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11 **UNITED STATES DISTRICT COURT**
 12 **CENTRAL DISTRICT OF CALIFORNIA -**
 13 **WESTERN DIVISION**

14 GOOD MORNING TO YOU) Lead Case No. CV 13-04460-GHK (MRWx)
 PRODUCTIONS CORP., et al.,)

15) **OPPOSITION TO DEFENDANTS'**
 Plaintiffs,) **MOTION FOR RECONSIDERATION**
 16) **OF COURT'S MEMORANDUM AND**
 17 v.) **ORDER RE CROSS-MOTIONS FOR**
) **SUMMARY JUDGMENT (DKT. NO.**
 18 WARNER/CHAPPELL MUSIC,) **244) OR, ALTERNATIVELY, TO**
 19 INC., et al.) **CERTIFY ORDER FOR IMMEDIATE**
 20) **INTERLOCUTORY APPEAL UNDER**
 Defendants.) **28 U.S.C. § 1292(b); MEMORANDUM**
 21) **OF POINTS AND AUTHORITIES IN**
 22) **SUPPORT THEREOF**

23) Date: November 16, 2015
 24) Time: 9:30 a.m.
 25) Room: 650
 26) Judge: Hon. George H. King,
 Chief Judge

28

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1 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

2 Dissatisfied with the outcome on the cross-motions for summary judgment,
3 Defendants now ask the Court to reconsider its comprehensive and well-reasoned
4 43-page decision granting in part Plaintiffs’ motion and denying Defendants’ cross-
5 motion (“Summary Judgment Order”). Summ. J. Order, ECF No. 244. The
6 Summary Judgment Order set forth in detail the Court’s meticulous review of all the
7 evidence before it and its careful analysis of the myriad legal and factual issues
8 raised by the parties. The summary judgment record, which stretched over the
9 course of nearly a year, is immense. The Court reviewed two rounds of joint briefing
10 (ECF Nos. 182 & 219), examined 126 exhibits comprising 1,947 pages (ECF Nos.
11 187-194), considered over 160 pages of 328 separately stated facts (ECF No. 183),
12 and heard over four hours of oral argument. Following the Court’s exhaustive
13 review of the immense record, the Court found that Defendants do not own a
14 copyright to the Happy Birthday lyrics, but found several triable issues of fact which
15 prevented the Court from concluding that the Happy Birthday lyrics are in the public
16 domain.¹

17 Under Local Rule (“L.R.”) 7-18, a motion for reconsideration may not “in any
18 manner repeat oral or written argument made in support of or in opposition to the
19 original motion.” Ignoring the clear mandate of L.R. 7-18 entirely, Defendants’
20 motion for reconsideration merely echoes their now-discredited summary judgment
21 arguments: it makes **no new arguments**, it presents **no new evidence**, and it cites **no**
22 **new law**. Defendants do not even feign compliance with L.R. 7-18. Defendants
23 simply think the Court “got it wrong.” The Court already addressed and rejected all
24 the issues Defendants raise in their motion for reconsideration in the Court’s
25 meticulously-researched 43-page Summary Judgment Order. The Court should

26
27 ¹ The remaining factual issues in Claim I are set for a bench trial on December
28 15 and 16, 2015. Status Conference Mins., ECF No. 248.

1 again reject these same tired arguments, and deny Defendants’ non-conforming
2 motion out of hand.

3 Likewise, Defendants cannot meet their heavy burden for a permissive
4 interlocutory appeal. Under 28 U.S.C. § 1292(b), the Court may certify an order for
5 an immediate appeal only when the court of appeals can rule on a pure, controlling
6 question of law without having to determine any disputed facts. Indeed, an appeal
7 such as this, which “turns on whether there is a genuine issue of fact,” is “[t]he
8 **antithesis** of a proper § 1292(b) appeal.” *McFarlin v. Conseco Services, LLC*, 381
9 F.3d 1251, 1259 (11th Cir. 2004) (emphasis added). An interlocutory appeal here –
10 which has no merit in any event – will **not** advance the resolution of this litigation; it
11 will only **prolong** it. Thus, the Court should refuse to certify an interlocutory appeal.

12 Defendants have needlessly and unreasonably interposed their meritless
13 motion solely to delay these proceedings. The Court should deny it forthwith.

