



Neutral Citation Number: [2025] EWHC 1827 (IPEC)

Claim No: IP-2022-000053

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY ENTERPRISE COURT

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: 24 July 2025

Before:

DAVID STONE
(sitting as a Deputy High Court Judge)

Between:

(1) SHANTELL MARTIN
(2) FOUND THE FOUND LLC
(a company incorporated in New York, USA) **Claimants**

- and -

(1) BODEGAS SAN HUBERTO SA
(a company incorporated in Argentina) **Defendants**
(2) GM DRINKS LIMITED

(3) MARC PATCH

Stephanie Wickenden and **Stefano Braschi** (instructed by **McCarthy Denning**)
for the Claimants.

The First Defendant did not appear.

The Third Defendant represented himself and the Second Defendant.

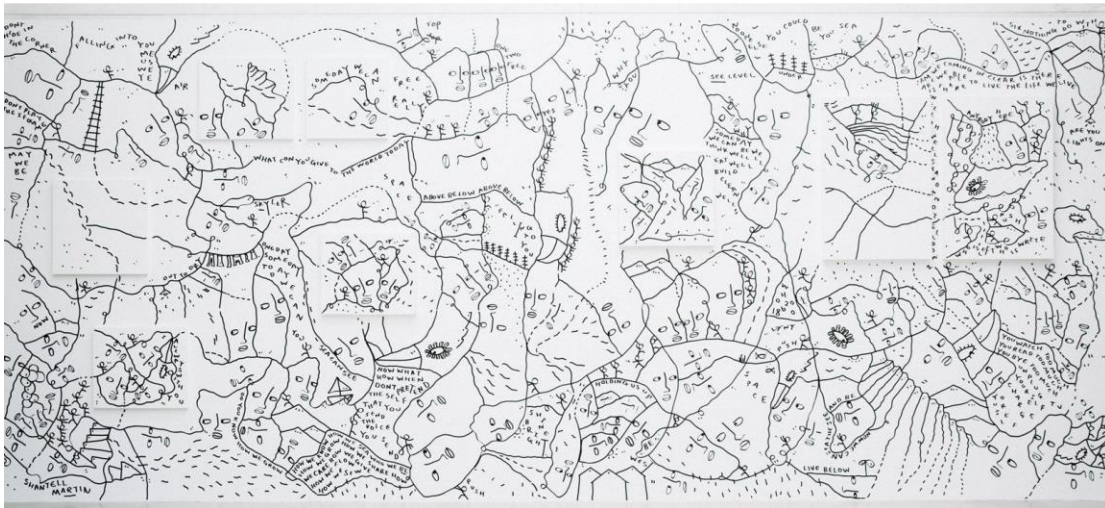
Hearing dates: 27 and 28 May 2025

Approved Judgment

This judgment was handed down remotely at 10.30am on 24 July 2025 by
circulation to the parties or their representatives by e-mail and by release to the
National Archives.

David Stone (sitting as Deputy High Court Judge):

1. This is my judgment following the trial of this matter over two days. The claim is primarily for copyright infringement and passing off.
2. The First Claimant, Shantell Martin MBE (**Ms Martin**) is a visual artist. In 2017, she created a wall drawing as part of a solo exhibition “Someday We Can” at the SKG Museum in Buffalo, New York. For the purposes of these proceedings, the wall drawing was referred to as the **Work**. I was not given the dimensions of the Work, but it filled one end of the sculpture court at the SKG Museum as part of a wider installation and therefore appears to be substantial in size – at least 4 metres tall and at least 12 metres long. Ms Martin assigned copyright in the Work to the Second Claimant, Found the Found LLC (**Found the Found**) on 2 June 2021. The Work is shown here:



3. To give some idea of the scale of the Work, Ms Martin is shown working on it in this image:

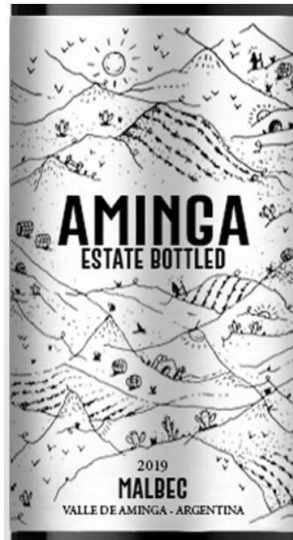


4. Ms Martin has developed a distinctive artistic style (to which I return below) which she has used in collaboration with various household name brands, including Puma, Jose Cuervo, The North Face, Tiffany & Co and the Financial Times. She has done so with significant success.
5. The First Defendant, Bodegas San Huberto (**BSH**), is a winery based in Argentina which produces wine, including for sale in the United Kingdom. It produced wines under three different labels as shown below:

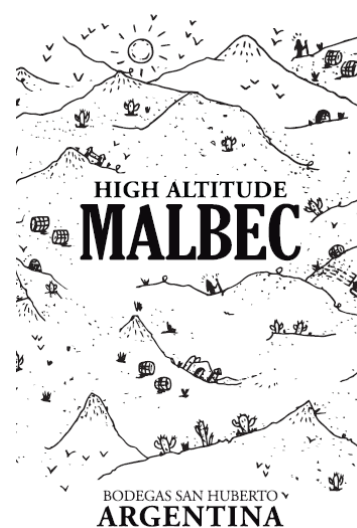
First Label



Second Label



Third Label



6. All products labelled as above (together, the **Products**) were exported from Argentina to the United Kingdom. Whilst different grape varieties were marketed under the various labels, nothing turns on this.
7. The Second Defendant, GM Drinks Limited (**GM Drinks**), is a UK-based wine importer and distributor, which imported into, and offered for sale and sold in, the United Kingdom quantities of wine bearing the First, Second and Third Labels. GM Drinks was the exclusive distributor of the Products in the United Kingdom. The Third Defendant, Mr Marc Patch (**Mr Patch**) is a director of GM Drinks, together with his wife. Mr Patch runs GM Drinks.
8. The Claimants claim:
 - i) copyright infringement in the Work contrary to sections 18, 22, 23(a) and 23(b) of the Copyright, Designs and Patents Act 1986 (the **CDPA**);
 - ii) infringement of Ms Martin's moral right to be identified as the author of the Work contrary to section 77 of the CDPA; and
 - iii) passing off of the Products as endorsed by Ms Martin.
9. As will appear below, the reality is slightly more complicated, in that it is Found the Found which claims copyright infringement, and Ms Martin who claims infringement of her moral rights and passing off.

10. Ms Stephanie Wickenden and Mr Stefano Braschi appeared on behalf of the Claimants instructed by McCarthy Denning. At my suggestion, Mr Braschi took on some of the advocacy in the case.
11. BSH did not appear and was not represented. Mr Patch represented himself, and, with the Court's permission, GM Drinks. Mr Patch was offered considerable assistance by the Claimants' legal team. I am confident that, overall, Mr Patch was given an appropriate opportunity to put his case and that of GM Drinks to the Court (I say more about this below).
12. In preparing this judgment, it has not been necessary for me to decide any novel issues of law – this judgment is therefore based entirely on applying known principles to the facts of this case.
13. Whilst the allegations of copyright infringement relate to the whole of the United Kingdom, passing off as a tort relates to England and Wales. However, for ease, and because this is how it was submitted to me by the Claimants, I use "United Kingdom" each time because the difference does not matter on the facts of this case.

Procedural Matters

14. As noted above, BSH did not appear at trial and was not represented. BSH had been represented at the Case Management Conference (CMC) before me by its Argentinian legal representative with my permission. I indicated at the CMC that BSH should not expect that permission to be extended to the trial. BSH thereafter obtained legal representation in the United Kingdom. That legal representation persisted until shortly before the trial, when BSH's lawyers (who were also representing GM Drinks and Mr Patch) made an application (which I granted) to come off the record because their invoices had not been paid. The result was that I had before me at trial on behalf of BSH:
 - i) a Defence which, whilst not carrying the names of any English legal professionals, had clearly been copied (and there is nothing wrong with that) from the Defence filed by GM Drinks and Mr Patch, which had been settled by specialist intellectual property counsel at the Bar of England and Wales;
 - ii) a witness statement of Jorge Degese, a director of BSH, said to be on behalf of all Defendants; and
 - iii) a witness statement from Mr Patch, again said to be on behalf of all Defendants.
15. Three preliminary issues therefore needed to be dealt with at the start of the hearing.
16. First, I needed to decide whether to adjourn the trial based on BSH's non-appearance. I did not adjourn the trial for the reasons I gave at the time.

17. Second, I needed to decide whether to strike out BSH's Defence under CPR 39.3(1). I was asked by the Claimants not to do so. Rather, given that the trial needed to proceed against GM Drinks and Mr Patch, counsel for the Claimants asked me to proceed against BSH as well, reserving a contingent position to her closing submissions to request strike out of BSH's Defence at that time. Whilst that will not be appropriate in every case, I was content that it was appropriate in this case. Ultimately, counsel for the Claimants made no such request in her closing submissions. Thus, the trial proceeded as against BSH, rather than by striking out BSH's Defence.
18. Third, I needed to decide what, if any, weight to give to BSH's evidence. The issue arose in the recent judgment of Mr Sean O'Sullivan KC sitting as a Deputy High Court Judge in *AMNS Middle East FZE v LIQS Pte Ltd* [2025] EWHC 150 (Comm) (see particularly paragraphs 32 and 33). In that case, the Judge declined to read the witness statements of the non-attending defendant on the basis that the witnesses had not been called, and no application had been made to admit the witness statements under a hearsay notice, following the Court of Appeal's judgment in *Williams v Hinton* [2012] CP Rep 3 (2011) per Gross LJ at [43]. Whilst I had already read Mr Degese's witness statement in preparation for the hearing, I have adopted the same position here in relation to it – it is not evidence in the proceedings, and has no weight.
19. A more complex issue arises in relation to BSH's Defence itself. In the IPEC, a Defence stands as evidence in chief in the proceedings, and is submitted over a statement of truth. IPEC cases can be tried on the basis of the pleadings alone, without permission being granted for any further evidence.
20. BSH's Defence was signed by Leonardo Francisco Spadone, President of BSH. Mr Spadone was not called to confirm the Defence. Thus, I was faced with counsel for the Claimants asking me not to strike out the pleading aspects of the Defence because the claimants wished to rely on aspects of them, but asking me to ignore the evidentiary aspects of the Defence. I was told that there is no IPEC decision on how to deal with the issue, although it must arise regularly, with the difficulty being that there will not usually be a bright line between what is "evidence" in a Defence, and what is pleading. However, I do not need to decide the issue in this case, because very little, if anything, in the Defence is evidentiary in nature. Further, GM Drinks and Mr Patch were present at trial, and had filed a Defence in relevantly identical terms. Mr Patch had signed the Defence on his own behalf, and on behalf of GM Drinks. He was cross-examined. Therefore, the "evidentiary" contents (if any) of the Defences were before me in relation to Mr Patch and GM Drinks, and counsel for the Claimants did not take any point that the result should be different as between BSH and GM Drinks/Mr Patch on the basis of any "evidence" in the Defence that could only be relevant to GM Drinks/Mr Patch. Having (quite rightly) brought the issue to my attention, counsel for the Claimants conceded that it did not affect this case. Whilst it does seem to me that a non-attending party cannot have the benefit of any evidence in its pleadings (in the same way that it cannot have the benefit of any witness statements which it does not turn up to defend), that is not an issue I need to decide today.

