

PRACTICAL ADVICE

FROM THE FASHION LAW PRACTICE



Fox Rothschild LLP
ATTORNEYS AT LAW

Fabric Copyright Infringement Claims on the Rise: Why Manufacturers Must Eradicate the Urban Legend of the “30% Rule”

There is no such thing as a 10% rule, 30% rule or whatever “rule” your designer may tell you. These “defenses” are merely urban legend! Copying someone else's fabric print is not permitted and can get you into expensive litigation quickly.

In fact, the number of fabric copyright infringement claims are on the rise. This summer alone, more than 30 of such cases were filed in the Central District of California. In fact, more than 195 have been filed in less than five years by a single plaintiff.

Why? Two reasons:

1. Due to the current state of copyright law, an unscrupulous plaintiff can easily obtain a substantial windfall based on an invalid copyright registration; and
2. Most designers still think it is OK to take a print of another, change it a certain percentage and then have it produced by their own supplier.

The Typical Hold-Up

Here is the common scenario: a fabric company files a “single work registration” copyright application on fabric designs that are stripes, plaids, geometric designs or other items

considered by most in the fashion industry to be in the public domain. If at least one item included in the batch is deemed to have minimal creativity, the entire group will be given a copyright registration number by the Copyright Office. Thus, by filing a single application, a company may claim ownership to thousands of simple patterns that would otherwise not be protectable.

Armed with a copyright registration, the fabric company then sues any and all apparel manufacturers that have made garments with a similar print, as well as all of the retailers that sold the alleged infringing items. The fabric company can seek actual or statutory profits from each entity involved and, more importantly, is entitled to attorney's fees for bringing the case per statute, even, unlike trademark law, if the infringement is not willful.

When a retailer receives such a suit, it forwards it to the garment manufacturer that must then defend itself and the retailer. Because courts presume the validity of a copyright registration, litigation costs to prove otherwise are enormous. To defend against such an action, it could cost more than \$150,000 per defendant, not including trial.

Instead of incurring such costs, or risk harming its relationship with the retailer, the apparel manufacturer will typically settle the suit for nuisance value. Recently, the typical plaintiffs in these cases have grown accustomed to “extorting” money and settlement amounts have grown.

What Should You Do?

While there is no absolute way to stop an unscrupulous plaintiff, there are a few things an apparel company can do to minimize the impact of any such suit on its business.

1. If you design your own fabrics, you can document the source of your inspiration and you should file a copyright registration on your proprietary materials.
2. There is no such thing as a 10% rule, 30% rule or whatever “rule” your designer may tell you. These are merely urban legend! Copying someone else's fabric print is not okay. Proper education of your design staff and salespeople is an absolute must.
3. Make sure that you have indemnity provisions in your contracts with your fabric suppliers.

4. Work with Fox Rothschild and other counsel to urge your elected representatives to change the laws in this area. The Copyright Office is aware of these problems and the increased litigation over invalidate registrations and is considering changes in the regulations, but only Congress can issue the legislation needed to prevent abuse.
5. Remain alert to this problem and the potential liability by using experienced professionals familiar

with fabric, the manufacturing process and defending these meritless actions cost effectively.

How Fox Rothschild Can Help

Staci Riordan, a fourth-generation garment industry attorney, can separate the facts from fiction and move your company forward, safely. Fox Rothschild can:

1. Review, register and protect your copyrights in your designs;

2. Train, educate and work with your company and your staff to ensure your rights are protected;
3. Review, revise or create comprehensive contracts protecting you and your supply chain and vendors;
4. Answer your questions regarding doing business in the industry in these tough economic times; and
5. We are working to change the law in these areas.



Staci Jennifer Riordan, Esq., Chair of Fox Rothschild Fashion Law Practice Group

As a fashion lawyer, Staci's practice focuses on issues faced by the fashion community, be it fashion licensing, copyright, trademark and business litigation as well as strategic planning and client counseling. In an industry as competitive as fashion, there is no substitute for experience, involvement and commitment. As a former apparel industry executive, professor and descendant of a long line of garment makers, Staci has the knowledge to help brands succeed.

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