

1 the question of whether UFI can recover actual damages and profits turns on the
2 nature of the infringement. Accordingly, the Court **GRANTS IN PART** and
3 **DENIES IN PART** Plaintiff UFI’s Motion for Partial Summary Judgment, and
4 **DENIES** Defendants’ Motion for Partial Summary Judgment.¹

5 **II. FACTUAL BACKGROUND**

6 UFI filed the Complaint against Defendants G-III and McKlein (collectively
7 “Defendants”) on February 5, 2013. (ECF No. 1.) The Complaint raises claims for
8 Copyright Infringement and Vicarious and/or Contributory Copyright Infringement.

9 UFI creates and purchases exclusive rights to two-dimensional works of art, and
10 files and receives copyright registrations for these works. (Simantob Decl. ¶ 2.)² UFI
11 also creates original fabric prints and sells fabric bearing those prints to its customer
12 base, which is composed mainly of companies that make and sell garments to
13 retailers. (*Id.*) The copyright at issue in this case is a textile design UFI refers to as
14 “AFFIRMATIVE,” which was registered with the United States Copyright Office on
15 July 29, 2009, and allocated Registration Number VAu 994-780 (hereinafter “Subject
16 Design”). (*Id.* ¶ 6, Ex. 1.) UFI began sampling and selling the Subject Design in June
17 2009 and has since sold tens of thousands of yards of fabric bearing the Subject
18 Design to numerous customers. (*Id.* ¶ 7, Ex. 2.)

19 G-III is a company consisting of multiple divisions, including AM Retail
20 Group. (Minniti Decl. ¶ 1, Monico Decl. ¶ 1.) AM Retail Group is located in
21 Brooklyn Park, Minnesota and operates retail stores under the name Wilson’s Leather.
22 (Minniti Decl. ¶¶ 1–5; Monico Decl. ¶¶ 1–5.) McKlein works with AM Retail Group
23 to supply handbags and wallets to Wilson’s Leather. (*Id.*; P. Saetia Decl. ¶¶ 3–14.)

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25 ¹ After carefully considered the papers filed with respect to these Motions, the Court deems the
26 matters appropriate for decision without oral argument. Fed. R. Civ. P. 78; L.R. 7-15.

27 ² The majority of declarants have submitted identical declarations in support of and/or in opposition
28 to both Motions for Summary Judgment. For example, while the docket in this case may indicate
that multiple declarations from Al Minniti have been filed, upon closer review these declarations are
really the same declaration dated August 31, 2013. Therefore, the Court will simply refer to these
declarations by the declarant’s last name, unless a distinction needs to be made.

1 The parties are in agreement that handbags and wallets bearing the Subject
2 Design (the “Accused Products”) were available for sale by G-III at Wilson’s Leather
3 retail stores. (Simantob Decl. ¶ 10, Ex. 6; ECF No. 60 ¶ 18.) UFI did not authorize
4 use of the Subject Design on the Accused Products. (Simantob Decl. ¶ 11; ECF
5 No. 60 ¶ 18.) Defendants claim that they had no knowledge that the Subject Design
6 was copyrighted by UFI. (Minniti Decl. ¶¶ 3–8; Monico Decl. ¶¶ 3–8.) However,
7 UFI asserts that G-III was aware of the copyright because G-III sampled the Subject
8 Design prior to UFI discovering the Accused Products for sale at Wilson’s Leather.
9 (UFI Mot. 8:7–13, 17:13–23.)

10 To support its theory, UFI points out that at least one division of G-III has been
11 a customer of UFI since as early as 2007. (Simantob Decl. ¶ 9.) UFI claims that in
12 July 2009, the Jessica Howard division of G-III ordered a sample of the Subject
13 Design. (*Id.* at Ex. 5.) An invoice dated July 14, 2010 also reflects that four yards of
14 suede fabric bearing the Subject Design were sent to someone named Mitchell at the
15 Jessica Howard division of G-III. (Simantob Decl. ¶ 9, Ex. 5.) Another order was
16 apparently placed on August 8, 2010 by someone named Laura for four yards of the
17 Subject Design in the same color scheme on sateen fabric. (*Id.*)