Confidentiality

21. I made a confidentiality order in relation to a confidential bundle of documents provided by both sides. Much of it was not actually confidential, including because it had been included in non-confidential evidence. If an ongoing confidentiality order is to be requested after trial, it would be helpful for the parties to narrow it to those documents (or parts of documents) which are truly confidential.

Pleading Points

22. The Claimants ran several pleading points which I do not consider advance matters. I therefore deal with them briefly. It was said in relation to certain paragraphs in the Defences filed by the Defendants that the denials were inappropriate, and I should therefore consider those denials in fact to be admissions. This was put to me on the basis of CPR 16.5 which provides:

“(1) In the defence, the defendant must deal with every allegation in the particulars of claim, stating—

- (a) which of the allegations are denied;
- (b) which allegations they are unable to admit or deny, but which they require the claimant to prove; and
- (c) which allegations they admit.

(2) Where the defendant denies an allegation—

- (a) they must state their reasons for doing so; and
- (b) if they intend to put forward a different version of events from that given by the claimant, they must state their own version.

(3) If a defendant—

- (a) fails to deal with an allegation; but
- (b) sets out in the defence the nature of their case in relation to the issue to which that allegation is relevant,

the claimant is required to prove the allegation.

...

(5) Subject to paragraphs (3) and (4), a defendant who fails to deal with an allegation shall be taken to admit that allegation.”

23. Whilst appropriate pleadings are to be encouraged, the Defendants in this case had clearly joined issue with the Claimants' claims, particularly in relation to the Second Label and Third Label (which they clearly said did not infringe) and it would have been clear to the Claimants what issues they needed to prove. Further, all three Defendants have put forward their own version of events – that the labels were designed by a third party, and that none of the Defendants knew of Ms Martin's work, nor that the First Label has some similarities to Ms Martin's work, until Ms Martin pointed that out. I therefore did not find this discussion helpful, particularly in circumstances where GM Drinks and Mr Patch were unrepresented. I have addressed below the specific instances where this was said to arise.

List of Issues

24. As is usual in the IPEC, I had settled the List of Issues at the CMC. At the time, GM Drinks and Mr Patch were represented by specialist intellectual property counsel. Given no further concessions by the Defendants, the List of Issues at trial remained as follows (adopting the definitions set out above – additionally, The Style was defined in the Particulars of Claim – I return to this definition below):

“Copyright Subsistence

1. Does copyright subsist in the Work under the CDPA?
2. Is Found the Found the owner of any copyright identified in paragraph 1? If so:
 - a. On what date did Ms Martin assign her copyright in the Work to Found the Found?
 - b. Was the above-mentioned assignment total or partial?
 - c. Is Ms Martin still the owner of any copyright in the Work?

Copyright Infringement

3. Is the First Label a copy of the Work or of a substantial part of the Work?
4. If yes, has the Second and/or Third Label been copied from the First Label, such that they or either of them constitute a substantial copy of the Work?

Passing Off

5. Does goodwill subsist in [T]he Style in the UK, including as generated by the endorsement of products sold by reference to the Style in the UK?
6. Is the goodwill in paragraph 5 owned by Ms Martin?
7. Have the Defendants misrepresented that their goods are connected in the course of trade with Ms Martin's business?
8. If so has such misrepresentation caused Ms Martin damage?

Joint Tortfeasorship

9. Are the Defendants or any combination of them joint tortfeasors in respect of (i) copyright infringement, and (ii) passing off, such that they are jointly liable for any of the acts alleged?"
25. At the CMC, I declined to include in the list of issues for trial copyright infringement under Argentinian law. As all the Products were imported into the United Kingdom where GM Drinks was the sole distributor, there was nothing to be gained by adding Argentinian copyright law to the trial – rather, it could have required expert evidence of Argentinian law, extending the trial for no purpose. Parties are reminded that the IPEC is a lower-cost jurisdiction for intellectual property disputes, particularly those involving small-to-medium-sized enterprises. That involves claimants trimming their sails and not running every point that may be open to them. Proportionality is key.
26. Two issues were argued in the Claimants' opening written submissions that are not apparent from the List of Issues – moral rights infringement and flagrancy damages. It should be noted that the Order for Directions I made at the CMC stated "[t]he trial shall determine only issues of liability, namely those set out in the schedule to this order". Thus, the parameters of the trial were set, clearly, at the CMC, and no permission has been sought since to add moral rights infringement or flagrancy damages to the list of issues to be decided.
27. The IPEC Guide notes (emphasis added):
- “The CMC is a particularly important part of IPEC procedure. No material may be filed in the case by way of evidence, disclosure or written submissions unless permission is given by the judge. The first and last opportunity to obtain such permission is likely to be at the CMC. Save in exceptional circumstances the court will not permit a party to submit material in addition to that ordered at the CMC (Part 63 rule 23(2)). A cost-benefit test is applied to the filing of material in support of a case, see PD 63 para 29.2(2). It is important that before the CMC the parties have given full consideration to the following:

The issues

The issues in dispute. These should clearly emerge from the statements of case. The parties must draw up a list of issues which the court will have to resolve at trial. It is not necessary to list every sub-issue that may arise and this should not be done. **The parties will be permitted to argue at trial any point which is both covered by the pleadings and which the opposing side should reasonably contemplate as falling within one or more of the listed issues.** The trial judge may refuse to hear argument at trial on a point which does not satisfy those criteria.”

28. Angela Fox notes in *Intellectual Property Enterprise Court: Practice and Procedure* (3rd edition, 2021, Sweet & Maxwell) at para 5-028 (footnotes omitted):

“Case management in the IPEC is issue-based and it is therefore essential for the judge to be able to identify the issues at the CMC. ... The list of issues should address the core issues in dispute in the case... .

The issues in the list should emerge from the statements of case, and only points which are covered by the statements of case and which the opposing parties may reasonably contemplate as falling within the list of issue will be permitted to be argued at trial. It is therefore important to ensure that the list of issues is comprehensive. On the other hand, though, the court does not require parties to identify every sub-issue, and in fact discourages this practice; if the main issue has been identified and the sub-issue would clearly flow from it, the main issue is likely to be sufficient for the list of issues. As observed by the court in *Mei Fields Designs Ltd v Saffron Cards & Gifts Ltd*, lists of issues are not intended to be construed ‘as if they were statutes or contracts – they are there for the purpose of narrowing disclosure and the evidence filed by the parties, and as a useful guide to the tribunal of the issues to be decided.’”

I respectfully agree with Ms Fox’s comments.

29. Whether or not the IPEC deals at trial with a matter not listed in the List of Issues is a matter for the relevant judge on each occasion. I do not seek here to make a hard and fast rule. The List of Issues is ordered at the CMC for a reason – it enables the Court to narrow the issues between the parties at that stage of proceedings, so that costs are not wasted preparing for things that will not be determined at trial. It tells the parties in proceedings (many of whom are unrepresented) what their evidence should address and what they can expect to have to deal with at the trial. That is a key point in this case. BSH made the decision not to attend the trial on the basis of the List of Issues it expected to face. Mr Patch attended the trial on his own behalf and on behalf of GM Drinks having been provided with that List of Issues. He was not in a position to take

objection to different issues being raised in the Claimants' skeleton argument. It would therefore be unfair, in my judgment, to allow these issues to be pursued by the Claimants against that clear factual background. I do not consider that either moral rights infringement or flagrancy damages falls under any of the headings set out in the List of Issues: I cannot see how the Defendants could reasonably contemplate that those matters fall within the List of Issues.

30. In relation to the copyright claim, this is brought only on behalf of Found the Found, the owner of the copyright. The List of Issues states:

“3. Is the First Label a copy of the Work or of a substantial part of the Work?

4. If yes, has the Second and/or Third Label been copied from the First Label, such that they or either of them constitute a substantial copy of the Work?”

31. Moral rights are not raised in terms, nor is Ms Martin's interest as the author referred to (as opposed to Found the Found's interest as the copyright owner).
32. The flagrancy claim (which is said to apply to both copyright infringement and passing off) is not mentioned at all in the List of Issues. It requires the determination of who knew what when, in relation to the three Defendants and three different wine labels imported into the United Kingdom over an approximately 4-year period. That is not a simple determination that can be read into the copyright or passing off claims. It has two additional difficulties. First, paragraph 44 of the Defence filed by GM Drinks and Mr Patch expressly notes “there are no particulars of flagrancy, and accordingly, the Relevant Defendants reserve the right to respond more fully to such allegations on receipt of full particulars thereof”. This also appears in the Defence of BSH. The Replies filed by the Claimants state in response to paragraph 44 of the Defence filed by GM Drinks and Mr Patch “the First Label is almost an exact copy of the Work, and the Second and Third Labels were each created based upon the First Label after the Defendants were put on notice of the allegation of infringement. It is noted that D1 admits that it was put on notice of the allegations of infringement”. The Replies do not, in my judgment, take matters further on flagrancy. So there was an existing pleading point taken by the Defendants that was not adequately addressed by the Claimants, such that the Defendants were entitled, in my judgment, to assume that the point was not being pressed at trial because it was not included in the List of Issues.
33. Second, whilst flagrancy can be dealt with at the liability trial (and there will often be good reasons to do so), it can also be dealt with at any quantum hearing which follows. This heightens the likelihood that the Defendants could not have been expecting to deal with the issue at the liability trial.
34. Therefore, I do not consider that these issues should be determined – it is too late for the Claimants to raise them now, and, had permission been sought, I would have refused it for the reasons I have set out above. However, in case I am wrong in that, I have set out below briefly my judgment on moral rights infringement and flagrancy.

35. I add one further comment. As is clear from the above, parties should not expect to be able to run at an IPEC trial points which are not within the List of Issues, and should draw to the Court's attention if they seek to do so because permission needs to be sought. It is not appropriate for a party simply to present new issues without permission, particularly, but not only, when the other parties are unrepresented. Permission should usually be sought well in advance of the trial. In many cases, by the trial, it will already be too late for the Court to entertain new issues, given that there is unlikely to have been disclosure or evidence on the topic, and the trial timetable will have been set.

