

Judge Saris Opines on Copyright Infringement in 3-D Greeting Card Case

New England IP Blog on **February 27, 2018**

On February 22, Chief Judge Saris in the District of Massachusetts issued an opinion on a motion to dismiss implicating several complex copyright infringement issues. The Chief Judge's ruling analyzed whether several allegedly infringing works could be considered "substantially similar" to the copyrighted works, as required to support a claim of copyright infringement. The "substantial similarity" analysis produced different results depending on the particular work under consideration.

The Plaintiff, LovePop, Inc. ("LovePop"), produces three-dimensional pop-up greeting cards, inspired by a paper-cutting art form called kirigami, for a variety of purposes. The Defendant, PaperPopCards, Inc., ("PaperPop") also sells three-dimensional pop-up greeting cards. LovePop alleged that PaperPop "slavishly copied" each of nine LovePop designs and that six of the designs appear in instructional videos posted on PaperPop's website. LovePop sued for infringement of its copyrights in the designs and related videos, claiming that PaperPop had produced impermissible "derivative works" within the scope of LovePop's exclusionary rights.

To save its copyright infringement claim from PaperPop's motion to dismiss, LovePop needed to show that the facts alleged, construed in the light most favorable to LovePop, demonstrated that PaperPop copied original elements of its copyrighted works, among other requirements. This showing required LovePop to demonstrate that the copying was so egregious as to render the allegedly infringing works "substantially similar" to the protected works. To gauge substantial similarity, courts often employ an "ordinary observer" test, under which substantial similarity is found if an ordinary observer would be disposed to overlook any disparities in the works.

The Court's analysis unfolded differently for each of the allegedly infringed designs. For example, for the "French Flower Cart" and "Flower Cart" designs, the Court perceived "a number of conspicuous similarities between the expressive flourishes in the two designs," including that both carts were roughly the same size and contained similar elements, such as five rows of flowers, latticework on the sides, pitched roofs, curved handles, fanciful wheel designs, and more. Citing these similarities, the Court concluded that "it is entirely plausible that an 'ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same.'" Accordingly, the Court denied the motion to dismiss for those designs, as well as several others.

However, the Court allowed the motion to dismiss with respect to certain "Hanukkah Menorah" and "Menorah" designs. For these, the court relied on the doctrine of *scènes à faire*. The doctrine holds that copyright protection does not extend "to elements of a work that are for all practical purposes indispensable, or at least customary, in the treatment of a given subject matter." For the menorah designs, the doctrine rendered unprotectable elements such as a candelabra holding nine candles, such that a factfinder could not consider them in conducting the ordinary observer test. The Court held that what similarities remained (e.g., both menorahs are gold in color with white candles) were insufficiently original to qualify for copyright protection. Accordingly, the Court granted PaperPop's motion to dismiss with respect to the menorah designs.

LovePop also claimed copyright infringement based on videos that the companies posted to their respective websites depicting their cards in action. LovePop argued that because it owned copyrights in its card designs, it also owned the exclusive right to produce derivative works based upon those designs. Thus, it argued that because PaperPop's cards are so similar to LovePop's cards, PaperPop's videos effectively constitute unauthorized derivative works based upon LovePop's card designs—even though PaperPop's videos actually depict PaperPop's own cards. The Court held that this issue raises complex questions of derivative copyright liability which needed a full record to decide, and therefore denied the motion to dismiss for the videos.

Chief Judge Saris' ruling demonstrates that it can be difficult to sustain a motion to dismiss when it comes to copyright infringement claims based on lack of substantial similarity. Often this determination turns on jury-triable issues that are hard to eliminate when the facts are viewed in the light most favorable to the non-movant. However, when it can be determined as a legal matter that certain asserted elements are unprotected by copyright, a motion to dismiss can prove more viable, as the case for substantial similarity can become more difficult to mount.

The case is *Lovepop, Inc. v PaperPopcards, Inc.*, 17-cv-11017-PBS, before Chief Judge Patti B. Saris. A copy of the Court's February 22, 2018 order can be found [here](#).