14 **II. THE COURT NEED NOT RECONSIDER ITS THOUGHTFUL**
15 **SUMMARY JUDGMENT DECISION**

16 **A. Defendants’ Motion Plainly Violates L.R. 7-18**

17 Local Rule 7-18 states as follows: “No motion for reconsideration shall in any
18 manner repeat oral or written argument made in support of or in opposition to the
19 original motion.” That is all Defendants’ motion for reconsideration does: it merely
20 echoes their now-discredited summary judgment arguments. They make no new
21 arguments, present no new evidence, and cite no new law. As summarized in the
22 following table and as discussed in detail in Sections C and D below, Defendants
23 previously made every argument in their motion for reconsideration:

24 ///

25 ///

Issue Raised on Reconsideration (ECF No. 247)	Where Raised in Joint Summary Judgment Brief (ECF No. 182)	Where Raised at March 23, 2015 Oral	Where Addressed by Court Order (ECF No. 244)
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		Argument (ECF No. 208)	
1 2 3 4 5 6 7	Court failed to hold that 1935 registration certificate was prima facie evidence Summy was authorized to publish and register Happy Birthday lyrics despite omitting Patty's name	15; 26; 44-54 ²	14:23-15:2; 16:6-8; 16:24- 17:1; 18:19- 23; 34:16-19 11-16
8 9 10	Court failed to find that Patty and Jessica transferred the Happy Birthday lyrics to Summy at least as of 1944	13; 26; fn. 16	5-6, 28-37
11 12 13 14	1944 assignment from The Hill Foundation shows unambiguous intent to transfer the Happy Birthday lyrics from Patty and Jessica to Summy	13; 26; fn. 16	5-6, 28-37
15 16 17 18 19	If 1944 assignment transferred the Happy Birthday lyrics to Summy, then whether Patty and Jessica authorized Summy to register and publish the lyrics in 1935 is immaterial	25; 48	14-15

20 The Court already considered and addressed all those arguments at length.

21 Because Defendants' motion improperly repeats those same losing arguments
22 again, their non-conforming motion should be denied.

23 **B. Standard of Review**

24 Reconsideration is "an 'extraordinary remedy, to be used sparingly in the
25 interests of finality and conservation of judicial resources.'" Kona Enters., Inc. v.
26

27 ² All citations to ECF documents refer to the ECF page numbers at the top of
28 the page.

1 Estate of Bishop, 229 F.3d 877, 890 (9th Cir. 2000) (citation omitted). In this
2 District, motions for reconsideration are governed by Local Rule 7-18, which
3 provides that reconsideration may be granted only when the moving party shows:

4 (a) a material difference in fact or law from that presented to the
5 Court before such decision that in the exercise of reasonable
6 diligence could not have been known to the party moving for
7 reconsideration at the time of such decision, or (b) the emergence
8 of new material facts or a change of law occurring after the time
9 of such decision, or (c) a manifest showing of a failure to consider
10 material facts presented to the Court before such decision.

11 Henderson v. J.M. Smucker Co., No. 10-4524-GHK (VBKx) 2013 U.S. Dist. LEXIS
12 166061, at *5 (C.D. Cal. Nov. 20, 2013). It is “**not a second chance** for the losing
13 party to make its strongest case or to dress up arguments that previously failed.”
14 Voelkel v. Gen. Motors Corp., 846 F. Supp. 1482, 1483 (D. Kan. 1994), *aff’d*, 43
15 F.3d 1484 (10th Cir. 1994).

16 **C. The Court Already Considered and Rejected Defendants’
17 Argument that Summy Was Authorization to Publish and
18 Register the Happy Birthday Lyrics Despite the Purported
19 “Mistake” in Not Listing Patty Hill on the Registration**

20 Citing no new evidence and no change in the law, Defendants’ main argument
21 in support of reconsideration, which they assert in various forms at least eight times
22 in their motion paper (Defs.’ Mot. for Recons. 8-10, 12-14, 21 & 22, ECF No. 247),
23 is that the Court failed to treat the 1935 registration for E51990 as prima facie
24 evidence that Summy owned a copyright to the Happy Birthday lyrics, not just the
25 piano arrangement composed by its employee, Preston Ware Orem, despite the
26 purported “immaterial mistake” in not including Patty Hill’s name in the
27 registration. Defendants’ argument is flawed for at least three reasons.