Witnesses

36. The Claimants called two witnesses:
- i) Ms Martin is, as I have said, a highly successful visual artist. She gave evidence of her background, her international success, her commercial work, the production of the Work and the assignment of copyright in the Work to Found the Found, how she became aware of the First Label, her communications with the Defendants, and the damage she says she has suffered. Ms Martin was made available for cross-examination, but Mr Patch did not wish to ask her any questions. I accept her evidence.
 - ii) Mr John Duff is Director of Marketing for Artlogic Limited, a role he has held since 2023. Artlogic is a software as a service company providing software for galleries, artists and collectors. He gave evidence of working with Ms Martin to produce a tote bag for Artlogic's 25th birthday party. He also gave evidence that Ms Martin later created a mural for Artlogic's office in 2023. Mr Duff was made available for cross-examination but Mr Patch did not wish to ask him any questions. I accept his evidence in relation to the matters outlined above. I do not accept unreservedly the final two paragraphs of Mr Duff's evidence for the reasons I set out below: these paragraphs relate to Mr Duff's opinion of what he would have thought had he encountered the Products in a supermarket. This was supposition and/or opinion evidence, and not something on which Mr Duff could usefully give evidence.
37. As stated above, I have not admitted the witness statement of Mr Degese, filed on behalf of the Defendants. Mr Patch gave a witness statement in which he gave evidence about his background, and his lack of knowledge of Ms Martin or her Work or Style until she first contacted him on 12 April 2020. Mr Patch was cross-examined skilfully by leading counsel for the Claimants. I also asked Mr Patch a number of questions. I consider him to have been an honest witness who was doing his best to assist the Court. I accept the evidence he gave in his witness statement, and in his answers to questions from counsel for the Claimants and from me.
38. Following the conclusion of Mr Patch's cross-examination, I provided him with the opportunity to set out his case. He did this from the witness box having been sworn to tell the truth. Whilst this approach will not be appropriate in all cases, I considered this to be the appropriate course in this case to ensure Mr Patch (and GM Drinks) had a fair trial, and given Mr Patch's reticence up to that point

to speak from the body of the Court. Counsel for the Claimants did not object to this course. She did, however, make closing submissions that much of what Mr Patch said was irrelevant to the proceedings, and ought not be relied on as evidence in the proceedings. I accept that submission, and have had it squarely in mind in reaching my conclusions in this case.

39. I consider that Mr Patch and GM Drinks had a fair hearing with appropriate opportunities to test the Claimants' evidence, and to present their own position. Neither side suggested otherwise. Mr Patch was offered opportunities to question the Claimants' witnesses, to ask questions of the Court, to address the Court, and to take breaks as and when he needed them. This was evidently not an easy experience for him, but both the Claimants' counsel and the Court did their best to assist. I should add that this in no way compromised the Claimants' position – they were represented by specialist leading and junior counsel together with specialist, experienced solicitors, and because of the absence of representatives for the Defendants, had significantly more time to address the Court than they would otherwise have had.

Examples of the Allegedly Infringing Products

40. At my request, I was provided with an example of the First Label on the Product (in this case, a bottle of Malbec). I also requested examples of the Second Label and the Third Label attached to bottles. I was told by the Claimants' counsel that these were not available. This was not helpful for the purposes of the passing off case. Whilst images can do some of the work, the curved nature of a bottle means that I was unable to experience the Second Label or Third Label as consumers would have experienced them. According to the correspondence, Ms Martin had instructed English solicitors specialising in intellectual property by 7 October 2020, when Products bearing the First Label were still on sale in the United Kingdom, and prior to the sale in the United Kingdom of Products bearing the Second Label or the Third Label. A "trap purchase" of the First Label Product was carried out by professional intellectual property investigators in September 2021. US lawyers had been instructed as early as 18 June 2020. It should therefore have been a priority to procure and retain examples of each label as attached to wine bottles. Whilst Ms Martin has changed English law firms more than once during these proceedings, that does not adequately explain the lack of evidence of what are said to be the infringing products in this case.

Background Facts

41. The following background facts were either not seriously contested, or were obvious from the face of the documents before me:
- i) Ms Martin designs, sells and endorses products which feature her artwork. These are advertised and sold around the world, including in the United Kingdom. She has an online shop where she sells original artworks, prints, books, t-shirts and tote bags. She has an extensive online presence.
 - ii) In early 2018, BSH instructed a Mr Guillo Milia to design a label for bottles of wine to be exported by BSH from Argentina and imported by

GM Drinks into the United Kingdom. Mr Milia sent draft designs to BSH on 14 May 2018, including the First Label. Mr Milia invoiced BSH for the First Label in two equal parts on 2 March 2019 and 23 October 2019.

- iii) GM Drinks imported First Label Products into the United Kingdom at some point after 1 January 2020. The dates are difficult to discern from the documents, including because a summary document provided by the Defendants is clearly wrong at least in part (as was acknowledged by Mr Patch in cross-examination). It is not necessary for me to decide the exact dates and quantities, as that will be a matter for any damages enquiry (on which I comment further below). However, doing the best I can based on the documents before me, it seems to me that 18,480 bottles of First Label Product were imported by GM Drinks into the United Kingdom. These were largely purchased and imported by GM Drinks prior to 13 April 2020 (when Ms Martin set out to GM Drinks her rights in the Work) although it is possible that a small shipment arrived in the United Kingdom after that date. I also take into account Mr Patch's uncontested evidence (which, to me, appears to be a common sense business proposition) that GM Drinks aimed to have wine in its possession for as limited a period as possible – from landing in the United Kingdom, GM Drinks' preference was for the wine to be with the wholesalers or retailers within 12 weeks (to which I return below).
- iv) GM Drinks possessed the First Label Product in the United Kingdom, exposed and offered it for sale, and sold it to a range of customers. All 18,480 bottles of First Label Product were sold by GM Drinks, at an approximate price of £1.90 per bottle. At least 12,600 bottles of First Label Product were sold by GM Drinks prior to 13 April 2020. It is possible that sales of small quantities continued thereafter, but unlikely, in my judgment, much beyond the end of 2020. GM Drinks' total profit on First Label Products was said to be £924.00.
- v) Ms Martin first wrote to GM Drinks by email on 12 April 2020 having been alerted to the First Label Products by at least one consumer in the United Kingdom. Ms Martin and Mr Patch (on behalf of GM Drinks) engaged in correspondence during which Ms Martin set out her (then) rights in the Work (the assignment to Found the Found happened later). Mr Patch passed that correspondence to BSH. Mr Patch looked into Ms Martin online, including watching a YouTube video about her and her work.
- vi) Ms Martin also contacted retailers of which she became aware, who stopped purchasing the Products from GM Drinks.
- vii) Following Ms Martin's complaint to GM drinks, BSH asked Mr Milia to redesign the label. Those instructions are not before the Court. Mr Milia emailed a proposed new label design to BSH on 29 April 2020. This resulted in the Second Label. Approximately 22,680 bottles of Second Label Product were imported into the United Kingdom by GM Drinks, possessed, offered for sale and sold in a period of approximately

2 September 2020 to 18 August 2022. These were sold by GM Drinks at an approximate price of £1.90 per bottle. The profit made by GM Drinks on Second Label Products was said to be £1,134.00.

- viii) Ms Martin’s lawyers complained about the Second Label by letter of 7 October 2020. The Defendants’ then representative responded on 21 October 2020 saying that “retailers are out of stock of [the] First Label” and denying that the Second Label infringes Ms Martin’s copyright in the Work. This representative was a Chartered Patent Agent regulated by IPREG. A further letter of 5 January 2021 sent on behalf of GM Drinks offered to give undertakings not to sell the First Label Product.
 - ix) Given Ms Martin’s complaints about the Second Label, BSH asked Mr Milia to redesign it. The Third Label was thus designed. Approximately 488,250 bottles of Third Label Product were imported by GM Drinks into the United Kingdom and sold in a period of approximately March 2021 to April 2024. Ms Martin’s lawyers complained about the Third Label in their letter to GM Drinks of 6 January 2022. That letter also notes that the damages sought in relation to all products were “at least USD200,000” based on the licence fee Ms Martin would have expected had BSH asked for her permission.
 - x) There was a fourth label in the evidence before me, but it was not mentioned in the trial, and I say no more about it.
 - xi) These proceedings were commenced on 29 June 2022. Service out of the jurisdiction on BSH took some time, not being confirmed by the Argentinian court until 7 February 2024. The First Defendant did not contest service out, or jurisdiction.
 - xii) The Claimants also sued BSH in Argentina and a mediation took place in Argentina without settling the dispute. I understand from the correspondence that those proceedings could not continue because the Claimants were out of time.
 - xiii) The CMC in these proceedings took place on 23 October 2024, when I listed the trial to take place before me on 27 and 28 May 2025.
42. I also need to say something more about Confidential Exhibit 1 to the Defence of GM Drinks and Mr Patch. This was said to record the sales by GM Drinks of the various Products. Under cross-examination, Mr Patch admitted to some inaccuracies, but it seems to me that there are more than those to which he admitted. He was unable to tell the Court the meaning of the various dates recorded. In relation to the purchase dates (from BSH), for example, the dates do not appear to match the evidence in relation to potential dates on which orders were placed (for example, because 3,500 bottles of First Label Product are assigned a date in 2022 by which time no First Label Product was still being produced). They also do not appear to me to be the dates on which the Products were shipped from Argentina, nor the dates on which they arrived in the United Kingdom. I cannot reconcile what are said to be the purchase dates with the

other evidence, and have come to the conclusion that the dates are simply inaccurate.

43. Similarly, the dates listed for sale of Products to retailers also appear to me not to be accurate – at least, I cannot reconcile them with the other evidence before me. Mr Patch’s oral testimony was that wine would be shipped from South America in 20-foot or 40-foot containers. On arrival these would be delivered either directly to GM Drinks’ clients, or to a warehouse from which the wine would then be shipped by GM Drinks to its clients. Mr Patch gave clear evidence that that would be in a matter of weeks following arrival in the United Kingdom – he aimed for wine to leave the warehouse within 12 weeks, to keep his storage costs down. This is inconsistent with the suggestion that First Label Products were still being provided by GM Drinks as late as 2022 – Mr Patch’s clear oral testimony was that all sales of First Label Products ceased once advised by Ms Martin of her rights in the Work on 13 April 2020.
44. I am conscious that the Confidential Exhibit was attached to the Defence at the time GM Drinks and Mr Patch were represented, but I am unable to rely on it because I find it to be inaccurate. It would, in my judgment in the circumstances of this case, be manifestly unjust to hold two unrepresented defendants to a document which is so clearly wrong. However, it likely has little impact for present purposes. It is admitted by the Defendants that the First, Second and Third Label Products were all imported by GM Drinks into the United Kingdom, and in quantities which, whilst not beyond question, appear to be accurate. Where the inaccuracy apparently lies is in the dates. It has thus not been possible for me to determine exactly when each of the First, Second and Third Label Products were sold, but, as it turns out, that is likely to matter much less than it appeared at the trial that it might, for the reasons I set out further below.

