

Copyright & Designs Law Update: *Drawing the Line Between Inspiration and Infringement*

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DATE

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AGENDA

Copyright law

- Cases
- Responses to CAIRG discussion paper
- Takeaways and practice points

Designs law

- Cases
- Proposed reforms
- Practical tips

Copyright & Designs Law
Update

Copyright Law

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Copyright cases

- *Hampden Holdings I.P. Pty Ltd v Aldi Foods Pty Ltd* [2024] FCA 1452
- *Hytera Communications Corporation Ltd v Motorola Solutions Inc* [2024] FCAFC 168

Hampden Holdings I.P. Pty Ltd v Aldi Foods Pty Ltd [2024] FCA 1452

PARTIES

First Applicant/Cross-Respondent
Hampden Holdings I.P. Pty Ltd
(**Hampden**)

Second Applicant
Lacorium Health Australia Pty Ltd
(**Lacorium**)

Respondent/Cross-Claimant
Aldi Foods Pty Ltd (**Aldi**)

HAMPDEN/LACORIUM'S CLAIM

11 works used on Aldi's "MAMIA" snacking range infringed copyright in the Applicants' Works

ALDI'S CROSS-CLAIM

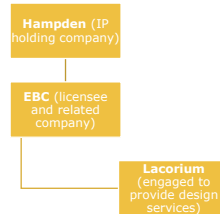
Hampden made unjustifiable threats of copyright infringement

ISSUES

- For each of the Applicants' Works, was Hampden and/or Lacorium the copyright owner?
- For each of the Impugned Works, had Aldi infringed copyright by reproducing a substantial part of one or more of the Applicants' Works?
- If all or part of the Hampden/Lacorium's copyright claim was made out, was Aldi liable for additional damages?
- Was Aldi's cross-claim made out?

HELD

- Hampden and Lacorium (either Hampden by itself or together as joint owners) were the copyright owner of the works and therefore had the right to bring their claims for breach of copyright.
- Only the Impugned Puffs Works reproduced a substantial part of the Applicants' Puffs Works.
- Aldi was liable for additional damages.
- Aldi's cross-claim was dismissed.



Timeline



- EBC began using the new packaging in Australia

Sep 2018



- Aldi began selling products in the MAMIA snacking range in the new packaging

Feb-Dec 2020



- Aldi began selling MAMIA baby puffs

Aug 2021

2017/2018

- EBC engaged B&B Studio (UK) to design packaging for EBC's BELLIES brand (BABY BELLIES, LITTLE BELLIES, MIGHTY BELLIES) (**B&B Designs**)
- EBC also engaged Lacorium (AU) to design packaging for additional products in the BELLIES range, based on the B&B Designs (**Lacorium Designs**)

Late 2018/2019

- Aldi engaged Motor Brand Design (**MBD**) to re-design the packaging for the MAMIA snacking range
- Aldi instructed MBD to use the BELLIES brand as the "benchmark"
- Note: MAMIA's snacking range did not include baby puffs at this point

2020/2021

- Aldi developed new baby puffs product for the MAMIA snacking range
- Aldi engaged MBD to develop packaging, who continues to use the BELLIES brand as the "benchmark"

Feb 2022

- Applicants commenced proceedings against Aldi for breach of copyright (no claim for passing off or misleading or deceptive conduct)

Copyright & Designs Law Update

The “puffs” products

Original work



Impugned work



Copyright & Designs Law Update

The “puffs” products

Original work



Impugned work



Copyright & Designs Law Update

The “puffs” products

Original work



Impugned work



Copyright & Designs Law Update

The “non-puffs” products

Original works



Impugned works



Did Aldi infringe the Applicants' copyright?

Causal connection

- Correspondence between Aldi's buying director and MBD included instructions for MBD to "follow the architecture of the *BABY BELLIES* packaging and use photographic imagery" (at [88])
- MBD therefore had access to the packaging of the Applicants' puffs and non-puffs products and undertook to "design packaging for the MAMIA snacking range (including the baby puffs) that resembled the packaging of the benchmark product (albeit not too closely)" (at [177] and [193])

Objective similarity

- The question is to be approached qualitatively, rather than quantitatively



Objective similarity – the "puffs" products

Original work



The layout and design elements, considered together, "involve a degree of creativity or originality" and were "qualitatively significant" (c.f. the "look and feel") (at [181]-[182]). Each element was present in Aldi's impugned work (at [183]). While there were differences, this was "not the focus for present purposes" (at [184]).

