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Opening Party Statement of Wendy Sloan

Sloan v. Just For Littles LLC

Docket number

23-CCB-03

Introduction

Wendy Sloan alleges that the artwork titled "Leaping Unicorns" has been unlawfully reproduced by Just for Littles (JFL) by replicating Ms. Sloan's copyrighted design on custom printed fabrics to produce custom dresses manufactured exclusively for JFL, by factories in China and sold within the USA between January 2019 through the end of November 2022.

Wendy Sloan, the Claimant, an artist from Burke, Virginia, designs and produces her own hand crafted home décor and children's accessories for her own business. She is a sole proprietor using the name Wendy Sloan for business purposes. She creates these items using fabrics she has designed herself. Her products are sold online and at her shop in Dulles, Virginia, under the name "Mainsail Studio". She occasionally sells her fabrics on Spoonflower.com https://www.spoonflower.com/profiles/mainsailstudio Ms. Sloan operates her online business via website https//:www.mainsailstudiopatterns.com

The respondent, Just for Littles, is a primarily online children's boutique based in Minnesota. https://justforlittles.com/. Just for Littles sells clothing and accessories direct to consumer and has a wholesale program. https://justforlittles.com/pages/wholesale-information According to a report published by The Citizen on June 20, 2019, Just for Littles was created when the owner, Ms. Tami Enz decided to launch her own company so she could design products "*just the way she wanted them*." The article goes on to describe that Just for Littles produces their own special fabrics manufactured in China and that the dresses are sold throughout the US, including New York and Los Angeles. ***(Article I)***

Ms. Sloan started illustrating the piece "Leaping Unicorns" in December 2016. The design depicts a unicorn leaping among flowers. The work includes unique features characteristic of Ms. Sloan's signature style, such as a flower with a heart-shaped center and a small bird perched on a vine. Additionally, the unicorn is an illustration based on Ms. Sloan's sewing pattern from her most popular product, a stuffed unicorn.

On December 30, 2016, Ms. Sloan posted "teasers" about the upcoming design on Instagram, including a video showing part of her creative process. ***(Article A)*** Link to Instagram post

The work was completed in January 2017 and published on Spoonflower.com. ***(Article B)*** A copyright registration certificate, VA0002067458, was issued on April 12, 2017. ***(Article C)***

Ms. Sloan developed the illustration as a repeating surface pattern design for use on her handmade dresses and home décor items. Additionally, she made the fabric available for purchase through the print-on-demand fabric company Spoonflower. ***(Article B)*** Prices for the fabric vary from $21 to $89 per yard based on the fabric type, with Ms. Sloan receiving a 10% royalty on each sale. Buyers of fabric printed with Ms. Sloan's designs from Spoonflower receive an immediate unlimited implied license for its use. Her Spoonflower customers include home sewers and proprietors of upscale handmade small businesses looking for exclusive designs not found in fast fashion or mass-produced products. Ms. Sloan has never offered "Leaping Unicorns" as a licensable digital download. ***(Article D)***

On November 2, 2022, Ms. Sloan came across a dress called the "JFL Second Edition Unicorn Twirl Dress." ***(Article E)*** It was available for purchase at $29.99, reduced from $39. Using an image search from the image in Article E, she found a more comprehensive description of the dress in a JFL Facebook post dated January 4, 2022, which described it as "Celebrating JFL's 3rd Anniversary with a modified version of our most popular JFL dress." ***(Article F)*** A comparison of the work "Leaping Unicorns" and

the images of "JFL Second Edition Unicorn Twirl Dress" shows that the fabric used to create the dresses is identical, minus subtle variations in the colors. ***(Article G)***

On November 2, 2022, Ms. Sloan reached out to JFL via their website's online customer service form to ask about the origins of the dress's artwork. ***(Article H page 4-5)***

Tami Enz, the owner of Just For Littles, responded to the inquiry. However, her reply did not address the question regarding the source of the artwork. Instead, Ms. Enz sent Ms. Sloan an image of one of Ms. Sloan's products taken from Ms. Sloan's website, along with the comment, "This is gorgeous! Thanks, Tami Enz." ***(Article H page 4)***

