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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

UNICOLORS, INC.,

Plaintiff,

v.

NB BROTHER CORP., et al.,

Defendants.

Case No. CV 16-02268-MWF (JPRx)

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

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This matter came on for trial before the Court sitting without a jury on August 22 and 23, 2017. Following the presentation of evidence and the parties' closing arguments, the matter was taken under submission.

Having carefully reviewed the record and the arguments of counsel, as presented at the trial and in their written submissions, the Court now makes the following findings of fact and reaches the following conclusions of law under Rule 52 of the Federal Rules of Civil Procedure. Any finding of fact that constitutes a conclusion of law is also hereby adopted as a conclusion of law, and any conclusion of law that constitutes a finding of fact is also hereby adopted as a finding of fact.

1 The following witnesses were called and examined by the parties in the order  
2 recited below:

3 On August 22, 2017, Chan Yong Jeong appeared on behalf of Plaintiff Unicolors,  
4 Inc. (“Unicolors”) and gave an opening statement. Miles L. Prince appeared on behalf of  
5 Defendant NB Brother Corp. (“NB Brother”) and gave an opening statement.

6 On the same day, following opening statements, Mr. Jeong examined **Nader**  
7 **Pazirandeh**, the president of Unicolors. Mr. Prince cross-examined Mr. Pazirandeh; Mr.  
8 Jeong conducted a redirect examination; and Mr. Prince conducted a recross. Mr. Jeong  
9 next examined **Sung “Jonathan” Rho**, a “design advisor” and president of a company  
10 called Design Guard, Inc., who provides freelance “design advisory” services to Unicolors  
11 in exchange for a fixed monthly fee. Mr. Prince cross-examined Mr. Rho.

12 On August 23, 2017, Mr. Prince examined **Allen Yang**, the founder and owner of  
13 NB Brothers. Mr. Jeong cross examined Mr. Yang; Mr. Prince conducted a redirect  
14 examination; and Mr. Jeong conducted a recross.

15 On August 23, 2017, following Mr. Yang’s testimony, Mr. Jeong made a closing  
16 argument on behalf of Unicolors and Mr. Prince made a closing argument on behalf of NB  
17 Brother.

## 18 I. FINDINGS OF FACT

### 19 A. Background

#### 20 1. Unicolors

21 1. Unicolors is based in Los Angeles, California. Mr. Pazirandeh, who has been  
22 working for Unicolors since 1999, testified that the “heart of [Unicolors’] business is  
23 creating designs.”

24 2. Unicolors employs 25 designers who create designs that can ultimately be  
25 printed on fabric, and about eight salespeople who then present the designs, either already  
26 printed on fabric or in digital form, to Unicolors’ customers.

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1           3.     Unicolors obtains copyright registrations for most of its designs, except for  
2 the ones that it doesn't "see any future" for. In order to save money, Unicolors registers  
3 as many designs as possible on a single copyright certificate.

4           4.     Unicolors makes money primarily by selling fabric by the yard and licensing  
5 its designs (also on a per-yard basis) to garment manufacturers, and sometimes sells  
6 finished garments. Its customers are primarily garment manufacturers who make and sell  
7 clothing to retailers.

8           5.     Unicolors tries to avoid selling fabric or licensing its designs to importers of  
9 finished garments, though Mr. Pazirandeh understands that sometimes "importers get  
10 ahold of [Unicolors'] designs."

11          6.     In addition to sending salespeople out to meet with customers, Unicolors  
12 maintains a large showroom containing fabrics printed with its designs. Mr. Pazirandeh  
13 testified that "designers from everywhere ... come and go through" the various design  
14 samples. Unicolors does not keep records of who visits its showroom. Mr. Pazirandeh  
15 would not knowingly allow an importer of finished garments into the showroom, but  
16 Unicolors takes no specific steps to prevent it.

## 17           **2. NB Brother**

18          7.     NB Brother, a garment importing company founded in 2009, has an office in  
19 Hacienda Heights, California and a warehouse in Vernon, California. Prior to July 2017,  
20 NB Brother's warehouse was located on Olympic Boulevard in Los Angeles, California.  
21 NB Brother has two employees, and Mr. Yang is its owner.

22          8.     Since its inception, NB Brother has been in the business of importing  
23 finished garments. It has never designed or manufactured fabric or finished garments, or  
24 commissioned the manufacture of finished products constructed of particular fabrics.