18 Defendants rebut UFI’s evidence of sampling the Subject Design by asserting
19 that the individuals at G-III responsible for purchasing the Accused Products had no
20 contact with the Jessica Howard division. (Minniti Decl. ¶ 5, Monico Decl. ¶ 5.) The
21 Jessica Howard division is located in New York City, while AM Retail Group, the
22 division responsible for Wilson’s Leather, is based in Minnesota. (Minniti Decl. ¶ 5.)
23 G-III asserts that the design for the Accused Products was selected by AM Retail
24 Group employees after being provided with options from McKlein. (*Id.* ¶¶ 2–3;
25 Monico Decl. ¶¶ 2–3.) McKlein in turn received the fabric design options from
26 Cheng Shun Textiles, a Chinese company. (P. Saetia Decl. ¶¶ 5, 14.) According to
27 Defendants, the Accused Products were purchased on a good faith belief that the

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1 fabric design was not subject to any copyright restrictions. (*Id.* ¶ 18; Minniti Decl.
2 ¶ 6; Monico Decl. ¶ 6.)

3 After discovering the Accused Products for sale at Wilson’s Leather stores, UFI
4 sent G-III a cease and desist letter on December 5, 2012. (Burroughs Decl. ¶¶ 3,
5 Ex. 9.) After an investigation, G-III indicates that it pulled the Accused Products from
6 the sales floor in February 2013, but admits that some sales of the Accused Products
7 occurred as late as March 2013. (Brooks Decl. ¶ 6, Ex. 6.)

8 The present Motions for Partial Summary Judgment were filed on November 4,
9 2013 and November 18, 2013. Since the Motions concern the same issues of fact and
10 law, the Court determined that the Motions should be considered simultaneously.
11 Several exhibits and portions of declarations submitted in support of and in opposition
12 to the Motions have been filed under seal because they contain certain confidential
13 information, such as proprietary customer lists and pricing.

14 III. LEGAL STANDARD

15 Summary judgment should be granted if there are no genuine issues of material
16 fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ.
17 P. 56(c). The moving party bears the initial burden of establishing the absence of a
18 genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).
19 Once the moving party has met its burden, the nonmoving party must go beyond the
20 pleadings and identify specific facts through admissible evidence that show a genuine
21 issue for trial. *Id.*; Fed. R. Civ. P. 56(c). Conclusory or speculative testimony in
22 affidavits and moving papers is insufficient to raise genuine issues of fact. *Thornhill’s*
23 *Publ’g Co. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979).

24 A genuine issue of material fact must be more than a scintilla of evidence or
25 evidence that is merely colorable or not significantly probative. *Addisu v. Fred*
26 *Meyer*, 198 F.3d 1130, 1134 (9th Cir. 2000). A disputed fact is “material” where the
27 resolution of that fact might affect the outcome of the suit under the governing law.
28 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1968). An issue is “genuine” if

1 the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving
2 party. *Id.* Where the moving and nonmoving parties’ versions of events differ, courts
3 are required to view the facts and draw reasonable inferences in the light most
4 favorable to the nonmoving party. *Scott v. Harris*, 550 U.S. 372, 378 (2007).

5 **IV. DISCUSSION**

6 UFI moves for summary judgment on copyright infringement and willfulness,
7 as well as on vicarious and contributory infringement. Defendants move for summary
8 judgment on the issues of willful and innocent infringement, as well as on vicarious
9 and contributory infringement. Defendants also seek summary judgment regarding
10 the availability of actual damages and profits. For the reasons discussed below, the
11 Court finds that summary judgment is only appropriate as to copyright infringement.³

12 **A. Copyright Infringement**

13 To succeed on a copyright infringement claim, a plaintiff must prove ownership
14 of a copyright and infringement—that the defendant copied protected elements of the
15 plaintiff’s works. *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 481 (9th Cir.
16 2000). The Court finds that UFI has established that both G-III and McKlein have
17 infringed on UFI’s copyright of the Subject Design.

18 **1. Ownership of the Copyright**

19 UFI has met its burden to establish ownership of the copyright to the Subject
20 Design. UFI has submitted a copyright registration certificate for the Subject Design.
21 (Simantob Decl. ¶ 6, Ex. 1.) The certificate indicates that UFI registered the textile
22 design “AFFIRMATIVE” with United States Copyright Office on July 29, 2009. (*Id.*)
23 The design was allocated Registration Number VAu- 994-780. (*Id.*) UFI also began
24 sampling and selling the Subject Design in June 2009. (*Id.* ¶ 7, Ex. 2.) Under 17
25 U.S.C. § 410(c), a “certificate of registration made before or within five years after

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27 ³ The Court has reviewed the evidentiary objections lodged by the parties. To the extent that the
28 Court relies upon evidence to which one or more parties have objected, the Court **OVERRULES**
those objections. The evidence upon which the Court relies is relevant, within the declarants’
personal knowledge, and based on nonhearsay under the Federal Rules of Evidence.

