



IP ITeasers Post 021:

What is art? According to the judiciary...

Recommended pre-viewing: <https://bit.ly/3MaVGtD>

"The appeal centres round what seems to me to be a novel and startling proposition, that there can be copyright in unusual facial make-up."

Lawton LJ

This week we consider the views of three judges, startled in varying degrees by the requirement to consider copyright subsistence in "works" related to make-up.

Merchandising Corporation of America Inc. and Others v Harpbond Ltd. and Others [1983] F.S.R. 32 concerns the famous Prince Charming make up worn by Adam Ant. The works considered for copyright protection were a sketch of the make-up design, photographs of Adam Ant in make-up and the make-up itself.

Whilst the language of the judgments show how far social and artistic expectations have moved on, some of the observations remain astute. It can be difficult to explain to clients why similarity does not always equate to copying. Walton J summed up why similarities in a photograph altered to super-impose the make-up onto a "clean" Adam Ant was not an infringement of the make-up design sketch as follows:

"There are, of course, similarities. If you are going to dress up as a Hottentot and be photographed in that state and somebody is going to alter a photograph of you to

make you look a Hottentot, naturally the two are going to bear quite a considerable resemblance, but there the matter ends."

On appeal, the focus was on the make-up itself which was not considered to be a "painting" within the meaning of the Copyright Act 1956 because it did not comprise a "surface" and was impermanent.

37 years later, ephemerality did not trouble Deputy Master Linwood who was "in no doubt" that copyright could subsist in designs which were embossed into make-up powders in *Islestarr Holdings Ltd v Aldi Stores Ltd* [2020] E.C.D.R. 20. It is difficult to reconcile this decision with *Merchandising Corporation* (which was cited to the Deputy Master). A full reading of Walton J and Lawton LJ's judgments show just how bizarre they found the consideration of the make-up design, both culturally and legally. It appears there was also no evidence relied upon, for example, of non-Western body art nor arguments that the fixation requirement could be satisfied through photography. Presented with such evidence, it is difficult to envisage the reasoning in *Merchandising Corporation* being applied to make-up today.