Mr Patch’s Position

45. Mr Patch set out his position before me in what I describe respectfully as layperson’s terms. He had ordered the Products from BSH not expecting them to infringe third party rights. He did no intellectual property clearance – and does not in relation to wine he imports – he expects the manufacturer to deal with that. He had never heard of Ms Martin or her Work prior to her contacting him. When Ms Martin complained to him, he handed the matter over to BSH and expected them to deal with it. BSH said they would. There is in the evidence before me an email from BSH to Mr Patch which says in terms “[i]n the event that a British legal injunction / shows up against you (we do not foresee this), as Leonardo said, we will protect you”. In the end, BSH did not protect Mr Patch or GM Drinks, and Mr Patch expressed his view that they had left him to be “thrown under a bus” by not turning up to defend the matter and leaving him to do so. Mr Patch did not think that he or GM Drinks infringed Ms Martin’s rights – it was all, he said, a matter for the winery. Mr Patch gave evidence that GM Drinks did not order any more of the First Label Products once Ms Martin had been in touch with him, but that stocks of the First Label Products continued to leave Argentina, be imported into the United Kingdom, and passed on to customers of GM Drinks.

46. Whilst I have some sympathy for Mr Patch’s predicament, GM Drinks, which he owns and runs, imported the Products into the United Kingdom, offered them for sale, and sold them. Whilst various aspects of copyright infringement have a requirement that the alleged infringer knew or ought to have known that the allegedly infringing articles infringed, others do not – they are strict liability statutory torts. Thus, GM Drinks can be liable for some types of copyright infringement without knowing that they infringed. Similarly, the tort of passing off does not require that the defendant knew that s/he was passing off – similarly, it is a strict liability tort. Thus, what GM Drinks and Mr Patch knew is irrelevant to the assessment of liability in relation to some aspects of the Claimants’ case.

Copyright Subsistence

47. Subsistence of copyright in the Work was formally challenged in the Defences filed by the Defendants, although the alleged inadequacies in the Particulars of Claim were dealt with in the Claimants’ Reply. Therefore, whilst I need to deal with the issue of subsistence because technically it remains live, I can do so very briefly.
48. Section 154(1)(a) of the CDPA provides:
- “(1) A work qualifies for copyright protection if the author was at the material time a qualifying person, that is –
- a) a British citizen...”
49. Section 159(1)(a) of the CDPA provides:
- “(1) Where a country is a party to the Berne Convention or a member of the World Trade Organisation, this Part, so far as it relates to literary, dramatic, musical and artistic works, films and typographical arrangements of published editions—
- (a) applies in relation to a citizen or subject of that country or a person domiciled or resident there as it applies in relation to a person who is a British citizen or is domiciled or resident in the United Kingdom...”
50. Section 159(1) of the CDPA complies with Article 5 of the Berne Convention for the protection of Literary and Artistic Works 1886 (as amended), to which both the UK and USA are (and were at all material times) signatories.
51. Ms Martin gave evidence that she is a British citizen and was resident in New York, USA at the time she created the Work. Copyright thus subsists in the Work by virtue of her nationality (section 154(a) of the CDPA), and/or residence (section 159(1) of the CDPA), and at the time of creation was owed by Ms Martin as the author of the work. There was no suggestion that the Work is not original.

52. The assignment of copyright in the Work from Ms Martin to Found the Found was effected by a document signed by the assignor and the assignee dated 2 June 2021, after Ms Martin first complained to GM Drinks about the First Label, but 12 months before the Claim Form was issued in these proceedings. The assignment includes an assignment of “all ... copyright” as well as all causes of action throughout the world. The assignment was not challenged. I note for present purposes that the assignment does not include goodwill in the Work.
53. Therefore, to answer the first two issues in the List of Issues, there is no doubt in my mind that copyright subsists in the Work under the CDPA and is owned by Found the Found, having been assigned by Ms Martin on 2 June 2021. All copyright was assigned, and none was retained by Ms Martin.

Copyright Infringement

54. The claim for copyright infringement is brought only by Found the Found, which now owns the copyright in the Work.

The Law

55. Section 18 of the CDPA provides:

“18. Infringement by issue of copies to the public.

(1)The issue to the public of copies of the work is an act restricted by the copyright in every description of copyright work.

(2)References in this Part to the issue to the public of copies of a work are to the act of putting into circulation in the United Kingdom copies not previously put into circulation in [the United Kingdom or] the EEA by or with the consent of the copyright owner.]

(3)References in this Part to the issue to the public of copies of a work do not include—

(a) any subsequent distribution, sale, hiring or loan of copies previously put into circulation (but see section 18A: infringement by rental or lending)

(b). . . .

(4)References in this Part to the issue of copies of a work include the issue of the original.”

56. Section 22 of the CDPA provides:

“22. Secondary infringement: importing infringing copy.

The copyright in a work is infringed by a person who, without the licence of the copyright owner, imports into the United

Kingdom, otherwise than for his private and domestic use, an article which is, and which he knows or has reason to believe is, an infringing copy of the work.”

57. Section 23 of the CDPA provides:

“23. Secondary infringement: possessing or dealing with infringing copy.

The copyright in a work is infringed by a person who, without the licence of the copyright owner—

(a) possesses in the course of a business,

(b) sells or lets for hire, or offers or exposes for sale or hire,

...

an article which is, and which he knows or has reason to believe is, an infringing copy of the work.”

58. The acts of infringement (importing into the United Kingdom, and offering for sale and selling in the United Kingdom) were not contested. Therefore, the primary issue in relation to the First Label (as set out in the List of Issues) was whether the First Label copied a substantial part of the Work.

59. Counsel for the Claimants referred me to the leading case of the Court of Justice of the European Union on copying of a substantial part: *Infopaq International A/S v Danske Dagblades Forening* (Case C-5/08) [2010] FSR 20, which was applied in England & Wales in *Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2010] EWHC 3099 (Ch); [2011] RPC 7 per Proudman J at §83:

“The effect of *Infopaq* is that even a very small part of the original may be protected by copyright if it demonstrates the stamp of individuality reflective of the creation of the author or authors of the article. Whether it does so remains a question of fact and degree in each case. It is often a matter of impression whether use has been made of those features of the article which, by reason of the skill and labour employed in its production, constitute it an original copyright work. Is there merely a commonplace arrangement of unoriginal words (see *Ladbroke* at 276) as Mr Silverleaf submitted? Or has substantial use been made of the skill and labour which went into the creation of the original work? I bear in mind Lord Hodson's reference at 288 in *Ladbroke* to Peterson J's remark in the *University of London* case (at 610) that "there remains the rough practical test that what is worth copying is *prima facie* worth protecting." Of course that is not a test in itself or all copying, however insubstantial, would be an infringement. Lord Hodson quoted this sentence in the context of his own observation that, "The defendants are not, in my opinion, able to escape by

saying that all that they have done is to give banal commonplace descriptions to matter which is common to all engaged in the business and that, even if they have copied, they have copied nothing of any significance."

60. Counsel for the Claimants also referred me to Edwin Johnson J's judgment in *Pasternak v Prescott* [2022] EWHC 2695 (Ch); [2023] FSR 9:

"94. Turning to the principles which govern copyright protection, these derive partly from English case law, but also from international treaties which have shaped the UK copyright regime, as well as EU law through Directive 2001/29/EC ("the InfoSoc Directive"). This part of EU law remains a retained part of UK law.

...

103. The effect of *Infopaq* and the concept of intellectual creation was considered by Lewison LJ in *SAS Institute Inc v World Programming Ltd* [2013] EWCA Civ 1482; [2015] ECDR. 17; [2014] RPC 8. At [38] Lewison LJ explained the test for what is a substantial part, post *Infopaq*, in the following terms (underlining also added):

"Our domestic legislation confines the doing of a restricted act (e.g. copying) to doing that act in relation to the work as a whole or any "substantial part of it": Copyright Designs and Patents Act 1988 s.16 (1), s.16 (3), *Nova Productions Ltd v Mazooma Games Ltd* [2007] EWCA Civ 219; [2007] E.C.D.R. 6; [2007] R.P.C. 25 at [29]. It has long been the position in domestic law that what is substantial is a question to be answered qualitatively rather than quantitatively. In *Infopaq* the court said that parts of a work are entitled to the same protection as the work as a whole. But the parts in question must "contain elements which are the expression of the intellectual creation of the author of the work": [39]. This is now the test for determining whether a restricted act has been done in relation to a substantial part of a work. ...

...

105. Lewison LJ proceeded to quote from the *Infopaq* decision. He then identified what was meant by intellectual creation in the following terms, at [31]:

"The court has also considered what amounts to an "intellectual creation" on a number of occasions. The essence of the term is that the person in question has exercised expressive and creative

choices in producing the work. The more restricted the choices, the less likely it is that the product will be the intellectual creation (or the expression of the intellectual creation) of the person who produced it...

...

107. The test of originality is therefore a qualitative, not a quantitative test. It seems to me that the post *Infopaq* test is usefully and succinctly stated by Zacaroli J in *Sheeran v Chokri* [2022] FSR 15, at [21] in the following terms:

“To amount to an infringement, however, the copying must be of either the original work or a “substantial part” of it: s. 16(3)(a) of CDPA. This is a qualitative, not quantitative, question. The test is whether the part in question contains elements which are the expression of the intellectual creation of the author of the work: *Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2011] EWCA Civ 890, at [24]-[28], applying *Infopaq International A/S v Danske Dagblades Forening* [2009] ECDR 16; [2010] FSR 20. The essential consideration is to ask whether a defendant has taken that which conferred originality on the claimant’s copyright work (or a substantial part of it): *Mitchell v BBC* [2011] EWPCC 42, per HHJ Birss QC at [28]-[29].”

61. I respectfully agree with Edwin Johnson J’s summary of the current position. I was also directed to commentary in *Laddie, Prescott & Vitoria: The Modern Law of Copyright*, 5th Edn (Lexis Nexis, 2018), at §4.50, on three different scenarios of imitation which may constitute copying, namely: exact imitation of the whole of the work, exact imitation of part of the work, and inexact imitation:

“If the claimant’s work is copyright (which implies that it is original) and the defendant has imitated it exactly, the latter must have infringed, unless he can establish one of the special defences available, eg fair dealing for purposes of private study, and so on. This case is therefore easy from a legal point of view. Again, if the defendant has not plagiarised the whole of the work but has imitated part of it exactly, say, the top left-hand corner of a painting, it is, in principle, easy to decide if he has infringed, that is, taken a ‘substantial part’: one inquires whether the part that was taken comprises the claimant’s expression of his own intellectual creation. This case, therefore, is also fairly easy from a legal point of view. However, cases often present themselves where it can be seen that the defendant has by no means copied the claimant’s work exactly. It is then necessary to decide on which side of the line the case falls. This line

separates that degree of resemblance which is too general to count from that which is too close to be allowed. In such cases the defendant may argue that he has not taken the claimant's work, only his idea..."

