

# Exhibit A

## IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

<b>AARON CLARK, et al.,</b>	:	
	:	
<i>Plaintiffs,</i>	:	
v.	:	<b>Case No. 2:08CV982</b>
	:	
<b>THE WALT DISNEY COMPANY, et al.,</b>	:	<b>Judge Holschuh</b>
	:	
<i>Defendants.</i>	:	<b>Magistrate Judge Abel</b>

### DECLARATION OF ELLEN M. SHAPIRO

I, Ellen M. Shapiro, state and declare as follows:

1. I am a graphic designer and writer. I hold a B.A. in art with a specialization in design from the University of California, Los Angeles, *magna cum laude*. I am owner of a New York graphic communications business. Founded in 1978 as Shapiro Design Associates Inc., the company was reorganized in 2008 as Visual Language LLC. We create and produce logos, identity systems, publications, advertisements, and marketing communications materials for corporations and nonprofit organizations.

I have been an adjunct professor and lecturer in corporate design, typography, and design presentations at leading design schools and colleges, including Pratt Institute, Parsons School of Design, the School of Visual Arts, and Purchase College, the State University of New York. I speak at design conferences in the U.S. and abroad, and have judged design competitions across North America.

As a design writer, I've written nearly 100 articles for international design magazines on design trends, firms, personalities, issues, and events around the world. The subject matter of my articles includes design education, visual merchandising, retail packaging, corporate and brand

identity, typography, illustration, photography, profiles of prominent firms and practitioners in these fields, and industry and cultural trends. I do book reviews and conference reviews. My articles on design for the entertainment industry include an article on rock posters for *Step Inside Graphics*, major features in *Print* and *Communication Arts* magazines on design and marketing of the Broadway musicals “Rent” and “Chicago,” and a profile of the design department at MTV Networks. I covered the launch of the Pantone Goe color system for *Communication Arts*. Three of my articles are in current magazines (7/09), including a feature on the Museum of Arts and Design (MAD) in New York City in the current issue of *Etapas*, the international design magazine published in France.

I design and sell a line of educational products to help teach letter recognition, sound-symbol associations, and blending—the fundamentals of reading—to children. Marketed as Alphagram Learning Materials, these products are sold to schools, districts, teachers and parents. I am the owner of U.S. Patent No. 5,788,503 for moveable flip-cards with letter and picture indicia.

2. I have been asked to analyze certain products produced by Defendants JAKKS Pacific, Inc.’s, Play Along Toys and Toys “R” Us’ (collectively “JAKKS”) to determine if the manufacturing, using, or selling of these products infringe U.S. Patent No. 5,548,272 (hereinafter the ‘272 patent”). The ‘272 patent is attached as Appendix A.

3. The products produced by JAKKS (hereinafter the “accused products”) include the (1) Hannah Montana “If We Were a Movie” Poster (Appendix B); (2) Hannah Montana “Make Some Noise” poster (Appendix C); and the (3) “Bigger Than Us | Part Time Pop Star” poster (Appendix D).

4. I have been provided with samples of each of the accused products. I analyzed each of the accused products against claims 1 and 5 of the '272 patent.

5. I have been advised that patent infringement requires a two-step analysis. The first step is to construe the relevant claim language in question and, in step two, to compare the accused products to the claim language. *See Nazomi Communications, Inc. v. Arm Holdings PLC*, 403 F.3d 1364, 1367-68 (Fed. Cir. 2005). Patent infringement requires that “the accused product or process contains, either literally or under the doctrine of equivalents, every limitation of the properly construed claim.” *Seal-Flex, Inc. v. Athletic Track and Court Constr.*, 172 F.3d 836, 842 (Fed. Cir. 1999). An accused product may infringe under the doctrine of equivalents if “the differences between the invention as claimed and the accused product or process are insubstantial.” *Vehicular Technologies Corp. v. Titan Wheel Intern., Inc.*, 212 F.3d 1377, 1381 (Fed. Cir. 2000).

6. As a person of ordinary skill in the art, I have reviewed claims 1 and 5 of the '272 patent, the specification, prosecution history, dictionary definitions of the relevant claim language, and comparable sources, as permitted by the Federal Circuit. *See Phillips v. AWH Corp.*, 415 F.3d 1303, 1318 (Fed. Cir. 2005) (en banc) (stating “[d]ictionaries or comparable sources are often useful to assist in understanding the commonly understood meaning of words and have been used both by our court and the Supreme Court in claim interpretation).

7. Two such “comparable sources” include the color wheel and various PANTONE® color matching systems, including the Pantone Goe Fan Guide.

8. The color wheel, a representation of color hues around a circle based on the wavelengths of light, has been in use since the late 19<sup>th</sup> century and is an industry-standard source. The Color Wheel is a tool for visualizing the relationship of colors to one another and for

choosing color schemes. As defined in *Graphic Design Referenced: A Visual Guide to the Language, Applications, and History of Graphic Design*, by Bryony Gomez-Palacio and Armin Vit, page 56 (Rockport, 2009):

The basic structure of color can be represented through the color wheel, which consists of twelve units: three primary colors, three secondary color, and six tertiary colors. Common combinations can be derived from this structure: complementary (by choosing colors on direct opposites of the wheel); clashing (by selecting a color on either side of its complementary color); analogous (by selecting three adjacent colors); and triad (where the selected three colors are equidistant from each other on the wheel). Unlimited combinations can be made through the choice of any hue, tint, or saturation, and shade or brightness.

