Electronically Filed
Docket: 22-CCB-0015
Filing Date: 06/11/2024 12:08:23 PM EDT

In order to prevail on a request for reconsideration at the Copyright Claims Board ("CCB"), Morly Investments Pty Ltd (imprint: The High Street Publishing Company) ("Claimant") must show a "'*clear error of law or fact material to the outcome*' or a *technical mistake* in the determination." CCB Handbook, Chapter 21 Final Determination, pg. 3. A "clear error" is one that is both "unquestionably wrong" and "'material' (important) to the outcome such that the CCB's decision would have been different without the error." *Id.* Claimant "must rely on evidence that was already presented to the CCB" and can "only submit new evidence if [it can] show through clear and convincing evidence that the new evidence was not available to [it], despite [its] reasonable diligence, before [it] submitted [its] written testimony." *Id.*

Claimant asserts that Michael Liu has been its "sole director and secretary" since July 1, 2002. Request for reconsideration, pg. 1. Claimant further asserts that, although Rebecca Lim ("Lim") is an "authorised representative of the company in this case" and a "passive shareholder/member in the company," she has not been a director since February 17, 2015. *Id.* Therefore, Claimant argues that there is "clear error" in the Final Determination because it "cannot have had knowledge of the breaches of copyright by the Disney entities that were discovered by the authorised representative on 5 March 2022 until the claim was originally lodged with the Copyright Claims board on 16 June 2022 at 09:12 PM EDT (as authorised by the Claimant on that date) and therefore the 'discovery rule' should be applied in this case." *Id.* at pgs. 1-2.

Claimant improperly relies on new evidence

Claimant's argument relies on evidence that was not presented to the CCB. Claimant did not produce any evidence showing that it only became aware of the allegedly infringing acts when Lim filed the CCB Claim on June 16, 2022. In fact, as the CCB found, "Claimant [did] not assert that it was unaware of the acts of infringement that allegedly took place more than three years prior to the claim []." Final Determination, Pg. 4. Further, Claimant cannot argue that its own knowledge was "unavailable to it." Claimant knew when it discovered the alleged infringing acts and should have presented this evidence in discovery.[1]

Claimant's alleged "clear error" is not "unquestionably wrong"

Claimant's alleged "clear error" is not unquestionably wrong. Under the discovery rule, a claim "accrues when 'the plaintiff discovers, or with due diligence should have discovered,' the infringing act." *Starz Entertainment, LLC v. MGM Domestic Television Distribution, LLC*, 39 F.4th 1236, 1237 (9th Cir. 2022); see

[1] Claimant asserts that it is not relying on new evidence because "the CCB should have done its own investigation of the Claimant in making its final determination with the Australian corporate regulator, or asked the Claimant for evidence of the corporate structure during the course of this case." Request for reconsideration, pg. 2. The CCB is under no obligation to investigate Claimant's allegations. If Claimant intended to rely on its corporate structure as its basis for tolling the statute of limitations under the discovery rule, Claimant was required to produce this evidence in discovery.

also *Warner Chappell Music, Inc. v. Nealy*, No. 22-1078, 601 U.S. ___, 2024 WL 2061137, *2 (May 9, 2024), available at https://www.supremecourt.gov/opinions/23pdf/22-1078_4gci.pdf.

First, the evidence does not support Claimant's assertion that Lim did not discover the alleged breaches until March 5, 2022. Email correspondence produced by Claimant demonstrated that Lim was closely and continuously monitoring e-book distribution as early as May 5, 2015 and was regularly raising her concerns over Respondents' post-termination e-book sales with HarperCollins Australia Pty Limited ("HCA"). Final Determination, pg. 4-5 ("Claimant's evidence shows that Lim was aware of allegedly infringing sales, both before and soon after the Disney Rights Reversion. [] Lim expressed her concerns to HCA that Disney was engaging in unauthorized distribution of the Works as early as May 2015 [] and continued to complain to HCA about unauthorized distribution by Disney in 2016 after the Reversion was clearly in effect."); *see also Id.* at pg. 5, fn. 4 ("Claimant was aware of alleged acts of infringement soon after the Disney Rights Reversion was in effect but did not file the claim until June 16, 2022.").

Next, Claimant has not provided any evidence that it exercised due diligence to discover allegedly infringing acts and timely pursue claims. Lim's books were distributed publicly and Claimant could have discovered the alleged infringements in the same way Lim did - by checking to see if any unauthorized distributors were selling them. Also, Lim, Claimant's prior director and current "authorised representative," had knowledge of the allegedly infringing acts as early as 2015. Claimant cannot now argue that because Lim allegedly failed to make Claimant aware of the alleged infringing acts for seven years, Claimant should be entitled to take advantage of the discovery rule.

Claimant's alleged "clear error" is not "material" to the outcome

Even assuming that Claimant has identified a "clear error" that is "unquestionably wrong" and relies on evidence that has already been presented the CCB, it is not material because it does nothing to alter the CCB's conclusion that Claimant failed to prove liability on behalf of Respondents. In its Final Determination, the CCB concluded:

- "There is also no evidence that Disney itself distributed any of [the unlicensed] copies." *Id.* at pg. 5.
- "[T]here is no evidence that *after the effective date of the Disney Rights Reversion*, and in particular on or after June 16, 2019, Disney engaged in any activities that induced, caused, or materially contributed to Hoopla's acts of distribution." *Id.* at pg. 7 (emphasis added).
- "Claimant has failed to come forward with evidence that would support a finding that Disney is liable for vicarious infringement of Claimant's copyrights." *Id.* At pg. 8.
- "There is insufficient evidence to conclude that Disney engaged in actions during the relevant period commencing on June 16, 2019 that would give rise to direct, contributory, or vicarious liability to Claimant for copyright infringement." *Id.* at pg. 9.

Applying the discovery rule to toll the statute of limitations does not change the fact there is no evidence demonstrating that Respondents are liable for copyright infringement for any unlicensed distribution after the rights reversion.

Conclusion

Claimant's request for reconsideration should be denied because it relies on new evidence and the alleged "clear error" is neither unquestionably wrong nor material to the outcome of the case. Claimant therefore fails to meet the applicable standard for reconsideration.

Proof of Delivery

I hereby certify that on Tuesday, June 11, 2024, I provided a true and correct copy of the Respondent's Response to Claimant's Request for Reconsideration to the following:

Morly Investments Pty Ltd (imprint: The High Street Publishing Company), represented by Rebecca Lim, served via ESERVICE at rebecca@morlygroup.com

Signed: /s/ Shani Thome