

PARTIES: BETWEEN:
HILTRUD GREEN Plaintiff
AND:
ROBERT ANDERSON Defendant

TITLE OF COURT: In the Supreme Court of the Northern Territory of Australia

JURISDICTION: Supreme Court of the Northern Territory of Australia

FILE NO: 125 of 1995

DELIVERED: 5 July 1996

HEARING DATES: 12-14/2/96, 20-21/2/96, 4-5/3/96

JUDGMENT OF: MILDREN J

CATCHWORDS:

Copyright - Form of the work is protected not the idea expressed in the form - style not protected by law of copyright - reproduction involves 2 elements, substantial use of the form and there must be a finding of fact that work is copied - originality of works - resemblance of the works

Legislation

Copyright Act 1968 (Cth), s115(4), s10(1)

Cases

Ancher, Mortlock, Murray and Woolley Pty Ltd and Ors v Hooker Homes Pty Ltd (1971) 2 NSWLR 278 at 284 approved
SW Hart & Co Pty Ltd v Edwards Hot Water Systems (1984-5) 159 CLR 466 approved
Computer Edge Pty Ltd v Apple Computer Inc (1986) 161 CLR 171,209 approved
Cuisenaire v Reed [1963] VR 719 approved
Dixon Investments Pty Ltd v Hall (1990) 18 IPR 490 discussed

Texts

Copinger and Skone James on Copyright, 13th Edition (1991)
346-0482 COPI

REPRESENTATION:

Counsel:

Applicant:	Mr Waters
Respondent:	Mr Wyvill

Solicitor:

Applicant:	Mildrens
Respondent:	Barr Moore and Co

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IN THE SUPREME COURT OF
THE NORTHERN TERRITORY
OF AUSTRALIA

No. 125 of 1995
(9513227)

BETWEEN:

HILTRUD GREEN

Plaintiff

AND:

ROBERT ANDERSON

Defendant

CORAM: **MILDREN J**

REASONS FOR JUDGEMENT

(Delivered 5 July 1996)

This is an action for alleged breach of copyright.

The plaintiff is a potter and sculptor. She claims to be the author of original artistic works, namely ceramic sculptures known as 'dome shaped lanterns inspired by houses of worship'.

It is claimed that the sculptures are in the shape of onion shaped domes, like the domes of Orthodox, Christian and Islamic houses of worship, have oval shaped cuts in them, often have almond shaped cuts stylised into patterns of leaves reaching from a branch, and sometimes topped by an elongated stem like a spire from a European castle. The plaintiff claims to be the owner of copyright in the 'dome shaped lanterns inspired by houses of worship' and that since 1993, the defendant has continuously infringed her copyright. She seeks damages or an account of profits, additional damages pursuant to s115(4) of the *Copyright Act 1968* (Commonwealth), interest, injunctive relief and costs.

Mr Wyvill, counsel for the defendant, in his final address, conceded that the plaintiff's work is original, and that her lanterns are works of 'artistic craftsmanship' and therefore 'artistic work' as defined by s10(1) of the *Copyright Act*. This concession was subject to the qualification that the plaintiff had established that she had not copied others' work and, in particular, the defendant's work. In other words, the defendant was not suggesting that the Act could not apply to her work. There was no concession that the plaintiff was the owner of the copyright in any of the lanterns.

The main thrust of the defendant's case was that he was an artist and a potter, and that his lanterns were his own creations and were not copies of the plaintiff's work. To the extent that there was a resemblance between the works of the plaintiff and the defendant, the resemblance was one of style; as the plaintiff held no copyright in the style, no action for breach of copyright could lie.

With the exception of the plaintiff's lanterns Exts P2, P4 and P10 about which there is a dispute about originality, there is no doubt that the plaintiff has established that the rest of her lanterns are her own original works. In view of Mr Wyvill's concession, it follows that the defendant has conceded that these lanterns are works of 'artistic craftsmanship', as defined by the Act, and it is not necessary to me to decide that issue for myself. Nevertheless it must be borne in mind that what follows is that the works are not merely works of craftsmanship, but that they are *artistic*, and whether or not they are properly described as 'sculptures', they are capable of being the subject of copyright under the Act.

