



## branding insight

may 2008

### De Longhi caught out by environmentally friendly claims

On the back of the release by the Australian Competition and Consumer Commission (ACCC) of an issues paper entitled **Green marketing and the Trade Practices Act**, an educational guide to business about their obligations under the Trade Practices Act (TPA), the ACCC has pursued De Longhi Australia Pty Ltd (**De Longhi**) over misleading environmental claims in its advertising of portable cooling units.

De Longhi is an importer, distributor and supplier of electrical appliances in the areas of heating, air-conditioning and air-treatment, food preparation and cooking, and house-cleaning and ironing.

The ACCC's concerns related to environmental claims made in relation to a range of De Longhi's portable cooling units that use harmful greenhouse gases, and an ECO model cooler that uses a low impact global warming gas (R290). The ACCC believed that the environmental claims gave the impression that the portable coolers and their component gases were "environmentally friendly."

De Longhi has given the ACCC court-enforceable undertakings that it will refrain from making misleading and unqualified environmental claims in the future about its products. Further it has published a corrective notice in the March edition of the Appliance Retailer trade magazine, and agreed to implement a trade practices compliance program. In relation to the ECO model, De Longhi has agreed to amend its advertising to specify that R290 is the most environmentally friendly refrigerant gas available at present for use in domestic portable air conditioners.

The ACCC's action in this matter confirms that it is serious that false 'green' claims in the marketing of goods and services will not be accepted.

### Red Bull's domain name battle

The World Intellectual Property Organisation (WIPO) recently ruled that the owner of the domain name [redbullsucks.com](http://redbullsucks.com), Carl Gamel of Kentucky in the United States, had violated Red Bull's trade mark rights in registering and using the domain name. Gamel has been ordered to transfer the domain name to Red Bull.

The ruling was made under the WIPO's uniform domain name dispute resolution policy (UDRP). The policy is aimed at protecting trade mark holders against illegitimate and bad faith use of domain names which are identical or confusingly similar to a trade mark.

Red Bull claimed that 'sucks' was a generic term and therefore [redbullsucks.com](http://redbullsucks.com) was confusingly similar to Red Bull's trade mark.

However, the WIPO panel took a broader approach to 'confusingly similar', following the interpretation adopted in the previous case of *Wal-Mart Stores v Richard MacLeod*. In that case the panel concluded that "a domain name can be considered

'confusingly similar' to a trade mark for the purposes of the UDRP when the domain name includes the trade mark, or a confusingly similar approximation, regardless of the other terms in the domain name." The case also noted that it is not an issue of confusion over source (given that Red Bull would not own a Red Bull sucks website) but whether there is "confusing similarity" when the trade mark and the domain name are compared.

Nevertheless, the panel noted that where a domain name owner holds a legitimate interest in the domain, and is using the disputed domain name as a legitimate protest site, then they would be protected under the Policy. Gamel argued in this case that he was using the domain name to criticise Red Bull. However, it was clear that the website corresponding with the domain name was not a protest site, but was being used to promote an alternative energy drink in competition with Red Bull, and was therefore registered in bad faith.

This decision further highlights the dangers facing cybersquatters and bad faith users of domain names.

### Snack right, snack wrong

This month the Federal Court has declared that Arnott's has breached the Trade Practices Act (TPA) by engaging in conduct likely to be false, misleading or deceptive in relation to the packaging and labelling of a number of "Snack Right" products.

The Australian Competition and Consumer Commission (ACCC) commenced action in the Federal Court in November last year against Arnott's Biscuits Limited (**Arnott's**) alleging misleading or deceptive conduct in the

packaging and labelling of the Snack Right Fruit Pillow and Fruit Slice biscuits.

The ACCC alleged that the labelling of the products gave consumers the impression that the fillings consisted of significant amounts of the fruits pictured on the packets, which was not in fact the case.

For example, the packaging of Snack Right's Apple and Blackberry Fruit Pillow biscuit was described as being "crammed with apples, blackberries and sultanas".

However the biscuit contains 1.7% blackberry concentrate, 38.8% sultanas, 12.9% apple concentrate, and 8.6% dried apple concentrate.

The ACCC argued that if berries and apples are on the packs then they should make up "a significant amount" of the ingredients, particularly as the biscuit is being described as being "crammed" with the ingredients.

Arnott's has given undertakings to the court that it will:

- amend the packaging of the Snack

Right products;

- refrain from similar conduct in the future; and
- publish a corrective notice on its website [www.arnotts.com.au](http://www.arnotts.com.au).

Arnott's has further agreed to review its trade practices law compliance program and agreed to contribute to the ACCC's legal costs.

The ACCC Chairman, Mr Graeme Samuel, stated that "this outcome is a

strong reminder to the food and beverage industry and those responsible for food labelling that the overall impression is important." Mr Samuel also emphasised that the findings should highlight to businesses that they need to "ensure that the key principles of misleading and deceptive conduct are considered during the design stage of product packaging. In particular thought must be given to how a consumer may interpret the labelling representations."

## ***Elwood Clothing v Cotton On Clothing***

The Federal Court recently delivered the judgment in the case of *Elwood Clothing v Cotton On Clothing* concerning copyright in computer designed drawings.

Elwood Clothing (**Elwood**) is a designer and manufacturer of clothing and accessories. Elwood claimed that Cotton On Clothing (**Cotton On**) had infringed copyright under the Copyright Act (the **Act**) in 2 computer designed drawings, the first called "NewDeal" and the second "Vintage Sport Swing Tag" (the **Design Drawings**).

