

O-039-14

TRADE MARKS ACT 1994

IN THE MATTER OF

AN APPLICATION FOR INVALIDATION (NO. 84200)

BY MR MUSHTAQ AHMED

AGAINST TRADE MARK REGISTRATION 2527587

STANDING IN THE NAME OF JAGMOHAN SINGH ATWAL

IN RESPECT OF THE TRADE MARK:



THE BACKGROUND AND THE PLEADINGS

1) Trade mark registration 2527587 was filed on 1 October 2009 by Mr Jagmohan Singh Atwal and it completed its registration process on 5 February 2010. It is registered for clothing, footwear and headgear.

2) Mr Mushtaq Ahmed has applied for the trade mark to be declared invalid on the basis of section 5(4)(b) of the Trade Marks Act 1994 (“the Act”); the claim is based on the law of copyright. Mr Ahmed states that he commissioned Umar Enterprise (“Umar”) to create a clothing label for him in October 2000; a British national, Mr Riaz, is claimed to be the actual designer. It is stated that the design was “re-worked” by Ashraf Khan of Leicester Labels (“LL”) in April 2006 to give an “updated look”. Attached to the statement of case are representations of the labels said to have been created by Umar:



and also the re-worked labels said to have been created by LL:



3) The re-worked labels are presented on a sheet of paper headed "APPROVAL SHEET" dated 5 October 2009. This is after the relevant date and also after the date on which the labels are claimed to have been created. Also provided in the statement of case is a letter from a firm of trade mark attorneys (Sergeants) who filed a trade mark application (2531590) for Mr Ahmed in respect of the stylised words KARLO RUICHI; in this letter it is explained that they obtained a label from LL on 13 November 2009 from which they extracted the stylised words to make the trade mark application. I note that in the trade mark referred to by Serjeants, KARLO is spelt with a K but in the representations of the label detailed above, it is CARLO with a C.

4) Mr Atwal filed a counterstatement denying the claims. He considers Mr Ahmed's claim to lack detail in terms of which design is relied upon and, if it was the reworked design, there is insufficient detail as to whether it qualifies for protection under the law of copyright. Some of Mr Atwal's further comments can be summarised as:

- That his trade mark registration (and also a trade mark for the words MISS SEXY B) was previously owned by a Mr Hamad Hashmat; this is not factually correct as the subject trade mark registration has been owned only by Mr Atwal.
- That the design for the trade mark was created by "Arte Creative Design" after being briefed by Mr Hashmat in or around June 2002.
- That Mr Ahmed's first design bears no resemblance to the subject trade mark.
- That despite the claim that the re-worked design was created in 2006, the document provided, as I have already noted, is dated 5 October 2009.
- That the letter from Sergeants is consistent with the label having been created in October 2009.
- That Mr Ahmed has a history of infringing Mr Atwal's trade marks. Reference is made to a trade mark for MISS 25EXY which was filed by Mr Ahmed, who withdrew it following opposition from Mr Atwal. Reference is also made to letters sent to Mr Ahmed concerning alleged infringements of the MISS SEXY B trade mark and also concerning the use of the words MISS SASSY in the same get-up as Mr Atwal's design.

5) Both sides filed evidence. Neither side requested a hearing. Neither side filed written submissions in lieu of a hearing. I will bear in mind the submissions/arguments that have been provided as part of the statements of case/counterstatement and/or as part of/ or accompanying the evidence.

THE RELEVANT LAW

6) The claim is made under section 5(4)(b) of the Act which reads:

“(4) A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented-

(a)

(b) by virtue of an earlier right other than those referred to in subsections (1) to (3) or paragraph (a) above, in particular by virtue of the law of copyright, design right or registered designs.”

7) The earlier right relied upon is a copyright. Consequently, Mr Ahmed must, at the relevant date of 1 October 2009, have been in a position to prevent the use of Mr Atwal’s trade mark under the law of copyright.