Ms. Sloan sent another email requesting information about the acquisition of the artwork. This email conveyed more emotion, as Ms. Sloan had previously fought against copyright infringement of her design and was deeply distressed to discover that her work had once again been exploited by a fast fashion importer. ***(Article H)***

Ms. Enz responded without disputing the allegation that her work was a replica of Leaping Unicorns. She stressed that she had purchased a license for the artwork several years earlier and commented, *"I have my own specialty fabric printed and made into garments. I've always purchased a license. Perhaps someone else modified your work and sold licenses to use it?"* ***(Article H page 1)***

Ms. Sloan responded to Ms. Enz's defense about the possibility of a fraudulent license by requesting that Ms. Enz provide specific details of the license. ***(Article H page 1)*** Ms. Sloan's primary objective in protecting her copyrighted material is to maintain control and stop its use in manufacturing. She prioritized locating and taking action against the party that sold the artwork to Ms. Enz, which explains why she did not file a copyright claim against JFL in November 2022. Ms. Sloan filed the claim only after Ms. Enz failed to provide information about the alleged fraudulent license.

Between November 2, 2022, and September 23, 2023, Ms. Sloan awaited a response from Ms. Enz regarding the purported license, investing numerous hours into searching various websites to locate the

seller of the artwork licenses. Despite these efforts, Ms. Sloan found no evidence that the artwork was being sold without her consent by any third-party entities. Furthermore, in the effort to find where Ms. Enz may have purchased the alleged license, Ms. Sloan discovered that dresses sold by JFL between 2019 and 2022 had three different variations of the Leaping Unicorns artwork printed on them. On September 23, 2023, one final email request for the license information was sent to Ms. Enz, making it clear that at copyright claim with the CCB had been started and that JFL would be named on the claim unless evidence of the alleged license was provided. ***(Article L)*** After getting no response from Ms. Enz, Ms. Sloan filed the claim with the CCB on September 29, 2023.

Facts of this case:

- Leaping Unicorns is the registered copyright of Wendy Sloan.
- Just For Littles launched in January of 2019. The business launch featured a dress made with fabric printed with Leaping Unicorns and embellished with a pink trim. It was used both as an item for sale in multiple sizes and also in social media marketing images.
- From 2019 until November 27, 2022, dresses featuring the Leaping Unicorn design were made using at least three distinct fabrics. (***Article R)*** provides a comparison of these fabric variations.
- It is challenging to definitively determine how JFL accessed the "Leaping Unicorns" artwork. Although Ms. Sloan takes precautions to protect online images and is public on social media about protecting her copyrighted works as a deterrent to IP theft, it would not have been impossible to copy the artwork, and there would be no other way to print the design on fabric without accessing Ms. Sloan's artwork. The three distinct variations in the printed fabrics used by JFL to produce Dress 1, 2 and 3, indicate that the artwork was accessed and printed on JFL fabrics, multiple times, with modifications, with each dress becoming more and more like the original artwork. ***(Article N)***.

- Although difficult, due to the effort Ms. Sloan puts into showing only mock-ups, low resolution and off center repeats of the work, it is possible to access the "Leaping Unicorns" artwork. The work appears on Ms. Sloan's website (mainsailstudiopatterns.com) but only as draped fabric mock-ups and sample dress images. It is available at Spoonflower.com/en/products/6255536-leaping-unicorn-purple-by-mainsailstudio , but only as right-click disabled images with watermarks and mock-ups of various products. However, at Spoonflower.com, despite the design being in mock-ups or watermarked, certain mock-up images display the full surface pattern repeat, for example on the wallpaper samples. ***(Article X)***. A determined individual could potentially use these images to create a high-resolution unauthorized copy of the design suitable for printing. Ms. Sloan also shares images of finished products printed with this artwork on social media pages. Ms. Sloan made an Instagram post in April of 2017, as a part of a fundraising auction, where one yard of the Leaping Unicorns fabric was being bid on. Regrettably, the Instagram post lacked the usual wrinkles or watermarks that were characteristic of all the other marketing images featuring this design. This error could have offered an additional opportunity to misuse the work. This social media post has since been removed.
- In an email sent by Ms. Enz to Ms. Sloan on October 24, 2023, Ms. Enz articulated that the dresses were crafted from rolls of fabric she purchased already printed by a factory in China four years earlier, in 2019 and that she had not purchased a license to use the fabric. She stated,

