

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES - GENERAL**

Case No. CV 11-08351 RGK (JCx) Date August 24, 2012

Title *MERIDIAN TEXTILES INC. v. TOPSON DOWNS OF CALIFORNIA, et al*

Present: The Honorable R. GARY KLAUSNER, U.S. DISTRICT JUDGE

Sharon L. Williams (Not Present)

Not Reported

Deputy Clerk

Court Reporter / Recorder

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

Not Present

Not Present

**Proceedings:** (IN CHAMBERS) Order re: Plaintiff's Motion for Partial Summary Judgment (DE 39)

**I. INTRODUCTION**

On October 7, 2011, Meridian Textiles, Inc. ("Plaintiff") filed a copyright action against Topson Downs, Inc. ("Topson"), Target Corp. ("Target"), and Wal-Mart Stores, Inc. ("Wal-Mart") (collectively, "Defendants"). The Complaint alleges two claims for relief: (1) Copyright Infringement, and (2) Contributory and/or Vicarious Copyright Infringement.

Before the Court is Plaintiff's Motion for Partial Summary Judgment. For the following reasons, the Court grants Plaintiff's motion as to the validity of some of its copyrights, and finds summary judgment in favor of Defendants appropriate as to all remaining issues presented by the motion.

**II. FACTUAL BACKGROUND**

The parties allege the following facts:

Plaintiff is a Los Angeles-based company that works with garment manufacturers looking for fabric printed with artwork. As part of its business, Plaintiff creates original two-dimensional graphic designs or purchases exclusive rights to original artwork from art studios.

Between 2008 and 2009, Plaintiff's in-house designer, Myoung Chung ("Chung") created the four designs at issue in this action: (1) S1479 ("Zebra Design"); (2) I03879 ("Animal Print Design"); (3) I03703 ("Burnout Design"); and (4) S2088 ("Lace Design") (collectively, "Subject Designs"). Plaintiff owned all the rights in the Subject Designs, and applied for, and received, copyright registrations for each of the Subject Designs. After creation of the Subject Designs, Plaintiff offered samples of the designs to numerous customers in the apparel industry, including Defendant.

On December 23, 2009, Plaintiff purchased garments at Target that Plaintiff believes infringes the Subject Designs. On February 2, 2010, Plaintiff purchased garments at Wal-Mart that Plaintiff believes infringes the Subject Designs. Investigation into the garments revealed that Topson was the manufacturer and vendor-partner that sold the garments.

### **III. JUDICIAL STANDARD**

Summary judgment is proper where “the pleadings, deposition, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). An issue is “genuine” if there is sufficient evidence for a reasonable jury to find for the nonmoving party, and a fact is “material” when it may affect the outcome of the case under the substantive law that provides the claim or defense. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986).

The moving party has the initial burden to demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party is without the ultimate burden of persuasion at trial, it may either produce evidence negating an essential element of the opposing party’s claim, or demonstrate that the nonmoving party does not have enough evidence to carry its burden at trial. *Nissan Fire & Marine Insurance Co. v. Fritz Companies, Inc.*, 210 F.3d 1099, 1106 (9th Cir. 2000). If the moving party meets this initial requirement, the burden then shifts to the opposing party to go beyond the pleadings and set forth specific facts that establish a genuine issue of material fact remains for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-87 (1986).

In granting summary judgment, a district court is not entitled to weigh the evidence and resolve disputed underlying factual issues. *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1161 (9th Cir. 1992). Rather, courts are required to view all inferences to be drawn from “the underlying facts . . . in the light most favorable to the party opposing the motion.” *Id.* (quoting *U.S. v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

### **IV. DISCUSSION**

Plaintiff contends that it is entitled to summary judgment on the following issues: (1) Plaintiff owns valid copyrights in the Subject Designs, and (2) Defendants infringed Plaintiff’s copyright by manufacturing and selling garments bearing the Subject Designs. The Court addresses each argument below.

