

1  
2  
3  
4  
5  
6  
7  
8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
10

11 TALAVERA HAIR PRODUCTS, INC., a  
12 Nevada corporation,

13 Plaintiff,

14 v.

15 TAIZHOU YUNSUNG ELECTRICAL  
16 APPLIANCE CO., LTD., a business  
17 entity; and THE INDIVIDUALS,  
18 PARTNERSHIPS, AND  
19 UNINCORPORATED ASSOCIATIONS  
IDENTIFIED ON EXHIBIT "1,"

20 Defendants.

Case No.: 18-CV-823 JLS (JLB)

**ORDER GRANTING IN PART AND  
DENYING IN PART PLAINTIFF'S  
MOTION FOR PARTIAL  
SUMMARY JUDGMENT**

(ECF No. 107)

21 Presently before the Court is Plaintiff Talavera Hair Products, Inc.'s ("Plaintiff")  
22 Motion for Partial Summary Judgment against the only remaining non-defaulting  
23 defendant, Defendant Taizhou Yunsung Electrical Appliance Co., Ltd. ("Defendant")  
24 ("Mot.," ECF No. 107). The Court took the matter under submission without oral argument  
25 pursuant to Civil Local Rule 7.1(d)(1). *See* ECF No. 108. Having carefully considered  
26 Plaintiff's arguments, the evidence, and the relevant law, the Court **GRANTS IN PART**  
27 and **DENIES IN PART** the Motion, as set forth below.

28 ///

## BACKGROUND

1  
2 “Plaintiff sells a unique and revolutionary patented product under the federally  
3 registered trademark Split-Ender® that quickly and easily trims split ends from hair.” *See*  
4 ECF No. 1 (“Compl.”) ¶ 13. “Plaintiff owns copyrights, trademark rights, and patent rights  
5 regarding its Split-Ender® product.” *Id.* ¶ 16. On April 30, 2018, Plaintiff filed the instant  
6 litigation against Defendant and several other entities for copyright infringement pursuant  
7 to 17 U.S.C. §§ 101 *et seq.*; unfair competition pursuant to the Lanham Act, 15 U.S.C.  
8 § 1125(a); trademark infringement pursuant to 15 U.S.C. § 1114; and infringement of  
9 Plaintiff’s U.S. Patents Nos. 6,588,108, 7,040,021, and 9,587,811 pursuant to 35 U.S.C.  
10 § 271(a). *See generally* Compl. On April 19, 2019, Defendant filed an answer to the  
11 Complaint. *See generally* ECF No. 66. The remaining defendants defaulted. *See generally*  
12 Docket.

13 On May 3, 2018, Plaintiff filed an ex parte application for a temporary restraining  
14 order (“TRO”), *see* ECF No. 9, which the Court granted on May 10, 2018, *see* ECF No.  
15 10. On March 16, 2020, Plaintiff moved for default and/or summary judgment against the  
16 defaulted defendants, *see* ECF No. 98, which motion subsequently was refiled and is  
17 currently pending, *see* ECF No. 111 (“Mot. for Default J.”). On July 17, 2020, Plaintiff  
18 filed the present Motion. *See generally* ECF No. 107. Defendant did not file an opposition.

## LEGAL STANDARD

19  
20 Under Federal Rule of Civil Procedure 56(a), a party may move for summary  
21 judgment as to a claim or defense or part of a claim or defense. Summary judgment is  
22 appropriate where the Court is satisfied that there is “no genuine dispute as to any material  
23 fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a);  
24 *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Material facts are those that may affect  
25 the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A  
26 genuine dispute of material fact exists only if “the evidence is such that a reasonable jury  
27 could return a verdict for the nonmoving party.” *Id.* When the Court considers the

28 ///

1 evidence presented by the parties, “[t]he evidence of the non-movant is to be believed, and  
2 all justifiable inferences are to be drawn in his favor.” *Id.* at 255.