1 first publication of the work shall constitute prima facie evidence of the validity of
2 copyright and the facts stated in the certificate.” A defendant then bears the burden of
3 rebutting the presumption of validity. *Hamil America Inc. v. GFI*, 193 F.3d 92, 98
4 (9th Cir. 1999). Here, while Defendants do not concede the Subject Design’s
5 originality, they do concede that they have been unable to unearth evidence to rebut
6 the presumption of the copyright’s validity. (Defs’ Opp’n 6:25–7:6.) Under the
7 Copyright Act, absent evidence to the contrary, UFI’s registration certificate is
8 sufficient to establish ownership at the summary judgment stage.

9 **2. Infringement of the Copyright**

10 Infringement of a valid copyright can be established in one of two ways. A
11 plaintiff must prove that the defendant had “access” to the copyrighted material and
12 that the accused product is substantially similar, applying both extrinsic and intrinsic
13 tests. *Three Boys Music*, 212 F.3d at 481; *see also Smith v. Jackson*, 84 F.3d 1213,
14 1218 (9th Cir. 1996). In the alternative, particularly where access is difficult to prove,
15 infringement can be established by showing that the accused design is so “strikingly
16 similar” to the copyrighted work that no explanation other than copying is plausible.
17 *Three Boys Music*, 212 F.3d at 481; *see also Walker v. University Books, Inc.*, 602
18 F.2d 859, 864 (9th Cir. 1979) (“[P]roof of actual copying . . . is often attained . . .
19 where the similarity between the two works is such that no explanation other than
20 copying is reasonably plausible.”).

21 In this case, UFI argues that it has established an “unmistakable chain of
22 events” linking G-III and McKlein to the Subject Design. (UFI Mot. 8:7–13.)
23 Specifically, UFI points to evidence that G-III has been a customer of UFI since at
24 least 2007 and that G-III ordered samples of the Subject Design on as many as three
25 occasions. (Simantob Decl. ¶ 9, Ex. 5.) UFI then provides the Court with a side-by-
26 side comparison of the Subject Design with the design on the Accused Products. (UFI
27 Mot. 12–13; Simantob Decl. ¶¶ 6, 8, 10, Exs. 1, 4, 6.)

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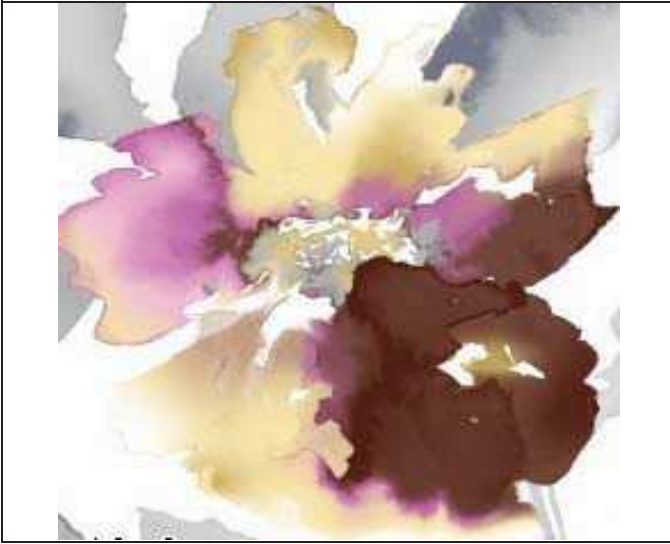
Subject Design



Accused Products



Subject Design Detail



Accused Product Design Detail



1 In response to UFI’s arguments regarding access and substantial similarity,
2 Defendants concede that the Subject Design and the design on the Accused Products
3 are “strikingly similar.” (Defs’ Opp’n 7:7–15, 9:9–16; ECF No. 60 ¶ 18.) Defendants
4 do not concede the issue of access, instead asking the Court to find that the
5 infringement is merely innocent, and limit UFI to statutory damages. (Defs’ Opp’n
6 2:3–7, 9:26–28.)

7 The Court finds that because the parties do not dispute that the Subject Design
8 and the design on the Accused Products are at least “strikingly similar,” summary
9 judgment should be granted on the issue of infringement.

