

## APPENDIX

## APPENDIX

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**FOR PUBLICATION**  
**UNITED STATES COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT**

**No. 18-56253**  
**18-56548**  
**D.C. No. 2:16-cv-02322-AB-SK**

**[Filed November 10, 2022]**

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UNICOLORS, INC., a California	)
Corporation,	)
Plaintiff-Appellee,	)
	)
v.	)
	)
H&M HENNES & MAURITZ, L.P.,	)
a New York limited partnership,	)
Defendant-Appellant.	)

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**OPINION**

On Remand from the United States Supreme Court  
Before: Carlos T. Bea and Bridget S. Bade, Circuit  
Judges, and Jon P. McCalla,\* District Judge.

Opinion by Judge Bea

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\* The Honorable Jon P. McCalla, United States District Judge for the Western District of Tennessee, sitting by designation.

**SUMMARY\*\***

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**Copyright**

On remand from the Supreme Court in this copyright-infringement action brought by Unicolors, Inc., against H&M Hennes & Mauritz, L.P., the panel affirmed the district court's judgment in general, save that it vacated and remanded with instructions to grant a new trial, limited only to damages, if Unicolors rejects the remittitur amount of \$116,975.23.

Unicolors, which creates designs for use on textiles and garments, alleged that a design it created in 2011 (the EH101 design) is remarkably similar to a design printed on garments that H&M began selling in 2015 (the Xue Xu design). The Supreme Court held that lack of either factual or legal knowledge on the part of a copyright holder can excuse an inaccuracy in a copyright registration under the Copyright Act's safe-harbor provision, 17 U.S.C. § 411(b)(1). Accordingly, the panel reviewed anew the threshold issue whether Unicolors holds a valid copyright in registration No. VA-1-770-400 (the '400 Registration), and concluded that under the correct standard, the '400 Registration is valid because the factual inaccuracies in the application are excused by the cited safe-harbor provision.

The panel held that a party seeking to invalidate a copyright registration under § 411(b) must demonstrate

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\*\* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

that (1) the registrant submitted a resignation application containing inaccuracies, (2) the registrant knew that the application failed to comply with the requisite legal requirements, and (3) the inaccuracies in question were material to the registration decision by the Register of Copyrights. The panel concluded that Unicolors's '400 Registration contained an inaccuracy, but that the district court's finding that Unicolors did not have the requisite knowledge of its application's inaccuracy per § 411(b)(1)(A) is not clearly erroneous. This lack of knowledge means that the '400 Registration falls within the ambit of the safe-harbor provision's protection, notwithstanding its failure to comply with the "single unit" requirement, and that Unicolors's copyright is valid. Unicolors can therefore maintain its infringement action against H&M over the EH101 design, which is covered by that registration.

Concerning H&M's pretrial challenges, the panel held (1) H&M forfeited any claim of error on appeal based on a claim that Unicolors's President Nader Pazirandeh's statements constituted impermissible, undesignated expert opinion; (2) the district court did not abuse its discretion when it excluded H&M's proffered expert testimony of Robin Lake on the issue of substantial similarity of the EH101 and Xue Xu designs; and (3) the district court did not abuse its discretion in excluding H&M's proffered expert testimony of Justin Lewis on the issue of damages.

The panel then addressed H&M's at-trial challenges.

First, H&M argued that the district court erred in refusing to instruct the jury that the Xue Xu design

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