3 The initial burden of establishing the absence of a genuine issue of material fact falls  
4 on the moving party. *Celotex*, 477 U.S. at 323. The moving party may meet this burden  
5 by identifying the “portions of ‘the pleadings, depositions, answers to interrogatories, and  
6 admissions on file, together with the affidavits, if any,’” that show an absence of dispute  
7 regarding a material fact. *Id.* When a plaintiff seeks summary judgment as to an element  
8 for which it bears the burden of proof, “it must come forward with evidence which would  
9 entitle it to a directed verdict if the evidence went uncontroverted at trial.” *C.A.R. Transp.*  
10 *Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (quoting *Houghton*  
11 *v. South*, 965 F.2d 1532, 1536 (9th Cir. 1992)). “This is true, even when the party against  
12 whom the motion for summary judgment is directed has not filed any opposition.”  
13 *Cristobal v. Siegel*, 26 F.3d 1488, 1495 (9th Cir. 1994) (citing *Sheet Metal Workers’ Int’l*  
14 *Ass’n. v. Nat’l Labor Relations Bd.*, 716 F.2d 1249, 1254 (9th Cir. 1983). “[W]here no  
15 evidence is presented in opposition to the motion, summary judgment should not be granted  
16 if the evidence in support of the motion is insufficient.” *Hoover v. Switlik Parachute Co.*,  
17 663 F.2d 964, 967 (9th Cir. 1981) (citations omitted).

### 18 ANALYSIS

19 Plaintiff incorporates by reference the evidence in support of its Motion for Default  
20 Judgment and “seeks partial summary judgment against [D]efendant” as to the following  
21 issues:

- 22 1. “The product packaging in issue infringes plaintiff’s registered copyright”;
- 23 2. “The owner’s manuals in issue infringe plaintiff’s registered copyright”;
- 24 3. “The product packaging in issue infringes plaintiff’s trademark rights”;
- 25 4. “The products in issue infringe plaintiff’s patent rights”;
- 26 5. “The products in issue were sold on Amazon.com and eBay.com by the 41  
27 Defaulted Defendants”; and

28 ///



1 citations omitted). On a motion for summary judgment, both parts are satisfied, and  
2 summary judgment in favor of the plaintiff is proper, where the “works are so  
3 overwhelmingly identical that the possibility of independent creation is precluded.”  
4 *Twentieth Century Fox Film Corp. v. MCA, Inc.*, 715 F.2d 1327, 1330 (9th Cir. 1989).

5 **A. Packaging**

6 Plaintiff seeks partial summary judgment that the product packaging at issue  
7 infringes Plaintiff’s registered copyright for its packaging. *See* Mot. Mem. at 3–4. Plaintiff  
8 owns a registered copyright for its packaging for the Split-Ender product, VA 2e-092-823,  
9 registered on February 5, 2018. *See* Compl. Ex. 2 (ECF No. 1-4); Statement of Undisputed  
10 Facts (“SOF,” ECF No. 107-14) at 1. In the absence of any opposition from any defendant,  
11 Plaintiff’s evidence is sufficient to create a presumption of validity.

12 Because Plaintiff did not provide evidence of access, the Court solely will analyze  
13 whether the works are strikingly similar as a matter of law. *See generally* Mot. Mem. Here,  
14 the works are “so overwhelmingly identical that the possibility of independent creation is  
15 precluded.” *Twentieth Century Fox Film Corp.*, 715 F.2d at 1330. Plaintiff’s copyrighted  
16 product packaging and the FASIZ, LESCOLTON, UMATE, and HAIR TRIMMER  
17 marked packaging are virtually identical and word-for-word, aside from the omission of  
18 Plaintiff’s patent and copyright notices on the latter. *See* Mot. for Default J. Exs. A & B  
19 (ECF Nos. 111-4 & 111-5) (comparing Plaintiff’s product packaging with the FASIZ,  
20 LESCOLTON, UMATE, and HAIR TRIMMER marked packaging); *see also* Mot. Mem.  
21 at 3–4; SOF at 1–2. Therefore, the Court finds that Plaintiff has satisfied its burden in  
22 proving that the packaging at issue infringes Plaintiff’s copyright as a matter of law.

