

COPYCAT—COPYRIGHT?

Dibbs Abbott Stillman,
Brisbane

Copyright infringement is a simple action if direct evidence can be produced to prove an allegation. But what happens when no direct evidence exists?

Dixon Projects Pty Ltd v Hallmark Homes Pty Ltd [2004] FCA 118 (20 February 2004) highlights what is needed to prove copyright infringement.

FACTS

Dixon alleged its intellectual property was infringed when Hallmark produced its 'Montego' house. Dixon asserted that the Montego design reproduced the whole or a substantial part of its 'Grand Vista' house design.

In mid-2000, Hallmark was looking to expand its business into the Sunshine Coast. One of Hallmark's directors inspected the Sunshine Coast for land availability, and examined the lots and sizes of the various homes in surrounding estates. The director sketched new design ideas and then employed trained draftsmen to develop them into working designs.

In 2001, Hallmark employed Shawn Haswell as its new manager for the Sunshine Coast. Prior to joining Hallmark, Haswell was employed by Dixon; and since 1997 had worked for Dixon on the Sunshine Coast as construction manager.

While on a tour of the Hallmark display home, Haswell commented that houses of the size on display were usually built on a canal or golf course and as such they needed an open area with glass at the back. The plan was edited accordingly, with the

final floor plan design drafted by Gerard Walker, an employee of Hallmark. Ultimately, a house was built on the Sunshine Coast in accordance with these plans.

Dixon constructed similar display homes in the same area just months after construction of the Hallmark house had commenced.

DECISION—COPYRIGHT OWNERSHIP

Who owns the copyright? Sweeny, the architect employed by Dixon, signed an employment contract in 1995. Sweeny drew an original sketch in December 1996 called the 'Silver Palm 97'; this design was later renamed the 'Grand Vista'. Keiler, another employee of Dixon, drew the floor plan. At the time the original sketch was drawn, Sweeny was a director and employee of a company named Primal Pty Ltd.

Primal was the trustee of the trust that carried on the business name of 'Ray Sweeny Architect'. Dixon closed its drawing section in April 1997 and thereafter obtained its architectural drawing services from Primal.

Hallmark had argued that Primal owned the original sketch. The court held the work undertaken by Mr Sweeny was done under the terms of his employment agreement with Dixon. The court also held an employee of Dixon prepared the floor plan, and accordingly Dixon owned the copyright in the design.

DECISION—COPYRIGHT INFRINGEMENT

The court upheld the test for reproduction as defined in *SW Hart & Co Pty Ltd v Edwards Hot Water Systems*:

The notion of reproduction, for the purposes of copyright law, involves two elements—resemblance to, and actual use of, the copyright work, or, to adopt the words which appear

in the judgement of Willmer LJ in *Francis Day & Hunter Ltd v Bron*... 'a sufficient degree of objective similarity between two works' and 'some casual connection between the plaintiffs' and the defendants' work. Lord Reid said ... 'Broadly reproduction means copying, and does not include cases where an author or compiler produces a substantially similar result by independent work without copying. And, if he does copy, the question whether he has copied a substantial part depends much more on the quality of what he has taken...

Dixon made no allegation of direct copying from a floor plan; only that the two plans were similar, in particular the similarity between the format and the treatment of the entry axis.

In this case the court noted clear and corroborated evidence that Hallmark had taken the existing display house floor plan, and edited that plan with red pen according to Haswell's comments. Neither the Hallmark director nor Walker had inspected Dixon's floor plan or display house.

It was held that Hallmark had not infringed Dixon's copyright. The similarities that existed between the two plans were not so striking as to preclude the possibility that Hallmark had independently arrived at a similar result. The court commented that in its built form, the living room of Hallmark's display house was totally different from Dixon's.

Courts are reluctant to find in a breach of copyright without direct evidence or striking similarities.

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