

EIP

Original Beauty's originality not passed off by Oh Polly

In *Original Beauty v G4K*, the High Court takes a closer look at when using someone else's garment when designing your own stops being a source of inspiration and becomes an act of outright copying. The case concerns "Bodycon" and "bandage" garments, the garment style made famous in recent years by celebrities such as the Kardashians, Jennifer Lopez and Beyoncé.

Original Beauty alleged infringement of their unregistered design rights under UK and EU law and that the defendants had passed their brand "Oh Polly" off as a sister brand to the claimants "House of CB". The defendants said the House of CB designs lacked originality and were common place, and that where they had used images of the claimants' designs in their design process they had only been for inspiration rather than copied.

Infringement

Looking at the design infringement claim, David Stone, sitting as Deputy High Court Judge, compared 20 House of CB designs against 20 Oh Polly designs.

For each design the judge first established when the claimants had created their design and the design process that to the design. It is worth noting that none of the defendants' designs were created before any of the claimants' designs (save for a few cases in which they had in any event been modified following the launch of the claimants' design). As to the defendants' design process in general, the judge highlights in his judgment that, Ms Henderson, the CEO of Oh Polly who designed many of the defendants' garments, was not a designer and could in fact not draw. Rather the design process involved Ms

Henderson designing garments in her head using for inspiration “digital mood boards” (essentially electronic folders of photos of third-party garments found on the internet).

Having considered the chain of events and the design processes the judge then moved on to consider whether the claimants’ UK unregistered design right (UKUDR) and Community unregistered design right (CUDR) were valid. Following which he then considered if the defendants’ design infringed any of these rights.

The judge found that the UKUDRs for all the claimants’ designs were all valid as none of them lacked originality or were commonplace over prior designs pleaded in the defence. The judge also found the CUDRs in all the claimants’ designs to be valid, finding that none of them produced the same overall impression as the prior designs.

When considering whether a design infringed the UKUDR the judge had to establish whether it had been made exactly or substantially to the claimants’ design. For several of the defendants’ designs, screenshots of the claimants’ design had been used as the source, sometimes the only source, of inspiration in the design process. This, combined with the timing of the creation of the two designs, led the judge to find that 7 of the defendants’ designs had been made substantially, if not exactly, to the claimants’ designs and so infringed the claimants’ UKUDR in those designs.

Given that 7 of the defendants’ designs were found to have been made substantially to the claimants’ designs it is not surprising that the judge did not find any of these designs to produce a different overall impression from the claimant’s design, thereby also finding them to infringe the CUDR in those designs (although for one only one colour way was found to infringe the CUDR). Even though some of the defendants’ designs had differences from the claimants’ designs such as lacking a buckle, these were perceived as too subtle to cause an overall different impression. It is perhaps not surprising that the judge found these differences to be too insubstantial to create a different overall impression in designs where he had already established there was infringement of the UKUDR.

Passing off

In relation to the passing off claim, the judge found that the defendants’ Oh Polly brand had obtained and copied the claimants’ business model, social media marketing etc. and had gained an advantage from of the success of the House of CB brand. However, the claim that the defendants had passed off their Oh Polly brand as a sister brand of House of CB failed because the claimants failed to prove deception. Although customers had noticed similarities between the brands none had been deceived. This was shown by

comments such as "Oh Polly fully copying House of CB designs" and "Oh Polly wanna be House of CB so bad" on social media.

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Comments

Overall the judge's findings are not surprising. He was unimpressed by the defendants' design evidence and commented that "there was an attitude of "couldn't care less" about the rights of others". Accordingly he held that "the circumstances of the case ... [were] sufficient to warrant an award of additional damages in relation to [the 7] designs".

Written by Hannah Elam.