independently copyrightable contributions, were not at issue. With
13 respect to authorship, the court expressly declined to determine
14 whether Reinsdorf was the sole author of the raw photographs
15 because, even if that were the case, the finished advertisements at
16 issue here would nevertheless be the product of contributions from
17 two authors, Reinsdorf (raw photographs) and Skechers (graphical
18 additions and modifications). (Order at 5 n.3.)

19 The court focused, therefore, on the third factor necessary to
20 establish the existence of a joint work: the intent of the parties
21 to merge independent contributions into a unitary whole. After
22 concluding that the record did not establish that Reinsdorf
23 intended his raw photographs to be merged into a finished
24 advertisement, the court denied Skechers' motion. (Id. at 7.)
25 Reinsdorf did not move for reconsideration or otherwise challenge
26 the court's conclusions.

27 Now, after the conclusion of discovery, Skechers seeks summary
28 judgment on the joint work issue. Skechers argues that the fully-

1 developed record now demonstrates that Reinsdorf did indeed intend
2 for his raw photographs to be merged with Skechers' graphical
3 enhancements into a finalized marketing image.

4 Reinsdorf's opposition to the motion does not dispute
5 Skechers' contentions regarding his intent with respect to the
6 synthesis of the parties' independent contributions. Instead,
7 Reinsdorf now challenges the second, authorship element of the
8 joint work test, arguing that the marketing images at issue here
9 are not the creations of two or more authors. (Opp. at 8-16.)

10 B. Joint Authorship

11 This case presents an unusual set of circumstances. In most
12 cases, a plaintiff seeks to establish that he is the sole author of
13 a work, see, e.g., Morrill, 157 F. Supp. 2d at 1122, or at least a
14 co-author of a work, see, e.g., Aalmuhammed v. Lee, 202 F.3d 1227,
15 1230 (9th Cir. 2000), so as to enjoy the benefits of copyright
16 ownership (or co-ownership). Here, in contrast, Plaintiff
17 Reinsdorf seeks to disavow any authorship role in the finished
18 marketing works.

19 Reinsdorf's position is understandable in light of the fact
20 that, as explained above, a co-author in a joint work cannot be
21 liable to another co-owner for infringement of the copyright in
22 that work. Oddo, 743 F.2d at 632-33 (9th Cir. 1984). Furthermore,
23 and perhaps more importantly, "[i]n a joint work, . . . each author
24 obtains an undivided ownership in the whole of the joint work,
25 including any portion thereof. Consequently, one joint author
26 thereby obtains the right to use or license that portion of the
27 joint work that was the sole creation of the other joint author."
28 1 Nimmer on Copyright § 6.06[A]. Thus, to bring a successful

1 infringement claim against Skechers, Reinsdorf must establish that
2 his role in the creation of the final marketing images did not rise
3 to the level of authorship.

4 The criteria for joint authorship include whether 1) an
5 alleged author exercises control over a work, serves as "the
6 inventive or master mind," or creates or gives effect to an idea;
7 2) there exists an "objective manifestation of a shared intent to
8 be coauthors; and 3) "the audience appeal turns on both
9 contributions and the share of each in its success cannot be
10 appraised." Aalmuhammed, 202 F.3d at 1233-35 (internal quotations
11 and citations omitted). Due to the variety of creative
12 relationships to which these factors apply, however, the factors
13 "cannot be reduced to a rigid formula." Id. at 1235.

14 1. Control

15 Courts in this district have found the joint control criterion
16 satisfied where "both parties had creative control over separate
17 and indispensable elements of the completed product." Morrill v.
18 Smashing Pumpkins, 157 F. Supp. 2d 1120, 1124 (C.D. Cal. 2001); see
19 also Eagle Rock Entm't. Inc. v. Coming Home Prods., Inc., No. CV 3-
20 571 FMC; 2004 WL 5642002 *13 (C.D. Cal. Sept. 1, 2004). Here, the
21 parties appear to agree on their respective degrees of control over
22 the constituent parts of the marketing images. Reinsdorf's
23 opposition argues that "[a]llthough . . . Skechers controlled the
24 latter half of the creative process here, namely the graphic design
25 of its marketing images, it exercised little to no control over
26 Reinsdorf's authorship of his underlying photographs. . . ." (Opp.
27 at 9.) Similarly, Reinsdorf asserts that "[j]ust as Skechers had
28 minimal involvement in Reinsdorf's authorship of his photographs,

1 [Reinsdorf] likewise did not exercise any supervisory powers over
2 the design of Skechers' marketing images" (Opp. at 11
3 (internal quotation omitted).) Skechers does not dispute these
4 characterizations. (Reply pp. 7-10.) Thus, as in Morrill and
5 Eagle Rock Entertainment, each party had exclusive, or near-
6 exclusive, power over the distinct constituent parts of the unitary
7 whole. The "supervisory" or "control" factor thus weighs in favor
8 of joint authorship.