10 **B. Willful and Innocent Infringement**

11 Both UFI and Defendants move for summary judgment on the issue of
12 willfulness. UFI contends that undisputed evidence proves that Defendants’ willfully
13 infringed on the Subject Design copyright. UFI points to the evidence that G-III has
14 been a customer of UFI since 2007, and samples of the Subject Design were ordered
15 by G-III on at least three occasions in 2009 and 2010. (Simantob Decl. ¶ 9, Ex. 5.)
16 On the other hand, Defendants argue that there is no evidence of willfulness, and thus
17 the Court should grant summary judgment in Defendants’ favor on the issue. (*E.g.*
18 Defs’ Opp’n 10:24–25.) Defendants contend that UFI’s evidence of sampling the
19 Subject Design is irrelevant because the sampling was done by a different division of
20 G-III that has no contact with AM Retail Group. (*Id.*) Instead, Defendants move for
21 summary judgment on innocent infringement, arguing that both G-III and McKlein
22 purchased the Accused Products from Cheng Shun Textiles in China on a good-faith
23 reasonable belief that the products were free from any claim of copyright
24 infringement. (Defs’ Mot. 8–12.)

25 The nature of Defendants’ infringement on UFI’s copyright—whether it was
26 willful or innocent—is essentially a question of damages. A finding of willfulness on
27 the part of Defendants allows UFI, within the Court’s discretion, to obtain more in
28 statutory damages. 17 U.S.C. § 504(c)(2). A finding of innocent infringement would

1 allow the Court, in its discretion, to limit the statutory damages available. *Id.* While
2 the Copyright Act does not define the term “willful,” the Ninth Circuit has held that
3 the term means “with knowledge that the defendant’s conduct constitutes copyright
4 infringement.” *Peer Int’l Corp. v. Pausa Records, Inc.*, 909 F.2d 1332, 1335 n. 3 (9th
5 Cir. 1990); *see also Columbia Pictures Television v. Krypton Broad.*, 106 F.3d 284,
6 293 (9th Cir. 1997) *rev’d on other grounds sub nom. Feltner v. Columbia Pictures*
7 *Television*, 523 U.S. 340 (1998); *cf. Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 957–58
8 (9th Cir. 2001). In contrast, innocent infringement occurs where the infringer was
9 “not aware and had no reason to believe that his or her acts constituted an
10 infringement of copyright.” 17 U.S.C. § 504(c)(2).

11 The Court finds that genuine issues of material fact remain as to the nature of
12 Defendants’ infringement in this case. UFI’s President Shar Simantob states that
13 G-III has been a customer of UFI since as early as 2007. (Simantob Decl. ¶ 9.) In
14 addition, UFI has supplied invoices indicating that the Jessica Howard division of
15 G-III ordered a sample of the Subject Design in 2009, and four yards of the Subject
16 Design on different fabrics on July 14, 2010 and August 8, 2010. (*Id.* at Ex. 5.)
17 Defendants counter this evidence with declarations from employees at G-III’s AM
18 Retail Group. AM Retail Group’s Director of Product Development Al Minniti and
19 Buyer Elizabeth Monico state that the Jessica Howard division of G-III is located, to
20 the best of their knowledge, in New York City, far away from AM Retail Group’s
21 location in Minnesota. (Minniti Decl. ¶ 5; Monico Decl. ¶ 5.) In addition, both
22 Minniti and Monico, who worked with McKlein to select the fabric design for the
23 Accused Products, state that they never received samples of the Subject Design from
24 anyone at the Jessica Howard division. (Minniti Decl. ¶¶ 3–6; Monico Decl. ¶¶ 3–6.)

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1 This conflicting evidence presents a genuine dispute as to G-III's knowledge that the
2 Subject Design was copyrighted by UFI.⁴

3 A reasonable jury could infer, although tenuous, that the individuals at G-III
4 involved in purchasing the Accused Products had knowledge of UFI's copyright,
5 based on the samples and orders placed at the Jessica Howard division of G-III.
6 While Defendants have presented declarations from two G-III employees to the
7 contrary, there is little evidence presented regarding the corporate structure of G-III
8 beyond rather conclusory statements from Minniti and Monico. The weight to be
9 given to the evidence presented by UFI and Defendants should be left to a jury.

