

*These articles, written expressly for CFA by our member attorneys, provide information about our industry's vulnerable IPR issues. The current case studies, along with their outcomes, will send a clear "protect yourself" message, and are part of CFA's continuing effort to be of assistance.*



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## "PROTECT YOURSELF"

### **BUYING TEXTILE PATTERNS (PRINT OR JACQUARD) REQUIRES PREPARATION TO GUARD AGAINST COPYRIGHT LITIGATION**

**Consider the circumstance in which you bought the pattern before you begin to use it.** Publicly available court records show that suppliers have filed over 225 lawsuits, seeking copyright infringement damages, within the Central District of California alone.

There may be no perfect way to buy and sell patterned textiles without the threat of litigation, but there are things you can do to substantially limit the financial exposure for you and your customers.

The damages arising from lawsuits for infringement include statutory damages and fees for attorneys - your own and, in some cases, for the plaintiff. Even a 'settlement' is costly. The pendulum has swung very far from levels of common sense....so be prepared.

### **WHAT YOU CAN DO**

1. Start by **asking the printer or knitter if the company has a copyright registration** of the pattern being considered, if they do, and you rely on their registration, that may be sufficient to sidestep the 'willful-damage assertion.
2. Ask to see **evidence of 'original-work' authorship** (either art work or a knitted sample). In cases where the mill has purchased the design from an art studio or another entity, ask that the sale to you includes a statement that the original copyright is being transferred to you. There should be an **assignment for the copyright from the originator of the design**. Everyone down the line should have an 'assignment' of the copyright.
3. **Get an indemnity, in writing, from the mill covering both you and anyone to whom you sell product.** This should be included in your purchase order. Whether the mill is domestic or off-shore, find out if they have their own insurance covering you and your customers for alleged copyright infringement claims.

4. **You can buy your own copyright infringement insurance.** Some of these policies are expensive and can cost more than \$25K per year, but it is a small price to pay to protect you and your customers.

5. **Use 'public domain' designs.** These are designs that are available without issues of copyright ownership. There are facilities that maintain libraries of thousands of prints already in the public domain or that 'exist in nature'. You can select a design from any of these reference materials and have it made. Of course, you do not have the right to that design either, but it will keep you out of the courtroom.

6. **If you are not comfortable with the response to your due-diligence inquiries, then do not buy the pattern!**

- if you ask for copyright registration from the mill (suggestion #1) and it cannot be supplied
- if you ask for original work of authorship (suggestion #2) and it cannot be supplied
- if you buy a print and the mill cannot provide you with an assignment (suggestion #3)...and you still buy the pattern, you may be considered a 'willful infringer if the print turns out to be infringing on someone's copyright.
- If all the red flags were raised and you chose to ignore them...it is a no-win situation

7. **Design your own prints.**

Case Study: *Background* - Copyright registration is obtained by filing an application, identifying the design. It requires the author to sign that the work is original, under penalty of perjury. After paying a small fee, nothing much more is required. *Images that "exist in nature" are not copyrightable.*

A print commonly known as a "zebra stripe" was the subject of a copyright registration dispute. The lawsuit stated that the alleged infringing "zebra stripe" was not a design found in nature; rather that it was created by an 'author'. The defendant argued that there are no two zebras with the same stripes and therefore the print cannot be the basis for a copyright-infringement lawsuit.

In August, 2012, a federal court issues a finding that the copyright in the zebra print design was invalid.

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