Impugned work



- Two-column layout
- Solid white background
- LHS: text elements of varying sizes, "stacked" vertically
- RHS: photographic images of the product and ingredients, in a vertical composition
- Oval-shaped cartoon character, with a large, light-coloured belly
- Rounded, childlike font
- Upper-right corner: a number

Objective similarity – the “non-puffs” products

Original work



“Although [Aldi’s] impugned work reproduces the large, oval-shaped cartoon character...which may be considered to be a creative or original element, the other elements that have been reproduced are commonplace...the number of layout and design elements that have been reproduced can be relevant to the qualitative assessment.” (at [203])

Impugned work



1. Solid white background
2. Large, oval-shaped cartoon character, with a large, light-coloured belly (with writing)
3. Upper-right corner: a number

Hytera Communications Corporation Ltd v Motorola Solutions Inc [2024] FCAFC 168

Reproduction of a “substantial part” of software code

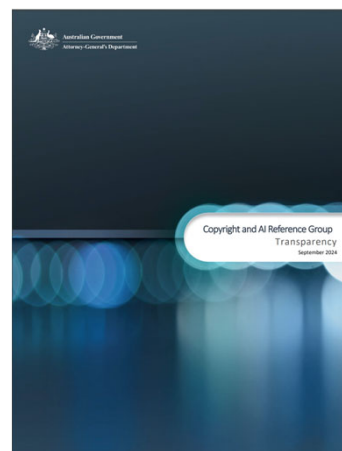
- “Respectfully, the primary judge was in error to approach the question of infringement by considering whether small segments of Hytera source code which had been copied from a Motorola Work formed a substantial part of the relevant Motorola Work. ...The question to be determined was whether, in respect of each of the Motorola Works, the **totality of the Motorola source code copied by Hytera** (into the impugned Hytera source code) was a **substantial part of the Motorola Work**.” ([783])
- “It follows that the assessment of whether copied computer code constitutes a substantial part of a relevant computer program (work) is concerned with the **quality of what is taken rather than the quantity**. The quality of the copied code is to be **assessed by reference to the importance which the code bears in relation to the work as a whole**, which can also be described as the **materiality of the code**. But importance and materiality do not refer to the function of the code in the sense of whether the code is important or material to the operation of the computer or device in which the code is installed. Rather, **importance and materiality refer to the originality** with which the code expresses the functions sought to be performed by the computer or device, which **includes** such matters as the **structure of the code and the choice and sequencing of commands**.” ([794])

The CAIRG

Transparency in Copyright and AI – 2025 and beyond

Copyright and Artificial Intelligence Reference Group (CAIRG)

- September 2024: Copyright and transparency discussion paper
- February 2025: Summary of CAIRG responses
- Transparency requirements on AI inputs and outputs
- Preferred regulatory approach – amending the Copyright Act or new AI Act?



[Copyright and AI – Transparency discussion paper - September 2024](#)

[Copyright and AI – Summary of CAIRG responses to transparency discussion paper - February 2025](#)

Key takeaways and practice points

Key takeaways and practice points

- Copyright protects **expression of ideas**, not ideas themselves
- Copyright is infringed if there is unauthorised use of the whole or '**substantial part**' of the work
- Whether a '**substantial part**' has been taken is a qualitative assessment
- Avoiding infringement
 - Refer to general concepts and ideas instead of competitor's products or features
 - If using reference images, obtain permission and do not use a 'substantial part' in final design
 - Consider obtaining a licence
 - Maintain appropriate records of independent design process

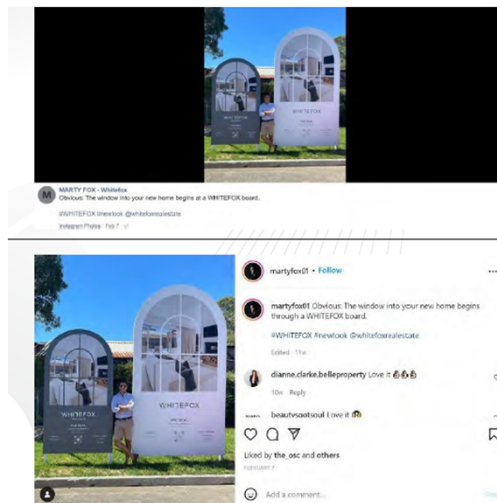
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Designs Law

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Fox Australia Pty Ltd [2024] ADO 2

"curved real estate advertising board".



