

AUG 06 2012

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CELS ENTERPRISES, INC., a New York corporation; ROBERT GOLDMAN, an individual,

Defendants-counter-claimants  
- Appellants,

v.

ROCK AND ROLL RELIGION, INC., a California corporation; DEFIANCE U.S.A., INC.,

Plaintiffs-counter-defendants  
- Appellees.

No. 10-55624

D.C. No. 2:09-cv-05258-R-PLA

MEMORANDUM\*

ROCK AND ROLL RELIGION, INC., a California corporation; DEFIANCE U.S.A., INC.,

Plaintiffs-counter-defendants  
- Appellees,

v.

CELS ENTERPRISES, INC., a New York corporation; ROBERT GOLDMAN, an

No. 10-55976

D.C. No. 2:09-cv-05258-R-PLA

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\* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

individual,

Defendants-counter-claimants  
- Appellants.

Appeal from the United States District Court  
for the Central District of California  
Manuel L. Real, District Judge, Presiding

Argued and Submitted November 14, 2011  
Submission Deferred November 15, 2011  
Resubmitted March 30, 2012  
Pasadena, California

Before: W. FLETCHER and RAWLINSON, Circuit Judges, and SINGLETON,  
Senior District Judge.\*\*

Appellants CELS Enterprises, Inc. and Robert L. Goldman (collectively  
CELS) appeal the district court's order granting summary judgment in favor of  
appellees Rock and Roll Religion, Inc. and Defiance U.S.A., Inc. (collectively  
Rock and Roll Religion), and the district court's order awarding attorneys' fees to  
Rock and Roll Religion.

Summary judgment is generally disfavored in trademark litigation, because  
the nature of trademark case analysis is fact intensive. *See Fortune Dynamic Inc.*  
*v. Victoria's Secret Stores Brand Management, Inc.*, 618 F.3d 1025, 1031 (9th Cir.

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\*\* The Honorable James K. Singleton, Senior United States District  
Judge for the District of Alaska, sitting by designation.

2010). At a minimum, CELS raised material issues of fact regarding the similarity of the marks, relatedness of the goods, marketing channels, likelihood of expansion and degree of consumer care factors as articulated in *AMF Inc. v. Sleekcraft Boats (Sleekcraft)*, 599 F.2d 341, 348-349 (9th Cir. 1979). Therefore, the district court erred in granting summary judgment in favor of Rock and Roll Religion. *See Fortune Dynamic*, 618 F.3d at 1039.

For the same reason, the district court did not err in denying CELS' motion for partial summary judgment. Because CELS failed to present any evidence of actual confusion and because material issues of fact remain to be decided regarding the other *Sleekcraft* factors, summary judgment in favor of either party was inappropriate. *See id.*

The district court has discretion to award attorney's fees to a prevailing party under the Lanham Act in exceptional cases. *See Classic Media, Inc. v. Mewborn*, 532 F.3d 978, 990 (9th Cir. 2008). The district court awarded Rock and Roll Religion attorneys' fees pursuant to 15 U.S.C. § 1117(a), reasoning that the case was exceptional because CELS' counterclaims were "groundless and pursued in bad faith. . . ." Because we reverse entry of summary judgment in favor of Rock and Roll Religion, it is no longer the prevailing party and is not entitled to attorney's fees. *See Classic Media*, 532 F.3d at 990.

**AFFIRMED in part, REVERSED in part, and REMANDED. Each party is to bear its costs on appeal.**