10 UFI also argues that Defendants willfully infringed on the Subject Design
11 copyright because they continued to sell the Accused Products for three months after
12 UFI sent a cease and desist letter in December 2012. (UFI Mot. 18:20–20:4.)
13 However, the Court cannot make such a finding as a matter of law. “To hold that
14 willfulness must be inferred whenever an alleged infringer uses an intellectual
15 property in the face of disputed title would turn every copyright claim into willful
16 infringement and would improperly discourage many legitimate, good faith
17 transactions.” *Danjaq*, 263 F.3d at 959. Instead, the applicable standard after receipt
18 of a cease and desist letter is whether Defendants’ had a good faith, reasonable belief
19 that their conduct was innocent. *Peer Int’l Corp.*, 909 F.2d at 1335–36. In this case, a
20 jury could find that three months was a reasonable amount of time for Defendants to
21 investigate the infringement claims contained in UFI’s cease and desist letter, and to
22 pull the Accused Products from the shelves. The jury could also find that it was
23 unreasonable. It is a question of fact that cannot be decided on summary judgment.

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27 ⁴ Both UFI and Defendants spend time arguing the applicability of the “corporate receipt doctrine”
28 to this case. But the Court finds this doctrine unpersuasive in deciding the issue at hand. The Court
has found very little case law to support application of this doctrine in favor of either UFI or
Defendants. Moreover, the courts that have utilized the corporate receipt doctrine at summary
judgment take diametrically opposed positions on its application. 4 Nimmer on Copyright § 13.02.

1 Since the Court finds that genuine issues of material fact remain with respect to
2 whether Defendants’ infringement of the Subject Design was willful, it necessarily
3 follows that the Court cannot grant summary judgment on innocent infringement.

4 **D. Vicarious Infringement**

5 To prove vicarious copyright infringement, a plaintiff must show that “the
6 defendant has (1) the right and ability to supervise the infringing conduct and (2) a
7 direct financial interest in the infringing activity.” *Perfect 10, Inc. v. Visa Intern.*
8 *Service Ass’n*, 494 F.3d 788, 802 (9th Cir. 2007). UFI argues that the Court should
9 grant summary judgment in its favor as to vicarious infringement because Defendants
10 “materially contributed in a single supply chain” from the manufacture of the fabric
11 and goods to the sale of the completed product. (UFI Mot. 16:2–4.) UFI also argues
12 that Defendants profited from the sales on each level of the supply chain. (*Id.* at
13 16:4–5.) But Defendants contend that the Court should grant summary judgment in
14 their favor on vicarious infringement because there is an absence of facts to support
15 the claim. (Defs’ Mot. 6:8–16.)

16 The Court finds that the evidence presents triable issues regarding vicarious
17 infringement. The facts indicate that G-III worked with McKlein to develop the
18 Accused Products. G-III supplied McKlein with handbag styles as well as wallet
19 styles. (Monico Decl. ¶ 2; P. Saetia Decl. ¶¶ 4–5, 13.) McKlein provided G-III with
20 samples of materials that could be used on the handbags and wallets. (P. Saetia Decl.
21 ¶¶ 7–8.) Among the materials sampled was a nylon fabric bearing the Subject Design.
22 (*Id.* ¶¶ 7–8, 17.) Multiple communications back and forth between G-III and McKlein
23 occurred regarding the design and material to be used on the Accused Products, with
24 G-III requesting that changes be made. (*Id.* ¶¶ 7–14.) G-III ultimately selected the
25 fabric with the Subject Design and McKlein placed the order with its factory. (*Id.*
26 ¶ 14; Monico Decl. ¶¶ 3, 5.) The factory then purchased the fabric with the Subject
27 Design from Cheng Shun Textiles to produce the Accused Products. (P. Saetia Decl.
28 ¶¶ 15–16.) A jury could find from these facts that both G-III and McKlein had a

1 supervisory role over the infringing conduct. They both played a role in selecting the
2 Subject Design for the Accused Products and the factory simply produced what it was
3 told to produce. Moreover, as discussed above, there is some evidence that G-III may
4 have known the Subject Design was copyrighted, which a jury could find gives greater
5 weight to the role G-III (and even McKlein) had in selecting and controlling the use of
6 the Subject Design. The back and forth communications between G-III and McKlein
7 when selecting the Subject Design for the Accused Products may also lead a
8 reasonable jury to find the requisite level of control over the infringing conduct.
9 Overall, the supervisory roles of G-III and McKlein remain as questions for the jury.