62. The authors of *Laddie, Prescott & Vitoria* address the difficulty of referring to the "idea/expression dichotomy" at §4.51:

"4.51. Confusion is caused in the law of copyright because of the use of the catchphrase 'There is no copyright in ideas but only in the form of their expression'. Unless one understands what this means its utility is non-existent, or it is positively misleading. An artistic work of the imagination presupposes two kinds of ingredients: the conception of one or more ideas, and artistic dexterity and skill in their representation in the chosen medium. It is not the law that copyright protects the second kind of ingredient only. If that were so a debased copy which failed to capture the artist's dexterity and skill would not infringe, which plainly is not the case. Unless an artist is content merely to represent a pre-existent object (eg a building) or scene, it is part of his task as artist to exercise his imagination and in so doing he may create a pattern of ideas for incorporation in his finished work. This idea-pattern may be as much part of his work, and deserving of copyright protection, as the brushstrokes, pencil- lines, etc. The true proposition is that there is no copyright in a general idea, but that an original combination of ideas may constitute a substantial part of a copyright work. In *LB (Plastics) Ltd v Swish Products* Lord Hailsham of St Marylebone said:

'Of course, it is trite law that there is no copyright in ideas But, as the late Professor Joad used to observe, it all depends on what you mean by "ideas". What the respondents copied from the appellants was no mere general idea. It was, to quote the respondents' own language, to "follow the pattern" or principle part or in whole'

In *Austin v Columbia Graphophone Co*, and again in *Vane v Famous Players Film Co Ltd*, Astbury J said:

'Although no copyright exists in ideas there is copyright and can be copyright in a combination of ideas, methods, and devices, used and expressed in and going to form part of a new and original work based though it may be on old matter.'"

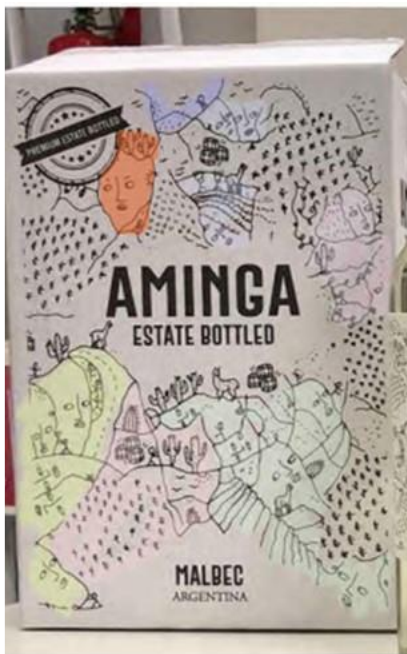
63. Counsel for the Claimants submitted that this is not a case about the idea/expression dichotomy, and I agree. But in any event, I have had the above comments well in mind in drawing my conclusions in relation to copyright infringement.

64. The Claimants put their case in relation to all three labels not based on copying of the whole Work, but rather the reproduction of elements of it. It was said that any reproduction of even the smallest part of the Work (which it should be remembered is a massive wall-drawing) is a substantial reproduction, if the part taken is the author's own intellectual creation. I am doubtful that that is what *Infopaq* decides, and it does not appear to be how Proudman J has expressed it in the excerpt set out above. I do not need to decide the point for the purposes of this case; but I am prepared to accept counsel for the Claimants' analysis for the purposes of this case on the basis that the point is more appropriately decided by a court which has heard full argument from both parties.

The First Label

65. The Claimants helpfully provided a side-by-side comparison of the First Label with the relevant part of the Work, with colour-coding to demonstrate some of the similarities. The image used for the First Label is actually of the side of the case in which 6 bottles of wine were packaged, but it is relevantly identical to the First Label, so nothing turns on that.

First Label (actually the case)



Segment of the Work



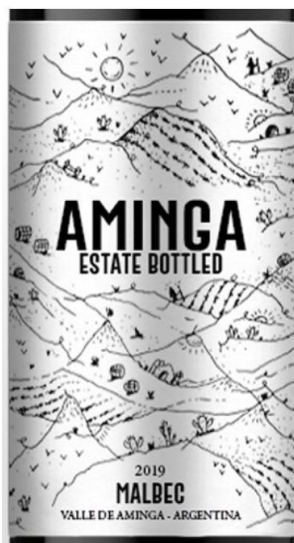
66. Counsel for the Claimants submitted that the similarities between the First Label and the Work are “more than sufficient” to engage the presumption that the Work has been copied: *Designers Guild Limited v Russell Williams Textiles) Limited* [2000] 1 WLR 2416 per Lord Millett at 2425 E-G. I accept that submission. There is no doubt in my mind that the First Label is clearly a copy, albeit a copy that has been modified in some respects. There are particular features of the Work (some of which are highlighted above) which are identically reproduced, and they are arranged in space identically. The First Label is clearly a copy of part of the Work.

67. In my judgment, the First Label is also very clearly a substantial reproduction of the Work. Adopting the words of Zacaroli J (as he then was) cited above by Edwin Johnson J, the First Label “has taken that which conferred originality on [Found the Found’s] copyright work (or a substantial part of it)”. To answer item 3 in the List of Issues, the First Label is a copy of a substantial part of the Work.
68. I should add for the benefit of Mr Patch that it does not matter that the First Label was designed by an independent designer, Mr Milia, on behalf of BSH. There was no evidence from Mr Milia, and no disclosed documents relating to his instructions to produce the First Label. But it does not matter. The acts of infringement are said to be the issuing of copies of the Work to the public, and the importing, offering for sale and sale of the Products – it therefore does not matter who actually undertook the relevant copying in the first place.

The Second Label

69. The Second Label is said to be a redesign of the First Label, and therefore also a copy of the Work. Looking at the Second Label, that appears to me to be the case. The question therefore arises as to whether the Second Label has moved far enough away – in the words of the editors of *Laddie, Prescott & Vittoria*, “it is then necessary to decide on which side of the line the case falls. This line separates that degree of resemblance which is too general to count from that which is too close to be allowed”.
70. I was not provided with a side-by-side comparison of the Second Label with the excerpt from the Work which was said to have been copied, but doing the best I can, the below images create the relevant comparison:

Second Label



Segment of the Work



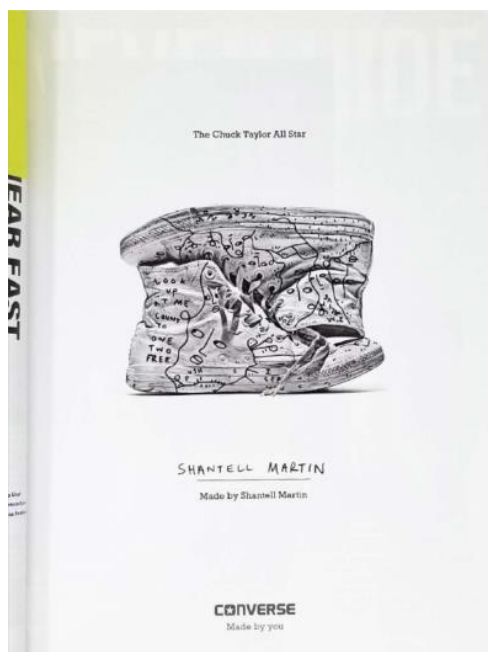
71. I have left the Claimants’ highlighting in the Segment of the Work to demonstrate that none of the features which I have found were copied in the First Label appears in the Second Label. I have also compared the Second Label with the whole Work, not just the segment excerpted above.

72. The Second Label was also designed by Mr Milia. I am satisfied that it was an attempt by Mr Milia to move away from the Work (and the First Label) to endeavour to avoid infringement (I return to this issue below). It was thus a copy of the First Label (for copyright purposes), and therefore also a copy of the Work. The question, as put by counsel for the Claimants in their opening written submissions was as follows: “[t]he issue with the Second Label (and Third) is whether sufficient disguise has been donned in order to actually prevent a substantial part of the Work from being taken so as to avoid infringement.”
73. Counsel for the Claimants suggested that a “straightforward” way to avoid infringement was to use an entirely different label. Whilst this is undoubtedly true, it is not the test I need to apply, so I need say no more about it.
74. The Claimants recognise that the Second Label falls within the third category identified by the editors of *Laddie, Prescott & Vittoria* – that is, inexact imitation. Counsel for the Claimants set out in their opening written submissions an eight-point feature analysis of what were said to be Ms Martin’s exercise of her expressive and creative choices:
- i) Ms Martin’s black and white graphic linear style created by, or appearing to be created by, a bold marker pen;
 - ii) fluid and continuous lines which overlap and interface with other sections of line;
 - iii) expressions of figures positioned on a line;
 - iv) dotted and dashed lines to create representations of a landscape and sky with birds in the sky;
 - v) line work which includes curves and small loops;
 - vi) the ends of line work used as a feature to create shape and visual impact, sometimes accompanied with dashed or dotted lines;
 - vii) such line-work building up to create two-dimensional abstracted drawings which reveal recognisable figurative and landscape elements, and
 - viii) figurative and landscape elements being without perspective or a sense of unified space.
75. The taking of these elements in the Second Label (and the Third Label) was said to constitute a substantial reproduction of the Work. It was submitted to me, in terms, that “the entirety of the [Second L]abel is in one form or another a copy of the Work”.
76. I did not find this feature analysis helpful for the purposes of assessing “substantial part”. First, feature i) is circular, defining the Work by reference to Ms Martin’s graphic linear style. Second, I do not consider that the analysis adequately sets out the features of the Work. This was not how third parties described Ms Martin’s work, for example. (I am conscious that what matters is

the Work, not Ms Martin's work more generally, but there are no descriptions of the Work in the evidence, and Ms Martin's work is, on the Claimants' case, consistent). Mr Duff, who gave evidence for the Claimants, described Ms Martin's work as follows – "[t]he faces, figures and features such as the way she does the black line – a map-like look with whimsical lines coming off it with a distinctive and pronounced thickness, makes her work instantly easily recognisable". The publisher of Ms Martin's monograph described her work thus: "[h]er work is a meditation of lines – a language of characters, lines, and messages that invites her viewers to share in her creative process". Ms Martin's lawyers (presumably on instructions) described her "distinctive black and white doodle style and include [sic] patch-worked faces". I recognise those descriptions of Ms Martin's work and the Work – I do not recognise the feature analysis. I consider Ms Martin's lawyers' description of "patch-work" to be accurate – Ms Martin's work has that appearance as does the Work. I also consider that the faces feature prominently in the Work, and in Ms Martin's work more generally – they are an essential element of nearly every example provided in the evidence. Third, counsel for the Claimants was equivocal when pressed as to whether, to be a "substantial reproduction", the Second Label needed to include all 8 elements (as one would expect from the use of the conjunctive "and" between elements vii) and viii)) or whether only some of them were necessary to constitute a substantial part. Counsel for the Claimants invited me to come up with my own feature analysis should I feel that the listed 8 elements were not made out. I do not consider that a useful way to proceed. Fourth, I do not consider that the Second Label reproduces all of the 8 elements (for example, it is readily obvious to me that the Second Label has perspective, contrary to element viii) relied on by the Claimants).