8) Section 5(4)(b) is relevant in invalidation proceedings due to the provisions of section 47(2) of the Act which state:

“(2) The registration of a trade mark may be declared invalid on the ground-

(a) that there is an earlier trade mark in relation to which the conditions set out in section 5(1), (2) or (3) obtain, or

(b) that there is an earlier right in relation to which the condition set out in section 5(4) is satisfied, unless the proprietor of that earlier trade mark or other earlier right has consented to the registration.”

9) Consequently, the claim is predicated on section 47(2)(b). Only certain persons are entitled to make a claim under section 47(2)(b), as detailed in the Trade Marks (Relative Grounds) Order 2007 (“the Order”):

“5.—(1) Only the persons specified in paragraph (2) may make an application for a declaration of invalidity on the grounds in section 47(2) of the Trade Marks Act 1994 (relative grounds).

(2) Those persons are—

(a)

(b) in the case of an application on the ground in section 47(2)(b) of that Act, the proprietor of the earlier right.”

10) Section 5(4)(b) may be relied upon by someone who is entitled to prohibit the use of the registered trade mark (strictly speaking the requirement would be to show entitlement to bring a claim in the courts), which would usually be the owner of the right relied upon. The Order, though, limits the ability to make a claim in invalidation proceedings to the owner of the right. Mr Ahmed has not, in any event, pleaded any other basis on which he could bring an action in the Court other than being the owner of the copyright(s). The net effect is that Mr Ahmed must establish that he is the proprietor, the owner of the copyright in the claimed prior works he relies on.

11) A helpful summary of the main principles of copyright law was given by District Judge Clark in *Suzy Taylor v Alison Maguire* [2013] EWHC 3804 (IPEC):

I will set out the law in greater detail than usual to assist the unrepresented Defendant, who did not attend the hearing, in understanding it. Section 1 of the CDPA provides for copyright to subsist in original artistic works. An "original artistic work" is a work in which the author/artist has made an original contribution in creating it – for example by applying intellectual effort in its creation.

7. Artistic works are listed in s.4(1) CDPA and include "a graphic work... irrespective of its artistic quality". Graphic work is defined in 4(2) as including "(a) any painting, drawing, diagram map, chart or plan and (b) any engraving, etching, lithograph, woodcut or similar work...".

8. For an artistic work to be original it must have been produced as the result of independent skill and labour by the artist. The greater the level of originality in the work the higher the effective level of protection is, because it is the originality which is the subject of copyright protection. If the work includes elements which are not original to the artist then copying only those elements will not breach that artist's copyright in the work. It is only where there is copying of the originality of the artist that there can be infringement.

9. Where there is more than one step in the production of a work of art which results in the creation of more than one original artistic work at different stages, more than one copyright may exist. In the case of a woodcut, for example, a drawing or design may first be created on paper (falling under 4(2)(a)), which is then cut or carved into a block of wood to make a woodcut (falling within 4(2) (b)). There will be two copyrights in two separate works, the design and the block.

10. Section 16 of the CDPA provides that the owner of the copyright in a work has exclusive rights to do various things in relation to the work as a whole or in relation to "any substantial part" of it. Again, when considering whether acts complained of relate to "any substantial part" of a work, it is

that part of the work which is original which is relevant to substantiality. What is substantial is a question of fact and degree in the context of the originality of the author.

11. If something is an exact copy of the whole or a substantial part of an artistic work protected by copyright, it will be an infringement if there is no defence provided by one of the exceptions contained in the CDPA. If something is an inexact copy, for example if it merely resembles an artistic work protected by copyright, it may or may not be infringing. The issue is whether it is a mere idea which has been copied or whether it is the work itself – ie the expression of the author's idea – which has been copied. There is no copyright in an idea per se because a mere idea is not a "work" in which copyright can subsist.