28 **1. Defendants’ Repetitious Argument Fails Under L.R. 7-
18**

First, Defendants raised this issue multiple times during the summary
judgment proceedings. Defendants offer no different or newly-discovered facts, and

1 they cite no change in the law occurring after the Court’s summary judgment
2 decision on this point. None of the “new” cases Defendants cite, the most recent of
3 which was decided in 2011 (more than three years **before** the cross-motion was
4 briefed), changed the law; they merely echo the cases Defendants cited before. Their
5 reconsideration argument merely repeats, albeit in slightly different words, the same
6 legal argument Defendants made repeatedly on summary judgment. See, e.g., Joint
7 Summ. J. Br. 15, 26 & 44-54, ECF No. 182; Summ. J. Hr’g. Tr. 14:23-15:2, 16:6-8,
8 16:24-17:1, 18:19-23, & 34:16-19, March 23, 2015, ECF No. 208. Under L.R. 7-18,
9 it should be denied on this basis alone. In Henderson, 2013 U.S. Dist. LEXIS
10 166061 at *8, this Court denied a motion for reconsideration that similarly sought to
11 reframe old legal arguments: “Defendant does not set forth one material fact that we
12 failed to consider. Defendant’s attempt to surreptitiously reframe these legal
13 arguments as a failure to consider material facts does not transform them into a
14 proper basis for reconsideration.”

15 The Court plainly considered – and properly rejected – that argument in the
16 Summary Judgment Order. For example, the Court addressed the question of
17 “immaterial mistake” with Defendants’ counsel during the hearing on March 23,
18 2015. Hr’g. Tr. 18:19-19:16; 32:10-15; 42:12-24. The Court also addressed the
19 “immaterial mistake” argument in its Summary Judgment Order. Summ. J. Order
20 11:28-12:2; 15:5-8. The fact that the Court, after considering all the evidence,
21 reached a different conclusion than Defendants argued for is not a basis for it to
22 reconsider its Summary Judgment Order.

23 Despite Defendants’ argument, the Court did **not** ignore the presumption
24 given to them under the registration certificate for E51990. To the contrary, the
25 Court expressly accepted that under the 1909 Act, a registration certificate
26 constitutes “‘prima facie evidence of the facts stated therein.’” Summ. J. Order 11
27 (quoting 17 U.S.C. § 209 (1909 Act)). The Court also expressly recognized that “‘a
28 majority of courts have held that § 209 [of the 1909 Copyright Act also] creates a

1 rebuttable presumption that the certificate holder has met all the requirements for
2 copyright validity.” Id. (quoting Acad. of Motion Picture Arts & Scis. v. Creative
3 House Promotions, Inc., 944 F.2d 1446, 1451 (9th Cir. 1991)).³ The Court simply
4 reached a different conclusion than Defendants wanted regarding whether the
5 presumption of validity had been rebutted or overcome. Defendants’ dissatisfaction
6 with the outcome is no basis for the Court to reconsider its decision.⁴

7 Defendants also repeat their prior argument that Plaintiffs offered no evidence
8 that the failure to name Mildred or Patty on the 1935 registration was an attempt to
9 defraud the Copyright Office. Defendants made that same argument before as well.
10 And the Court expressly considered (and properly rejected) it. Summ. J. Order 14-
11 15. Defendants’ re-do of that argument again overlooks the fact that Plaintiffs
12 offered considerable evidence that (a) Patty was not the author of the Happy
13 Birthday lyrics; and (b) even if Patty was the author of the Happy Birthday lyrics,
14 she never transferred any right to those lyrics to Summy. Again, citing no new
15 evidence or changed legal standard, Defendants’ dissatisfaction with the Court’s
16 ruling on an issue it already has considered is no reason for the Court to reconsider
17 its decision.

18 **2. Defendants’ Argument Remains Legally Unsupported**

19 Second, Defendants’ argument was, and still is, unsupported by any legal
20 authority. As the Court correctly held in its Summary Judgment Order, the limited
21 presumption afforded by a registration certificate “is not an insurmountable one.”⁵ It
22 certainly is not conclusive proof of anything. If the Court were to reconsider its
23 careful analysis of this issue, Defendants’ argument would make a registration

24 ³ The Court quoted the same 24-year old Acad. of Motion Pictures case on
25 which Defendants rest their motion for reconsideration.

26 ⁴ Significantly, Defendants have not asked the Court to reconsider its allocation
27 of the burden of proof. Summ. J. Order 9:19-10:2 (placing burden on Defendants).

28 ⁵ See Summ. J. Order 11 (discussing limited scope of presumption).