9 2. Audience Appeal

10 While acknowledging that the audience appeal of the marketing
11 images could be attributed to both parties' contributions,
12 Reinsdorf argues that the bulk of the images' appeal can be
13 attributed to Reinsdorf's photos, and quantified. Reinsdorf
14 contends that the relative appeal of the parties' separate
15 contributions can be appraised by a casual comparison of the raw
16 photographs with the finished images. (Opp. at 17.) "From that
17 basis," Reinsdorf claims, "one can fairly easily parse how much of
18 the audience appeal of the work originates" from the various
19 elements. (Id.) This conclusory assertion notwithstanding, the
20 only evidence Reinsdorf cites is a survey study by Dr. Frank Luntz.
21 (Opp. at 17.) Dr. Luntz' survey was designed to test brand
22 recognition, not to appraise the relative audience appeal of the
23 various elements in the finished advertisements. Putting aside for
24 the moment Skechers' objections to Dr. Luntz's opinions, it does not
25 appear that Dr. Luntz ever compared Reinsdorf's raw photographs to
26 the finished Skechers advertisements. Nor did Dr. Luntz present
27 either Skechers' complete advertisements or Reinsdorf's raw
28 photographs to survey participants. (Declaration of Dr. Carol

1 Scott in Support of Motion to Exclude Luntz Report ¶ 46.) Without
2 such a comparison, Skechers cannot credibly argue that the relative
3 audience appeal of the joint authors' contributions has been
4 ascertained, and has failed to demonstrate that the share of appeal
5 attributable to each element can be appraised. The audience appeal
6 factor therefore weighs in favor of joint authorship.

7 3. Objective Manifestations of Intent

8 With respect to manifestations of intent, in the absence of a
9 contract, the inquiry here must focus on the facts. Aalmuhammed,
10 202 F.3d at 1235. Here, Skechers has presented facts that it
11 suggests evince the parties' intent to be joint authors. Reinsdorf
12 testified, for example, that his goal was to do a "great job,"
13 defined as "capturing great moments" that "Skechers could use in
14 its advertising and marketing materials." (Reinsdorf Deposition,
15 Welsh Dec., Ex. 50 at 323:3-6.) Reinsdorf did not expect anything
16 in particular about the finished images, as "[Skechers] could do
17 whatever," and never did anything creatively with the pictures that
18 it was not allowed to do. (Reinsdorf Depo. at 314:18-19; 330: 2-
19 6.) Indeed, Reinsdorf had created similar images, which Skechers
20 subsequently modified for use in advertising materials not at issue
21 in this case, for Skechers at an earlier photo shoot, the "Michelle
22 K" photo shoot. (Id. at 393.) As with the earlier Michelle K
23 shoot, Reinsdorf understood that he would be taking photos for
24 Skechers to use in its catalogs and other marketing materials.
25 (Id. at 396:10-20.) Reinsdorf's representative, Robert Heller
26 ("Heller"), acknowledged in an e-mail to Skechers personnel that
27 Skechers' intended to "digitally play" with or otherwise "decorate"
28 Reinsdorf's raw images. (Ex. 53 to Welsh Dec. at 128.)

1 Heller also testified that, as Reinsdorf's representative, he
2 affirmatively wanted Skechers to do something with the images, "to
3 make beautiful ads for their company." (Id. at 130.) Indeed,
4 Reinsdorf facilitated Skechers' manipulation of the images by
5 suggesting that Skechers use a gray or white background so as to
6 facilitate digital alteration of Reinsdorf's photos. (Id. at
7 125:5-7.) When Reinsdorf received samples of the finished
8 advertisements, his representative did not express shock or
9 confusion, but rather stated, "These came out great! Love the art
10 direction in the graphics!!" (Ex. 24 to Welsh Dec.) Even after
11 the commencement of this suit, Reinsdorf displayed the finished
12 marketing images on his personal website. (Dec. of William Briggs
13 in Opposition to Motion, Ex. 46.)²

14 While these actions and communications provide an indication
15 of Reinsdorf's intent that the parties' separate contributions be
16 merged into a unified whole, that is not the question here.
17 Rather, the issue is whether the parties manifested an intent to be
18 co-authors. The difference is important. While intent to merge
19 separate contributions is a necessary element of a joint work, it
20 is not equivalent to an intent to be joint authors.

21 Aalmuhammed itself provides a useful illustration of the
22 distinction. There, the plaintiff wrote certain passages and
23 scenes that appeared in a movie. Aalmuhammed 202 F.3d at 1231-32.