77. Rather, perhaps to state the obvious, in a question of copyright infringement of an artistic work (in this case, a wall-drawing), it is what it looks like that matters. Comparing the two works side-by-side is key. It may help to observe that both the artistic work and the allegedly infringing copy include birds, but that will not matter unless some element of the expression of the birds in the artistic work has been taken. Otherwise, the analysis falls foul of the principle that no copyright subsists in a general idea. Overly-lawyered feature analyses will not assist the Court, which is able to make the side-by-side comparison, particularly where the feature analysis does not appropriately represent what the work in issue actually looks like.
78. Further, the Second Label does not include two of the prominent visual features that make Ms Martin's Work original. First, the Second Label clearly has perspective. Second, it includes no humanoid faces. To me, having reviewed the Work and reviewed all the evidence before me of Ms Martin's other work (relevant to passing off, not to copyright infringement), including the various comments made by third parties in relation to Ms Martin's work, it is a particular element of Ms Martin's style that she mixes humanoid faces with geographic elements, devoid of perspective. This is done (largely) using black lines on a white background. It is, perhaps, easier to give some examples from the







79. When pressed at trial, the Claimants' counsel submitted that faces are not present in all Ms Martin's work – but they are in all the evidence that is before me and are very prominent in the Work. For example, counsel for the Claimants submitted to me that faces were not prominently included in Ms Martin's work for The North Face – this is clearly not right. The evidence shows the work submitted by Ms Martin which was used by The North Face to fabricate clothing and accessories, which clearly includes faces, as follows:

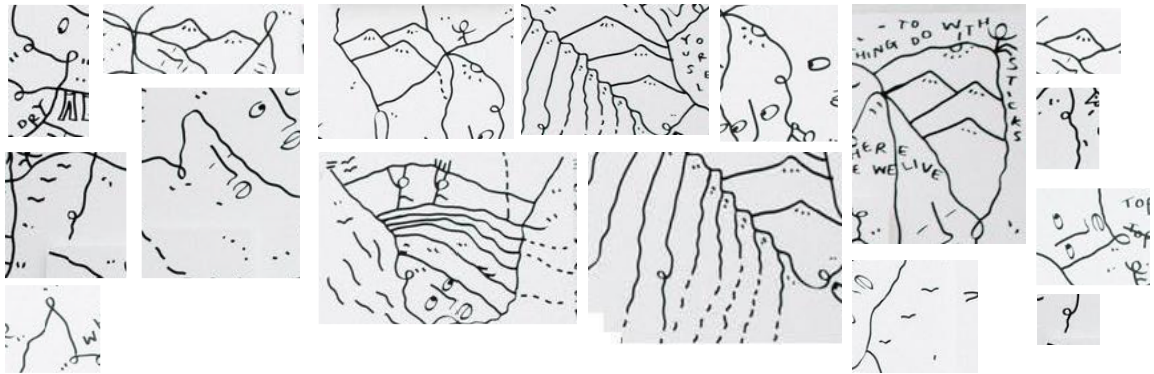


80. Faces are also apparent in The North Face garment as worn by Ms Martin in this image:



81. I did find two examples where a suite of works was prepared (one for Jose Cuervo, one a set of lithographs offered through Ms Martin's website), where only 5 of the 6 pieces in each suite included faces. But taken as a suite of works, faces are included.
82. I have set out these comments on Ms Martin's work more generally to deal with the issue only once – I return to my conclusions below in relation to passing off. To be clear, for the purposes of copyright infringement, I have considered only the Work: my review of the evidence of Ms Martin's wider oeuvre relates to the passing off claim. It is clear to me that the Work, like Ms Martin's work more generally, includes many humanoid faces. In the context of the Work, which was a large wall-drawing, some of the faces would have been a metre high. They are thus significant, and have, in my judgment, been overly downplayed in the Claimants' copyright feature analysis.
83. I therefore reject the allegation of copyright infringement by the Second Label based on the feature analysis.

84. Reliance was also put on exact copying of what were described as “a number of Ms Martin’s distinctive features”, namely her:
- i) loops;
 - ii) dotted lines;
 - iii) placement of mountains within graphic shapes; and
 - iv) depictions of suns and birds.
85. Sixteen examples of these were provided in the Claimants’ opening written submissions, as follows:



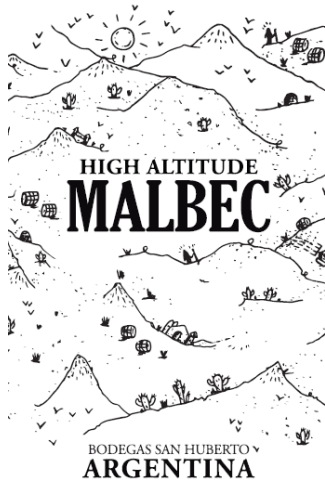
86. Doing the best I can, I cannot find exact (or even close) reproductions of any of those 16 visual elements in the Second Label. There are loops, dotted lines, mountains, suns and birds, but not as set out in the 16 examples to which my attention was drawn.
87. I therefore reject copyright infringement on this basis as well.
88. In closing submissions, infringement was put on a third slightly different basis – it was said that the designer of the Second Label “has sought to emulate, for example, [Ms Martin’s] use of figures or objects incorporated on top of a line, whereas in place of people, which [Ms Martin] often uses, cactuses have been used on the top right-hand side and in the sort of central element of the ... label on the right, you can see that there have been some barrels that have been drawn with some dashes around there and also the section beneath which presumably is meant to represent vineyards. This is still the designer copying Ms Martin’s expression, seeking to use her own style to represent additional elements that represent presumably the wine, so wine barrels etc”. It was also submitted that the llamas shown in the Second Label replicate the stick figure humans in the Work.
89. Looking again in detail at the Second Label and the Work, I cannot see how an image of a cactus (or a llama), which cannot be found in the Work, is a reproduction of a person as set out in the Work. Nor can I see that a black and white line drawing of a barrel or a vineyard, neither of which appear in the Work, is, on any basis, an infringement of Ms Martin’s copyright.

90. I therefore also reject this third basis on which copyright infringement was put. The various elements of the Second Label are not inexact imitations of the Work, as counsel for the Claimants submitted: they are black and white line drawings of different objects.
91. Standing back, I must ask myself, in the words of Proudman J, whether the Second Label “demonstrates the stamp of individuality reflective of the creation of [Ms Martin]. Whether it does so remains a question of fact and degree in each case. It is often a matter of impression whether use has been made of those features of the article which, by reason of the skill and labour employed in its production, constitute it an original copyright work.” In my judgment, Found the Found has not made out its case – I can find no use in the Second Label of features of the Work as alleged. As I have mentioned, there are loops, dotted lines, mountains, suns and birds – but those are all common elements in the language of drawing. Put another way, the loops, dotted lines, mountains, sun and birds are not Ms Martin’s loops, dotted lines, mountains, suns and birds as set out in the Work. Nor are they a substantial reproduction of them, or of the Work.
92. Counsel for the Claimants accepted that a designer, having reviewed a copyright-protect work, is able to move far enough away from it so that any new work created is not a substantial reproduction – to do so, she said, it must not include the author’s own intellectual creation. Counsel for the Claimants submitted that the Second Label (and the Third Label) still contains enough of Ms Martin’s intellectual creation because those labels do not move far enough away. I disagree. I consider that the Second Label has moved far enough away. Put another way, in my judgment, the Second Label does not include any of Ms Martin’s intellectual creation. Where there are similarities, they are banal aspects of the language of drawing, such as lines, loops, dots, birds and suns – they are not lines, loops, dots, bird or suns as drawn by Ms Martin in the Work, or as are particular to her Work. They are not the expression of her creativity.

The Third Label

93. The Third Label was another attempt to get further away from the Work. I am satisfied that it was a copy of the Work. The question I need to decide is whether it constitutes a substantial reproduction, or whether, as counsel for the Claimants conceded it could, it has moved far enough away.
94. In their opening written submissions, the Claimants provided a comparison of the Second Label and the Third Label. Once again, this is not the test. Rather, I must look at the Third Label and assess whether it is a substantial reproduction of the Work. Putting the Third Label next to the segment of the Work said to be copied for the First Label looks like this:

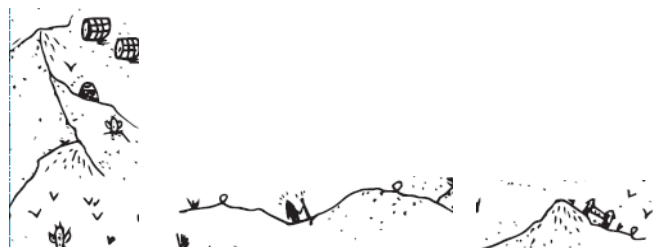
Third Label



Segment of the Work



95. Whilst I have put those two images side-by-side, I have also considered the whole of the Work in my analysis.
96. Again, it is apparent that none of the elements relied on in relation to substantial part for the First Label is present in the Third Label. The Third Label is further away from the Work than the Second Label.
97. The Claimants relied on the same three bases of infringement as for the Second Label. First, they relied on the feature analysis that I have set out above. My conclusion on that analysis is the same as for the Second Label – it does not lead to a finding of reproduction of a substantial part.
98. Second, the Claimants relied on the following three segments of the Third Label which are said to reproduce parts of Ms Martin’s expression of her intellectual creation in the Work, namely her loops, lines and dot-work:



99. With the Second Label, the Claimants provided me with 16 excerpts from the Work which were said to have been reproduced in the Second Label. Here, I was given three examples from the Third Label, which were said to be present in the Work. Again, doing the best I can, I cannot find these elements in the Work. The Work undoubtedly includes loops, lines and dot-work, but not these loops, lines or dot-work.
100. It is clear to me that the Third Label is far enough from the Work not to include any of Ms Martin’s intellectual creation. The Claimants have not pointed to any element of the Work (no matter how small) that has been copied exactly. The

Third Label and the Work look different, and the various elements of it each look different to the elements of the Work. Ms Martin's intellectual creation has not been taken. The Third Label is not a substantial reproduction of the Work. The Third Label does not infringe Found the Found's copyright.