### **Elwood NewDeal T-Shirt**



### **Elwood Vintage Sport Swing Tag**



The Court had to consider whether the arrangements of principally literary materials such as the Design Drawings were capable of being "artistic works" within the meaning of the Act.

The Court concluded that whether a work will be recognised as an artistic work such

as a drawing is highly fact specific.

The Court believed that the Design Drawings, in whole or in individual components, were designed to convey a visual look and feel, rather than to be read as text. It was not accepted that the Design Drawings conveyed a coherent message as distinct from a pictorial effect. The judge held that the Design Drawings performed none of the functions that one would expect to find in a literary testing. They did not tell a story, give instructions, describe a scene, or convey information about the product on which they were featured.

The Court then considered whether the Design Drawings displayed sufficient originality for the purposes of protection as "original artistic works."

The Act does not require any particular level of novelty or creativity, but it is still necessary to show that there has been the application of some minimum level of skill and effort exerted in the making of the form in which the particular work is expressed. Further, copyright may subsist in a work that comprises original and non-original elements.

The fact that Elwood had expended several weeks and significant effort in creating the Design Drawings helped establish that skill and labour was expended in their creation. The Design Drawings were considered to have the requisite originality. However, it remained

for the court to determine the scope of protection.

Copyright protects forms of expression, not underlying concepts or ideas.

The judge accepted that the underlying concept of the NewDeal Design (as depicted above) was that of a central logo surrounded by a V-shaped pattern of arched text, with the distinctive feature of numbers at the shoulder level.

Therefore Elwood could not claim copyright over all designs featuring the layout described. The judge stated that "the bare fact that there is similarity of general layout does not establish infringement".

Further, the judge did not accept that there could be copyright over the general layout of a swing tag because:

- what was described as potentially a stylised logo and text running horizontally and vertically (as depicted above) was an unprotected idea; and
- the form of the Vintage Sport Swing Tag is quite common to the garment industry.

Lastly the Court looked at whether the allegedly infringing items being reproduced represented a substantial part of the Design Drawings.

The principal elements making up the compositions include the font and size of the text, the degree of arc in the text, the

relationship between the sizes of the elements, the precise size of the central logo and the ordering of the elements.

Cotton On relied on the following dissimilarities to show that a substantial part of the design had not been taken:

- the words used in Cotton On's t-shirts;
- the different numbers: 68 (for TIJUANA), 62 (for MOSCOW), 89 (for RED LIONS);
- the distinct central devices: a profile of a bull, a lion, stars; and
- the differences in the fonts and stylings of the individual letters, words and numbers.

#### Cotton On Tijuana T-Shirt



#### Cotton On Kingston and Moscow T-Shirts



In relation to the Vintage Sport Swing Tag, Cotton On submitted that the label of Cotton On differs in the following respects:

- the words on each line;
- the fonts and font sizes used;
- the positioning and arrangement of the

- lines of text;
- the colours used for each line; and
- the devices used: "96 EST" in a single small circle on the Elwood tags, compared with a lion within a double circle on Cotton On's label.

#### Cotton On Swing Tag



The courts have over time considered a number of factors in determining whether the infringing act was done in relation to a substantial part of the work including:

- the importance of the part in relation to the work as a whole (quality over quantity); and
- the quality of the skill or labour in producing the original work.

Cotton On in the case of the NewDeal print was found to have adapted the idea of the V shaped graphic and the placement of the text and symbols within that V shaped graphic, but **not** to have copied the text or the symbols. Cotton On's use of the **idea** did not constitute reproduction of a substantial part of the work and thus did not infringe copyright.

In relation to the Vintage Sport Swing Tag, the judge held that what was taken was just one part of a series of parts that constitute the copyright work, and just one idea, not a substantial part of the work. Therefore, again, there was no copyright infringement.

In conclusion, while the Court found that the t-shirt and swing tag designs, featuring text, were "drawings" for copyright purposes, these were not infringed when a rival company merely had regard to the overall design, shape and layout, as they were ideas and not a "substantial part" of the drawings.

## key contacts

### melbourne

Dan Pearce  
Partner  
t: +61 (0)3 9321 9840  
e: [dan.pearce@holdingredlich.com.au](mailto:dan.pearce@holdingredlich.com.au)

### sydney

Dianne Beer  
Special Counsel  
t: +61 (0)2 8083 0425  
e: [dianne.beer@holdingredlich.com.au](mailto:dianne.beer@holdingredlich.com.au)

### brisbane

Paul Venus  
Partner  
t: +61 (0)7 3135 0613  
e: [paul.venus@holdingredlich.com.au](mailto:paul.venus@holdingredlich.com.au)

#### disclaimer

The information in this publication is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavour to provide accurate and timely information, we do not guarantee that the information in this newsletter is accurate at the date it is received or that it will continue to be accurate in the future.

#### melbourne

350 William Street, Melbourne VIC 3000  
t +61 (0)3 9321 9999 f +61 (0)3 9321 9900

[www.holdingredlich.com.au](http://www.holdingredlich.com.au)

#### sydney

Level 65, MLC Centre, 19 Martin Place, Sydney NSW 2000  
t +61 (0)2 8083 0388 f +61 (0)2 8083 0399

#### brisbane

Level 1, 300 Queen Street, Brisbane QLD 4000  
t +61 (0)7 3135 0500 f +61 (0)7 3135 0599