23 **B. Manuals**

24 Plaintiff also seeks partial summary judgment that the user manuals at issue infringe  
25 Plaintiff’s registered copyright for its manual. *See* Mot. Mem. at 4–6. Plaintiff owns a  
26 registered copyright for its manual for the Split-Ender product, VA 2-093-290, registered  
27 on February 5, 2018. *See* Compl. Ex. 3 (ECF No. 1-5). Again, in the absence of any

28 ///

1 opposition from any defendant, Plaintiff’s evidence is sufficient to create a presumption of  
2 validity.

3         Similar to the infringing product packaging, the text in Plaintiff’s copyrighted  
4 manual is nearly identical to that found in the FASIZ, LESCOLTON, UMATE, and HAIR  
5 TRIMMER marked manuals, aside from the omission of Plaintiff’s trademark, copyright,  
6 and patent notices in the latter. *Compare* Compl. Ex. 3 (ECF No. 1-5) *with* Compl. Exs.  
7 10–13 (ECF Nos. 1-12–15); *see also* Mot. Mem. at 4–5; SOF at 2–4. Because Plaintiff’s  
8 manual and the FASIZ, LESCOLTON, UMATE, and HAIR TRIMMER marked manuals  
9 are so “overwhelmingly identical,” the Court finds that the manuals at issue infringe  
10 Plaintiff’s registered copyright as a matter of law.

11         Accordingly, the Court **GRANTS** partial summary judgment in favor of Plaintiff on  
12 Plaintiff’s first cause of action for copyright infringement. There is no genuine issue of  
13 material fact that the product packaging and owner manuals at issue infringe Plaintiff’s  
14 registered copyrights.

## 15 **II. Trade Dress Infringement**

16         “[T]he Lanham Act, in § 43(a), gives a producer a cause of action for the use by any  
17 person of ‘any word, term, name, symbol, or device, or any combination thereof . . . which  
18 . . . is likely to cause confusion . . . as to the origin, sponsorship, or approval of his or her  
19 goods . . . .’” *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 209 (2000) (citing 15  
20 U.S.C. §1125(a)). Trade dress is “the ‘total image of a product,’ including features such  
21 as size, shape, color, texture, and graphics.” *Millennium Labs., Inc. v. Ameritox, Ltd.*, 817  
22 F.3d 1123, 1126 (9th Cir. 2016) (quoting *Disc Golf Ass’n v. Champion Discs, Inc.*, 158  
23 F.3d 1002, 1005 n.3 (9th Cir. 1998)). For a trade dress infringement claim, the plaintiff  
24 must prove that: “(1) the trade dress is inherently distinctive or has acquired distinctiveness  
25 through secondary meaning; (2) there is a likelihood that the public will be confused by  
26 the infringing use; and (3) the trade dress is nonfunctional.” *Stephen W. Boney, Inc. v.*  
27 *Boney Servs., Inc.*, 127 F.3d 821, 828 (9th Cir. 1997) (citation omitted).

28 ///

1 Plaintiff seeks partial summary judgment that the product packaging at issue  
2 infringes Plaintiff’s trade dress in violation of 15 U.S.C. §1125(a). *See* Mot. Mem. at 6–9.  
3 Plaintiff owns the stylized incontestable trademark, Trademark Reg. No. 2,645923, for  
4 SPLIT-ENDER for “[e]lectric and battery-operated hair trimmers for the removal of split  
5 and damaged hair ends; scissors, razors and electric shavers” in International Class 008.  
6 *See* Compl. ¶ 56(a); *see also id.* Ex. 4 (ECF No. 1-6). Plaintiff also owns the word mark  
7 SPLIT-ENDER, Registration No. 5535584, for “[e]lectric and battery-powered hair  
8 trimmers” in International Class 008. *Id.* ¶ 56(b).<sup>2</sup> The Court is unaware of any trademark  
9 registration for Plaintiff’s product packaging with the USPTO. *See generally* Compl.; Mot.  
10 Mem.