24
25 ² The exhibit in question is not an image of Reinsdorf's
26 website, but rather a cease and desist letter sent to Reinsdorf by
27 Skechers, referencing the use of the advertisements. In its reply,
28 Skechers asserts that it sought to prevent Reinsdorf from
displaying Skechers trademarks and logos, but not the marketing
images. (Reply at 10.) It is unclear whether the website
displayed Skechers logos or trademarks separate and apart from the
advertising images themselves.

1 The court found that the parties all intended for the plaintiff's
2 contributions to be merged into independent parts of the movie as a
3 whole. Id. at 1332. That intent, however, had no bearing on
4 whether the parties intended the contributing plaintiff to be an
5 "author" of the film. Id. at 1232-35. Applying the control,
6 audience appeal, and intent factors described above, the
7 Aalmuhammed court ultimately determined that, despite the parties'
8 intent to merge their independent contributions, the parties did
9 not intend for the plaintiff to be a co-author of the movie and the
10 plaintiff was not an author of the film. Id. at 1235.

11 Skechers' evidence that the parties here intended Reinsdorf's
12 photos to be merged with Skecher's digital alterations and
13 additions therefore does not resolve the authorship issue. Indeed,
14 the parties behaved in ways uncharacteristic of joint authors.
15 Perhaps most importantly, Reinsdorf charged Skechers thousands of
16 dollars for his work. Not only did Reinsdorf charge for his time
17 and effort, but also for "usage" of the photographs. (Declaration
18 of Robert Heller in Opposition to Motion, Ex. 11.) Reinsdorf also
19 attempted to limit Skechers' use of its ads by including temporally
20 and geographically restrictive language in his invoices to
21 Skechers. Skechers, for its part, also sought to prevent Reinsdorf
22 from making use of the finished images on his personal website,
23 even during the pendency of this suit. (Briggs Dec., Ex. 46.)

24 A party intending to jointly produce a finished work generally
25 would not require payment from a co-author and, conversely, would
26 not likely agree to pay for a purported co-author's contribution.
27 More importantly, a co-author would not attempt to constrain an
28 intended co-author's use of a collaborative work. Other courts

1 have come to similar conclusions under similar circumstances. In
2 Tang v. Putruss, 521 F. Supp. 2d 600 (E.D. Mich. 2007), for
3 example, a contract between a photographer and a purported co-
4 author required that the second party pay the photographer money
5 before using the photographer's photos. Id. at 607. The court
6 found such a provision inconsistent with an intent to be joint
7 authors. Id.

8 The court in Robinson v. Buy-Rite Jewellery, Inc., No. 03 CIV
9 3619(DC), 2004 WL 1878781 (S.D.N.Y. Aug. 23, 2004), addressed
10 circumstances similar to, but critically different from, those
11 here. In Robinson, as here, a photographer was hired for a fashion
12 shoot, and yielded all subsequent decision-making authority as to
13 how the photos would be used. Id. at *3. Unlike here, however,
14 the photographer agreed that the other contracting party could use
15 the photographs without limitation. Id. Relying on this
16 "critical" fact, the court concluded that the parties did intend to
17 be joint authors. Id.

18 This court's analysis of the three Aalmuhammed authorship
19 factors indicates that while the control and audience appeal
20 factors suggest plural authorship, the parties' behavior toward one
21 another could indicate a lack of intent to be joint authors of the
22 finished works. There remains, therefore, a genuine dispute of
23 material fact as to whether Skechers' finished advertisements are
24 the products of multiple authors.³ See S.O.S., Inc., v. Payday,
25 Inc., 886 F.2d 1081, 1086 (9th Cir. 1989) ("Authorship is a

26
27 ³ As discussed at argument, it is unclear at this juncture
28 whether Skechers intends to pursue its joint authorship theory,
which might give rise to a claim for an accounting. See Harper &
Row Publishers v. Nation Enters., 471 U.S. 539, 568 (1985).

1 question of fact."); Gaylord v. U.S., 595 F.3d 1364, 1377 (Fed.
2 Cir. 2010); Medforms, Inc. v. Healthcare Management Solutions,
3 Inc., 290 F.3d 98, 110 (2d Cir. 2002).

4 C. License Issues

5 1. Exclusivity

6 The complaint alleges that "Reinsdorf entered into a series of
7 written license agreements with Skechers for its exclusive use of
8 his photos" (Compl. ¶ 55.) In February 2012, Reinsdorf
9 confirmed that the facts asserted in his complaint were accurate to
10 the best of his knowledge. (Reinsdorf Depo. at 16:14-16.)