  > *"After searching through over 4 years of records 😳, I bought the fabric from a factory in China that already had rolls of it. It was offered to me as an option. I do things differently now that I understand certain factories can't be trusted."*
  >
  > (***Article Q)***

To support this statement, Ms. Enz uploaded to the CCB website two documents, an undated invoice with mathematical errors, from Tuance E-Commerce Firm for 22 dresses (***Article O)*** and a screenshot of various fabrics that was purportedly from a catalog offered by an unknown Chinese entity. The catalog shows a grainy image of "Leaping Unicorns" at space number 95. However, this document also lacked dates, manufacturers' names, messages, or any other validating information. It also included images of obviously trademark infringing famous character fabrics, which would have been a red flag that the fabric choices were not licensed***. (Article P)***

- In July 2021, Just for Littles shared several images in their Instagram Stories from the Minnesota State Fair. Prominently displayed at the fair was a banner featuring a girl twirling in an infringing dress. Also visible in the photo was a clothing rack containing 22 infringing dresses. ***(Article O)***. Social media posts describing it as JFL's most popular dress proves that the dresses exhibited at the fair in 2021 were reorders and not the original 22 ordered in 2019. ***(Article F)*** This dress notably differs from Dress #1 by including flower motifs absent in Dress 1, yet lacking the fine details shown in Dress 3. ***(Article R)*** Ms. Enz has not provided any information about the origin of Dress 2 or how its fabric was sourced. After being confronted about this dress during the second Pre-Discovery conference, Ms. Enz uploaded a blurry second invoice ***(article T)*** which had "Tuance E Commerce Firm" at the top but no other identifiable information. There were 55 infringing dresses on this order.
- In January of 2022 Just for Littles released a Dress #3 to celebrate the third anniversary of JFL. This dress was made with fabric printed with Leaping Unicorns. (***Article E)*** Ms. Enz provided an undated, unlabeled "Pro Forma" invoice to account for 40 dresses in the Dress #3 style ***(Article W).*** Ms. Enz has not provided any explanation as how she obtained the fabric for these 40 dresses, who the manufacturer was or how the printed artwork on the dress was a perfect, intricately detailed

copy of Ms. Sloan's original work, devoid of the poor print quality of dress 2 and the missing motifs in dress 1.

- On April 16, 2024, during the CCB Status Conference, Ms. Sloan asked Ms. Enz to provide dress sales data for a fair resolution. Ms. Enz argued it was impossible as she didn't keep individual records. However, Ms. Sloan highlighted that Shopify should allow her to produce online sales reports. Ms. Enz inaccurately stated Shopify was only used after she STOPPED selling the infringing dresses. Ms. Sloan discovered this to be a false statement ***(Article U)***. Ms. Sloan shared this evidence with Ms. Enz via an email on June 5, 2024 ***(Article V)*** Ms. Enz still denied using Shopify and refused to produce any additional discovery documents to explain actual dress sales.

In an email dated October 24, 2023, Ms. Enz assured Ms. Sloan that she would make every effort to remove all images from her various platforms. ***(Article Y)*** Ms. Sloan interpreted this assurance to cover images on Facebook, Instagram, and TikTok. Although Ms. Enz may have removed some images, as of May 23, 2024, numerous images remained on the publicly accessible Just for Littles Facebook page. Instead of removing the content, Ms. Enz blocked Wendy Sloan from accessing the Just for Littles Facebook page, leaving Ms. Sloan unaware that the images were still there. Subsequently, Ms. Sloan discovered the images were still posted by viewing the Just for Littles Facebook page through a relative's account. When confronted about blocking Ms. Sloan, Ms. Enz accused Ms. Sloan of harassing her customers, which necessitated the block. (***Article EE)*** However, this accusation is unfounded; Ms. Sloan does not engage in harassment or social media shaming.