Acts of Infringement

101. Infringement is alleged under sections 18, 22, 23(a) and 23(b) of the CDPA. The relevant acts were largely admitted or are apparent on the face of the documents before the Court. I can therefore deal with these issues briefly.
102. Section 18 of the CDPA relates to issuing copies of the work to the public. In the United Kingdom, this was done by GM Drinks. GM Drinks has therefore infringed copyright in the Work by issuing to the public the First Label. This appears to have occurred for the first time on or around 5 February 2020. Had I found that the Second and Third Labels infringe (which I have not), then GM Drinks would have been liable for issuing copies to the public in the United Kingdom.
103. Neither BSH nor Mr Patch issued the First Label Products to the public and so cannot be directly liable under section 18 of the CDPA (I deal with joint tortfeasorship below).
104. Section 22 of the CDPA relates to importing into the United Kingdom "an article which is, and which he knows or has reason to believe is, an infringing copy". All importing into the United Kingdom was undertaken by GM Drinks.
105. Section 23(a) of the CDPA relates to possessing in the course of business "an article which is, and which he knows or has reason to believe is, an infringing copy". GM Drinks possessed the First Label Products whilst they were in the United Kingdom.
106. Section 23(b) of the CDPA relates (relevantly) to selling, or offering or exposing for sale, "an article which is, and which he knows or has reason to believe is, an infringing copy". Selling, offering and exposing for sale of the First Label Products were undertaken in the United Kingdom by GM Drinks.
107. Infringement under sections 22, 23(a) and 23(b) therefore depends on whether GM Drinks knew, or had reason to believe, that the First Label infringed. Mr Patch gave evidence that he had not heard of Ms Martin, and was not aware of the Work, prior to her drawing it to his attention. This was not challenged in cross-examination, and I accept it to be the case. GM Drinks has admitted that Ms Martin gave notice of her ownership of copyright on 13 April 2020. The law provides a short period of time to enable a defendant to evaluate the facts that have been presented. Given the similarities between the First Label and the Work, and Ms Martin's helpful coloured comparison document provided by email to Mr Patch on 13 April 2020, in my judgment, GM Drinks, from shortly after that date, knew or at the very least had reason to believe that the First Label was an infringing copy of the Work.

108. Thus, GM Drinks is not liable under sections 22, 23(a) or 23(b) for any First Label Products imported, possessed in the course of business, sold or offered or exposed for sale prior to 13 April 2020, but is liable for copyright infringement for First Label Products relevantly dealt with from shortly after that date.
109. I have found that the Second Label and Third Label do not infringe Found the Found's copyright. If I am wrong in that, then the issue arises as to whether GM Drinks knew or had reason to believe that the Second and Third Label infringed for the purposes of sections 22, 23(a) and 23(b). I have had the advantage of a day and a half of argument from senior specialist counsel, and I have reached the conclusion that the Second and Third Labels do not infringe. GM Drinks had no such advantage. Further, as I have set out above, GM Drinks was advised by a specialist practitioner that the Second Label did not infringe the Work (and the Third Label is, on its face, further away from the Work). Thus, I am unable to conclude that, had I found that the Second and/or Third Labels was a substantial reproduction of the Work, GM Drinks would have had reason to believe that the two labels infringed the Work – particularly given that they had received legal advice that the Second Label did not infringe.
110. It was not alleged that Mr Patch was primarily liable for copyright infringement. BHS undertook no relevant acts in the United Kingdom and is therefore not primarily liable for copyright infringement.

Conclusions on Copyright Infringement

111. In summary, in my judgment:
- i) GM Drinks is liable for copyright infringement in relation to the First Label:
 - a) under section 18 of the CDPA in relation to all the First Label Products; and
 - b) under sections 22, 23(a) and 23(b) of the CDPA only in relation to any First Label Products relevantly dealt with from shortly after 13 April 2020.
 - ii) GM Drinks is not liable for copyright infringement in relation to the Second Label or Third Label.
 - iii) BSH and Mr Patch are not primarily liable for copyright infringement in relation to any of the First, Second or Third Labels.
112. I am conscious that that result will appear odd to Mr Patch, who considered BSH to be responsible for the copying which occurred. However, as I have set out above, some aspects of copyright law are strict liability, or relate to knowledge which I have found GM Drinks had from shortly after 13 April 2020. In relation to the strict liability aspect, copyright law provides that no damages will be payable by an innocent infringer, to which I return below: GM Drinks may be able to avail itself of that provision. GM Drinks will, however, be liable

at least for the damage caused by the approximately 5,880 bottles which it handled from shortly after 13 April 2020.

Moral Rights Infringement

113. As I have set out above, IPEC procedure requires that matters to be decided by the Court at trial are listed in the List of Issues. Therefore, as moral rights infringement was not so listed, there is no need for me to determine it and I decline in the exercise of my case management discretion to do so. However, in case I am wrong in that, I set out my findings below, based on the brief argument that was put to me at the trial.
114. The allegation of moral rights infringement is made only against GM Drinks and only in respect of First Label Products put into circulation in the United Kingdom after 13 April 2020. As set out above, this is a comparatively very small number of bottles (approximately 5,880 bottles).
115. The CDPA provides:

“s.77 Right to be identified as author or director

- (1) The author of a copyright literary, dramatic, musical or artistic work, and the director of a copyright film, has the right to be identified as the author or director of the work in the circumstances mentioned in this section; but the right is not infringed unless it has been asserted in accordance with section 78...
- ...
- (4) The author of an artistic work has the right to be identified whenever—
- (a) the work is published commercially or exhibited in public, or a visual image of it is communicated to the public;...

s.78 Requirement that right be asserted.

- (1) A person does not infringe the right conferred by section 77 (right to be identified as author or director) by doing any of the acts mentioned in that section unless the right has been asserted in accordance with the following provisions so as to bind him in relation to that act.
- (2) The right may be asserted generally, or in relation to any specified act or description of acts—
- ...
- (b) by instrument in writing signed by the author or director.
- (3) The right may also be asserted in relation to the public exhibition of an artistic work—
- (a) by securing that when the author or other first owner of copyright parts with possession of the original, or of a copy made by him or under his direction or control, the author is identified on the original or copy, or on a frame, mount or other thing to which it is attached, or
- ...

(4) The persons bound by an assertion of the right under subsection (2) or (3) are—

...

(b) in the case of an assertion under subsection (2)(b), anyone to whose notice the assertion is brought;

(c) in the case of an assertion under subsection (3)(a), anyone into whose hands that original or copy comes, whether or not the identification is still present or visible;...

116. The Work was signed by Ms Martin. Whilst this would have been extremely difficult to see on the copy of the Work forwarded by Ms Martin by email to Mr Patch on 13 April 2020, it was open to Mr Patch to enlarge the image to view Ms Martin's signature. Ms Martin also asserted her authorship of the Work at that time. As the First Label Products distributed to the public in the United Kingdom by GM Drinks from shortly after 13 April 2020 did not carry an acknowledgement of Ms Martin's authorship, in my judgment, Ms Martin would have succeeded under section 77 of the CDPA had she been permitted to run the point.

Passing Off

117. The passing off claim is brought by Ms Martin personally, as she owns any goodwill in her work. The claim is put on two bases – classic passing off on the basis of false endorsement, and also the inherent deceptiveness of the bottles which is said to bring strict liability to BSH, as well as to GM Drinks.

The law

118. The law on passing off is well known. As set out in *Reckitt & Colman Products Ltd v Borden Inc* [1990] 1 WLR 491 at 499, a claimant must prove goodwill, misrepresentation and damage. Goodwill must include customers in the United Kingdom: *Starbucks (HK) Limited & Anor v British Sky Broadcasting Group Plc & Ors* [2015] UKSC 31. In respect of misrepresentation, it is not necessary for a claimant to establish that the defendant consciously intended to deceive the public, provided that is the probable result of the conduct: *Harrods Ltd v Harrodian School* [1996] RPC 697 at 706. Passing off can be established based on false endorsement, provided all three conditions are met. In *Irvine v Talksport Ltd* [2002] EWHC 367; [2002] WLR 2355, Laddie J held (at §38) that there is no need for the parties to share a common field of activity. At §48 the Judge said:

“[T]here is nothing which prevents an action for passing off succeeding in a false endorsement case. However to succeed, the burden on the claimant includes a need to prove at least two, interrelated, facts. First that at the time of the acts complained of he had a significant reputation or goodwill. Second that the actions of the defendant gave rise to a false message which would be understood by a not insignificant section of his market that his goods have been endorsed, recommended or are approved of by the claimant...”

119. This approach was endorsed by the Court of Appeal in *Fenty v Arcadia Group Brands Limited* [2015] EWCA Civ 3; 2015 WLR 3291 (at §40). Kitchin LJ (as he then was) set out the relevant principles as follows:

“34.... [I]t is enough that the goods provided by the defendant are represented as being in some way connected or associated with the claimant, provided that the connection is a material one in the sense that it has caused or is likely to cause the claimant damage in their business...

...

43. So the claimant in a case of this kind must make good his case on the evidence. He must show that he has a relevant goodwill, that the activities of the defendant amount to a misrepresentation that he has endorsed or approved the goods or services of which he complains, and that these activities have caused or are likely to cause him damage to his goodwill and business...”

120. Counsel for the Claimants also submitted that where goods are inherently deceptive, additional factors apply, and referred me to *Wadlow on the Law of Passing Off*, 6th Edn (Sweet & Maxwell: 2016):

“5-249. It is passing-off for a trader to put into circulation goods which are inherently likely to deceive ultimate purchasers or consumers, even though the immediate purchasers may be middlemen who are not themselves deceived and even though the middleman may ultimately dispose of the goods in a manner which does not deceive anyone at all. The tort is complete when the defendant parts with possession of the deceptive goods, though actual damage to the claimant may not occur until later, if at all...

...

5-255. The law regarding inherently deceptive goods is clear. There is strict liability for putting into circulation goods which bear indicia sufficiently close to those distinctive of the claimant for deception to take place when those goods reach the market. It is no defence that the supplier may act honestly and innocently, nor that his immediate customers may not be deceived...

...

5-257. ...Lord Greene confirmed that the tort was complete when the offending goods were sold to the middleman.

“The defendant in a passing-off action has in the normal case, the simple case, sold a quantity of

deceptive goods. Those goods he may have sold direct to a member of the public, the ultimate purchaser, or he may have sold them to a middleman who is himself going to sell them to members of the public, or perhaps to some other trader who, in turn, deals directly with the public. The defendant has therefore put upon the market and sent into the market a quantity of goods which on the face of them, and ex hypothesi, are saying something about themselves which is calculated to mislead. That is the very gist of the conception of passing-off.”

5-258. Lord Greene went on to identify three categories of middlemen: those who did not realise confusion was likely and who would therefore take no special precautions to prevent it; those who would foresee confusion and take steps to make sure it did not take place; and those who would fail to do so because they intended to benefit from the possibility of confusion. The defendant’s liability did not, in principle, depend on which category his trade customers fell into. What happened after the goods left his hands was relevant only to the measure of damages, and that would be the same whether a particular dealer fell into the first category or the third.”

121. I respectfully agree with Professor Wadlow.

Goodwill

122. There is no doubt in my mind that Ms Martin has, and had at all relevant times, the requisite goodwill in the United Kingdom to found an action for passing off. There was plenty of evidence before me of activity she has undertaken in the United Kingdom to foster that goodwill – the attractive force that brings in custom: *IRC v Muller & Co's Margarine* [1901] AC 217. The following examples, taken from the evidence, all support the existence of that goodwill, or acknowledge/celebrate it. In saying that Ms Martin had the requisite goodwill at the relevant times, I have taken care in relation to events occurring after the relevant dates (such as the award to Ms Martin by HM the King of an MBE): goodwill is rarely generated overnight, so events after the relevant dates can in some circumstances provide support for the existence of goodwill as at the relevant dates. I have listed below some only of the indications of goodwill – but I have taken into account all of the evidence that was before me.