25          9.     From 2014 through 2016, NB Brother had approximately 20 to 30 customers,  
26 most of whom are located in downtown Los Angeles.

27          10.    Yang testified that NB Brother purchases all of its finished garments from  
28 clothing wholesalers in China. The wholesalers maintain storefronts in a structure similar

1 to, but many times larger than, an American-style mall, which contains many different  
2 wholesalers. Mr. Yang periodically travels to China to purchase finished garments on  
3 behalf of NB Brother.

4 11. The clothing wholesalers that NB Brother purchases from represent that they  
5 manufacture the garments themselves in their own factories, and that NB Brother is  
6 permitted to resell the garments in the United States.

7 12. NB Brother first purchases clothing from the Chinese wholesalers and then  
8 presents the clothing to its customers in Los Angeles. It does not solicit specific customer  
9 requests and then attempt to locate clothing that satisfies those requests. Mr. Yang  
10 testified that if NB Brother’s customers “want the items [NB Brother] already ha[s] in  
11 stock, [NB Brother] will sell it to them. [If] [t]hey are not interested, then they won’t buy  
12 from [NB Brother].”

13 **B. The Alleged Copyright Infringement**

14 13. Unicolors has valid ownership of SM1357 (the “Subject Design”), registered  
15 with the United States Copyright Office under Registration Number VA 1-901-365, and  
16 the Subject Design is original. This is a picture of the Subject Design (Plaintiff’s Exhibit  
17 2):



26 14. Unicolors created the Subject Design in 2013 and obtained a copyright on  
27 January 6, 2014. Unicolors provided fabric samples bearing the Subject Design to  
28 prospective customers, which were primarily companies that supplied clothing to Los

1 Angeles and New York retailers. Between December 2014 and May 2015, Unicolors  
2 sold 36,614.10 yards of fabric bearing the Subject Design to various manufacturer-  
3 customers.

4 15. In April 2015, NB Brother purchased 1,300 pair of “NH-52”-style women’s  
5 shorts (the “NH-52 Shorts”) from Chinese vendor Yiwu Longshun Import and Export Co.,  
6 Ltd. (“Longshun”) for \$1.65 per unit. On May 20, 2015, NB Brother resold all 1,300 pair  
7 NH-52 Shorts to a company called “Superline” for \$1.85 per unit. This is a picture of a  
8 pair of NH-52 Shorts (Plaintiff’s Exhibit 16):



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19 16. Yang did not specifically recall purchasing the NH-52 Shorts from  
20 Longshun, but he recalled that, prior to NB Brother being sued in this action, his general  
21 practice when purchasing patterned clothing was to ask the representatives of Chinese  
22 vendors such as Longshun whether there was “anything wrong with [the] merchandise”  
23 and whether it was “okay for [him] to sell [the merchandise] in the U.S.,” in an effort to  
24 avoid copyright infringement. Yang was consistently told that “it’s not a problem,” and  
25 he had no reason to suspect otherwise because “no problems arose with respect to those  
26 issues.”

27 17. Yang testified that he had never visited the design rooms of Unicolors or any  
28 other fabric producer, and had never heard of Unicolors before this lawsuit.

1 18. Unicolors commenced this action against NB Brother and several other  
2 defendants in April 2016. Unicolors alleged that, by purchasing and selling the NH-52  
3 Shorts without Unicolors' permission, NB Brother is liable under theories of direct,  
4 vicarious, and/or contributory copyright infringement.

5 19. Until being sued by Unicolors here, NB Brother had never been sued for  
6 copyright infringement.

7 20. Since being sued by Unicolors, NB Brother has required Chinese wholesalers  
8 to provide proof of U.S. copyright registrations before purchasing patterned garments.

9 21. Applying the law as stated below, the Court **FINDS** that the patterns are  
10 substantially similar, such that the pattern of Exhibit 16 was copied from Exhibit 2. The  
11 question, then, is whether NB Brother is liable for that copying.