The manner in which the plaintiff pleaded her case is capable of giving the impression that her numerous lanterns are in fact one whole work of which the several lanterns are but parts. In the end, I do not think the plaintiff suggested this. The

exact nature of what the plaintiff claimed copyright in was not clearly expressed. What was suggested, as I understood the plaintiff's case, was that the form or combination of the elements which comprised each lantern was original; that the several lanterns were parts of a series; that the lanterns were so distinctive in style as to be easily recognisable as her work; that the defendant's work so resembled the plaintiff, that the inference must be drawn that he had copied it. The plaintiff also put her case on the basis that each lantern was unique and of a copying by the defendant of individual lanterns. It is necessary to isolate what it is that the plaintiff has copyright in, and what is not capable of being the subject of copyright.

The Form of the Work is Protected Not the Idea Expressed in the Form

Copinger and Skone James on Copyright, 13th Edition (1991), states, at para 8-8:

"A further preliminary observation is that it is essential to have in mind, in approaching any question of infringement, the nature of the thing protected by copyright law. What is protected is not original thought or information, but the original expression of thought or information in some concrete form. Consequently, it is only an infringement if the defendant has made an unlawful use of the form in which the thought or information is expressed. The defendant must, to be liable, have made a substantial use of this form; he is not liable if he has taken from the work the essential idea, however original, and expressed the idea in his own form, or used the idea for his own purposes. Protection of this kind can only be given, if at all, under the patent law, or by involving the principles applicable to confidential information, or passing-off, for instance."

In para 8-68, the learned authors observe:

"What is protected is the skill and labour devoted to making the artistic work, not the skill and labour devoted to developing the idea or invention communicated."

These principles have been approved by Australian courts. In *Ancher, Mortlock, Murray and Woolley Pty Ltd and Others v Hooker Homes Pty Ltd* (1971) 2 NSWLR 278 at 284, Street J, in the context of architectural plans, said:

"But the law does not restrict the application and development of architectural concepts and styles: original concepts and styles may, without risk of infringement, be applied and developed by other architects in subsequent buildings. The law does not prevent one architect from following in the footsteps of a colleague; it does prevent him from copying the plans of his colleague so as to enable him to follow those footsteps; and it does prevent him from physically reproducing those footsteps and thereby following them."

In *S.W. Hart & Co Pty Ltd v Edwards Hot Water Systems* (1984-5) 159 CLR 466, Wilson J observed, at 484:

"... copyright rests not in the idea, however romantic or important that idea may be, but in the particular form in which the idea finds expression in the work."

In *Computer Edge Pty Ltd v Apple Computer Inc* (1986) 161 CLR 171 at 209, Brennan J (as he then was) said:

"The exclusive right to reproduce a work in which copyright subsists is not calculated to prohibit the use of ideas expressed in the work, though the form in which these ideas may be expressed without the license of the owner of the copyright is limited. But copying in the sense of reproducing something which embodies the same ideas is not, without more, an infringement; the form of the thing produced must be such as to resemble the work in which the copyright subsists ... both resemblance and derivation are essential to reproduction."

Style is not Protected

As to style, see *Ancher, Mortlock, Murray and Woolley Pty Ltd and Others v Hooker Homes Pty Ltd*, supra. In *Cuisenaire v Reed* [1963] VR 719, Pape J at 728-9 said:

"In considering whether this box of rods is a 'work of artistic craftsmanship' it must be borne in mind that the

Act affords copyright protection to, inter alia, artistic works and not to ideas, and that it is original skills or labour in execution and not originality of thought that is required. As was said by Lindley, LJ in *Hollinrake v Truswell* [1894] 3 Ch 420, at p 427, "Copyright, however, does not extend to ideas, or schemes, or systems or methods. It is confined to their expression; and if their expression is not copied the copyright is not infringed".