1 certificate – even one that purportedly omits important information – not just prima
2 facie evidence, but instead conclusive proof, and not merely of what was stated in
3 the certificate, but of what was omitted from it as well.

4 Defendants have cited no new authority or change in the law to require
5 reconsideration. No court has ever given such weight or breadth to any registration
6 certificate, and this Court was correct not to do so here.

7 **3. Defendants’ Argument Remains Factually** 8 **Unsupported**

9 Third, Defendants’ argument also remains unsupported by any evidence.
10 Defendants have offered no proof – none in the voluminous summary judgment
11 record and no new evidence for the Court to reconsider now – that the omission of
12 Patty’s name from the registration for E51990 was, in fact, a mistake at all, rather
13 than an accurate description of the limited scope of the work-for-hire covered by
14 that copyright.

15 As the Court correctly found, E51990 is a work-for-hire copyright for a
16 derivative work. Summ. J. Order 13 (citation omitted). The record easily proves that
17 E51990 covered only new material added to Mildred and Patty Hill’s pre-existing
18 work, Good Morning to All, by Summy’s employee, Preston Ware Orem. Id. at 13-
19 14. The registration was entitled “Application for Republished Musical Composition
20 with New Matter.” Id. at 13 (quoting J.A. Ex. 48). The author of the new matter was
21 identified as “Preston Ware Orem, employed for hire by Clayton F. Summy Co.” Id.
22 Defendants have admitted that Mr. Orem did **not** write the Happy Birthday lyrics.
23 Id. at 14 (citing ECF Nos. 95 at ¶ 97; 99 at ¶ 97). Therefore, the only new matter
24 that could have possibly been added by Mr. Orem was the piano arrangement. Id.

25 The 1935 work-for-hire copyright E51990, covering only new material added
26 to the pre-existing musical composition Good Morning to All, was limited to Mr.
27 Orem’s piano arrangement. Leaving Patty Hill’s name off that limited copyright
28 registration **was no mistake** and Defendants presented no evidence to the contrary.
Defendants’ argument that Patty’s name was “mistakenly” omitted from the

1 registration rests now on reconsideration, as it rested before on summary judgment,
2 on at least two entirely unsupported factual premises: (1) that the registration was
3 not intended to cover only the new work added by Mr. Orem as Summy’s employee;
4 **and** (2) that it was not intended to cover only the work-for-hire at all, since Patty
5 never worked for Summy. There is no evidence – **none** in the expansive summary
6 judgment record and **none** on reconsideration – to support either premise. In the
7 end, Defendants’ argument that Patty’s name was “mistakenly” omitted from the
8 1935 registration for E51990 is nothing more than tired, repetitive, and factually
9 unsupported speculative argument.

10 **D. The Court Already Considered Whether Patty and Jessica**
11 **Hill Transferred the Happy Birthday Lyrics to Summy**

12 Defendants’ second argument in support of reconsideration is that the Court
13 overlooked portions of The Hill Foundation’s assignment of various copyrights to
14 Summy in 1944. After a meticulous review of all the evidence in the summary
15 judgment record of three different assignments from the Hill sisters and The Hill
16 Foundation to Summy, the Court rejected Defendants’ argument that Patty and
17 Jessica transferred the Happy Birthday lyrics to Summy in 1944. Summ. J. Order
18 35-37. Brushing aside the Court’s detailed, careful analysis of all three transfers,
19 Defendants argue that the Court **ignored** a few words from The Hill Foundation’s
20 1944 assignment. Defendants’ dismissive second argument also suffers from at least
21 three fatal flaws.

22 **1. Defendants’ Repetitive Argument Adds Nothing to the**
23 **Court’s Prior Careful Analysis of the 1944 Assignment**

24 First and foremost, the Court carefully considered the exact same argument,
25 **and all the same evidence** that Defendants again offer in support of it, in deciding
26 the cross-motions for summary judgment. There is no doubt that the Court carefully
27 reviewed The Hill Foundation’s 1944 assignment to Summy. Its discussion of the
28 1944 transfer is set forth in the Summary Judgment Order.