12. The issue was considered by Lord Hoffman in *Designers Guild Ltd v Russell Williams (Textile) Ltd* [2001] FSR11 HL who said:

"Plainly there can be no copyright in an idea which is merely in the head, which has not been expressed in copyrightable form, as a literary, dramatic, musical or artistic work, but the distinction between ideas and expression cannot mean anything so trivial as that. On the other hand, every element in the expression of an artistic work (unless it got there by accident or compulsion) is the expression of an idea on the part of the author. It represents her choice to paint stripes rather than polka dots, flowers rather than tadpoles, use one colour and brush technique rather than another, and so on. The expression of these ideas is protected, both as a cumulative whole and also to the extent to which they form a "substantial part" of the work..."

Ladbroke (Football) Ltd v William Hill (Football) Ltd establishes that substantiality depends on quality rather than quantity... and there are numerous authorities which show that the "part" which is regarded as substantial can be a feature or combinations of features of the work, abstracted from it rather than forming a discrete part. That is what the judge found to be copied in this case...

Generally speaking, in cases of artistic copyright, the more abstract and simple the copied idea, the less likely it is to constitute a substantial part. Originality, in the sense of the contribution of the author's skill and labour, tends to lie in the detail with which the basic idea is presented."

13. Lord Hoffman went on to set out the correct approach for a court concerned with determining an action for infringement of artistic copyright, which is the approach I shall follow:

"The first step in an action for infringement of artistic copyright is to identify those features of the defendant's design which the plaintiff alleges to have been copied from the copyright work. The court undertakes a visual comparison of the two designs, noting the similarities and the differences. The purpose of the examination is not to see whether the overall appearance of the two designs is similar, but to judge whether the particular similarities relied on are sufficiently close, numerous or extensive to be more likely to be the result of copying than of coincidence. It is at this stage that similarities may be disregarded because they are too commonplace, unoriginal or consist of general ideas. If the plaintiff demonstrates sufficient similarity, not in the works as a whole but in the features which he alleges have been copied, and establishes that the defendant had prior access to the copyright work, the burden passes to the defendant to satisfy the judge that, despite the similarities, they did not result from copying..."

Once the judge has found that the defendant's design incorporates features taken from the copyright work, the question is whether what has been taken constitutes all or a substantial part of the copyright work. This is a matter of impression, for whether the part taken is substantial must be determined by its quality rather than its quantity. It depends upon its importance to the defendant's work... The pirated part is considered on its own... and its importance to the copyright work assessed. There is no need to look at the infringing work for this purpose."

12) The law of copyright in the UK is governed by the Copyright, Designs and Patents Act 1988 ("CDPA"). Works in which copyright can subsist are defined by section 1(1) of the CDPA:

"(1) Copyright is a property right which subsists in accordance with this Part in the following descriptions of work –

- (a) original literary, dramatic, musical or artistic works,
- (b) sound recordings, films [or broadcasts], and
- (c) the typographical arrangement of published editions."

13) Given the nature of the claimed works and the content of the pleadings, the only potential category of prior work would be of an original artistic work(s). Section 4 of the CDPA defines the nature of an artistic work:

"(1) In this Part "artistic work" means –

(a) a graphic work, photograph, sculpture or collage, irrespective of artistic quality,

(b) a work of architecture being a building or a model for a building, or

(c) a work of artistic craftsmanship.

(2) In this Part –

"building" includes any fixed structure, and a part of a building or fixed structure;

"graphic work" includes –

(a) any painting, drawing, diagram, map, chart or plan, and

(b) any engraving, etching, lithograph, woodcut or similar work; "photograph" means a recording of light or other radiation on any medium on which an image is produced or from which an image may by any means be produced, and which is not part of a film;

"sculpture" includes a cast or model made for purposes of sculpture." The definition of graphic work is not exhaustive, "it includes" the types of work listed."