11 Three months later, however, over two months after the
12 deadline to make changes to the deposition transcript, Reinsdorf
13 purported to completely change his answer to "Skechers did not
14 actually get exclusive use of the pictures." (Supplemental Dec. of
15 Robert Welsh, Ex. 6.) Reinsdorf has not provided any explanation
16 for the untimely reversal. Reinsdorf also now states in opposition
17 to the instant motion for summary judgment that he "never granted
18 Skechers an exclusive right to use my photographs." (Reinsdorf
19 Dec. at 17.) A party may not, however, create an issue of fact by
20 contradicting prior deposition testimony. Van Asdale v. Int'l Game
21 Tech., 577 F.3d 989, 998 (9th Cir. 2009). The court finds that
22 there is a clear inconsistency between Reinsdorf's initial
23 testimony, in which he confirmed the complaint's allegation that he
24 granted Skechers an exclusive license, and his later untimely
25 correction and declaration that he did not grant Skechers an
26 exclusive license. Reinsdorf's subsequent affidavit is a sham, and
27 is therefore stricken. Id.

28 2. Copyright Infringement vs. Breach of Contract

1 Skechers also argues that it is entitled to summary judgment
2 because the invoices Reinsdorf sent to Skechers are not copyright
3 licenses as a matter of law. Instead, Skechers contends, the
4 licenses are ordinary contracts that do not give rise to copyright
5 protections or remedies. In Skechers' words, "the invoices merely
6 reflect the transfer of ownership of a complete set of Plaintiff's
7 raw photographs for Skechers' 'exclusive use,' subject only to a
8 *contractual* obligation to provide Plaintiff with additional
9 compensation for uses that may have extended beyond the six month
10 usage period." (Reply in Support of Motion for Clarification
11 ("C.Reply") at 16:18-21; 17:20-23.)

12 Skechers relies primarily on the Ninth Circuit's decision in
13 UMG Recordings Inc. v. Augusto, 628 F.3d 1175 (9th Cir. 2011). In
14 Augusto, a record company sent out unsolicited promotional CDs to
15 music critics and other industry professionals, but affixed
16 "promotional use only, not for sale" - type language to the discs.
17 Augusto, 628 F.3d at 1177-78. The defendant somehow acquired
18 several of the promotional CDs and re-sold them. Id. at 1178. The
19 record company then brought a copyright action for violation of its
20 exclusive right to distribute the CDs. Id. The question presented
21 was whether the record company's mailing served to transfer title
22 to the CDs to the recipients, thus enabling a first sale defense,
23 or whether the "promotional use only" language on the CDs
24 constituted a copyright license rather than a transfer of
25 ownership. In that context, the court looked to several factors
26 before concluding that no copyright license existed, and that the
27 record company's initial distribution of the CDs effected a sale.
28 Id. at 1179-83.

1 The question here, however, is not whether a particular
2 transfer constituted a copyright license or a transfer of
3 ownership, but rather whether a particular breach of a license
4 constituted a copyright violation or a run-of-the-mill breach of
5 contract. Augusto is, therefore, inapposite.

6 Rather, the situation presented here is controlled by MDY
7 Industries, Inc., LLC, v. Blizzard Entertainment, Inc. 629 F.3d
8 928 (9th Cir. 2011). As the Ninth Circuit explained in MDY,
9 contractual terms that limit a license's scope are "conditions,"
10 the breach of which constitutes copyright infringement. MDY, 629
11 F.3d at 939. All other license terms are covenants, "the breach of
12 which is actionable only under contract law." Id. "Wherever
13 possible, equity construes ambiguous contract provisions as
14 covenants rather than conditions." Id.

15 A breach of a license agreement only gives rise to a copyright
16 claim if the licensee "(1) exceeds the license's scope (2) in a
17 manner that implicates one of the licensor's exclusive statutory
18 rights." Id. At 940. As the Federal Circuit has illustrated:

19 [C]onsider a license in which the copyright owner grants
20 a person the right to make one and only one copy of a
21 book with the caveat that the licensee may not read the
22 last ten pages. Obviously, a licensee who made a hundred
23 copies of the book would be liable for copyright
24 infringement because the copying would violate the
25 Copyright Act's prohibition on reproduction and would
26 exceed the scope of the license. Alternatively, if the
27 licensee made a single copy of the book, but read the
28 last ten pages, the only cause of action would be for
breach of contract, because reading a book does not
violate any right protected by copyright law.

26 Storage Tech. Corp. v. Custom Hardwar Engineering & Consulting,
27 Inc., 421 F.3d 1307, 1316 (Fed. Cir. 2005).

1 The issue presently before this court is not whether
2 Reinsdorf's licenses constitute copyright licenses or non-copyright
3 contracts, but whether Skechers' conduct violated a condition or a
4 covenant of the agreements between the parties. The parties appear
5 to agree that Skechers was licensed to use Reinsdorf's photographs
6 for only six months. (Complaint ¶¶ 5-6; C.Reply at 16.) Reinsdorf
7 alleges that Skechers copied his photographs beyond the temporal,
8 geographical, and media limitations of the licenses. (Compl. ¶ 6.)
9 Such unauthorized use would encroach upon Reinsdorf's exclusive
10 right to copy his works, conferred upon him by the Copyright Act,
11 and would therefore violate a condition of the license rather than
12 a covenant. Thus, the breaches at issue here give rise to a
13 copyright infringement claim. See Storage Tech., 421 F.3d at 1316
14 ("[U]ses that violate a license agreement constitute copyright
15 infringement only when those uses would infringe in the absence of
16 any license agreement at all.") (internal quotation omitted).