11 **A. Inherent Distinctiveness**

12 “For trade dress to be protected it must serve to identify the source of a product either  
13 through the inherently distinct nature of the trade dress, or because the trade dress has  
14 secondary meaning.” *KRBL Ltd. v. Overseas Food Distribution, LLC*, No. CV 16-2431  
15 PA (GJSX), 2016 WL 3748660, at \*4 (C.D. Cal. May 26, 2016) (citing *Clicks Billiards,*  
16 *Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1259 (9th Cir. 2001)). “[A] mark is inherently  
17 distinctive if “[its] intrinsic nature serves to identify a particular source.” *Wal-mart Stores,*  
18 *529 U.S. at 210* (citing *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992)).  
19 To determine whether trade dress for product packaging is inherently distinctive, the Ninth  
20 Circuit applies the “*Seabrook* test,” which asks whether: “(1) the design or shape is a  
21 common, basic shape or design; (2) it was unique or unusual in a particular field; and (3)  
22

---

23  
24 <sup>2</sup> At the time of the filing of the Complaint, Plaintiff owned Trademark Application Ser. No. 87746962,  
25 but the Court takes judicial notice of the fact that the mark has since issued. *See*  
26 [https://tsdr.uspto.gov/#caseNumber=87746962&caseSearchType=US\\_APPLICATION&caseType=DEF](https://tsdr.uspto.gov/#caseNumber=87746962&caseSearchType=US_APPLICATION&caseType=DEF AULT&searchType=statusSearch)  
27 *AULT&searchType=statusSearch*; *see also In re Ex Parte Application of Jommi*, No. C 13-80212 CRB  
28 (EDL), 2013 WL 6058201, at \*2 (N.D. Cal. Nov. 15, 2013) (“A court may take judicial notice of public  
records of governmental entities and authoritative sources of foreign law, including information posted on  
government websites . . . .”) (citing *Stevens v. Nkwo–Okere*, Case No. 13–1974 HRL, 2013 U.S. Dist.  
LEXIS 122172, at \*5 n.3 (Aug. 27, 2013); *Sears v. Cnty. of Monterey*, Case No. 11–1876 LHK, 2013 U.S.  
Dist. LEXIS 120401, at \*12 (N.D. Cal. Aug. 22, 2013)).

1 it was a mere refinement of a commonly-adopted and well-known form of ornamentation  
2 for a particular class of goods which consumers view as mere ornamentation.” *Mattel, Inc.*  
3 *v. MGA Entm’t, Inc.*, 782 F. Supp. 2d 911, 1004 (C.D. Cal. 2011) (quoting 1 McCarthy on  
4 Trademarks and Unfair Competition § 8:13 (4th ed. 2010)). The Ninth Circuit emphasizes  
5 that courts should “focus not on the individual elements, but rather on the overall visual  
6 impression that the combination and arrangement of those elements create when assessing  
7 trade dress.” *Clicks Billiards*, 251 F.3d at 1259.

8 Plaintiff bears the burden of proving distinctiveness as an element of its trade dress  
9 claim. *See Seirus Innovative Accessories, Inc. v. Gordini U.S.A. Inc.*, 849 F. Supp. 2d 963,  
10 986 (S.D. Cal. 2012). Plaintiff contends that its product packaging is inherently distinctive  
11 trade dress but fails to acknowledge, much less apply, the “*Seabrook* test.” *See* Mot. Mem.  
12 at 6–7. Plaintiff asserts, without elaboration, that the “combination of text, images, color  
13 and source identifying phrases” is inherently distinctive. *See* Mot. Mem. at 7; *see also* SOF  
14 at 4. Plaintiff also provides a declaration of Victor Talavera, its president, stating that  
15 “Plaintiff’s trade dress packaging is an inherently distinctive combination of text, images,  
16 color and source identifying phrases” and that “Plaintiff’s copyrights in its packaging and  
17 patents on its product help assure the distinctiveness and strength of its trade dress  
18 packaging.” *See* Declaration of Victor Talavera (“Talavera Decl.,” ECF No. 111-3) ¶ 7.