14) Under UK law the standard of originality to qualify as an artistic work requires that the work must be the author's own intellectual creation¹. As will be seen, this is an important aspect of the proceedings before me. There are also qualification requirements for protection under the law of copyright, which, for artistic works, relates to the nationality of the author or the place of first publication.

15) In summary, the following must be established:

- i) That Mr Ahmed is the owner of the claimed prior works.
- ii) That the claimed prior works meet the qualification requirements of the CDPA.
- iii) That the claimed prior works are the result of the author's own intellectual creation.
- iv) That the notional use of Mr Atwal's trade mark would, at the relevant date, have been capable of prevention by Mr Ahmed, because, essentially,

¹ *SAS Institute Inc. v World Programming Limited* [2013] EWCA Civ 1482

the use of the trade mark would have constituted an infringement of the copyright in the claimed prior works.

THE EVIDENCE

16) Rather than go through the evidence witness statement by witness statement, I will instead break the evidence down by reference to the various issues it covers. For the record, evidence has been given by:

- i) Mr Mushtaq Ahmed, the applicant for invalidation.
- ii) Mr Ashraf Khan, the director of Leicester Labels Ltd.
- iii) Mr Gurveer Atwal, the son of the registered proprietor.

The nature of Mr Ahmed's business and the companies he operates

17) Mr Ahmed's evidence is that he opened a manufacturing company called Star Fashions in 1989. He states that in 2009 its name was changed to "Mission Rochdale Limited". Later evidence from him (a series of invoices issued by various businesses operated by Mr Ahmed) shows a progression of names from:

- i) Star Fashions, to,
- ii) Star Fashions (Rochdale) Ltd ("Rochdale) Ltd" being hand written), to,
- iii) Mission (Rochdale) Ltd.

18) From this information I infer that Star Fashions was initially a trading name of Mr Ahmed. A company was subsequently incorporated called Star Fashions (Rochdale) Limited which, from the publicly available information on the website of Companies House, was incorporated on 10 March 2002 and dissolved on 20 October 2009. Therefore, what Mr Ahmed describes as a change of name in 2009 was not a change of name, but the setting up of a new company, Mission (Rochdale) Ltd, which from the publicly available information on the website of Companies House, was incorporated on 7 January 2009. Mr Ahmed states that "his company" supplies ladies and children's fashion wear, namely blouses, skirts, dresses and trousers, and that he has used the brand name KARLO RUCCHI since 2000.

The creation of the first KARLO RUCCHI label(s)

19) Mr Ahmed states that he commissioned Umar to design and supply a swing label for his brand. Umar subsequently instructed "Elite Labels" to design and supply the labels. It is explained that Umar had been supplying Mr Ahmed with zips, buttons, threads etc and that they had a good relationship with suppliers of swing tags. Elite Labels supplied the labels to Umar who then forwarded them to Mr Ahmed. This is why, it is stated, that Umar is labeled as the customer in Exhibit MA1, a document which depicts what I have already set out as the original label; the document is headed with the company details of Elite Labels

(its full name is Elite Labels (Leicester) Ltd, hereafter “Elite”), and, as Mr Ahmed states, the customer is identified as Umar. The document is not dated. The exact date of creation is not clear, but from the totality of the evidence, I infer that the label was commissioned and created sometime in 2000.

20) Mr Ahmed describes four types of labels supplied to him between 2000-2004 (a swing label, a sticker and two woven labels). Exhibit MA2 contains a “to whom it may concern” letter dated 5 September 2011 from Umar corroborating this information. The letter writer states that he supplied the labels to Mushtaq Ahmed, trading as Star Fashions. Exhibit MA3 contains a series of invoices dated between 2000 and 2004 between Umar and Star Fashions (none of the invoices refer to Star Fashions (Rochdale) Ltd). The invoices include various items including Karlo Rucci labels. Mr Ahmed states that he had an excess supply of labels, so he kept using them until March 2008.