Thus, an artist may follow the style of another without breaching the latter's copyright, if that is all that has been done; although if the artist takes the 'feeling and character' of another artist's work, this will be a relevant, but not conclusive, consideration as to whether there has been a reproduction: see *Copinger and Skone James on Copyright*, supra, para 8-54.

Reproduction

Reproduction involves two elements. First, as noted above, there must be a substantial use of the form in which the original artistic thought was expressed. It is not necessary to prove an exact reproduction of the whole work; it is sufficient if there is reproduction of a substantial part of it: see s14(1) of the Act.

Secondly, there must be a finding of fact that the defendant copied the plaintiff's work. It is not enough that the works of both parties are identical or bear a strong resemblance to each other, if in fact there was no copying: *Copinger and Skone James on Copyright*, supra, para 8-9.

Copinger and Skone James on Copyright, supra, at 8-10 summarises the position thus:

"... there is no infringement unless it is established that the defendant has produced a work which both closely resembles the plaintiff's work and also has been produced by a direct or indirect use of those features of the plaintiff's work in which copyright subsists."

As to proof of copying, as there is seldom direct evidence of this available to a plaintiff, this is usually only able to be proved by inference drawn from all the surrounding circumstances. Consequently, a critical finding of fact is whether or not the defendant has had access to the plaintiff's work directly or indirectly. *Copinger and Skone James on Copyright*, supra, at 8-13, observe:

"The proper test, in all cases, probably involves four propositions: (1) In order to constitute reproduction within the meaning of the Act there must be (a) a sufficient degree of objective similarity between the two works, and (b) some causal connection. (2) It is quite irrelevant to inquire whether the defendant was or was not consciously aware of such causal connection. (3) Where there is a substantial degree of objective similarity, this of itself, will afford prima facie evidence to show that there is a causal connection between the plaintiff's and the defendant's work; at least it is a circumstance from which the inference may be drawn. (4) The fact that the defendant denies that he consciously copied affords some evidence to rebut the inference of causal connection arising from the objective similarity, but is in no way conclusive. Thus if there is a sufficient similarity between the plaintiff's work and the defendant's, and the defendant has had an opportunity to copy the plaintiff's work directly or indirectly, this will establish a prima facie case of copying which the defendant has to answer. This may be done by bringing forward some alternative explanation of the similarities, and the judge's task will then be, on the evidence as a whole, to decide whether there has been copying or not. The fact that the judge disbelieves a witness who denies copying does not necessarily prove the contrary, that is, copying. Thus it would appear that similarity coupled with proof of access to the plaintiff's productions gives rise to an inference of copying and leads to a shift in the evidential burden from the plaintiff to the defendant to refute copying."

The Main Issues Between the Parties

These are best expressed by reference to the submissions made by Mr Wyvill on behalf of the defendant:

1. There is no sufficient resemblance between the copyright works of the plaintiff and that of the defendant to amount to a reproduction.

2. There is no proof of copying.
3. To the extent that there is a resemblance between any of the works of the defendant with that of the plaintiff's, the plaintiff did not own the copyright in those works.

Do Any of the Defendant's Works Closely Resemble Any of the Plaintiff's Works?

I have already observed that the notion of 'close resemblance' does not require proof of an exact reproduction of the whole work. Whether or not there is a sufficient resemblance is one of fact and degree, depending upon the circumstances of each case. It is not a matter of adding up the similarities or lack of them. The emphasis is upon the quality of that which has been allegedly copied, not the quantity: see *S W Hart & Co Pty Ltd v Edwards Hot Water Systems* (1984-5) 159 CLR 466 at 482 per Wilson J.

In *Dixon Investments Pty Ltd v Hall* (1990) 18 IPR 490 at 494 the Full Court of the Federal Court of Australia (Lockhart, Spender and Ryan JJ) observed:

"In determining whether the quality of what is taken is a substantial part of the copyright work various circumstances are relevant. A significant element is the importance which the alleged substantial part bears in relation to the work as a whole. If it is a vital or material part, even though it may be only a small part of it in quantity, it may nevertheless be sufficient: see *Blackis & Sons Ltd v Lothian Book Publishing Co Pty Ltd* (1921) 29 CLR 396. In *G Ricondi & Co (London) Ltd v Clayton and Waller Ltd* (1930) Macq CC (1928-30) 154 (Ch) it was held at 162 that eight bars of a particular air may in some circumstances form a substantial part of that air, although Luxmoore J held that on the facts of the case the taking of eight bars which formed part of a particular motif in Puccini's "Madam Butterfly" did not constitute infringement.