17 D. Evidentiary Issues

18 Skechers filed Motions in Limine seeking to exclude the
19 testimony of Plaintiff's experts Frank Luntz and Jamie Turner, and
20 raised an evidentiary objection to the Supplemental Report of
21 expert David Connelly. Under Federal Rule of Evidence 702, an
22 expert witness may offer opinion testimony if 1) that specialized
23 knowledge will aid the trier of fact, 2) the testimony is based on
24 sufficient information, 3) the testimony is the product of reliable
25 methods, and 4) the expert has properly applied those methods to
26 the facts of the particular case. Fed. R. Evid. 702.

27 1. Frank Luntz

28

1 Plaintiff's expert Dr. Frank Luntz ("Luntz") conducted a
2 survey designed to test 1) whether Reinsdorf's photographs were
3 directly linked to the Skechers brand and 2) whether Reinsdorf's
4 photos influenced consumers' decision to purchase a product. (Opp.
5 at 5.) Skechers contends that this survey was fatally flawed, in
6 that it was directed at an unrepresentative population, employed
7 improper stimuli that produced biased responses, and failed to use
8 adequate controls. (Mot. at 1).

9 Although Dr. Luntz knew that Skechers' customer base is
10 disproportionately female, he surveyed an even number of men and
11 women aged sixteen to twenty-four. (Decl. of Carol Scott ¶ 9;
12 Luntz Depo. at 119). Luntz selected that age range because,
13 according to his research, that demographic is the "meat of the
14 athletic wear purchaser."⁴ (Declaration of Jeffrey A. Barker ¶ 5.)
15 Skechers, however, has submitted evidence that it is not an
16 "athletic wear" company, but rather a "fashionable footwear"
17 company that sells products ranging from "active" apparel to
18 "dress[wear]". Luntz surveyed participants from five geographical
19 regions, but did not compare the distribution of participants to
20 the distribution of Skechers' advertising and sales. (Luntz
21 Deposition at 113-15.) Nor did Luntz determine whether the ads
22 used in the survey had actually been displayed in participants'
23 home regions.

24 Luntz attempted to evaluate the link between Reinsdorf's
25 photos and Skechers' brand by showing survey participants an image,
26 then asking the participants to identify the company the image was

27
28 ⁴ Luntz did not keep any written records of his demographic
research.

1 promoting. (Luntz Depo., Ex. 511.) Respondents had the option to
2 choose between Skechers, Adidas, Converse, Nike, and Reebok. (Id.)
3 There was no "I don't know" option. (Id.) As described above,
4 Skechers sells a broad range of products, including dress apparel.
5 Luntz later acknowledged that all survey options other than
6 Skechers are principally athletic apparel companies. (Luntz Depo.
7 at 172-73.)

8 Skechers argues that the survey format produced biased,
9 unreliable results. (Barker Dec. ¶ 6.) For example, at question
10 10, participants were shown an image of a woman in heavy makeup,
11 tight, shiny, purple leather pants, a revealing top, and raised-
12 heel, strapped, polka dot shoes. (Luntz Depo., Ex. 511). Survey
13 respondents were then asked whether the image promoted Adidas,
14 Converse, Nike, Reebok, or Skechers. (Luntz Depo., Ex. 511).
15 Question 11, in contrast, poses the same brand-identification
16 inquiry with respect to an image of a baseball player on a baseball
17 field, in uniform and batting helmet, lifting a weighted baseball
18 bat. (Id.) The survey is replete with other examples of Skechers
19 ads featuring models in leather jackets and jewelry staring
20 straight into the camera, while all non-Skechers ads feature action
21 and sports scenes. (Id.)

22 Later in the survey, respondents were again presented with the
23 same ads they had already seen. This time, ads from all five
24 companies were presented to respondents side-by-side. The survey
25 asked participants to identify which of the five ads ("disco girl"
26 with sunglasses, baseball player, gymnast, etc) was a Skechers ad.
27 (Id.) Skechers argues that the obvious differences between
28 Skechers "fashionable" ads and the other companies' athletic-themed

1 ads skewed identifications toward Skechers and render the Luntz
2 survey fundamentally deficient.