Fox Australia Pty Ltd [2024] ADO 2

Section 18 - Certain designs not to be treated as other than new and distinctive

(1) This section applies if:

- (a) copyright under the Copyright Act 1968 subsists in an artistic work; and
- (b) an application is made by, or with the consent of, the owner of that copyright for registration of a corresponding design

(2) The design is not to be treated, for the purposes of this Act, as being other than new and distinctive, or as having been published, by reason only of any use previously made of the artistic work, unless:

- (a) the previous use consisted of, or included, the sale, letting for hire or exposing for sale or hire of products to which the design had been applied industrially, other than products specified in regulations for the purposes of paragraph 43(1)(a); and
- (b) the previous use was by, or with the consent of, the owner of the copyright in the artistic work.



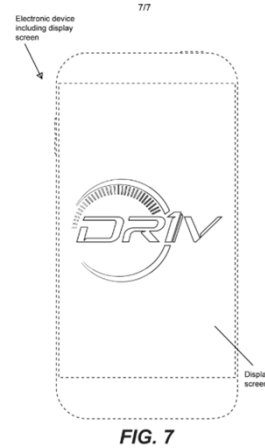
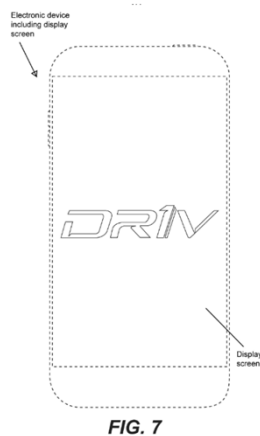
Fox Australia Pty Ltd [2024] ADO 2

HELD:

- The render was an artistic work.
- The Design was a 'corresponding design' of the render.
- The Design had **not** been 'industrially applied' in making of the prototype boards (and the uploading of the image to social media did not constitute an invitation to purchase or hire the prototypes).
- The use of the artistic work had been with consent of the owner.
- Citations 2 and 3 should be excluded from prior art by reason of s 18.
- **Design certified.**

DRiV IP, LLC [2024] ADO 3

"Electronic device including a display screen; Display screen" (depicted below).



DRiV IP, LLC [2024] ADO 3

- Current practice of IP Australia is to examine designs '**at rest**' (ie. when the relevant product is switched to an "off state").
- The examiner's representation of DRiV IP, LLC's product 'at rest' (on right) -> not new and distinctive when compared to prior art.
- DRiV IP, LLC sought to challenge this approach.



DRiV IP, LLC [2024] ADO 3

- Delegate upheld current practice, noting that under the Designs Act:
 - Definition of “**visual feature**” includes “*the shape, configuration, pattern and ornamentation **of** the product*”. An image that appears on a display screen would not normally be considered a quality or attribute **of** a display screen as such (applying *Apple Inc* [2017] ADO 6).
 - Definition of “**product**” (as “*a thing that is manufactured or hand made*”) is confined to physical things and exhaustive, not inclusive or open ended. A Graphical User Interface (GUI) or icon cannot itself be a “product”.
- Interpretation supported by extraneous materials (EM and ALRC Report)
- Overseas jurisdictions (EU/UK) irrelevant give different definitions of ‘product’ under their respective design laws.

DRiV IP, LLC [2024] ADO 3

- DRiV IP LLC tried to circumvent the approach by amending the product names:

Electronic device including a display screen on which a logo is...

...visible at least when the device is used as intended...

...visible at least when the device is used as intended, the device having all things necessary for the logo to be visible on the screen..

...non-transiently visible...

....non-transiently visible, this device having all things necessary for the logo to be visible on the screen...

HELD: Amendments still didn’t overcome issue of Designs being considered **at rest**.

Outcome: Designs revoked.

Proposed reforms

Proposed reforms

Key proposed legislative changes under consideration:

- Protection of **virtual designs** (both as standalone products and as displayed via a physical product).
- Protection of **partial designs**.
- **Post-registrations linking** of designs owned by same person.

Practical tips

Practical tips

Seeking protection of your designs:

- file application *before* use of the design (or within grace period)

Avoiding infringement:

- clearance searches
- designing around registered design(s)

What to do if you receive a letter of demand?

- Is the design certified?
- Is the owner same as party making allegation?
- Can you rely on any prior use?
- Any grounds for revocation?

Presenters



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