

MAY 15 2009

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WHAM-O, INC., a Delaware corporation,

Plaintiff-counter-defendant -  
Appellee,

v.

MANLEY TOYS, LTD., a Hong Kong  
corporation,

Defendant-counter-claimant -  
Appellant.

No. 08-56188

D.C. No. CV-08-01281-RSWL-  
CW

MEMORANDUM\*

Appeal from the United States District Court  
for the Central District of California  
Ronald S.W. Lew, District Judge, Presiding

Argued and Submitted May 5, 2009  
Pasadena, California

Before: GOODWIN, O'SCANLAIN, and GRABER, Circuit Judges.

Manley Toys, Ltd., appeals the district court's denial of its motion for a preliminary injunction. We affirm.

---

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

1. We take judicial notice of the documents from the related case of SLB Toys, USA, Inc. v. Wham-O, Inc., No. 08-55432, that Wham-O, Inc., included in the Excerpts of Record. See United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc., 971 F.2d 244, 248 (9th Cir. 1992) (noting that this court "may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue" (internal quotation marks omitted)). We do not, and cannot, take judicial notice of Tab 1, a declaration in support of a motion for summary judgment, because it was submitted to the district court in January 2009, well after the district court ruled on the preliminary injunction. See Ball v. Rodgers, 492 F.3d 1094, 1118 (9th Cir. 2007) (holding that the court of appeals cannot consider documents that are not part of the district court's record).

2. "The grant or denial of a preliminary injunction will be reversed only where the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact." United States v. Peninsula Commc'ns, Inc., 287 F.3d 832, 839 (9th Cir. 2002). The district court held that Manley "had not sufficiently shown irreparable harm because the purported harm could have been avoided through its own conduct and there are legal remedies available to compensate Manley for its purported harm." The court further held

that Manley had "not sufficiently shown likelihood of success on the merits because Manley has not sufficiently shown that Wham-O's conduct was legally wrongful."

The district court did not abuse its discretion in so ruling. Manley's alleged lost profits can be remedied by an award of damages. Additionally, Manley did not demonstrate that Wham-O did anything other than assert its legal rights in its yellow trademark, which the jury in SLB Toys found to be valid.

AFFIRMED.