## 12 **II. CONCLUSIONS OF LAW**

### 13 **A. First Claim: Direct Copyright Infringement**

14 1. To prevail on a direct copyright infringement claim, a plaintiff must show (1)  
15 that it owns a valid copyright on the allegedly infringed work, and (2) that the defendant  
16 "copied" protected elements of that work. *See, e.g., Three Boys Music Corp. v. Bolton*,  
17 212 F.3d 477, 481 (9th Cir. 2000); 4 Nimmer on Copyright § 13.01 ("Reduced to most  
18 fundamental terms, there are only two elements necessary to the plaintiff's case in an  
19 infringement action: ownership of the copyright by the plaintiff and copying by the  
20 defendant."). It is undisputed that Unicolors owns a valid copyright on the Subject  
21 Design. The focus is thus on the issue of "copying."

22 2. Absent direct evidence of copying, which Unicolors did not present, a  
23 plaintiff can establish "copying" by showing (1) that the defendant had access to  
24 plaintiff's work and (2) that the two works are "substantially similar." *L.A. Printex*  
25 *Industries, Inc. v. Aeropostale, Inc.*, 676 F.3d 841, 846 (9th Cir. 2012).

26 3. Some courts have held that, "in rare cases, a plaintiff can prove copying even  
27 without proof of access if he can show that the two works are not only similar, but are so  
28 strikingly similar as to preclude the [possibility] of independent creation." *Gable v. Nat'l*

1 *Broadcasting Co.*, 727 F. Supp. 2d 815, 823 (C.D. Cal. 2010) (citing *Meta-Film Assoc.,*  
2 *Inc. v. MCA Inc.*, 586 F. Supp. 1346, 1355 (C.D. Cal. 1984)). This rule only applies  
3 where, “as a matter of logic, the only explanation [for the similarities] between the two  
4 works must be ‘copying rather than ... coincidence, independent creation, or prior  
5 common source.’” 4 *Nimmer on Copyright* § 13.02 (2017) (internal quotation marks and  
6 citations omitted). Unicolors argues that the pattern of the Subject Design and the NH-52  
7 Shorts are so “strikingly similar” that a showing of access is unnecessary. The Court  
8 disagrees. A side-by-side comparison of the two designs reveals many similarities; they  
9 are both Aztec-style patterns containing a mix of angular shapes such as triangles and  
10 diamonds. But there are also differences in the color scheme and in the arrangement of  
11 the various shapes. For example, the Subject Design contains two rows of long, narrow  
12 triangles with their points facing one another, bisected by a row of horizontal diamonds;  
13 the NH-52 Shorts do not. While the patterns of the NH-52 Shorts and the Subject Design  
14 share common elements, they are not the same. Accordingly, the Court declines to find  
15 infringement under the “striking similarity” theory; a showing of both access and  
16 substantial similarity is required.

17 4. “To prove access, a plaintiff must show a reasonable possibility, not merely a  
18 bare possibility, that an alleged infringer had the chance to view the protected work.” *L.A.*  
19 *Printex*, 676 F.3d at 846 (internal quotation marks and citations omitted). “Absent direct  
20 evidence of access, a plaintiff can prove access using circumstantial evidence of either (1)  
21 a ‘chain of events’ linking the plaintiff’s work and the defendant’s access, or (2)  
22 ‘widespread dissemination’ of the plaintiff’s work.” *Id.* (quoting *Three Boys Music*, 212  
23 F.3d at 482). However, “[a]ccess may not be inferred through mere speculation or  
24 conjecture.” 4 *Nimmer on Copyrights* § 13.02 (2017) (citations omitted).

25 5. For the duration of this action – indeed through the bench trial – the parties  
26 have seemingly been laboring under the assumption that the key issue, apart from the  
27 degree of similarity between the Subject Design and the NH-52 Shorts patterns, is whether  
28 or not *NB Brother* had access to and copied the Subject Design. Mr. Yang’s

1 uncontroverted testimony made clear that NB Brother is solely in the business of  
2 purchasing finished garments from China and reselling them in the U.S. NB Brother does  
3 not design or manufacture clothing, does not commission the manufacture of clothing out  
4 of selected fabrics, and does not visit the showrooms of any fabric designers, including  
5 Unicolors. There is no evidence that NB Brother itself gained access to the Subject  
6 Design and then copied it.

7         6.       The better question, which neither party has addressed, is whether *Longshun*  
8 had access to, and thus may have copied, the Subject Design. Unicolors has not presented  
9 any direct evidence that Longshun accessed the Subject Design prior to selling the NH-52  
10 Shorts to NB Brother, and it also hasn't presented any circumstantial evidence that would  
11 render the notion of Longshun accessing the Subject Design anything more than  
12 speculation or conjecture.

