

The latest developments in “copycat” cases in the drinks industry

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Agenda

- **Trade marks / passing off** – issues with *confusion* and *tarnishment*
- **Designs** – lighting the way?
- **Copyright** – to the rescue?
- Lessons from recent developments and “dupalikes”
- Implications of generative AI



Recent developments





VS



Trade mark infringement and passing off = out?

- Thatchers' claim against Aldi dismissed
- Trade mark infringement and passing off claims
 - s10(2) “confusion infringement”: overall appearance of Aldi Taurus Lemon Cider was similar to Thatchers trade mark, leading to a likelihood of confusion (passing off also based on confusion)
 - s10(3) “reputation infringement”: Aldi sign took unfair advantage of, and/or was detrimental to the distinctive character and/or repute of, Thatchers trade mark (including taste “tarnishment”)
- Decision
 - No evidence of confusion
 - No intention to exploit Thatchers' reputation/goodwill. Permitted “benchmarking”
 - No taste “tarnishment”



VS



Designs – lighting the way?

- UK registered design rights infringement (i.e. does the design produce the same overall impression on the informed user?)
- Decision
 - Aldi's infusionist branding/colouring = differences of “*relatively minor detail*”
 - Overall impression created was not different
 - M&S had a considerable degree of freedom in designing the bottle's features, which were largely considered to be aesthetic and not technical requirements
- Better avenue to protect against lookalikes?
 - Likelihood of confusion is irrelevant for registered designs
 - Value of registered designs

Copyright to the rescue?

- Expanding area of law for “artistic works”, and “intellectual creation” test now confirmed
- *Charlotte Tilbury*:
 - “Filmstar Bronze and Glow” powder palette design
 - Infringement of artistic copyright: “*not concerned with the appearance of the defendant’s work but with its derivation*” (emphasis added)
- Drinks labels (*Thatchers?*)
- Whole bottle (*Au Vodka?*)



Lessons and “dupalikes”

- **UK registered design rights** – particularly useful where a product is new in a market sector and contains an innovative or striking design element
- **Copyright** – need to prove both ownership of the work and show alleged infringing designs were derived from the copyright works
- **Evidence of design copying** – *Thatchers*: no adverse inference drawn:
 - “relatively little in the way of documentary evidence arising from the Aldi side relating to design of the packaging,.... because the majority of the design decisions were communicated orally in accordance with Aldi’s deliberately lean and efficient business model”
- Some brands embracing dupes – consumer stamp of approval?

The implications of generative AI

- Prompt engineering:
 - ChatGPT/Midjourney/DALL·E: *“you are the designer of a gin bottle and label, provide a budget version evocative of the Tanqueray London Dry Gin bottle/label....”*
- Ease of lookalike design production with AI helping to sail closer to the wind
- Images of well known brands contained in AI model training data sets and/or inputted by lookalike prompt engineer (end user)
- Brand design teams using gen AI models for designing – who owns the output content, is it protectable, what do platforms TS&Cs say, data privacy and confidentiality breaches
- RPC’s AI guide – explains all....



Q&A