19 Plaintiff’s product packaging consists of the following: a black, tan, and white color  
20 scheme; the stylized word mark SPLIT-ENDER PRO in a tan color; the short phrase  
21 “SNIPS THE ENDS, NOT THE LENGTH” in a lighter tan color; a large photo of the Split-  
22 Ender Pro product; “TALAVERA” in gold with a circle around it; and a photograph of a  
23 woman with long hair. *See* Mot. for Default J. Exs. A & B (ECF Nos. 111-4 & 111-5).  
24 The packaging and arrangement of the elements as a whole seem to merely describe the  
25 product, a hair tool, rather than the source, Talavera Hair Products, Inc. In addition,  
26 Plaintiff fails to provide evidence that such packaging is at all unique in the hair tools  
27 industry. *See Solofill, LLC v. Rivera*, No. CV1702956SJOAJWX, 2018 WL 6038287, at  
28 \*3 (C.D. Cal. Aug. 3, 2018) (“Plaintiff provides a laundry list of elements which it claims



1 compose its trade dress, yet these elements are, for the most part, entirely functional or  
2 generic and, even in combination, are not ‘so unique, unusual or unexpected’ as to create  
3 a clear presumption of origin.”).

4 Taking into account the various product packaging features such as the product  
5 description, product name, slogan, and photographs as a whole, Plaintiff is still left with “a  
6 fairly routine color scheme, graphic layout, and choice of font.” *Spark Indus., LLC v.*  
7 *Kretek Int’l, Inc.*, No. CV 14-5726-GW ASX, 2014 WL 4365736, at \*8 (C.D. Cal. Aug.  
8 28, 2014) (“[E]ven including features that ‘assist in describing the product [and] its  
9 effective packaging’—like product shape, cartomizer display, and product descriptions—  
10 [plaintiff] is left with a fairly routine color scheme, graphic layout, and choice of font.”).  
11 Further, “the mere presence of a registered trademark as a component of the trade dress  
12 [does not] render the broader trade dress inherently distinctive.” *Solofill*, 2018 WL  
13 6038287, at \*3. Here, based on the evidence presented by Plaintiff, Plaintiff’s product  
14 packaging is “not the sort of arbitrary or uncommon trade dress that would qualify as  
15 inherently distinctive.” *Lanard Toys Ltd. v. Novelty, Inc.*, No. CV 05-8406CAS(JJX), 2007  
16 WL 2439505, at \*11 (C.D. Cal. Mar. 17, 2006) (holding that the product packaging for  
17 toys, “including the [plaintiff’s] choice of colors, the placement of illustrations, product  
18 name, and text on the packaging, the illustrations themselves, and the use of instructions  
19 balloons[,]” was not inherently distinctive.).

20 Therefore, the Court finds that Plaintiff has failed to meet its burden in proving that  
21 its trade dress is inherently distinctive as a matter of law.

22 ***B. Acquired Distinctiveness***

23 “[A] mark has acquired distinctiveness, even if it is not inherently distinctive, if it  
24 has developed secondary meaning.” *Clicks Billiards*, 251 F.3d at 1262. “The trade dress  
25 of a product or service attains secondary meaning when the purchasing public associates  
26 the dress with a particular source.” *Fuddruckers, Inc. v. Doc’s B.R. Others, Inc.*, 826 F.2d  
27 837, 843 (9th Cir. 1987) (citing *First Brands Corp. v. Fred Meyer, Inc.*, 809 F.2d 1378,  
28 ///

1 1383 (9th Cir. 1987)). “Whether a particular trade dress has acquired secondary meaning  
2 is a question of fact.” *First Brands*, 908 F.2d at 1383.