#### **A. Validity of Copyrights**

Under 17 U.S.C. § 410(c), a registration certificate constitutes prima facie evidence of the validity of the copyright and of the facts stated in the certificate. *See Lamps Plus, Inc. v. Seattle Lighting Fixture Co.*, 345 F.3d 1140, 1144 (9th Cir. 2003). To rebut the presumption of validity, the defendant must introduce competent evidence showing the contrary. *Hamil America, Inc. v. GFI*, 193 F.3d 92, 98 (9th Cir. 1999). One means by which to rebut the presumption is a showing on the part of the defendant that the plaintiff’s work is not original, as originality is the indispensable prerequisite for copyrightability. *North Coast Indus. v. Jason Maxwell, Inc.*, 972 F.2d 1031, 1033 (9th Cir. 1992)(citing *Kamar Intern, Inc. v. Ross Berrie and Co.*, 657 F.2d 1059, 1061 (9th Cir. 1981). The originality requirement, however, does not mean that the copyright must represent something entirely novel. *Id.* Rather, all that is needed is that the author contributed something more than a “merely trivial” variation, something recognizably “his own.” *Id.* (quoting *Sid and Marty Krofft Television Productions Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1163 n. 5 (internal quotations omitted)). “Originality [in the context

of copyrights] ‘means little more than a prohibition of actual copying.’” *Id.*

Plaintiff has introduced evidence that it holds duly issued copyright registrations in the Subject Designs. (Deutchman Decl. at ¶¶ 4,6,8, and 10, Exs. 2,4,6, and 8.) The certificates identify Plaintiff as the copyright claimant. *Id.* Therefore, the copyrights’ validity and Plaintiff’s ownership of the copyrights are presumed.

To rebut the presumption, Defendants argue that the Subject Designs are unoriginal, and lack even the minimal level of creativity to warrant protection under copyright law. The Court addresses Defendants’ arguments as to each of the Subject Designs separately.

1. Zebra Design

Defendants argue that Plaintiff claims an exclusive right to a zebra pattern that is meant to, and does, look exactly like a zebra. Defendants further argue that the Zebra Design is nearly identical to other zebra patterns that were in existence long before Plaintiff’s alleged 2009 date of creation. In support of their position, Defendants introduce expert testimony that the Zebra Design is merely a classic zebra style, which has been around since at least the 18th Century. (Young Decl. ¶ 11-12.) Moreover, Defendants’ expert states that, while there are hundreds of variations on the theme, the zebra print is a derivative idea copied from nature, with few subtle variations, and is not particularly inventive or proprietary. *Id.* The classic pattern is distinct and recognizable in all of its representations, and virtually indistinguishable from one another. *Id.* To illustrate their point, Defendants attach various images of zebra print found in the clothing and textile industries, including images included in design books and textbooks. (Gilchrist Decl., Exs. 2 and 3; Nellor Decl., Ex. 2; Young Decl., Ex. E.)

Considering the evidence presented by the parties, the Court finds that Defendants succeed in rebutting the presumption. While the depiction of zebra stripes as they exist in classical form does not deprive the design of originality, there must be something original added to its expression. *See Kamar Intern., Inc. v. Russ Berrie and Co.*, 657 F.2d 1059, 1061 (9th Cir. 1981). Comparing Plaintiff’s Zebra Design to the various other zebra patterns introduced by Defendants, the Court finds the differences nearly indistinguishable. Scrutinizing both Plaintiff’s and other zebra designs, the Court discerns only minute differences in the thickness of the lines and orientation of the pattern. These minute differences do not rise to the level of originality. “Although the amount of creative input by the author required to meet the originality standard is low, it is not negligible.” *Satava v. Lowry*, 323 F.3d 805, 810 (9th Cir. 2003)(citing *Feist Pubs., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991)). “There must be something more than a ‘merely trivial’ variation, something recognizably the artist’s own.” *Id.* (citing *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 489 (9th Cir.2000)). In this instance, the Court finds nothing that is recognizably the artist’s own. In fact, looking to the evidence, the Court notes that Defendants’ expert includes several zebra designs in Exhibit E to her declaration. (*See* Young Decl., ¶ 12.) According to her declaration, Plaintiff’s Zebra Design is reproduced at the bottom of each page in the exhibit as a point of comparison. *Id.* However, there is no recognizably consistent design that appears at the bottom of each page. While this may be an error or oversight on the part of Defendants, what is significant is the fact that the Court is unable to discern which of the designs depicted may, in fact, be Plaintiff’s Zebra Design. This fact lends overwhelming support to the finding that any variation found in the Zebra Design is merely trivial, lending nothing recognizable as the artist’s design.