10 There are also questions of fact that remain with respect the second element
11 required to establish vicarious infringement. “The essential aspect of the ‘direct
12 financial benefit’ inquiry is whether there is a causal relationship between the
13 infringing activity and any financial benefit a defendant reaps, regardless of *how*
14 *substantial* the benefit is in proportion to a defendant’s overall profits.” *Ellison v.*
15 *Robertson*, 357 F.3d 1072, 1079 (9th Cir. 2004). Defendants argue that there is no
16 evidence of a causal relationship between the infringement and the financial benefit
17 that Defendants obtained from the purchase and sale of the Accused Products.
18 Employees of both G-III and McKlein state that the price paid for the Accused
19 Products was commensurate with the market price for similar goods and that they
20 received no “discounts” when purchasing the fabric bearing the Subject Design.
21 (Minniti Decl. ¶ 7; Monico Decl. ¶ 7; P. Saetia Decl. ¶ 16; T. Saetia Decl. ¶ 6.) While
22 these statements from employees are helpful to Defendants’ case, the weight to be
23 given this evidence may once again turn on the question of knowledge. As already
24 discussed above, there is evidence to suggest that Defendants may have known that
25 the fabric bearing the Subject Design was copyrighted. If that is the case, the mostly
26 conclusory declarations from Defendants—without additional information, such as
27 actual evidence of the market price for similar goods—may not convince a jury that
28 the causal link between the infringing activity and the financial benefit is absent.

1 Since there remains a genuine issue of material fact regarding the Defendants’
2 knowledge that the Subject Design was copyrighted, which bears upon the weight to
3 be given to employee testimony, the Court finds that summary judgment as to
4 vicarious infringement is improper.

5 **E. Contributory Infringement**

6 All parties also seek summary judgment as to contributory infringement. “A
7 defendant is a contributory infringer if it (1) has knowledge of a third party’s
8 infringing activity, and (2) induces, causes, or materially contributes to the infringing
9 conduct.” *Perfect 10*, 494 F.3d at 795. As already discussed at length, a genuine
10 issue of material fact exists as to whether G-III and McKlein had knowledge of the
11 infringing activity. UFI has presented some evidence that at least G-III may have
12 known that the Subject Design was copyrighted because of the orders sent to the
13 Jessica Howard division of G-III. If Defendants knew that selecting the Subject
14 Design for the Accused Products constituted infringement, then a jury could also find
15 that Defendants at least materially contributed to the infringing conduct. Accordingly,
16 the Court cannot grant summary judgment as to contributory infringement.

17 **F. Actual Damages and Profits**

18 Lastly, Defendants seek summary judgment on the recovery of actual damages
19 and profits. Under the Copyright Act, a plaintiff may recover statutory damages *or*
20 actual damages and profits for infringement. 17 U.S.C. § 504(a). Specifically, “the
21 copyright owner is entitled to recover the actual damages suffered by him or her as a
22 result of the infringement, and any profits of the infringer that are attributable to the
23 infringement and not taken into account in computing the actual damages.” § 504(b).
24 Defendants raise a novel argument as to why the Court should limit the available
25 damages to UFI, which centers on both G-III and McKlein being considered
26 “downstream infringers.” (Defs’ Mot. 12–25.) The thrust of the argument is that UFI
27 cannot establish a causal link between Defendants’ profits from the Accused Products
28 and the infringing activity, which originated with Cheng Shun Textiles. (*Id.*) The

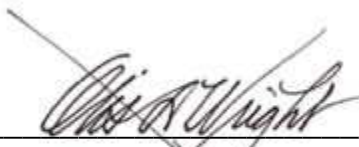
1 problem with Defendants’ argument is that it once again hinges on Defendants’
2 knowledge. In order to entertain Defendants’ arguments about merely being
3 “downstream infringers,” the Court must first find that Defendants’ infringement was
4 innocent. Since the Court has made no such finding, the Court cannot grant summary
5 judgment on the issue of actual damages.

6 **V. CONCLUSION**

7 For the reasons discussed above, the Court **GRANTS IN PART and DENIES**
8 **IN PART** Plaintiff UFI’s Motion for Summary Judgment. (ECF No. 50.) Summary
9 judgment is granted as to copyright infringement alone, and denied as to all remaining
10 claims and issues in UFI’s Motion. The Court **DENIES** Defendants’ Motion for
11 Summary Judgment. (ECF No. 72.)

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13 **IT IS SO ORDERED.**

14
15 December 27, 2013

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18 **OTIS D. WRIGHT, II**
19 **UNITED STATES DISTRICT JUDGE**