The creation of the re-designed KARLO/CARLO RUCCHI label(s)

21) Mr Ahmed states that in 2008 he commissioned LL to re-design the label. His brief to LL was to update the existing design, but to maintain its colours. Examples of the current labels were provided to LL. He gave instructions that the new design should be built on the existing one but “given a fresh up to date look with an edge”. He states that the new design consisted of the same colours, but the graphics had changed to an echo font and the swing tags changed to a curved shape. An example is provided in Exhibit MA4; it matches the image provided in the statement of case depicted earlier, albeit the brand name depicted is KARLO RUCCHI not CARLO RUCCHI as per the label filed with the statement of case. This document is not dated, nor does it provide any further detail such as its creator. Mr Ahmed states that he was pleased with the design so he commissioned LL to supply the labels. He states that LL has been supplying him since April 2008. Exhibit MA5 is a letter headed “for the attention of Mr R-T-R”; the dashes represent letters that I cannot ascertain. It is headed “Dear Sirs” and confirms that Leicester Labels Ltd has been supplying KARLO RUCCHI labels to Mission (Rochdale) Ltd since April 2008. This is somewhat incongruous as the company was not incorporated until 2009, therefore, prior to January 2009 LL must have been supplying Star Fashions (Rochdale) Ltd; this is corroborated by a series of invoices from April 2008 to November 2009 in which Star Fashions (Rochdale) Ltd were initially invoiced with later invoices being issued to Mission (Rochdale) Ltd. Some of the early invoices refer to CARLO RUCCHI labels, rather than KARLO RUCCHI. Mr Ahmed explains that this was an error by LL which he subsequently addressed. It is not clear if this was an error in invoicing or production. Some labels must have been produced with the incorrect name given that Mr Ahmed provided one as part of his statement of case.

22) A somewhat different version of events is given by Mr Khan, a director of Leicester Labels Limited, the very person that Mr Ahmed refers to in his statement of case as being the “re-worker” of the labels. He was approached by

Mr Atwal's representative to give his evidence. His evidence is that the design brief for the label his company produced for Mr Ahmed came entirely from Mr Ahmed. He states:

"The design brief for the swing label came entirely from [Mr Ahmed]. There was no input from [Leicester Labels Limited's] design team or from any individual designer within [Leicester Labels Limited]. [Mr Ahmed] gave [Leicester Labels Limited] the design of the swing tag labels and asked the company to manufacture them for him."

Sales of KARLO RUCCHI goods

23) Mr Ahmed provides a series of invoices issued either by Star Fashions, Star Fashions (Rochdale) Ltd or Mission (Rochdale) Ltd. They date between 2001 and 2011 and are addressed to a number of companies that Mr Ahmed states are wholesalers. The invoices list various garments, but the writing is not sufficiently clear to see whether the words KARLO RUCCHI appear in any of them. They are put forward as evidence of Mr Ahmed's (or his companies) sales of goods under his KARLO RUCCHI label.

Mr Ahmed's trade mark(s)

24) Mr Ahmed states that in 2005 "the brand KARLO RUCCHI" was registered under number 2401139. The registration certificate is provided in Exhibit MA7. It is a word only mark. Mr Ahmed explains that he was under the misapprehension that the trade mark registration protected the whole of the design. He then refers to the logo KARLO RUCCHI being registered on 13 November 2009 and he provides a copy of a letter from Sergeants (as referred to earlier) which indicates that they took the stylised words from one of the labels provided to them by LL. He highlights, though, that the label has been used since April 2008 when it was created by LL.

The creation of the subject trade mark

25) Mr Atwal's evidence contains information about how the subject trade mark was created. By way of context, reference is made to a Mr Hamad Hasmat as a previous owner of the MISS SEXY B trade mark. Whilst Mr Hashmat has never owned the trade mark registration the subject of these proceedings (Mr Atwal filed the application for registration and has been its only owner) he did own a trade mark for the words MISS SEXY B; it is now owned by Mr Atwal. A copy of the Form TM16 filed in September 2009 used to record the change of ownership from Mr Hashmat to Mr Atwal is provided. Both parties to the assignment signed this document. This, of course, does not represent the deed of assignment itself.