- JFL made countless social media images and post, reals and videos showcasing the infringing dresses. ***(Article GG)***

- JFL has a wholesale program that used images of the infringing dresses as the online marketing for the wholesale program. **(Article HH)**
- The number of dresses sold is in question but there were at a minimum the 22 dresses from Article A, the 40 from Article W, 22 observed in Minnesota State Fair images from Article S and 55 listed on Article T. Which appears to be 139 dresses, but without actual sales data and this uncertainty Ms. Sloan amended her damages claim from actual to statutory, arguing that a fair resolution based on real sales is impossible without access to accurate sales data, which Ms. Enz claims are unavailable. Ms. Sloan has no way of knowing if a fair resolution is less than or greater than the 139 dresses, although based on the extensive social media posts about the dresses, it seems likely that 139 is a minimum number.

Problems with the Respondents Claim Response

On March 27, 2024, Ms. Enz submitted her claim response (Article AA) to the ECCB website. In her response, she asserted a defense, based on having permission to use the allegedly infringed work, or that the agreement with the claimant limits damages. Under the section titled "Disputed Facts and Claims," Ms. Enz detailed the origins of the infringing dresses:

> *"Within my first few months of starting in early 2019 I was contacted by Tuance E-Commerce Firm, via Facebook, a wholesale children's clothing company that offers customizable items. I was shown styles they could make and the fabric choices from their fabric supplier. As a good faith purchaser I selected fabric number 95 assuming they had all the appropriate licenses to use that fabric. Has it been proven that they did not? After selecting fabric number 95 I selected all the remaining element options they offered and purchased 22 dresses for a total price of $105.83. Fabric number 95 wawas one element out of many options offered by the manufacturer of the out of many other elements including but not limited to the neck linestyle, bodice style, waist height, armpit length, tags, placement of tags, sleeve style, thread color, trim type, and ruffle. "*

This is false. Ms. Enz launched Just for Littles WITH the infringing dresses in stock AND for sale at the launch party that occurred on January 18, 2019. It is logistically impossible to get custom clothing ordered from China and imported into the USA in just 18 days. This statement

also does not acknowledge or explain the fact that dresses were reordered multiple times or that the dress was modified and released in 2022 as a celebration of JFL's 3rd anniversary. In a Facebook Live video posted on the JFL public Facebook page on April 19, 2019, Ms. Enz, while holding up one of the infringing dresses says "We launched with this dress and it was so popular, we brought it back." (***Article CC)***

In the same video at 13:00 Ms. Enz explains that she searches for artwork to have printed on her Just for Littles fabric and always purchases a license from the artist. This statement was made just three months after the initial launch of JFL, so Ms. Enz was clearly aware of the importance of obtaining licenses for use of artwork. Considering the high number of trademarked characters in the "fabric catalog" she was shown by "Tuance E-Commerce Firm", it would have been a huge red flag for Ms. Enz that it was unlikely that she was purchasing licensed fabrics.

The Claim Response from Ms. Enz goes on to state:

> *"Mrs. Sloan contacted me in the autumn of 2022, I apologized this had happened to her but I was unsure of licensing at that time because the dresses were purchased over 3 years prior when I first started my company."*

This is false. Ms. Sloan contacted Ms. Enz in autumn of 2022 regarding the "JFL 3rd Anniversary Unicorn Twirl Dress." The third anniversary of Just for Littles was in January of 2022. Not three years prior and the dresses were a new color way with a different trim than the dresses purchased three years prior. The fact is, Ms. Sloan contacted Ms. Enz regarding dresses that were acquired multiple times between 2019 and 2022 and as soon as 10 months prior to the initial contact. They were still for sale on the JFL website on the day of contact. However, it was only after this initial contact did Ms. Sloan realize that the infringement extended back to 2019.