It is always a question of judgment in each case whether the parts taken from the work in which copyright subsists

represent the taking of a substantial part of the work: *S W Hart & Co Pty Ltd v Edwards Hot Waters Systems*, supra. The question of what is a substantial part of a work may involve fine questions of degree. *Bauman v Fussell* [1978] RPC 485 is an interesting example. There will be infringement if the defendant's work bears a similarity to a substantial part of the plaintiff's work even if it differs markedly in other ways. It is not necessary that there be a substantial similarity overall between the two works: *Bauman v Fussell*.

Sometimes perspective or the balancing of features may represent a substantial part of the plaintiff's work in which copyright subsists; and if they are substantially reproduced in the defendant's work then the latter will infringe: see *Krisarts SA v Briarfine Ltd (t/a Lenton Publications)* [1977] FSR 557 a case concerning the plaintiff's paintings of well known views of London."

If the copyright work is of a simple and straightforward nature, one not of marked originality, it is more difficult to find that there has been a reproduction. The cases do not clearly discuss whether this is so because the resemblance is not sufficiently close, or because the inference of copying is harder to draw; it is probably a combination of both. An example of a case where it was held that the resemblance was not sufficiently close is *Hanfstaengl v Baines & Co* [1895] AC 20. The House of Lords considered sketches made at an exhibition of living persons who assumed the dress, attitude and position of figures to be found in the plaintiff's copyright paintings, and who had been placed as far as possible in apparently the same surroundings. The subjects depicted represented "courtship" - a young man courting a young woman at a country stile, a subject matter which Lord Herschell LC described as one "of great antiquity", often being the subject of pictorial representation. His Lordship said at 24-25:

"This cannot be said to be the design of the plaintiff's painting within the meaning of the Act. Much more must be comprehended than this. There can only be a copy of such a design if the treatment of the subject be the same. Now, comparing the sketch with the photograph from the painting, I do not think this can be said to be the case. The faces are different; the mode in which the

woman's hair is arranged is different; the dress, especially in the case of the woman, is different; the pose is different; the attitudes are different; the background is different, and in the case of the sketch the foreground is wanting. In the artist's design all these things play a part, and, though I do not say that a variation in one or even more of these respects would prevent the sketch being a copy of the design, yet comparing the two, and considering the design of the painting as a whole, I cannot avoid the conclusion that the sketch is not a copy of the painting or of the design thereof, and therefore that there has been no infringement."

Similar conclusions were reached by the other members of the House. See also the discussion by the Federal Court in *Dixon Investments Pty Ltd v Hall*, (1989-90) 18 IPR 490 at 496. In cases such as this, the conclusion may be, for example, that what has been copied is the "concept or idea behind the copyright", and not the copyright work.

As I apprehend it, the plaintiff's case is that she is the creator and owner of the copyright in a number of pots some of which were tendered in evidence as Exts P2, P3, P4, P10, P21, P22, P23, P24, D3 and D7. These pots are of varying shapes and styles, but of particular significance in this case are Exts P2, P3, P4, P10, P22 and D7, because, as I apprehend the plaintiff's case, these are the pots which represent the pots which it is alleged the defendant has allegedly copied. I say "which represent", because it is the plaintiff's case that she has created hundreds of pots over the years which have been sold, that her work is idiosyncratic, and although she may not be able to say which precise pot or pots created by her the plaintiff copied, she alleges that the defendant's work so resembles her own, that he must have copied some other pot or pots of hers which resembled her pots. The way Mr Waters put the plaintiff's case in his final submissions was not expressed in these precise terms, but he did not suggest that any particular pot of the plaintiff's had been copied (other than, perhaps, Ext P2). As he put it (Tr 554-555):

"... the test of substantial reproduction or copying can be fulfilled if one looks at and compares P1 ... P26 and P19 (pots created by the defendant) with P22 and D7 ... we ask you to do an exercise which gives you the opportunity to assess the similarities with those that I just mentioned and we would say the similarities are sufficient in that broader range of pots to easily find that there was a copying going on here ...

