

Textile Design Similarity In The Eye Of The Beholder (The Jury): H&M Found Liable For Copyright Infringement

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On December 7, a federal jury in Los Angeles awarded \$846,720 in damages to Unicolors, Inc. in its suit against H&M Hennes & Mauritz, LP for copyright infringement of a textile design. *Unicolors, Inc. v. H&M Hennes & Mauritz L.P.*, Case No. 2:16-cv-02322 (C.D. Cal).

Here is a comparison of the designs at issue that led to a finding of willful infringement:

Related Capabilities

- Trademark, Copyright + Advertising
- Intellectual Property Litigation



THE WINNING ARGUMENTS:

Unicolors argued that it only needed to prove the “possibility of access” and substantial similarity in order to demonstrate infringement and that the possibility of access could be established by its widespread dissemination of its work (selling over 40,000 yards of its pattern to numerous customers) before H&M sold its products. Further, Unicolors contended that the two designs were “strikingly similar” – *i.e.*, that similarities between the designs could *only* be explained by copying, rather than by “coincidence, independent creation, or prior common source.”

Unicolors urged that small differences in the designs should be “disregarded,” because on the human form, small differences fade within a few feet of distance from the wearer, and that small differences in the designs could actually be evidence of willful infringement. It also argued that H&M was reckless, if not willful, in continuing to sell the allegedly infringing goods after it was on notice of Unicolors’ claim.

THE LOSING ARGUMENTS:

In defense, H&M relied on the following theories:

- It did not “design, manufacture, distribute,” or have “anything to do with the creation or selection” of the allegedly infringing product;
- The design H&M used was protected by a Chinese copyright obtained in 2014 in China (and a U.S. copyright obtained in 2017);
- Unicolors failed to present “some evidence” of copying, pursuant to the Ninth Circuit’s decision in *United Fabrics, International v. C&J Wear*, 630 F.3d 1255, 1257 (9th Cir. 2011);
- To date, no court has permitted a plaintiff to rely on the “strikingly similar” doctrine where the accused design is protected by a copyright registration;
- The producer of H&M’s design provided “credible evidence” of its independent creative process, including a “written paper trail”;
- Unicolors did not have any evidence of prior access by either H&Ms or the designer (a Chinese entity) prior access to Unicolors’ design; and
- It had six-figure losses on the goods

LESSONS FOR THE FUTURE:

Although jury verdicts are often unpredictable, a few themes emerge from a review of Unicolors’ success:

1. If you are on notice of a potential infringement, continuing to sell the products in dispute can lead to enhanced damages and a finding of willfulness;
2. Cases involving textile designs can be hard to predict; although there may be only a narrow scope of protection, minor differences may not be enough to convince a jury that the designs are not substantially similar; and
3. Evidence of independent creation must be credible and convincing.