26) The relevance of Mr Hashmat to these proceedings becomes apparent in the provision (in Mr Atwal's evidence) of a written statement (although not a witness

statement) from Mr Jean Philippe Carer. Mr Carer is the manager of Arte Creative Design. He states that Mr Hashmat of “Cosywear” briefed him in June 2002 to design a new swing and neck label for his MISS SEXY B trade mark. He was briefed that red was to be the main colour. Mr Carer states that he created a curved shape swing ticket consisting of figurative text for the word “MISS SEXY B” with a repeated visual echo in the background. He provides a copy which matches the registered trade mark. Once approved, Mr Hashmat placed a number of orders for such labels and provides an invoice from October 2004 supporting such sales.

27) Mr Ahmed comments on this in his evidence. He simply denies it, but gives no reason for his denial. He also notes that there is no evidence of the actual assignment from Mr Hashmat to Mr Atwal.

Mr Ahmed’s complaint

28) Mr Ahmed states that in October 2009 one of his customers informed him that Mr Atwal was using a similar swing tag to him. He states that he contacted “the trade mark office” (presumably the Intellectual Property Office) who informed him that his registration was for the brand KARLO RUCCHI and not the whole of the design. He was surprised at this because he thought the registration was for the whole of the design including the graphics, the design, the shape, the size and the colours. Mr Ahmed considers that the trade mark application was made in bad faith as it copies the design of the swing tags that he commissioned from LL; no ground under section 3(6) has, though, been pleaded. Mr Ahmed considers that he owns the copyright and design right (no pleading under design right law was, though, made) to the swing tags given that he commissioned it and that it was put into the public domain when he supplied garments to clothing wholesalers prior to Mr Atwal’s trade mark being registered. He states that it cannot be a co-incidence that the labels are very similar containing the same colours, curved shape, echo background and French flag at the bottom. He states that Mr Atwal must have copied his design.

Previous correspondence between the parties

29) Mr Ahmed refers to correspondence between the parties as follows:

- i) A letter from Mr Atwal’s representatives alleging that Mr Ahmed is infringing the subject trade mark.
- ii) A letter from Mr Ahmed’s representative to Mr Atwal denying the above claims on the basis that Mr Ahmed had been using the design since before Mr Atwal’s trade mark was registered and a counter allegation that it is Mr Atwal who has been copying. A request for evidence of Mr Atwal’s proprietary rights was made.

30) Mr Atwal's evidence also introduces into the proceedings various exchanges of correspondence between the parties' legal representatives, a feel for which can be gleaned from the preceding paragraph. I do not consider it necessary to summarise this evidence. It is essentially claim and counterclaim, argument and counter argument. It is not evidence of fact and it does not assist me in the matters that need to be determined.

FINDINGS IN RELATION TO THE INITIAL LABELS

31) Mr Ahmed refers to two sets of labels that he commissioned. It is not altogether clear if he considers the subject trade mark to breach copyright in both, or only just the later one(s). At paragraph 28 I noted Mr Ahmed's complaint (in his evidence) which refers to alleged copying of: colours, curved shape, echo background and French flag at the bottom. This suggests that Mr Ahmed's claim is really about the re-worked labels not the initial ones. However, for sake of completeness, I will give some brief views in respect of the initial labels. The competing works are set out below:



32) In his counterstatement, Mr Atwal states that the initial labels bear no resemblance to the subject trade mark. I agree that any claim that a substantial part of the earlier work has been copied is bound to fail. In terms of what is claimed to have been copied, this is limited to the colour (which is actually not quite the same) and the French flag at the bottom (which is actually a different shape). In isolation or totality, this is simply insufficient. **The claim in relation to the initial labels must fail.**