3 A plaintiff can prove its trade dress has acquired distinctiveness through direct  
4 evidence such as consumer surveys, or circumstantially through “exclusivity, manner, and  
5 length of use of a mark; amount and manner of advertising, amount of sales and number of  
6 customers, established place in the market, and proof of intentional copying by the  
7 defendant.” *Filipino Yellow Pages, Inc. v. Asian Journal Publ’n, Inc.*, 198 F.3d 1143, 1151  
8 (9th Cir. 1999). In the Ninth Circuit, “deliberate copying may suffice to support an  
9 inference of secondary meaning,” in certain circumstances. *Fuddruckers*, 826 F.2d at 844.  
10 “The rule derives from the assumption that a defendant would not copy a mark or design  
11 unless it (1) believed the mark or design had attained secondary meaning in the minds of  
12 consumers, and (2) intended to exploit this secondary meaning to deceive consumers.”  
13 *Cont’l Lab. Prod., Inc. v. Medax Int’l, Inc.*, 114 F. Supp. 2d 992, 1008 (S.D. Cal. 2000)  
14 (citations omitted).

15 Here, Plaintiff fails to provide any direct evidence of acquired distinctiveness or any  
16 circumstantial evidence pertaining to the exclusivity, manner, and length of use of its trade  
17 dress in its Motion or supporting evidence. *See generally* Mot. Mem.; Mot. for Default J.;  
18 Compl. Regarding advertising, Plaintiff provides the following facts in its Complaint,  
19 although Plaintiff makes no arguments in its Motion premised on these facts: Plaintiff  
20 expends significant monetary resources on Internet marketing and consumer education,  
21 including search engine optimization strategies; since at least 2003, Plaintiff’s Split-Ender  
22 product was advertised on television in the United States and many countries throughout  
23 the world through distributors; Plaintiff’s and third parties’ numerous videos regarding  
24 Plaintiff’s Split-Ender product posted on the Internet, including Facebook and YouTube,  
25 have 40 million views; and Plaintiff spends thousands or tens of thousands of dollars a  
26 month on trade shows around the world. Compl. ¶¶ 60–61. However, evidence of  
27 advertisements and promotional activities pertaining generally to a *product* does not  
28 demonstrate that its *packaging* has acquired distinctiveness. *See Walker & Zanger, Inc. v.*

1 *Paragon Indus., Inc.*, 549 F. Supp. 2d 1168, 1180 (N.D. Cal. 2007) (“[A]dvertising must  
2 direct the consumer to those features claimed as trade dress; merely ‘featuring’ the relevant  
3 aspect of the product does not suffice.”); *First Brands*, 809 F.2d at 1383 (“[P]romotional  
4 activities must involve ‘image advertising,’ that is, the ads must feature in some way the  
5 trade dress itself. Otherwise, even evidence of extensive advertising or other promotional  
6 efforts would not necessarily indicate that prospective buyers would associate the trade  
7 dress with a particular source.”) (citations omitted); *see also Carter-Wallace, Inc. v.*  
8 *Procter & Gamble Co.*, 434 F.2d 794, 800 (9th Cir. 1970) (upholding the district court’s  
9 finding that the plaintiff’s “advertising campaign ha[d] not stressed the color and shape of  
10 [plaintiff’s] antifreeze jug so as to support an inference of secondary meaning”). Finally,  
11 regarding sales, although Plaintiff states it has sold goods all over the United States and  
12 many countries since at least 2003, *see, e.g.*, Compl. ¶¶ 15, 61(c), and provides the price at  
13 which its product was previously and is currently sold, *see Talavera Decl.* ¶¶ 18–19,  
14 Plaintiff has failed to provide evidence of actual sales numbers or use of its alleged trade  
15 dress associated with any of these sales. *See generally* Mot. Mem.; Mot. for Default J.;  
16 Compl.