If one looks at that bundle together, Your Honour, we say, the similarities are glaring ..."

(I observe in passing that Mr Waters must have meant D19, not P19 which is a book of financial records).

In order to support the inference of reproduction, the plaintiff gave evidence about the whole history of her work as a potter, and a number of photographs of other pots of hers were tendered (Exts P6, P14 and P16) in order to show further examples of her work at various times between 1987 and 1995. To enable comparisons to be made, the plaintiff tendered two of the defendant's pots (P1 and P26) and photographs of other examples of the defendant's work (P7, P8 and P31).

The defendant also tendered a number of his own pots (D1, D2, D12, D13, D16, D18 and D19) primarily for the purpose of demonstrating that he had not copied any of the plaintiff's pots, but had arrived at a similar style of pottery solely as a result of his own creativity, progressing over a period of time from 1991 to 1995.

The plaintiff's case as thus presented is somewhat of an ambit claim. With the possible exception of Exts P1, P2, P4, D2 and P10, no particular pot of the plaintiff is pointed to as having been copied; and no particular pot of the defendant is pointed to as being a copy of a particular pot of the plaintiff's. Rather, the inference of copying is sought to be drawn by a comparison between pots of a certain class which are the plaintiff's creations, with pots of the defendant.

The plaintiff's claim is made only for breach of copyright. There is no claim for passing off, or for breaches of the *Trade Practices Act*, for example.

The conceptual difficulty of comparing the defendant's work with representative works of the plaintiff is not made any easier by the fact that the plaintiff herself acknowledged that each individual lantern she created was unique (Tr. 28):

"... each one of the lanterns I produce is slightly different from the other, so they retain their uniqueness. There is no mass production as in domestic pottery, where one bowl has to be the same according to the fit and storage. These lanterns are all being produced uniquely in their own shape and form."

Nevertheless, although each lantern is unique (as indeed is inevitable given that the lanterns are individually made using a potter's wheel) the differences between each lantern of a particular class or style are only slight, so that what the plaintiff asserts is that one can disregard those slight differences; it is sufficient if the plaintiff can point to a representative of the class and by comparing it with one of the defendant's works, prove that his work so resembles that work, that it bears a "close resemblance" to it. Mr Wyvill did not contend otherwise, and I will approach this question in that manner.

I have already observed that ideas and style are not protected by the law of copyright. The plaintiff's real complaint in this case is, I believe, that the defendant has copied her ideas and style. She said as much herself when she gave evidence of having seen the defendant's work (Tr. 67):

"He was set up at the Parap Markets and he stood away from Mindil Beach. At that point it didn't concern me too much. I saw his craftsmanship and I decided, let the people decide. When I didn't return to the market for good reasons in 1994 and he moved into my spot - I'd been building up my clientele for a number of years - and he produced more lanterns of the same style than (sic) mine

and my business started to suffer, that is the point when I approached Bob Anderson in 1994 and I ask him whether it's necessary for him to continue copying my work." (emphasis mine)

Nevertheless, it is conceded that her works are capable for the protection afforded by the law of copyright, subject to the limitations mentioned above, the plaintiff is entitled to a remedy if her copyright has been breached. But, if style and ideas are not protected, it is necessary to see precisely what it is about her work which is protected, so that one can see if there is a sufficient resemblance in the sense discussed above.