FINDINGS IN RELATION TO THE RE-WORKED LABELS

33) There is conflicting evidence in relation to the creator of the re-worked labels. Mr Ahmed's position is that he commissioned LL to create the re-worked labels – he referred specifically in his statement of case to Mr Khan being the

creator. However, the person Mr Ahmed claims to be the creator has provided direct evidence to the effect that neither he nor anyone else in LL brought any artistic input to the process - all LL did was to manufacture labels to a design provided by Mr Ahmed. Mr Ahmed did not respond to Mr Khan's evidence. Mr Khan has no apparent axe to grind in these proceedings. I come to the view that Mr Khan's evidence is to be believed. This leaves me in a position of not knowing who created the re-worked labels nor the circumstances of such creation. This creates all manner of difficulties both in terms of the necessity for Mr Ahmed to own the copyright, and also in terms of whether the re-worked labels were the result of the (unknown) author's own intellectual creation. I will take these two difficulties in turn.

34) In terms of ownership, Mr Ahmed makes his case upon a false assumption. He has referred on many occasions to him owning the copyright because he commissioned it. However, the position in relation to the first ownership of a copyright work is set out in section 11 of the CDPA as follows:

“11 First ownership of copyright

(1) The author of a work is the first owner of any copyright in it, subject to the following provisions.

(2) Where a literary, dramatic, musical or artistic work, or a film, is made by an employee in the course of his employment, his employer is the first owner of any copyright in the work subject to any agreement to the contrary.

(3) This section does not apply to Crown copyright or Parliamentary copyright (see section 163 and 165) or to copyright which subsists by virtue of section 168 (copyright of certain international organisations).”

35) In view of the above, the first legal owner of any copyright subsisting in the re-worked labels would have been the author of the work, the person who created it. It is not the commissioner of the work. I have already found that Mr Khan (or anyone else in LL) did not create the work and, thus, he was not the first owner. If Mr Ahmed provided Mr Khan with the design to manufacture the labels from, it does not follow that Mr Ahmed created it. There is, therefore, nothing to support the conclusion that Mr Ahmed was the first owner.

36) In terms of the ownership issue, I am aware that a distinction can be drawn between the legal owner of copyright and an equitable owner. This can be seen in *R. Griggs Group Ltd & Ors v Evans & Ors* [2003] EWHC 2914 (Ch) (02 December 2003). From this case, it is clear that in certain circumstances a commissioner may be regarded as an equitable owner of a commissioned work. Such circumstances would include, in my view, a company (or person) commissioning the creation (including the artistic design) of labels to be used by that company in the course of trade. However, in circumstances where it has not

been established who created the work and in what circumstances, I have difficulty in making such a finding.

37) A related difficulty lies in establishing that the re-worked labels are the result of the (unknown) author's own intellectual creation. When one does not know the circumstances in which the re-worked labels were created, and when there is evidence (albeit hearsay evidence) from Mr Carer that he created the subject trade mark in 2002, six years before the re-worked labels, then a question mark is placed upon the originality of the re-worked labels. Furthermore, I accept Mr Carer's evidence that he created the subject trade mark in 2002, therefore, Mr Atwal is most unlikely to have copied any work created by, or for, Mr Ahmed. **For all these reasons, my finding is that the claim based upon the re-worked labels must fail.** That is even before dealing with the qualification requirements of the CDPA which would have given a further difficulty, at least on the basis of any claim that the work would qualify with reference to the nationality of its author.

38) The application for invalidation fails.

Costs

39) The proprietor has been successful and is entitled to a contribution towards his costs. I hereby order Mr Ahmed to pay Mr Atwal the sum of £1300. The sum is calculated as follows:

Preparing a statement and considering the other side's statement - £300
Considering and filing evidence - £1000

40) The above sum should be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful

Dated this 23rd day of January 2014

Oliver Morris
For the Registrar,
The Comptroller-General