Defendants’ attempt to use § 1292(b) to cite some additional cases or even

1 raise new arguments they could have raised before is improper. Henderson, 2013
2 U.S. Dist. LEXIS 166061 at *5-6 (citing L.R. 7-18; Yang Ming Marine Transp.
3 Corp. v. Oceanbridg Shipping Int’l, Inc., 48 F. Supp. 2d 1049, 1057 (C.D. Cal.
4 1999)) and *8-9 (citing L.R. 7-18; Kona, 229 F.3d at 890; Union Pac. R.R. Co. v.
5 Coast Packaging Co., 236 F. Supp. 2d 1130, 1137 (C.D. Cal. 2002)). For this reason
6 alone, the Court should deny Defendants’ highly improper motion.

7 **2. Defendants’ Repetitive Argument Remains Contrary**
8 **to Controlling Ninth Circuit Precedent**

9 Second, Defendants argument that the 1944 assignment from The Hill
10 Foundation can be applied retroactively to expand the limited scope of the 1935
11 copyright is inconsistent with controlling precedent in the Ninth Circuit and
12 elsewhere. The right to register a copyright cannot be retroactively assigned. An
13 assignment of the right to register a copyright must be made before the copyright is
14 registered by the new owner. While a writing, such as the 1944 assignment, may
15 confirm a **prior** oral agreement to assign a copyright, the oral agreement must have
16 been made **before** the attempt to register the copyright. 3 M. Nimmer & D. Nimmer,
17 Nimmer, Copyright, § 10.03[A][3] (2014).⁶

18 Moreover, the writing must be timely because permitting a third-party to
19 claim copyright ownership years later does not serve the statutory goal of enhancing
20 “predictability and certainty of copyright ownership.” Effects Assocs., Inc. v. Cohen,
21 908 F.2d 555, 557 (9th Cir. 1990). In *Kronigsberg Int’l, Inc. v. Rice*, 16 F.3d 355,
22 357 (9th Cir. 1994), the Ninth Circuit held that a letter agreement written three years
23 **after** an alleged oral license was **untimely and invalid**. Then, as now, Defendants do

24
25 ⁶ For the subsequent writing to be valid, the acquirer must prove the prior oral
26 agreement. See *Budget Cinema, Inc. v. Watertower Assocs.*, 81 F.3d 729, 733 (7th
27 Cir. 1996) (a later writing to confirm an alleged oral transfer of a copyright is not
28 permitted “because there was no evidence that Budget discussed the rights to the
work with [the copyright owner] prior to registration....”).

1 not dispute the untimeliness of the 1944 assignment. They have offered no case law
2 or other authority to support their assertion that the 1944 assignment – regardless of
3 its limited scope – retroactively gave them any rights to register a copyright to the
4 Happy Birthday lyrics in 1935.

5 **3. Defendants’ Repetitive Argument Still Ignores the** 6 **Facts**

7 And third, even if the Court were to reconsider this argument and disregard
8 the fact that The Hill Foundation’s 1944 assignment was far too late to expand the
9 limited scope of the E51990 copyright, Defendants’ argument is inconsistent with
10 the detailed factual record. Defendants focus their argument only on The Hill
11 Foundation’s transfer to Summy. However, the record proves that The Hill
12 Foundation itself **had no rights to the lyrics** and, thus, The Hill Foundation owned
13 no such rights that it could assign to Summy.

14 Even if Patty or Jessica Hill had any rights to the Happy Birthday lyrics, a
15 fundamental fact that is disputed, they **never** transferred any common law
16 copyrights or rights to any “books, musical compositions and arrangements,
17 including both the words and music thereof” to The Hill Foundation. As the Court
18 knows from its careful consideration of the 1944 transactions, Patty and Jessica Hill
19 assigned only their “right, title and interest, joint and several, in and to” seven
20 federal copyrights, including E51990, to The Hill Foundation. See J.A. Ex. 53 at 698
21 (ECF No. 189).⁷ They **never** assigned **any** rights to books, musical compositions,
22 arrangements, or words and music to The Hill Foundation – those words are **not** in
23 the assignment from Patty and Jessica to The Hill Foundation. Since The Hill
24 Foundation could assign to Summy only what it received from Patty and Jessica,

25 ⁷ In 1942, Patty and Jessica Hill assigned their “right, title and interest, joint
26 and several, in and to” four federal copyrights and renewal copyrights for Song
27 Stories for the Kindergarten, Song Stories for the Sunday School, and Good
28 Morning to All to The Hill Foundation. See J.A. Ex. 42 at 620.

1 The Hill Foundation had no rights to books, musical compositions, arrangements, or
2 words and music to assign to Summy.

3 Therefore, based on all the evidence in the summary judgment record and
4 already considered by the Court, Defendants’ repetitive argument still has no factual
5 support, and it must be denied for this reason as well.