3 Lastly, Skechers contends that the Luntz survey failed to use
4 adequate controls. (Mot. at 11-12.) Survey participants were not
5 shown any ads that did not contain any Reinsdorf images, nor were
6 they shown any unaltered Reinsdorf images. Instead, respondents
7 were only shown images containing both Reinsdorf's photographs and
8 alterations and enhancements made by Skechers. Participants were
9 never asked why they associated a particular ad with Skechers.
10 Skechers argues that absent any controls, such as ads containing
11 photos other than Reinsdorf's or Reinsdorf's unaltered photos, the
12 survey provides no basis upon which to conclude that Reinsdorf's
13 photos are the motivating force behind consumers' association of
14 the ads in question with Skechers' brand.

15 Reinsdorf makes virtually no attempt to defend Luntz's
16 methods. Instead, Reinsdorf contends that Skechers has merely
17 "nitpicked" the Luntz survey, and that any questions regarding the
18 survey's technical reliability is a question of weight to be
19 determined at trial. (Opp. at 1, 5); see E. & J. Gallo Winery v.
20 Gallo Cattle Co., 967 F.2d 1280, 1292 (9th Cir. 1992). The first
21 step in the court's analysis of any survey, however, is to
22 determine whether the survey is admissible, relevant, and conducted
23 according to accepted principles. Clicks Billiards, Inc. v.
24 Sixshooters, Inc., 251 F.3d 1252, 1263 (9th Cir. 2001). The court
25 must, therefore, determine whether a preponderance of the evidence
26 establishes that the reasoning or methodology underlying expert
27 testimony is scientifically valid. Daubert v. Merrell Dow Pharms.,
28 Inc., 509 U.S. 579, 593 (1993). Unless survey evidence is

1 conducted according to accepted principles, it is not admissible in
2 the first instance. Fortune Dynamic, Inc. v. Victoria's Secret
3 Stores Brand Mgm't, Inc., 618 F.3d 1025, 1036 (9th Cir. 2010).

4 Here, the preponderance of the evidence indicates that the
5 Luntz survey was not conducted according to accepted scientific
6 principles. Luntz did not identify any basis, save for his own
7 undocumented research, for selecting the survey population that he
8 used. There is no indication that the survey population had any
9 relationship to the relevant population of Skechers consumers.
10 Skechers fashion-focused ads were presented alongside obviously
11 distinctive sportswear ads in closed-ended brand identification
12 questions with no "I don't know" option. Furthermore, though the
13 survey purported to examine the role that Reinsdorf's photos played
14 in consumers' association of certain ads with Skechers' brand, the
15 survey did not include any controls or basis for comparison.

16 These inadequacies speak not merely to the weight that should
17 be accorded to the survey, but rather to the fundamental
18 reliability of Luntz's approach. Reinsdorf does not identify any
19 scientific principles underlying the Luntz survey, which appears to
20 violate numerous accepted practices in the field of survey
21 research. (Scott Dec. ¶¶ 24-25, 31; Shari S. Diamond, Reference
22 Guide on Survey Research, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE
23 373-408 (Fed. Judicial Center 3d ed. 2011). Accordingly, Skechers'
24 Motion to Exclude Luntz's testimony and report is GRANTED.⁵

25
26 ⁵ The court further notes that Reinsdorf did not comply with
27 the Magistrate Judge's order regarding the production of raw data
28 from the Luntz survey. Though Reinsdorf eventually produced the
data, he did so after the expiration of the deadline set by the
Magistrate Judge and after the filing of the instant motion.

(continued...)

1 2. Jamie Turner

2 A copyright owner is entitled to recover "any profits of [an]
3 infringer that are attributable to the infringement." 17 U.S.C. §
4 504(b). Recoverable profits include an infringer's "indirect
5 profits," which generally arise when an infringer uses "a
6 copyrighted work to sell another product." Garcia v. Coleman, No.
7 C-07-2279 EMC, 2009 WL 799393 at *2-3 (N.D. Cal. Mar. 24, 2009)
8 (citing Polar Bear Prods. v. Timex Corp., 384 F.3d 700 (9th Cir.
9 2004)). Because only those profits "attributable to the
10 infringement" are recoverable under the Copyright Act, "a causal
11 link between the infringement and the monetary remedy sought is a
12 predicate to recovery" of any kind. Polar Bear, 384 F.3d at 708.

13 It is the plaintiff's burden to establish a non-speculative
14 causal connection between an infringement and the infringer's
15 profits. Id. at 708, 711; Mackie v. Rieser, 296 F.3d 909, 914-16
16 (9th Cir. 2002). A plaintiff cannot merely present an infringer's
17 gross revenue, but rather must identify a particular revenue stream
18 that bears a "legally sufficient relationship" to the infringement.
19 Polar Bear, 383 F.3d at 711.

20 Reinsdorf seeks to introduce the testimony of Jamie Turner to
21 establish the amount of Skechers' profits attributable to Skechers'
22 use of Reinsdorf's photographs. Turner summarized his analysis as
23 follows:

- 24 1. [W]e can broadly conclude that more than 0% but
25 less than 100% of the net profits generated by
26 Skechers during this period can be attributable
 to Mr. Reinsdorf's brand imagery.