The Court **denies** summary judgment as to the validity of Plaintiff’s copyright in the Zebra Design. Rather, the Court finds that, as a matter of law, Plaintiff’s copyright in the Zebra Design is invalid.

2. Animal Print Design

As to the Animal Print Design, Defendants argue that the design is nothing more than a depiction of various different animal skins placed next to one another, a concept that has been used in the public domain going back to the 15th Century. Defendants introduce expert testimony to support this argument. (See Young Decl., ¶ 17; Nellor Decl., ¶ 7; Gilchrist Decl., ¶ 7.) Defendants also submit images of various other textile designs that incorporate the same concept. (See Nellor Decl., Ex. 2; Young Decl., Ex. F; Gilchrist Decl., Ex. 2.)

The Court disagrees with Defendants on this issue. As stated in Section IV.A.1. above, the fact that Plaintiff's design depicts real animal skins or a matter in the public domain does not preclude a finding of originality so long as something original has been added to its expression. See *Kamar*, 657 F.2d at 1061. Unlike the Zebra Design discussed above, the Animal Print Design is an arrangement of several different and distinct components. In comparing Plaintiff's design to the images offered into evidence by Defendants, the Court finds that Defendant has not successfully rebutted the presumption of originality. While the general concept is not novel, the combination of how the prints are arranged, what types of animal skin were selected, and the scale and proportion of one print relative to another is more than a trivial variation. The artist's choices provide originality to the expression of the concept.

The Court **grants** summary judgment as to the validity of Plaintiff's copyright in the Animal Print Design.

### 3. Burnout Design

With respect to the Burnout Design, Defendants present evidence that such designs are created by a technological process involving selective fiber removal to create a random pattern. (Young Decl., ¶ 13.) Therefore, there are generally no distinct repeats or recognizable elements. *Id.* According to Defendants' expert, this design has enjoyed enormous popularity over the last seven or eight years, starting before Plaintiff's claimed creation date, and has been made by many manufacturers. *Id.* As such, Defendants argue that the Burnout Design is nothing more than a preexisting design comprised of the same elements.

Again, the Court disagrees with Defendants on this issue. At most, Defendants' evidence establishes that all burnout designs are created using the same technological process. However, because the process allows for selective fiber removal, it stands to reason that different designs may be created by selecting different fibers to be removed. In fact, Defendants' evidence supports this inference. In comparing Plaintiff's Burnout Design to those introduced by Defendants' expert, the Court finds the designs quite different. (Compare Nellor Decl., Ex. 1, p.3 (image of Plaintiff's Burnout Design), with Nellor Decl., Ex. 2, pp. 8-10; Gilchrist Decl., Ex. 5 (images of other manufacturers' burnout designs).) As such, Defendants have failed to rebut the presumption of validity, and the Court **grants** summary judgment in favor of Plaintiff on this issue.

### 4. Lace Design

Defendants argue that the Lace Design is also comprised of preexisting designs and non-copyrightable elements. Specifically, Defendants' expert states that the Lace Design is merely a reproduction of a vintage bobbin lace; the elements used in the floral laces are limited and suggest repetition of motifs within the same genre. (Young Decl., ¶ 19.) Defendants have also attached examples of other lace designs to support their argument that the Lace Design is nothing more than a common and long used version of a basic concept, and therefore not entitled to copyright protection. (Young Decl., Ex. G; Gilchrist Decl., Ex. 4; Nellor Decl., ¶ 2.)

Again, the Court find that Defendants have failed to rebut the presumption of a valid copyright. As stated previously, the fact that Plaintiff's design depicts a common matter in the public domain does

not preclude a finding of originality so long as something original has been added to its expression. *See Kamar*, 657 F.2d at 1061. In comparing the Lace Design to images introduced by Defendants, the Court finds the floral elements of the Lace Design recognizably different from the other designs presented in evidence. Not only are the flowers designs different in shape, size, and detailing, the leaf designs connecting the flowers are also quite dissimilar. Therefore, the Court **grants** summary judgment in favor of Plaintiff on this issue.

## **B. Infringement of the Design**

Based on the Court's findings in Section IV.A. above, the following infringement analysis pertains only to Plaintiff's Animal Print Design, Burnout Design, and Lace Design.

