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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ATARI INTERACTIVE, INC.,  
Plaintiff,  
v.  
REDBUBBLE, INC.,  
Defendant.

Case No. 18-cv-03451-JST

**DRAFT JURY INSTRUCTIONS**

United States District Court  
Northern District of California

Following are the jury instructions the Court currently intends to give in this matter. These instructions are very much in draft form, and the Court welcomes the parties' help in identifying errors and omissions.

Contrary to the Court's statement from the bench, and subject to further discussion, the Court does not intend to give Redbubble's requested instruction on expressive works. Redbubble's instruction is taken from Ninth Circuit Model Instruction 15.19A, which places the burden on the plaintiff to show that a work is *not* expressive and not on the defendant to show that a work *is* expressive. The Ninth Circuit Jury Instructions Committee explains the reasons for this as follows:

No case has explicitly decided whether the question of First Amendment protection is to be decided by the court in all instances or whether it is a mixed question of fact and law. This instruction assumes that the court has already determined that the allegedly infringing work is protected by the First Amendment, as was the case in *Gordon [v. Drape Creative, Inc. 909 F.3d 257, 264 (9th Cir. 2018)]*. In a case in which the court concludes there are factual findings a jury must make before deciding the threshold question of First Amendment protection, this instruction should be modified accordingly.

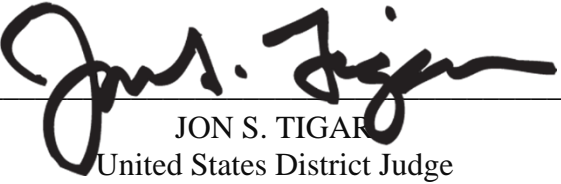
Because the Court has not "already determined that [any] allegedly infringing work is protected by

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the First Amendment,” there is no predicate for this instruction. No party has proposed a different instruction on this topic.

**IT IS SO ORDERED.**

Dated: November 2, 2021

  
\_\_\_\_\_  
JON S. TIGAR  
United States District Judge

United States District Court  
Northern District of California

**1.4 DUTY OF JURY**

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Members of the Jury: Now that you have heard all of the evidence, it is my duty to instruct you on the law that applies to this case. Each of you has received a copy of these instructions that you may take with you to the jury room to consult during your deliberations.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. And you must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath to do so.

Please do not read into these instructions or anything that I may say or do or have said or done that I have an opinion regarding the evidence or what your verdict should be.

United States District Court  
Northern District of California

**1.6 BURDEN OF PROOF—PREPONDERANCE OF THE EVIDENCE**

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2 When a party has the burden of proving any claim or affirmative defense by a  
3 preponderance of the evidence, it means you must be persuaded by the evidence that the claim or  
4 affirmative defense is more probably true than not true.

5 You should base your decision on all of the evidence, regardless of which party presented  
6 it.

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United States District Court  
Northern District of California

**1.9 WHAT IS EVIDENCE**

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The evidence you are to consider in deciding what the facts are consists of:

1. the sworn testimony of any witness;
2. the exhibits that are admitted into evidence;
3. any facts to which the lawyers have agreed; and
4. any facts that I have instructed you to accept as proved.

United States District Court  
Northern District of California

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