27 ⁵(...continued)

28 Nevertheless, Skechers does not appear to have been unduly
prejudiced by the late production.

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2. We know there was already some value to Skechers [sic] brand . . . so it is safe to assume that Mr. Reinsdorf's images are worth less than 100% of the net profits
3. [W]e know that Mr. Reinsdorf's brand imagery was used around the globe
4. We also know that this brand imagery was a foundational element of the marketing program
5. [W]e know that the residual value of the brand imagery will continue for approximately five years
6. Therefore, based on the above facts and based on my experiences working with brands such as The Coca Cola Company, AT&T and CNN . . . , it is reasonable to conclude that the value that Mr. Reinsdorf's copyrighted brand images contributed to the net profits for the corporation fall somewhere between 50% and 75% of the net profits

(Turner Report at 14-15.)

Turner's entire contribution to this dispute essentially amounts to, "I have a lot of experience with brands and marketing, therefore I can divine that 50-75% of this large, successful, company's profits come from Reinsdorf's photographs." This "analysis" identifies no causal link, let alone a non-speculative connection, between Skechers' alleged infringement and any particular revenue stream. Turner somehow settles upon an indirect profits figure between \$161 million and \$241.1 million without any specific data or discernible methodology, and in reliance on such "facts" as "it is safe to assume that Mr. Reinsdorf's images are worth less than 100% of the net profits."⁶ Turner's opinion is not

⁶ The court does not consider Turner's newly proffered opinion, submitted as an opposition to Skechers' Motion in Limine. See Fed. R. Civ. P. 37(c)(1). Even if the court were to consider Turner's declaration, the result here would not change. The declaration is internally inconsistent, referring at one point to financial reports from 2007 through 2009 and elsewhere to reports spanning from 2008 to 2010, and purports to rely on other late-filed declarations that conflict with Turner's statements and
(continued...)

1 based upon sufficient facts and is not the product of reliable
2 methods. Because Turner's opinion fails to illustrate a
3 relationship of any kind between infringing conduct and specific
4 income, it cannot serve as a basis for granting Reinsdorf Skechers'
5 indirect profits. Skechers motion to exclude Turner's testimony is
6 GRANTED. ⁷

7 3. David Connelly

8 After the close of discovery, Reinsdorf provided a
9 Supplemental Report by expert David Connelly as an exhibit to
10 Plaintiff's opposition to Skechers' Motion for Summary judgment.
11 Skechers objects to the Connelly Supplemental Report ("Supplmental
12 Report" or "CSR").⁸

13 Parties bear a duty to supplement expert reports or deposition
14 testimony if the disclosure is somehow incomplete or incorrect.
15 Fed. R. Civ. P. 26(e). "Supplementation . . . means correcting
16 inaccuracies, or filling the interstices of an incomplete report
17 based on information that was not available at the time of the
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19 _____
20 ⁶(...continued)
conclusions.

21 ⁷ Having concluded that Turner's opinion is inadmissible for
22 failure to apply reliable methods and rely upon sufficient
23 information, the court does not address Skecher's contention that
Turner is not qualified to present expert testimony.

24 ⁸ A party may challenge the admissibility of summary judgment
25 evidence by objection or by a motion to strike. Pfingston v. Ronan
26 Eng'g Co., 284 F.3d 999, 1003. Skechers raised an objection to and
27 Motion to Strike the Connelly report (and the supplemental
28 declaration from Jamie Turner, see n.6, supra) all in a single
document, filed twenty-one days prior to the noticed hearing date.
(Dkt. No. 185.) Because the court considers Skechers' objection to
the Connelly Supplemental Report timely raised, the court does not
address whether a Motion to Strike need comply with Central
District of California Local Rule 6-1.

1 initial disclosure." Keener v. United States, 181 F.R.D. 639, 640
2 (D.Mont. 1998). The duty to supplement "does not give license to
3 sandbag one's opponent with claims and issues which should have
4 been included in the expert witness' [original] report." Rojas v.
5 Mako Zaninovich, Inc., No. 09-cv-00705 AWI JLT, 2011 WL 4375297 at
6 *2 (E.D. Cal. Sept. 19, 2011) (citation omitted).

7 In his Supplemental Report, Connelly states that he initially
8 did not have access to "sufficiently detailed financial information
9 to enable an assessment of Skechers [indirect] profits." (CSR at
10 1.) Connelly explained at his deposition that he would need
11 "[a]dditional information concerning the particular product lines
12 at Skechers" before he could perform an indirect profits analysis.
13 (Connelly Deposition at 96::1-2.) Later, after his initial report
14 and deposition, Connelly received "general ledger type transaction
15 records," which he then used to perform an indirect profits
16 analysis in the Supplemental Report. (CSR at 1.) The Supplemental
17 Report ultimately concludes that \$33,479,171 of Skechers' profits
18 are attributable to its infringing uses of Reinsdorf's photos.
19 (Id. at 10; Ex. B.)