17         Rather, Plaintiff contends that Defendant’s allegedly intentional copying proves that  
18 Plaintiff’s trade dress has acquired distinctiveness. *See* Mot. Mem. at 8–9; Compl. ¶ 65(g).  
19 However, because the allegedly infringing packaging prominently displays the marks  
20 FASIZ, UMATE, LESCOLOTON, and HAIR TRIMMER, any inference of acquired  
21 distinctiveness by Defendant’s copying is diminished. *See Spark Indus.*, 2014 WL  
22 4365736, at \*11 (“[C]ourts have held that prominent display of defendant’s mark refutes  
23 an inference that the defendant copied the plaintiff’s trade dress in order to capitalize on its  
24 secondary meaning.”). In addition, rather than providing direct evidence of intentional  
25 copying, Plaintiff contends that the near word-for-word copying on the package, as well as  
26 the placement of text, images, and identical slogans as a whole, provides circumstantial  
27 evidence of intentional copying. *See Talavera Decl.* ¶¶ 9–11. Plaintiff also relies on  
28 *Uniden Corp. of Am. v. Unipacific Corp.*, No. 83-2792, 1983 WL 44363 (C.D. Cal. Aug.

1 2, 1983), where the court found that the plaintiff’s trade dress had acquired distinctiveness  
2 through evidence of deliberate and close copying, plaintiff’s extensive advertising  
3 featuring the trade dress, and plaintiff’s “tremendous sales.” Mot. Mem. at 8 (citing *Uniden*  
4 *Corp. of Am.*, 1983 WL 44363, at \*7). Unlike *Uniden*, however, Plaintiff fails to provide  
5 evidence of any advertising featuring its packaging or concrete evidence of sales and  
6 instead solely relies on circumstantial evidence of intentional copying. Therefore, the  
7 Court finds, on the evidence presently before it, that Plaintiff has not met its burden in  
8 establishing that its trade dress has acquired distinctiveness.

9 Because Plaintiff has not proven as a matter of law that the product packaging is  
10 protectable trade dress, the Court will not proceed to analyze whether the packaging is non-  
11 functional or whether there is a likelihood of confusion with the allegedly infringing trade  
12 dress. Rather, the Court **DENIES** Plaintiff’s request for partial summary judgment as to  
13 trade dress infringement.

### 14 **III. Patent Infringement**

15 Regarding direct infringement, the Patent Act provides: “whoever without authority  
16 makes, uses, offers to sell, or sells any patented invention, within the United States or  
17 imports into the United States any patented invention during the term of the patent therefor,  
18 infringes the patent.” 35 U.S.C. § 271(a). An “issued patent carries with it a presumption  
19 of validity under 35 U.S.C. § 282.” *Tinnus Enters. LLC. v. Telebrands Corp.*, 846 F.3d  
20 1190, 1205 (Fed. Cir. 2017).

#### 21 **A. Validity of the Patents**

22 Plaintiff owns the following patents for its Split-Ender® product: U.S. Patent No.  
23 6,588,108, issued July 8, 2003, titled “HAIR TRIMMING DEVICE WITH  
24 REMOVABLY MOUNTABLE COMPONENTS FOR REMOVAL OF SPLIT ENDS  
25 AND STYLING OF HAIR” (the “108 Patent”); U.S. Patent No. 7,040,021, issued May 9,  
26 2006, titled “HAIR TRIMMING DEVICE WITH REMOVABLY MOUNTABLE  
27 COMPONENTS FOR REMOVAL OF SPLIT ENDS AND STYLING OF HAIR” (the  
28 “021 Patent”); and U.S. Patent No. 9,587,811, issued May 9, 2006, titled “HAIR

1 TRIMMING DEVICE” (the “’811 Patent”). *See* Compl. Ex. 5 (ECF No. 1-7); *see also*  
2 SOF at 5. Here, no defendant has raised a challenge to the validity of the patent, and  
3 consequently, the Court concludes as a matter of law that Plaintiff’s unexpired ’108, ’021,  
4 and ’811 Patents are valid and enforceable.