It is clear that the plaintiff does not own the copyright in lanterns or in dome-shaped or onion shaped lanterns as such. Nor does she own the copyright in "almond shaped cuts stylised into patterns of leaves reaching from a branch". These are generic, common-placed forms, and the plaintiff claims no copyright in them. Nor does the plaintiff have copyright in a generic design of pottery lanterns which embraces the features of being onion or dome shaped, containing oval or almond shaped leaf patterned cut outs (with or without branches) and with or without a top shaped like a spire. Such a claim could not possibly be made. The elements of such a design are too imprecise and are capable of producing lanterns of infinite variety, many of which are in any event not original (see for example Exts D33 and D25). These features comprise the style or idea of the plaintiff's work, not the form.

What she can claim copyright in, is the form of each lantern as a whole piece. The plaintiff's expert, Ms Grace Cochrane, the curator of the Australian Decorative Art and Design Section of the Powerhouse Museum, Sydney, acknowledged that there was nothing original in any of the several parts of the works, be it in the shape of the pot, the shape or design of the lids, the design of the lid tops, the shape of the cuts, or the leaf patterns etc. These are "generic", or common

place, ideas, designs and shapes that have been used in pottery for centuries. What was original was the combination of these shapes and patterns in the way they were arranged in each pot. For example, in cross-examination she said (Tr p96):

“So the only thing, the only thing ultimately that we’re talking about that’s original in all of that work on that table there, (the plaintiff’s pots had been assembled on a table in court) is the way it’s been arranged, in other words the combination of these standard ideas? --- Absolutely.”

Ms Cochrane also said that what was original was ‘the whole object’ or ‘the form’ of the work, by which she meant the ‘totality of the work’ (Tr p. 79).

Before making any comparisons, some other points must be mentioned. First, these lanterns are cheaply made and intended for sale in the markets. The defendant’s expert, Mr Raymond Hearn, the Associate Dean of the School of Fine Arts at the Northern Territory University, said that they were “made fairly quickly and essentially for markets” (p. 447). They sold, on the evidence, depending on size, for from \$20 to \$40 each. Secondly, they are primarily functional. They hold candles. The cuts in the sides are made so as to shield the candle from the wind, and also to let out light. But they are also decorative, whether in use as a lantern, or simply as an ornament. Thirdly, I find, that there is nothing else about the plaintiff’s lanterns of any significance as a work of artistic craftsmanship. I do not disbelieve her evidence as to her sources of inspiration, but I agree with Mr Hearn that the lanterns do not express any philosophical, conceptual or aesthetic expression of an idea; they make no statements to the beholder, and in this they differ from many other types of artistic works.

In *S W Hart & Co Pty Ltd v Edwards*, in the passage cited above, Wilson J observed that it is not the idea which is

protected, but the form in which the idea finds its expression. If there is no idea, there is no form for any idea. The basic idea here is that of a simply decorated onion shaped or dome shaped pottery lantern which sheds its light through the leaf patterned cuts in the sides. The form which can be protected is therefore the form of each pot as a whole, and that is comprised in this case, inter alia, of the relationship which the several parts of that form bear to the whole; it is the balancing of these features and the quality of them balanced together which are the important form of her expression of the idea, and which comprise the protected design. There is no question in this case of substantial resemblance between any of the several parts of the pots separately. Fourthly, these lanterns are not highly decorated or unusual in shape or design. They are of a simple and straightforward nature. Finally, the plaintiff cannot complain if all the defendant has done is to make dome or onion shaped lanterns with cuts resembling leaf patterns. That is the idea, which is not protected. What must be shown initially is that the overall design of one or more of the defendant's lanterns bears a sufficient resemblance to one or more of hers.

Bearing these matters in mind, I turn now to see if there is such a sufficient resemblance. I will begin by reference to Exts P22 and D7, as suggested by Mr Waters. As to Ext P22, this style of pot in my opinion bears no resemblance whatsoever to anything created by the defendant. It is totally different in shape and design. The quality of the feature balanced together is nothing like anything created by the defendant. Next I turn to Ext D7. There are two pots marked Ext D7. In my opinion, the first lantern bears even less resemblance, if that is possible, to anything the defendant created. Not only is it totally different in shape and design, it is smaller, differently coloured, and has large leaf shapes stuck onto the sides of it (something which has not featured in any of the defendant's work). The second

lantern is also quite different in design. It has a large hole cut out of the side to enable access to the candle, no lid at all, very large outlined cuts which are somewhat haphazardly placed on the sides of the pot, and a much heavier less ornate base. None of these features appear in the defendant's work. Looked at as a whole, I see no resemblance between this pot and any of the defendant's work.