To successfully establish a copyright infringement claim, in addition to demonstrating ownership of the copyright, the plaintiff must establish (1) the defendant's access to the copyrighted work, and (2) substantial similarity between the copyrighted work and the allegedly infringing material. *Berkic, v. Crichton*, 761 F.3d 1289, 1291-92 (9th Cir. 1985). The parties do not dispute the first element, Topson's access to the copyrighted work. (Defs.' Statement of Genuine Issues of Disputed Facts ("Defs.' SGI"), Nos. 22-27.) Therefore, the Court addresses only the second element, substantial similarity.

Substantial similarity requires a fact specific inquiry, but it "may often be decided as a matter of law." *Benay v. Warner Bros. Entm't*, 607 F.3d 620, 624 (9th Cir. 2010) (quoting *Sid & Marty Krofft Television Prods., Inc., v. McDonald's Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977)). To prevail on a copyright infringement claim, a plaintiff must prove substantial similarity under both the extrinsic and intrinsic tests. *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485 (9th Cir. 2000). The extrinsic analysis is objective and based on "specific criteria which can be listed and analyzed." *Funky Films, Inc. v. Time Warner Entertainment, Co.*, 462 F.3d 1072, 1077 (9th Cir. 2006) (citing *Kouf v. Walt Disney Pictures & Television*, 16 F.3d 1042, 1164 (9th Cir. 1994)). The intrinsic analysis is subjective and focuses on whether a reasonable person would find the work substantially similar. *Id.* In a motion for summary judgment, courts usually apply only the extrinsic test, leaving the intrinsic test to the trier of fact. *Id.* Only "where [the] works are so overwhelmingly identical that the possibility of independent creation is precluded," is a grant of summary judgment in favor of the plaintiff appropriate. *See Twentieth Century-Fox Film Corp. v. MCA, Inc.*, 715 F.2d 1327, 1330 (9th Cir. 1983).

### 1. Extrinsic Test

The extrinsic test compares only the concrete, protectable elements of the works. *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1443 (9th Cir. 1994). While not an exhaustive list, the relevant factors for evaluating art work include "subject matter, shapes, color, material and arrangement of the representations." *Cavalier v. Random House, Inc.*, 297 F.3d 815, 826 (9th Cir. 2002).

As an initial matter, Defendants state that even if Plaintiff's designs are entitled to copyright protection, they are entitled to only thin protection. Defendants argue that Plaintiff's designs are merely reproductions of ideas, facts, or concepts in the public domain, which cannot be protected. According to Defendants, any protection afforded can only be as to the manner in which the author combines the ideas or concepts. Therefore, to establish infringement, Plaintiff must establish that the infringing work is virtually identical to its own. Recent Ninth Circuit law, however, holds differently where the subject matter is stylized textile design.<sup>1</sup> *See L.A. Printex Indus., Inc. v. Aeropostale, Inc.*, 676 F.3d 841 (9th

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<sup>1</sup> "Stylized" means, "to represent or design according to a style or stylistic pattern rather than according to nature or tradition." *Stylized Definition*, Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/stylized> (last visited August 20, 2012).

Cir. 2012). According to the Ninth Circuit, “[b]ecause there is ‘a wide range of expression’ for selecting, coordinating, and arranging [ ] elements in stylized fabric designs, ‘copyright protection is ‘broad’ and a work will infringe if it’s ‘substantially similar’ to the copyrighted work.’” *L.A. Printex*, 676 F.3d at 850 (quoting *Mattel, Inc. v. MGA Entm’t, Inc.*, 616 F.3d 904, 913-14 (9th Cir. 2010)). Like the subject matter of *L.A. Printex*, both the Animal Print Design and the Lace Design are stylized fabric designs. In other words, while the two designs draw from nature, they do not depict animals or flowers as they actually appear in nature. See *L.A. Printex*, 676 F.3d at 851, fn.4. Therefore, applying relevant law, Plaintiff’s Animal Print Design and Lace Design are entitled to broad protection. As to Plaintiff’s Burnout Design, Defendants’ generalized argument misses the mark. While the technological process for creating a burnout design may be common, or in the public domain, Defendants have failed to present evidence showing that the actual design depicted in Plaintiff’s Burnout Design was taken from the public domain. As such, the Court finds that none of the designs at issue are subject to thin copyright protection.