The Claim Response from Ms. Enz goes on to state:

> *"I also deactivated the online product with 2 dresses remaining, size 12 months and size 12 youth."*

This is false. These dresses were included in a Black Friday Sale on November 27, 2022, twenty-five days after the initial contact from Ms. Sloan. ***(Article FF)***

The claim response from Ms. Enz goes on to state

> *"I went above and beyond for Sloan, in the autumn of 2022, removing all online images, to the best of my knowledge, and deactivating the online product."*

This is false. As of May 23, 2024 there were still several social media posts on the JFL Facebook page. It would have taken very little effort, seconds at most, to find and delete them just by typing the word "unicorn" into the search field. What Ms. Enz actually did was block Ms. Sloan from viewing the JFL public Facebook page to see that the images were still there. It should be noted that all of the social media images used in the evidence for this claim were collected on or after November 2, 2022. If Ms. Enz had actually made an effort to remove them, it would have been impossible for Ms. Sloan to have acquired any of the evidence in this claim other than the images found on November 2, 2022. The "going above and beyond" statement is particularly egregious. ***(Article GG)***

Ms. Enz also selected the fair use defense claiming that this defense applies because it was "only one element" of the entire product.

This defense doesn't make sense.

The "fair use" defense does not apply here. Also, the infringing art was not "only one element" of the entire product. The Leaping Unicorns design was in it's entire seamless repeat, printed edge to edge on the fabrics used to create these dresses, making it the key factor driving their market demand. Ms. Enz's business focused on custom "twirl dresses," which were largely similar except for minor differences in necklines, sleeves, and trims. Demand for a specific dress depended on the fabric's popularity. For the infringing

dresses, apart from a small trim at the skirt's hem, the entire dress featured the infringing fabric, making the printed artwork the main reason JFL customers would prefer these dresses over others.

In the Claim Response Ms. Enz also questions whether it can be proven that the fabric supplier lacked permission from Ms. Sloan to use the artwork, asking, "Has it been proven that they did not?" The answer is yes. The flaws printed on the fabric prove this. If the supplier had permission, Ms. Sloan would have provided an error-free or modified version of the digital artwork suitable for high-quality screen printing.

Damages

Ms. Sloan initially sought to resolve this claim through a Settlement Conference. She intended to request actual damages based on JFL dress sales data, including lost royalties from fabric sales and profits from the dress sales. However, Ms. Enz declined to share sales data or documents showing the cost of goods sold, leaving Ms. Sloan unable to propose a fair resolution. As a result, Ms. Sloan canceled the Settlement Conference because she couldn't determine actual damages or a fair outcome for both parties. Ms. Sloan is now seeking statutory damages of at least $4131 based on the following:

Based on the three alleged invoices and the image of 22 dresses at Minnesota State Fair, Ms. Sloan assumes that at least 139 dresses were sold. The dresses had a retail price of $39. Ms. Sloan assumes that at least $15 of each dress would have had to go towards Ms. Enz's cost of goods sold and other business expenses. Profits might have been around $25 per dress. Ms. Sloan assumes between 1-4 yards of custom fabric was printed for each dress, depending on dress size. Ms. Sloan estimates 1.75 yards of fabric per dress, considering there were more small sizes produced than large. From 2019 to 2023, Ms. Sloan's Cotton Spandex Jersey was priced at $27 per yard. Consequently, she is using this amount as the basis for

calculating the fabric's value and the corresponding 10% royalty she would have gained if Ms. Enz had acquired the fabric through proper legal avenues. ***(Article II)***

135 dresses x $25 = **$3475**

135 dresses x 1.75 yards = 243 yards

243 yards x $27 per yard = $6567

10% royalty of $6567= **$656**

Est. Profits $3475 + Est. Royalties $656 = $4131

The $4131 estimate does not include the value of marketing materials and social media campaigns using images of the infringing dresses.

The above statements are true to the best of my knowledge.

Wendy Sloan 9/06/2024



Proof of Delivery

I hereby certify that on Friday, September 06, 2024, I provided a true and correct copy of the Opening Party Statement of Wendy Sloan to the following:

Just For Littles LLC*, represented by Tami Enz, served via ESERVICE at support@justforlittles.com

Signed: /s/ Wendy Sloan