Mr Waters did not draw my attention to any other specific pots for comparison, but I understood him to submit that such comparisons should be made with the rest of the plaintiff's work.

As to Ext P2, I see no sufficient resemblance between that lantern and anything the plaintiff has created. To begin with, it is totally different in shape from anything the defendant created except for one of the pots shown in Ext P8. It is more pear-shaped than onion-shaped. It is of a different colour than anything the defendant created. It has a nob on the lid similar to that used by the defendant on some of his works, but there is no copyright in the nob. The pot in the photo Ext P8 has a frog on the top of it instead of a nob. The leaf pattern on the lid is almost perpendicular; the defendant's leaf pattern on similar styles of lids are not as perpendicular and to my mind the shape of the defendant's cuts are cruder and less uniform. The lid on the pot in the photo P8 is larger. There are no gaps in the leaf pattern on the plaintiff's work; whereas the defendant's work has other patterns between the leaf patterns to fill in gaps between the leaf patterns. Looked at as a whole, I see little if any similarity in the overall design of Ext P2 and any of the plaintiff's work.

As to Ext P3, this lantern is different in shape, colour and design from anything the defendant has done. The lid is quite different in many respects; it has a lip, a leaf patterned nob, the cuts are outlined, and there are small round holes in

various parts of it. None of these features are to be found in any of the defendant's work. The bottom section also features the small round holes or the outlined cuts. Looked at as a whole, I see no resemblance whatsoever between the design of this lantern and anything created by the defendant.

I will not go into detail in relation to Exts D3, P21, P23 or P24. Suffice it to say none of these lanterns bear the slightest resemblance in design to any of the defendant's work.

I turn now to Ext P10. There are some similarities between the design of this lantern and the defendant's lanterns, P1, D2 and P26. Beginning with P10, it is similar in shape and size to P26, and both have leaf patterns, but there the resemblance ends. P26 has a lid; P4 does not. P10 has a hole cut into the side to access the candle; P26 does not. The plaintiff's pot is of a different glaze; the defendant's is rougher and cruder. The defendant's pot has a green frog on the top; the plaintiff's does not. The shape of the cuts are quite different. Looked at as a whole I see no sufficient resemblance between the design of P10 and P26. P1 and D2 bear less resemblance, even superficially, to P10 than does P26. None of the defendant's pots in the photographs look much like P10. I find there is no sufficient resemblance between anything created by the defendant and Ext P10.

Ext P10 is rather like the plaintiff's pots shown in photo 8 in Ext P6. For the same reasons, I am unable to see any sufficient resemblance between any of the defendant's works and these lanterns.

The plaintiff's pot in photo 1 of Ext P6 is similar to Ext P22 but with even larger cuts. None of the defendant's work bears any resemblance to it.

The plaintiff's pot in photo 3 of Ext P6 has an opening at the top like the neck of a bottle and a flask-like shape. None of the defendant's work bears any resemblance to it.

The plaintiff's pot in photo 4 of Ext P6 is shaped with a neck and collar (not seen in any of the defendant's work) and has a quite different style of lid to any of the defendant's work. Looked at as a whole, nothing the defendant has created bears a sufficient resemblance to this work.

The plaintiff's lantern shown in photo 5 of Ext P6 is of the style of Ext P22 although the cut-outs appear less uniform in size, some being larger and some smaller. I can see no resemblance at all between the defendant's work and this work.

The plaintiff's lantern shown in photo 7 of Ext P6 is uniquely shaped. Apart from the fact that it has leaf-shaped cut-outs, none of the defendant's work bears any resemblance to this lantern.

The plaintiff's lantern shown in photo 9 of Ext P6 is somewhat hard to see, but the general shape and leaf pattern are quite different from anything the defendant has done. I am unable to see any sufficient resemblance. Similarly, with the plaintiff's lanterns shown in Ext P16.