5 ***B. Infringement***

6 “Determining patent infringement requires that the court determine whether  
7 someone (1) without authority (2) makes, uses, offers to sell, sells, or imports (3) the  
8 patented invention (4) within the United States, its territories, or its possessions (5) during  
9 the term of the patent.” *Van Well Nursery, Inc. v. Mony Life Ins. Co.*, 421 F. Supp. 2d  
10 1321, 1334 (E.D. Wash. 2006) (citing 35 U.S.C. § 271(a); *Cyrrix Corp. v. Intel Corp.*, 77  
11 F.3d 1381 (Fed. Cir. 1996)).

12 Plaintiff alleges that the “FASIZ, LESCOLTON, UMATE and HAIR TRIMMER  
13 marked electric hair trimmers are the same in all material respects,” and “only the product  
14 name, color and/or design on handle grip (lines or dots) differ between the infringing  
15 devices.” Compl. ¶ 81. Plaintiff provides the Declaration of Patent Expert Ben Esplin  
16 (“Esplin Decl.,” ECF No. 111-12), supported by separate detailed infringement charts for  
17 Plaintiff’s ’108, ’021, and ’811 Patents that set forth the text of the patent claim compared  
18 with annotated images of the allegedly infringing products, *see id.* Exs. 2–13.

19 After thorough review of the evidence provided, the Court concludes that Plaintiff  
20 has sustained its burden in proving that the FASIZ, LESCOLTON, UMATE and HAIR  
21 TRIMMER marked products each infringe Plaintiff’s ’021, ’108, and ’811 Patents.  
22 Accordingly, the Court **GRANTS** partial summary judgment in favor of Plaintiff on  
23 Plaintiff’s fourth cause of action for patent infringement. There is no genuine issue of  
24 material fact that the FASIZ, LESCOLTON, UMATE and HAIR TRIMMER marked  
25 products infringe Plaintiff’s patents.

26 **IV. Defendant’s Trademark Registration “FASIZ”**

27 Finally, Defendant asks the Court to grant partial summary judgment that Defendant  
28 owns trademark registrations for the mark “FASIZ.” Mot. Mem. at 11. It is undisputed

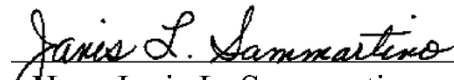
1 that Plaintiff owns registered trademarks in the mark “FASIZ.” *See* Mot. Mem. Exs. 6–10  
2 (ECF Nos. 107-6–10) (showing that Defendant has protection for the mark “FASIZ” in,  
3 *inter alia*, Australia, Belarus, Brazil, China, Colombia, the European Union, Japan, Korea,  
4 New Zealand, Russia, Singapore, Ukraine, the United Kingdom, and the United States).<sup>3</sup>  
5 Therefore, the Court **GRANTS** partial summary judgment that Defendant owns trademark  
6 registrations for the mark “FASIZ” in, *inter alia*, the United States and Brazil.

7 **CONCLUSION**

8 For the foregoing reasons, the Court **GRANTS** Plaintiff’s Motion for Partial  
9 Summary Judgment (ECF No. 107) as to copyright infringement and patent infringement.  
10 The Court **DENIES** Plaintiff’s Motion as to trade dress infringement. Finally, the Court  
11 **GRANTS** Plaintiff’s Motion as to Defendant’s ownership of trademark registrations for  
12 the mark “FASIZ.”

13 **IT IS SO ORDERED.**

14 Dated: March 4, 2021

15   
16 Hon. Janis L. Sammartino  
17 United States District Judge  
18  
19  
20  
21  
22  
23  
24  
25

---

26 <sup>3</sup> Again, “[a] court may take judicial notice of public records of governmental entities and authoritative  
27 sources of foreign law, including information posted on government websites, and may also take notice  
28 of undisputed information on a private entity’s website.” *In re Ex Parte Application of Jommi*, 2013 WL  
6058201, at \*2. Accordingly, in the absence of any objection from Defendant as to the authenticity of  
these trademark registrations, the Court takes judicial notice of these records.