a. *Animal Print Design*

In comparing the concrete, protectable elements of the Animal Print Design with Defendants' animal print top, the Court finds significant differences between the two.<sup>2</sup> Both designs incorporate three distinct animal prints, two of which are the zebra and the leopard. The similarities end there. First, as compared to the Animal Print Design, Defendants' top uses a more densely clustered depiction of the leopard print. Second, the markings on Plaintiff's cheetah print are spaced much further apart, and less mosaic-like than Defendants' counterpart. Defendants have attributed this difference to the fact their top depicts a different animal altogether, a giraffe rather than a cheetah. Finally, the arrangement of the three components also differs. As opposed to the Animal Print Design, Defendants' top appears to overlap the three different elements much more extensively, resulting in a more muddled appearance. Based on these significant differences, the Court finds that Plaintiff fails to satisfy the extrinsic test.

b. *Burnout Design*

In comparing the concrete, protectable elements of the Burnout Design with Defendants' burnout top, the Court again finds significant differences.<sup>3</sup> Although both designs are distinguishable as burnout designs, the structural elements of the two designs are dissimilar. First, the overlaying fibers that remain in the Burnout Design appear lined and jagged, as if the surface was etched with a thin, sharp object. Defendants' top, on the other hand, gives the appearance of rounded ink blots of various shapes and sizes. Second, the arrangement of the elements in Defendants' top create a looser, more relaxed pattern. In contrast, the elements of Burnout Design fuse into one another creating a denser pattern. In light of these significant structural differences, the Court finds that Plaintiff has failed to satisfy the extrinsic test.

c. *Lace Design*

Finally, the Court compares the concrete, protectable elements of the Lace Design with Defendants' lace tops, one of which was sold at Target (Deutchman Decl., Ex. 13), the other sold at Wal-Mart (Deutchman Decl., Ex. 15). Again, the Court finds the designs different.<sup>4</sup> All three designs incorporate stylized six-petaled flowers and scrolled leaves overlaying mesh. However, the scale of the elements relative to each other are not the same. In comparison with Plaintiff's Lace Design, the flowers in Defendants' tops are larger relative to the scrolled leaves. Also, in Plaintiff's Lace Design, the floral elements are predominant, creating a clear foreground and background. In contrast, the floral elements and the mesh of Defendants' tops are equally dominant, creating lower contrast and the appearance of all elements existing on a single plane. Finally, the mesh is different. Specifically, the mesh in Defendants' tops is much more irregular and web-like than Plaintiff's design. In light of the significant differences in the designs' concrete elements, the Court finds that Plaintiff has failed to satisfy the extrinsic test.

2. *Intrinsic Test*

As stated above, to prevail on its infringement claim, Plaintiff must show substantial similarity under both the extrinsic and intrinsic tests. Because Plaintiff has failed to satisfy the extrinsic test as to all three designs at issue, Plaintiff's claim fails, and the Court need not address the intrinsic test.

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<sup>2</sup> In analyzing the extrinsic factors, the Court looks to Deutchman Decl., Exs. 2 and 10.

<sup>3</sup> In analyzing the extrinsic factors, the Court looks to Deutchman Decl., Exs. 6 and 12.

<sup>4</sup> In analyzing the extrinsic factors, the Court looks to Deutchman Decl., Exs. 8, 13, and 15.

3. Conclusion

In light of the findings above, the Court finds that Defendants have not infringed Plaintiff's copyrights in the Animal Print Design, Burnout Design, and Lace Design.

**V. EVIDENTIARY OBJECTIONS**

To the extent the Court relied on evidence to which the parties objected, those objections are overruled.

**VI. CONCLUSION**

Based on the foregoing, the Court **GRANTS in part** Plaintiff's Motion for Partial Summary Judgment as follows:

- (1) Validity of Plaintiff's Copyright in Zebra Print: **DENY**
- (2) Validity of Plaintiff's Copyrights in Animal Print Design, Burnout Design, and Lace Design: **GRANT**
- (3) Infringement of Plaintiff's Copyrights in Animal Print Design, Burnout Design, and Lace Design: **DENY**

Moreover, the Court finds that as a matter of law, Plaintiff's copyright in the Zebra Design is invalid. While the remaining three copyrights are valid, the Court finds no infringement by Defendants. Therefore, the Court *sua sponte* grants **summary judgment in favor of Defendants** on these issues.

The Court further orders Defendants to submit a Proposed Judgment consistent with this Order no later than **August 31, 2012**.

**IT IS SO ORDERED.**

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 Initials of Preparer \_\_\_\_\_