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Lidl v Tesco: The Court of Appeal reverses copyright infringement decision

Julius Stobbs, Emma Dixon (Stobbs IP) · Monday, April 8th, 2024

This is the second of three blogs examining the recent UK Court of Appeal decision in *Lidl v Tesco*^[1]. As reported in our first blog, the Court of Appeal upheld the High Court's finding of trade mark infringement and passing off by Tesco in respect of Tesco's use of a blue and yellow sign for its Clubcard promotions.



The Wordless Mark



The Mark with Text



Example of the Marks as used by Lidl



The Sign (Tesco)



Example of the Sign as used by Tesco, with overlaid text

However, the Court of Appeal overturned the High Court's finding of copyright infringement. This is likely to be welcomed by copyright lawyers as the High Court decision received a critical reaction from many legal commentators, particularly in respect of the Smith J's finding of 'substantial reproduction'.

Copyright at first instance

At first instance, Smith J found that: (1) the Lidl Mark with Text (the “**Lidl Work**”) was an artistic work protected by copyright; (2) Lidl established a presumption of copying, which Tesco failed to discharge; and (3) a substantial part of the Lidl Work was reproduced in the Tesco Clubcard Sign with Text (the “**Tesco Work**”).

The first instance judgment did not go into a detailed analysis on ‘substantial part’. The basic test of substantiality under UK law is whether the later work replicates a substantial part of the aspects of the earlier work which (by reason of the skill, labour and judgment which went into their creation) make it an original work attracting copyright protection. It was unclear to legal commentators how the judge found that a yellow circle on a blue square was a substantial part of the skill and labour of a work containing a complex logo design where the word, and font for, LIDL was a key element of the artistic work.

The Appeal

Tesco appealed against the judge’s findings on subsistence and also on substantial reproduction and the appeal on the latter was allowed.

Lord Justice Arnold found that the judge had applied the correct test as to subsistence and that her conclusion that the Lidl Work had “*involved free and creative choices so as to stamp it with the author’s personal touch*” was a conclusion open to her.

However, on his analysis as to substantial reproduction, Lord Justice Arnold concluded that Tesco had not infringed copyright in the Lidl Work. Counsel for Tesco submitted that Tesco had not reproduced a substantial part of that copyright work because Tesco had not copied what was original to the author(s) of the Lidl Work. He pointed out that the shade of blue in the Tesco sign had been used previously by Tesco as part of its corporate livery, Tesco had previously used yellow circles in their signage, and the distance between the yellow circle and the edges of the blue square in the Tesco Signs was different to the Lidl Work. It followed, he argued, that all that Tesco’s design agency had copied from the Lidl Work was the idea of a yellow circle in a blue square.

Lord Justice Arnold found that although the Lidl Work is sufficiently original to attract copyright, the scope of protection conferred by that copyright is narrow. He found that Tesco had not copied at least two of the elements that make the work original, namely the shade of blue and the distance between the circle and the square, and that although Tesco had copied the visual concept of a blue square surrounding (among other material) a yellow circle, that is all they had done. Overall, he concluded, this did not amount to copyright infringement.

A helpful clarification

Overall, this decision is to be welcomed. The High Court’s interpretation of ‘substantial part’ cast a very wide net as to what would be deemed to be copyright infringement under UK law. The Court of Appeal has clarified the law on substantial part and has recognised that while the Lidl Work did attract copyright, the scope of protection afforded was (sensibly) narrow. A relief for legal commentators (and – in part – for Tesco).

[1] [2024] EWCA Civ 262 (19 March 2024)

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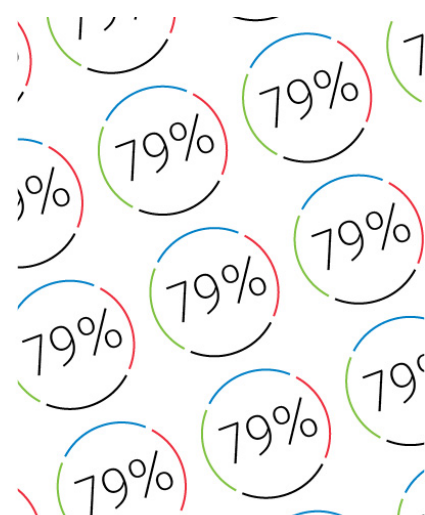
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