20 Skechers argues that Connelly's report is a new opinion rather
21 than a supplement, and that his reliance on the newly available
22 "general ledger type" data is a mere pretext. The court agrees.
23 Connelly initially opined that he could not perform an indirect
24 profits analysis without specific product line information. By
25 Connelly's own admission, however, the "new" evidence, upon which
26 the Supplemental Report's indirect profits calculation is
27 ostensibly based, does "not attribute [Skechers'] sales to specific
28

1 product lines."⁹ (CSR at 6.) Indeed, the CSR explains that
2 because "at least 87.4% of the net sales transactions reported in
3 Skechers' transaction records were described only in very general
4 terms, and not attributed to specific products, . . . the recently
5 produced records do not provide sufficient detail concerning
6 Skechers sales" (CSR at 7.) The new general ledger data,
7 therefore, cannot possibly serve as the basis for Connelly's
8 indirect profits analysis. There is no indication that the other
9 information underlying Connelly's newly formed conclusion was
10 unavailable at the time of Connelly's initial report and
11 deposition. Skechers' objection to the CSR is therefore sustained,
12 and the CSR is excluded. Fed. R. Civ. P. 37(c)(1).

13 Furthermore, even if the CSR had been timely produced, it
14 suffers from serious methodological and factual deficiencies that
15 raise serious questions as to its admissibility and relation to
16 Reinsdorf's indirect profits claim. Despite the CSR's
17 acknowledgment that the required product-line data is lacking, the
18 CSR goes on to reach an indirect profits figure of over \$33
19 million. To reach that figure, the CSR begins with the baseless
20 assumption that 100% of sales not attributed to a specific product
21 line (see n.9, supra) were the result of Skechers' infringing uses
22 of Reinsdorf's photos. (CSR at 8.) Although it is undisputed that
23 Skechers was authorized to use the photos for at least six months,
24 the CSR makes no attempt to break out sales resulting from

25

26 ⁹ The CSR explains that the general ledger information did
27 include some product-specific data, but only for lines not
28 associated with Resindorf's photos and not at issue in this case.
These "fashion and street brand" sales represented only 12.6% of
Skechers' reported revenue. (CSR at 6-7.)

1 authorized uses. In addition, that CSR relies upon the fatally
2 flawed Luntz survey, described above, to support the conclusion
3 that Reinsdorf's photos were responsible for Skechers' increasing
4 gross revenues.¹⁰ (CSR at 3, 11.) The CSR is not grounded upon
5 reliable methods or data, and does no more than establish a
6 speculative relationship between Skechers' profits and its
7 infringing uses of Reinsdorf's photographs. Fed. R. E. 702; Polar
8 Bear, 384 F.3d at 7011; Mackie, 296 F.3d at 914-16.

9 E. Statutory Damages and Attorney's Fees

10 Skechers seeks summary judgment on Reinsdorf's claims for
11 statutory damages and attorney's fees due to his failure to
12 register his photographic works within the period contemplated by
13 the Copyright Act. Plaintiff does not oppose the motion with
14 respect to these issues. Having reviewed the record, the court
15 GRANTS Skechers' Motion for Summary Judgment with respect to
16 statutory damages and attorney's fees.

17 **IV. Conclusion**

18 Skechers has not demonstrated that the parties intended to be
19 co-authors of the finished marketing images, which are, therefore,
20 not joint works. Nor has Skechers demonstrated, as a matter of
21 law, the lack of a copyright license agreement or breach of such
22 argument. Accordingly, Skechers' Motion for Summary Judgment is
23 DENIED in these respects.

24 The expert opinions of Frank Luntz and Jamie Turner do not
25 satisfy the requirements of Federal Rule of Evidence 702.

26
27 ¹⁰ The CSR's conclusion that Skechers enjoyed above-average
28 sales growth is itself based upon a somewhat suspect comparison to
only a narrow subset of Skechers competitors. (CSR at 8 n.12
(excluding Nike's high growth rate from comparison.))

1 Accordingly, Skechers' Motions in Limine to exclude those opinions
2 are GRANTED. Skechers' objection to the Supplemental Report of
3 David Connelly is SUSTAINED.

4 Given Plaintiff's failure to adequately demonstrate a causal
5 link between Skechers' profits and its allegedly infringing
6 conduct, Skechers' motion for summary judgment on Plaintiff's
7 indirect profits claim is GRANTED. Skechers' unopposed motion for
8 summary judgment with respect to statutory damages and attorney's
9 fees is also GRANTED.

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12 IT IS SO ORDERED.

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15 Dated: February 6, 2013

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DEAN D. PREGERSON
United States District Judge