6 **4. Defendants’ Circular Assignment Argument is**
7 **Unavailing**

8 Defendants’ final, desperate argument that it is immaterial whether Patty and
9 Jessica authorized Summy to register and publish the Happy Birthday lyrics, is
10 merely a fall-back to its main argument: even if Patty and Jessica gave Summy no
11 rights to the lyrics, the 1935 copyright E51990 still covered the lyrics despite the
12 “mistaken” omission of Patty’s name from the registration. That circular argument
13 fails for all the reasons discussed in Section C above.

14 **III. THE ORDER SHOULD NOT BE CERTIFIED FOR IMMEDIATE**
15 **INTERLOCUTORY APPEAL UNDER 28 U.S.C. § 1292(B)**

16 An immediate interlocutory appeal by permission under 28 U.S.C. § 1292(b)
17 is appropriate only where the underlying order: (1) involves a controlling question
18 of law; (2) as to which there is a substantial ground for difference of opinion; and
19 (3) an immediate appeal from the order may materially advance the ultimate
20 termination of litigation. The party seeking an immediate interlocutory appeal must
21 demonstrate **all three** prerequisites, and even then, certification for an interlocutory
22 appeal is generally disfavored and should only be granted in “exceptional situations
23 in which allowing an interlocutory appeal would avoid protracted and expensive
24 litigation.” *Rieve v. Coventry Health Care Inc.*, 870 F. Supp. 2d 856, 878 (C.D. Cal.
25 2012) (citing *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1982).
26 “Section 1292(b) is a departure from the normal rule that only final judgments are
27 appealable, and therefore must be construed narrowly.” *James v. Price Stern Sloan,*
28 *Inc.*, 283 F.3d 1064, 1067 n.6 (9th Cir. 2002). None of these three requirements are
present here.

1 **A. There Is No Qualifying “Controlling Question” of Law**

2 The first requirement of § 1292(b) is met only where the controlling question
3 presents an “abstract legal issue” or “pure” question of law. Rieve, 870 F. Supp. 2d
4 at 879. Certification for an immediate interlocutory appeal is **not** appropriate where,
5 as here, appellate review would “necessitate a detailed inquiry into the record.” Id.
6 (interlocutory appeal not appropriate where the appellate court’s “inquiry would
7 likely be fact intensive, unique to this case, and not the abstract type of question
8 [that] could be decided without significant engagement with the facts of this case”).
9 An interlocutory appeal permits expedited appellate review when “a case turn[s] on
10 a pure question of law, something the court of appeals could decide quickly and
11 cleanly without having to study the record....” Id. (quoting Ahrenholz v. Bd. of
12 Trustees of Univ. of Illinois, 219 F.3d 674, 676-77 (7th Cir. 2000). In Ahrenholtz,
13 219 F.3d at 676-77, the Seventh Circuit held that a summary judgment decision is
14 especially inappropriate for interlocutory review because “to decide whether
15 summary judgment was properly granted requires hunting through the record . . . to
16 see whether there may be a genuine issue of material fact lurking there....” As the
17 Eleventh Circuit held in McFarlin, 381 F.3d at 1259, an appeal (such as this one)
18 that “turns on whether there is a genuine issue of fact,” is “[t]he antithesis of a
19 proper § 1292(b) appeal.”
20

21 No review of the Court’s detailed, fact-intensive Summary Judgment Order
22 could be done “quickly and cleanly without having to study the record” in this case.
23 Ahrenholz, 219 F.3d at 677. To the contrary, the purported “controlling questions”
24 Defendants have raised, and the underlying fact-specific questions of copyright
25 ownership decided by the Court after its painstaking review of the exhaustive
26 summary judgment record, are precisely the kind of questions that require a fact-
27 intensive appellate review; they are the antithesis of a proper § 1292(b) appeal.
28

1 **B. There Is Not Substantial Ground for Difference of Opinion**

2 In deciding whether the second requirement has been met, the Court must
3 consider, first and foremost, “the strength of the arguments in opposition to the
4 challenged ruling.” Rieve, 870 F. Supp. 2d at 880 (citations omitted). This prong is
5 not satisfied where, as here, “defendants have not provided a single case that
6 conflicts with the district court’s construction or application of [the applicable law].”
7 Couch v. Telescope Inc., 611 F.3d 629, 633 (9th Cir. 2010); Rieve, 870 F. Supp. 2d
8 at 880 (same) (citation omitted). Defendants’ bald assertion that “reasonable judges
9 might differ” (Mot. Recons. 24)⁸ without providing any contrary legal support, does
10 not satisfy their burden. The Court already has engaged in an extremely detail-
11 oriented analysis of the facts under the applicable law.⁹ Defendants’ dissatisfaction
12 with the outcome of the Court’s analysis “is not a strong enough argument to create
13 the exceptional circumstances required for interlocutory appeal.” Rieve, 870 F.
14 Supp. 2d at 880.