13         7.       Unicolors has not presented evidence of any "chain of events" linking the  
14 Subject Design and the NH-52 Shorts. In connection with its summary judgment motion,  
15 the only arguments Unicolors made regarding access were that (1) it sold a total of  
16 36,614.10 yards of fabric printed with the Subject Design between December 2014 and  
17 May 2015, and (2) NB Brother's principal place of business is 1.6 miles away from  
18 Unicolors' principal place of business. Unicolors presented no new theories or evidence  
19 of access at trial. The distance between NB Brother's and Unicolors' offices has no  
20 bearing on the question of Longshun's opportunity to access the Subject Design, as  
21 Longshun is based in China and NB Brother purchased the NH-52 Shorts from Longshun  
22 as finished products rather than asking Longshun to manufacture shorts out of fabric  
23 imprinted with a pattern similar to the Subject Design. Unicolors has not established  
24 Longshun's access to the Subject Design under a "widespread dissemination" theory  
25 either. In its statement of uncontroverted facts filed in connection with its summary  
26 judgment motion, Unicolors stated that it "provided fabric samples [of the Subject Design]  
27 to prospective customers, who are primarily suppliers to the Los Angeles and New York  
28 fashion industry," and then sold "approximately 36,614.10 yards of the fabric" to some of

1 those customers. Unicolors has presented no evidence that 36,000 or 37,000 yards of  
2 fabric is a substantial amount in the context of wholesale textile sales. Without anything  
3 else (and Unicolors has not presented anything else), it would be mere speculation to  
4 conclude that Longshun, a Chinese company, had the opportunity to view and copy the  
5 Subject Design as a result of Unicolors' sale of 36,614.10 yards of fabric in the U.S.

6 8. Therefore, the Court concludes that Unicolors has failed to establish that NB  
7 Brother (independently or through Longshun) copied the Subject Design. NB Brother is  
8 thus not liable for direct copyright infringement.

9 **B. Second Claim: Vicarious Copyright Infringement**

10 9. "A defendant is vicariously liable for copyright infringement if he enjoys a  
11 direct financial benefit from *another's* infringing activity and 'has the right and ability to  
12 supervise' the infringing activity." *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir.  
13 2004) (quoting *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1022 (9th Cir. 2001))  
14 (additional citations omitted) (emphasis in original). "Those elements constitute  
15 independent requirements; each must be demonstrated to render the defendant vicariously  
16 liable." 3 Nimmer on Copyright § 12.04 (2017).

17 10. Based upon the evidence presented at trial and in connection with Unicolors'  
18 motion for summary judgment, the only possible primary actor through whom NB Brother  
19 could be liable for vicarious infringement is Longshun. However, given the lack of  
20 evidence regarding Longshun's access to the Subject Design, Unicolors has not  
21 established that there is any underlying infringement and thus cannot possibly succeed on  
22 a vicarious infringement claim against NB Brother. Moreover, even if Unicolors could  
23 establish that Longshun copied the Subject Design, there is no evidence that NB Brother,  
24 a U.S.-based importer of finished garments with two employees, has the "right and ability  
25 to supervise" the activities of Longshun, a Chinese vendor. Accordingly, NB Brother is  
26 not liable for vicarious copyright infringement.

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1 purchased the NH-52 Shorts, copied the Subject Design, and thus failed to establish direct  
2 infringement. The Court thus finds in favor of NB Brother.

3 On Unicolors' Second Claim for vicarious copyright infringement, Unicolors failed  
4 to establish any underlying infringement by Longshun, the only entity through which NB  
5 Brother could be held vicariously liable, or that Unicolors had the right and ability to  
6 supervise Longshun's activities, and thus failed to establish vicarious infringement. The  
7 Court thus finds in favor of NB Brother.

8 On Unicolors' Third Claim for contributory copyright infringement, Unicolors  
9 failed to establish any underlying infringement by Longshun, the only entity through  
10 which NB Brother could be held contributorily liable, or that NB Brother knew or should  
11 have known of any infringement, and thus failed to establish contributory infringement.  
12 The Court thus finds in favor of NB Brother.

13 The Court will enter a separate judgment pursuant to Federal Rules of Civil  
14 Procedure 54 and 58(b).

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17 Dated: October 3, 2017.

18 MICHAEL W. FITZGERALD  
19 United States District Judge  
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