

Elwood Clothing Pty Ltd v Cotton On Clothing Pty Ltd [2008] FCAFC 197

Joel Parsons, Senior Associate, Bird & Bird, revisits the Elwood v Cotton On decision for our special fashion edition.

The decision in *Elwood* provides guidance as to the preferable approach when ascertaining the scope of a protected work, and the applicable test for determining infringement, in the context of visual designs on clothing. The decision confirms an artistic work in such circumstances includes various visual aspects such as the layout, selection, arrangement, of the visual elements in the design.

Elwood, a designer and manufacturer of clothing and accessories, produced a t-shirt called the “NewDeal” t-shirt, as well as the “Vintage Sport Swing Tag”, a design applied to swing tags or labels used by Elwood in respect of its garments.



Elwood NewDeal T-Shirt



Elwood alleged that Cotton On had infringed copyright in the NewDeal t-shirt and the Vintage Sport Swing Tag. The designs of both the original

work, and allegedly infringing items, comprised of various graphical elements including short phrases and numbers.



Cotton On Tijuana, Moscow and Kingston T-Shirts

Cotton On employees who designed the allegedly infringing items conceded they had been directed to use the Elwood products as a reference for new products. Cotton On also conceded that Elwood's designs were "original", however, whether or not Cotton On had taken a substantial part of Elwood's work, remained in issue. Cotton On also argued that Elwood's designs were literary, rather than artistic works.

At first instance the Court ruled against Elwood. The Court found that Elwood's designs were artistic works, but the "V-shaped" pattern of text and the layout of the NewDeal design, comprised part of the work's underlying idea, rather than the expression of the idea, and so to the extent Cotton On copied these aspects of the design, there was no infringement of the copyright in Elwood's works. On appeal, the Full Court agreed that Elwood's works were artistic works because they were of an artistic quality, consisting of layout, form, positioning and shaping and the interrelationship of the various visual elements. Any meaning that could arguably be conveyed by reading the text or numerals in those designs was so obscure and subservient to the artistic aspect, that they did not amount to a literary work.

However, the Full Court held that the relevant "works" in the circumstances, comprised the whole of each design "...enclosed by a notional circumferential boundary which encloses all of the various elements, and...the vacant space between them". Accordingly, the layout of the NewDeal design and other stylistic elements giving rise to the "look and feel", were matters of expression rather than the idea or concept. Even though the words and numbers in Cotton On's designs were different, by taking the layout and other relevant visual elements of Elwood's designs, Cotton On took a substantial part of the copyright work. Cotton On's design was found to have infringed the Vintage Sport Swing Tag on the same basis.



Elwood Vintage Sport Swing Tag



Cotton On Swing Tag