This leaves the lantern Ext P4, which does bear a resemblance in design to P1 and D1. At first the plaintiff contended that Ext P4 was created by her in March 1995 as one of a batch of about 40 (Tr. pps 55-56; 104). Ext P1 was purchased by a friend on behalf of the plaintiff from the defendant in the beginning of July 1995. Later the plaintiff conceded in cross-examination that she had created Ext P4 some months after Ext P1 came into her possession, and after she had had a close look at Ext P1 in the presence of her solicitor (Tr. p.232-3). I am not satisfied that the lantern P4, or any other lanterns made in the same design as P4 and made at the

same time as P4, existed before the defendant created P1, or for that matter D1, which I am satisfied was created by the defendant in 1994 (Tr. 300). The plaintiff contended that she had been making pots like Ext P4 prior to 1993 (p. 56), but I am unable to accept her evidence on this topic. First, the plaintiff was unable to produce any photographs or examples of her work which closely resembled the design of Ext P4. It is interesting to observe also that the pot to the far right of Ext D5 which is of a similar style to Ext P4 was allegedly created in 1990 (Tr. p.132). The plaintiff explained her failure to produce this pot to the court on the basis that it was smashed in a move just before Christmas 1995 (Tr. 132-33). The photograph Ext D5 was taken at the same time, according to the plaintiff, as Ext D4. The plaintiff claimed that the photo Ext D4 was taken in January 1996 (Tr 129). If this be so, it could not have been destroyed before Christmas 1995. The plaintiff also claimed that this pot had been in her husband's possession (she had separated from her husband in September 1993) and had been located in the garden and subsequently cleaned up. The pot in question looks remarkably new; I find it hard to believe it had been outside in a garden for several years. The plaintiff's husband was called by the plaintiff. He gave no evidence about this pot being in the garden. The plaintiff claimed to have made several hundred pots like P1 before July 1995. In cross-examination this was put (Tr. 121):

"So of those several hundred we only see two that are surviving today, or that you've been able to locate, exhibit P3 and exhibit P2 which are those two back there? --- That's right.

Is that the case? --- Yes."

I have already found that the pots Exhibits P2 and P3 do not bear a sufficient resemblance to Ext P1. This being so, I am unable to accept the plaintiff's assertion.

The plaintiff called a Mr Harold Hubel, a professional potter who claimed to be familiar with her work. According to Mr Hubel, he became familiar with the plaintiff's work over the period 1987-1993. Although he was able to recognise the plaintiff's work, and that Exts P2 and P4 were examples of her work, and could give a general description of her work, I am not satisfied that I can draw the inference from his evidence that Ext P4, or anything closely resembling it in design, existed prior to 1993. Comparing the plaintiff's and defendant's works as a whole it is not difficult to recognise which works were created by the plaintiff and which were created by the defendant. I thought it particularly significant that Mr Hubel was not asked in evidence in chief whether he had ever seen a pot which closely resembled Ext P4 in design prior to 1993. The best his evidence got was that he had seen pots made by the plaintiff which had the features and shape of Ext P4, but not necessarily all in a single pot which closely resembled the design of P4 (see Tr. pps. 173-4). The witness Norelle Clark, who worked for the plaintiff in 1993 for a period of 9 months, did not recognise P4 as like one of the pots she had sold (Tr. 183-04). The witness Kathryn Borrow, called by the defendant, who worked for the plaintiff part time over a period of about 8 months in 1993 had never seen a lantern which looked like P4 or P1 in the plaintiff's shop (Tr. 423-6).

In all the circumstances I am not satisfied that the plaintiff has established that she had created lanterns designed like P4, P1 or D2 prior to the defendant having created P2 or D2, or, to put it another way, that any of the defendant's work sufficiently resembles any of the plaintiff's.

This being so, the plaintiff's action must fail. It is unnecessary to consider the other issues between the parties. There will be judgment for the defendant. I will hear counsel on the question of costs.