15 **C. An Immediate Appeal Will Not Materially Advance the**
16 **Ultimate Determination of this Litigation**

17 Finally, certification for interlocutory appeal is not appropriate where, as here,
18 it “would actually delay the resolution of the litigation....” Rieve, 870 F. Supp. 2d at
19 880 (citing Strauss v. Sheffield Ins. Corp., No. 05CV1310-H(CAB), 2006 U.S. Dist.
20 LEXIS 98094, 2006 WL 6158770, at *4 (S.D. Cal. June 23, 2006)). The instant case

21 ⁸ Defendants cite Reese v. BP Exploration (Alaska) Inc., 643 F.3d 681, 688 (9th
22 Cir. 2011) for their “reasonable judges” standard. However, Reese held only that
23 this prong is met when reasonable judges may differ where **novel legal issues** are
24 presented not where, as here, the key determination turns on heavily detailed **fact**
25 issues. Defendants have not raised any disputed legal issues, novel or otherwise, for
the Court to reconsider.

26 ⁹ As previously discussed, the summary judgment record consists of a joint
27 brief (ECF No. 182), a supplemental joint brief (ECF No. 219), 1,947 pages of
28 exhibits (ECF Nos. 187-194) and 328 uncontroverted facts (ECF No. 183); and four
hours of oral argument.

1 was filed over two years ago, a bench trial on Count One is set to take place on
2 December 15, 2015 (less than two months away), briefing on class certification is
3 scheduled in January and February of 2016, and the class certification hearing is set
4 for February 22, 2016. Status Conference Mins., ECF No. 248. As such, any
5 interlocutory appeal at this stage of the proceedings would only delay the resolution
6 of the case. Rieve, 870 F. Supp. 2d at 880 (determining that interlocutory appeal of
7 summary judgment order in a putative class action before class certification “would
8 significantly delay litigation”).¹⁰

9 In sum, Defendants have failed to meet their heavy burden of showing any
10 exceptional circumstances in this case to merit an immediate interlocutory appeal.

11 **IV. CONCLUSION**

12 For all these reasons, Defendants’ motion for reconsideration makes no new
13 arguments, it presents no new evidence, and it cites no new law. Defendants’ motion
14 to certify for immediate interlocutory appeal does not raise any pure question of law,
15 as to which there is substantial ground for difference of opinion and which the Ninth

16
17 ¹⁰ See also *Xoom, Inc. v. Imageline, Inc.*, No. Civ A 3:98CV00542, 1999 U.S.
18 Dist. LEXIS 21978, *9 (E.D. Va. Sept. 3, 1999) (declining to certify question of
19 copyright ownership for interlocutory appeal, the court explained that “[i]f a
20 question were to be certified, everyone would be forced to wait until a determination
21 is made on appeal. At that point, the case would be remanded for trial with an
22 opportunity for further appeals on other issues after trial.” The court concluded that
denying interlocutory review was “more efficient than going through two rounds of
appeals with a trial taking place sometime in between.”) *Id.*

23 Finally, *Mattell, Inc. v. Bryant*, 441 F. Supp. 2d 1081, 1099 (C.D. Cal. 2005),
24 cited by Defendants at p. 25 of their motion for the proposition that certification
25 should be granted when necessary to avoid “needless expenditure of judicial
26 resources[,]” is easily distinguishable, as it turned on the fundamental threshold
27 question of whether the district court had jurisdiction to hear the case on which there
28 was no applicable precedent. Wanting to avoid the inevitable waste of resources
were the court of appeals to find jurisdiction lacking, the court certified the issue for
interlocutory review.

1 Circuit can decide without having to determine any questions of fact. Therefore, the
2 Court should swiftly deny Defendants' meritless motion for reconsideration and its
3 equally meritless alternative motion to certify for permissive interlocutory appeal.

4 Dated: October 26, 2015

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