9. The Pantone Matching System (PMS), with 1,114 separate solid colors, has been an industry standard since about 1965; it gives printers, designers, fabricators, and others a common language: a number system to use when choosing and specifying color. As Ken Garland wrote of the PMS in *Graphics, Design & Printing Terms: an International Dictionary*, page 155 (Design Press Division of Tab Books, NY; 1980, 1989): "...in specifying color of printing ink, [the] customer only needs to supply printer with reference number." In 2007, Pantone launched the Goe System, with 2,058 colors, nearly double the number of available colors, which offers better color emulation for current technology and production techniques. Pantone Inc. manufactures and sells a number of color systems; in addition to systems for specifying printing inks, Pantone offers systems for fashion, home, plastics, paint, architecture, and contract interiors. It is likely that the designer of the Hannah Montana posters used one of the 1,005 chips in the Pantone Plastics Opaque Selector to choose a color for each of the speaker housings that matched a color in the art of its respective poster. The art itself was most likely created in Adobe Photoshop in RGB (colors native to digital photography and used in Web applications) and changed to the CMYK (four process) colors for offset printing.

10. I have been advised that the only claim limitation at issue in the present case is the “wherein” limitation in claims 1 and 5. This limitation from claim 1 reads:

Wherein a surface of said housing is prepared with a matching art which is substantially the same as that area which appears on said portion of said poster that said housing covers when said housing is attached to said poster, such that said housing artistically blends in with the surrounding poster art that is not covered by said housing.

11. Claim 5 has identical language with the exception of the opening words: “Wherein a surface of said house is prepared with a matching art which is....” The focus of the claim construction dispute centers on the remaining language of the claim, which is identical in both claims 1 and 5.

12. Based on a review of the intrinsic record, dictionaries and the aforementioned comparable sources, the meaning of this limitation as understood by a person of ordinary skill in the art is that the color, finish, and surface artwork of the housing form a harmonious visual effect with the art on the poster.

13. To artistically blend the speaker housing artwork to the poster art, a designer would choose a color for the housing that is significant in the color scheme of the poster. The colors of the housing could be the same as a predominant hue in the color scheme of the poster. The overall effect would also be harmonious if the color of the housing were *analogous* (two or three different hues adjacent on the industry-standard color wheel; *complementary* (two hues opposite on the color wheel), or *split complementary* (two adjacent hues plus one opposite). JAKKS accused poster, “Make Some Noise,” demonstrates this approach. *See* Appendix E.

The color wheel is relevant to this case because the language of the patent requires that the color of the poster housing “artistically blend in” with the poster art itself; the accused products employ colors that “artistically blend in” with the poster art. On the color wheel,

analogous or adjacent colors are considered harmonious. In the Hannah Montana “Make Some Noise” poster, as one example, the lavender of the speaker housing exactly matches the lavender of the background area on the upper right of the poster. *See* Appendix E. The housing is adjacent to a turquoise area on the bottom of the poster. Lavender and turquoise are part of an analogous color scheme; therefore, to a person of ordinary skill in the art, these colors "artistically blend in" as this term is used in claims 1 and 5 of the '272 patent.

14. The interpretation of the “wherein” provision set forth in paragraph 12 above is also supported by dictionary definitions. *See* Appendix I.

15. I have been advised that the next step is to compare the accused products with claims 1 and 5 to determine if the accused products infringe literally or under the doctrine of equivalents.

16. I have found, as a result of my review, that the accused products literally infringe claims 1 and 5 of the '272 patent. As shown in Appendices F-H, the accused products contain each and every limitation of claims 1 and 5.

17. The review was done as follows: each poster was scanned at high resolution, and an Adobe Photoshop file was created for each poster. To ensure that the colors in the electronic files matched the actual posters themselves as accurately as possible, I carefully examined the files on screen and as they appeared printed on ordinary white laser bond paper. I reviewed all the limitations of Claims 1 and 5 of the '272 patent. I created an Adobe Illustrator file with a matrix that listed each claim limitation, word for word. I placed the electronic file of the poster next to the list of limitations, observed that the poster(s) conformed to the limitation, and drew a line from the words of each limitation to the part or parts of the poster and housing that correspond to it.

18. I found that claims 1 and 5 of the '272 patent read on the three accused posters in every case.

Therefore, it is my opinion that:

19. The “If We Were a Movie” accused product (Appendix B) possesses each and every limitation of claims 1 and 5 or, at the very least, an equivalent thereof. *See* Appendix F.

20. The “Make Some Noise” accused product (Appendix C) possesses each and every limitation of claims 1 and 5 or, at the very least, an equivalent thereof. *See* Appendix G.

21. The “Bigger Than Us | Part Time Pop Star” accused product (Appendix D) possesses each and every limitation of claims 1 and 5 or, at the very least, an equivalent thereof. *See* Appendix H.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on this 31st day of July, 2009, in Irvington, New York

A handwritten signature in black ink, appearing to read "Ellen M. Shapiro", written in a cursive style.

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Ellen M. Shapiro