- i) In November 2016, Ms Martin participated in a special event at Tate Modern, London, showcasing her work;
- ii) She had a solo show in London in 2021;
- iii) Ms Martin has over 11,000 UK-based followers on Instagram, 20,000 followers on X (formerly Twitter); 50,000 subscribers on YouTube (where her videos have attracted thousands of views); 97,000 Tumblr

followers and 70,000 followers on LinkedIn (not all these followers are UK-based, and not all relate to figures before the relevant dates, but they give some idea of Ms Martin's breadth and depth of support);

- iv) Ms Martin was awarded an honorary fellowship from the University of the Arts, London in 2024;
 - v) Ms Martin's works are used to teach in UK schools;
 - vi) Since 2013, Ms Martin has commercialised her work by engaging in collaboration and/or endorsement agreements. Examples of endorsement deals which targeted the UK include:
 - a) Jose Cuervo in 2017;
 - b) Puma in 2018;
 - c) The North Face in 2020;
 - d) Absolut in 2020;
 - e) Liquid Icons in 2021 – Ms Martin was Artistic Director of the Golden Vines awards, with an event hosted in London;
 - f) The Financial Times in 2021 including an event in London; and
 - g) Grind Coffee in 2023.
123. There is no doubt in my mind that Ms Martin had the requisite goodwill at the time the First Label was first offered to the public in the United Kingdom, which goodwill continued as the Second Label and Third Label were first offered to the public in the United Kingdom. There is a question of what Ms Martin's goodwill was in. This is not the case of a plastic lemon filled with juice where the goodwill resides in the getup of a single, mass-produced item. Rather, goodwill is said to exist in Ms Martin's entire artistic output. That therefore needs some further clarification.
124. The Particulars of Claim set out the primary claim – “Ms Martin has a distinctive graphic line-work style which renders her works instantly recognisable”. This is then further defined by what is described in the Particulars of Claim as **The Style**. Goodwill is said to subsist in The Style:
- i) a black-and-white palette;
 - ii) lines created by, or appearing to be created by, a bold marker pen;
 - iii) fluid and continuous lines which overlap and interface with other sections of line;
 - iv) line work which includes curves and small loops;

- v) the ends of line work used as a feature to create shape and visual impact, sometimes accompanied with dashed or dotted lines;
 - vi) such line-work building up to create two-dimensional abstracted drawings which reveal recognisable figurative and landscape elements, and
 - vii) such figurative and landscape elements being without perspective or a sense of unified space within the overall piece.
125. The definition of The Style is very similar to, but not exactly the same as, the feature analysis advanced in relation to the Claimants' copyright infringement case.
126. Unlike for the purposes of the copyright case, it is necessary to set out in words the elements which make up Ms Martin's goodwill. In most passing off cases, this is easier – as it was for the plastic lemon in the *Jif Lemon* case. Describing an artist's style is more complicated, and nothing I say in trying to do so is intended to offend Ms Martin, who has clearly been very successful as an artist and as a business person, including in her licensing and endorsement work. As with the feature analysis crafted for the purposes of the copyright infringement case, I do not consider that the definition of The Style in the Particulars of Claim adequately or properly captures the key elements of Ms Martin's goodwill. Rather, it appears to have been drafted, carefully, so as to attempt to encompass the First Label, Second Label and Third Label, each of which could be said to exhibit some of the elements listed.
127. As set out above in relation to the copyright claim, it seems to me that it is easier to demonstrate Ms Martin's goodwill with images than with words. I have set out in this judgment numerous depictions of her work taken from the evidence. Her goodwill subsists in that work. Particularly, it seems to me that her work, overall, exhibits the following characteristics:
- i) black line drawings on a white background;
 - ii) two-dimensional imagery, with an absence of perspective; and
 - iii) as described by Mr Duff, a “map-like” look, or patchwork with an unusual mix of humanoid faces with geographical features such as mountains.
128. There is, of course, more to her work, and, as I have said, that simple description of what I perceive from the evidence to be the main aspects of it is not intended to offend Ms Martin. Quite to the contrary – her work is clearly highly successful. But it is easier to show it than to say it – the images I have excerpted in this judgment demonstrate Ms Martin's work and the goodwill that attaches to it in the United Kingdom much better than my attempt to describe it.

Misrepresentation

129. There were before the Court two instances of UK consumers being misled. Ms Martin said she did not know either of the individuals concerned before their postings.
130. In one, a Ms Stephanie Kane contacted Ms Martin on or around 18 June 2020 through an online platform, leading to the following conversation, a screenshot of which was in evidence:

“Ms Kane: Hello! Hope you’re ok! I just bought a bottle of wine with what I thought has your work all over the label but I can’t see your name anywhere on the bottle.

[picture of First Label Product]

Is this yours?

Ms Martin: They ripped me off [sad face emoji]

Do you know where you bought it from?

Ms Kane: Ahh no! Sorry to hear that, I wish I didn’t but it now, I was over excited thinking it was yours and yours fairly! I got it from the late night shopper in Stoke Newington London.”

131. Another UK purchaser posted on or around 24 August 2020 that the First Label Product matched their tattoo, tagging the post with @shantell_martin as follows:



132. There were said to have been examples prior in time to these two, but Ms Martin did not keep screenshots or other records, so it is not possible to know what was said. I was also asked by her counsel to infer that there were examples after these two: I decline to do so in the absence of any evidence to that effect. By 24 August 2020, Ms Martin was well represented by specialist practitioners, and should have been aware of the need to screenshot and keep any examples of

misrepresentation. I therefore reject the claim made by counsel for the Claimants that there were examples from after 24 August 2020 (a claim, I should add, that wasn't made by Ms Martin herself in her evidence).

133. These two examples confirm my own view that the First Label is sufficiently close to Ms Martin's work so as to create a misrepresentation that she has endorsed the First Label Product. It seems to me very likely indeed that anyone within Ms Martin's goodwill (which I have endeavoured to illustrate and describe above) will consider that Ms Martin has endorsed or otherwise been associated with the First Label Product.
134. I can find no liability for BSH, however, on the basis that there is no evidence that BSH did anything in the United Kingdom. As I understand the evidence, GM Drinks imported the Products into the United Kingdom. BSH therefore undertook no acts in the United Kingdom to which passing off could attach. I can see the attractiveness to a claimant of the notion, set out in *Wadlow*, that it is not necessary with an inherently misrepresentative product to claim joint tortfeasorship, but rather strict liability attaches to each supplier in the chain. Without deciding the point, that may well be the case when those acts all happen in this jurisdiction. But the importation by GM Drinks of the Products into the United Kingdom does not retrospectively make unlawful something which may well have been lawful in Argentina (and as no evidence of Argentinian law was adduced before me, I do not make any such finding). I return to joint tortfeasorship for passing off below.
135. I do not consider that the Second Label or the Third Label amount to misrepresentations. I do not consider they are sufficiently similar to Ms Martin's work, nor to the Claimants' definition of The Style, to constitute a misrepresentation. This is because:
 - i) Neither the Second Label nor the Third Label includes any humanoid faces – as I have set out above, these are prevalent throughout the examples of Ms Martin's work which were in evidence before me, and are, in my view, a significant contributor to her goodwill. They seem to me to be a large contributor to what she is known for;
 - ii) Neither the Second Label nor the Third Label is without perspective. In both labels, there is a traditional depiction of perspective, with the top of the label being the top of the view, and a clear sense of foreground;
 - iii) Neither the Second Label nor the Third Label includes the “map-like” or patchwork quality prevalent in Ms Martin's work; and
 - iv) Whilst it is impermissible in a copyright case to consider what has been added to the allegedly infringing copy, it is essential for the law of passing off to look at the whole of the allegedly tortious product, including what has been added. Many of the elements of the Second Label and Third Label are not to be found in Ms Martin's work at all, including the clear indicia of wine-making (such as barrels) and what were said to be indicia of Argentina (such as cacti and llamas). These

serve to distinguish the Second and Third Labels from Ms Martin's work and The Style (as defined).

136. In my judgment, no "not insignificant section" of Ms Martin's market would consider that she was involved in the Second Label or Third Label products. I am fortified in this conclusion by the absence of any evidence from independent consumers. Whilst of course this is not necessary for a finding of passing off, the various points of contact in relation to the First Label demonstrate that misled consumers did in fact get in touch – evidence of misrepresentation was possible to obtain. In relation to the Second and Third Labels, there was none, in circumstances where considerably larger volumes of the Third Label Product were sold in the United Kingdom than of the First Label Product. Whilst not determinative, this accords with my view of the evidence before the Court.
137. Counsel for the Claimants asked me to draw adverse inferences against the Defendants for failing to disclose the instructions to the designer, Mr Milia, in relation to the Second and Third Labels: *Wade v Singh* [2024] EWHC 1203 (Ch) at paragraphs 47 to 54; *Ebofi v Royal Mail Group Limited* [2021] UKSC 33 at paragraph 41. It was submitted to me by the Claimants' counsel that in the absence of those disclosed documents, I should draw the adverse inference that those instructions must have been "[r]emove the most offensive bits but keep as much as you can". I do not consider that that submission assists the Claimants. First, any adverse inference is available only against BSH. This is because it was the party which instructed the designer and therefore would be likely to have any relevant documents. I have found BSH not to be liable for passing off in relation to the First Label because it carried out no relevant act in the United Kingdom, and that is also true in relation to the Second (and Third) Label. No adverse inference can be drawn against Mr Patch or GM Drinks. Further, even if I accept that the instructions to Mr Melia said what counsel for the Claimants alleges, that does not establish passing off – rather, such a comment reads to me like a defendant trying to design around a perceived problem (which is permissible), as opposed to a defendant trying to create a misrepresentation. I therefore decline to draw such an inference and can find no evidence of an intention to deceive, but, if I am wrong in that, it would not, on the facts of this case, have assisted the Claimants in any event.
138. I was also asked to draw adverse inferences against BSH from the fact that around 5 January 2021 BSH considered 5 other designs for the Third Label, all of which were further away from Ms Martin's work than the label eventually adopted. It was submitted that BSH could readily have adopted any of those other designs, but chose the one closest to Ms Martin's work. Again, this does not, as counsel for the Claimants conceded, assist the Claimants against GM Drinks or Mr Patch, and BSH undertook no relevant acts in the jurisdiction. It is relevant that, by this time, the Defendants had received advice from an English-qualified specialist intellectual property practitioner that the Second Label did not infringe. I can find no intention to deceive in the conduct shown in this document.
139. Finally, counsel for the Claimants submitted that the Second and Third Labels were more likely to amount to passing off because of the possibility that they would appear on a retail shelf alongside the First Label (which I have found to

constitute passing off). I reject this argument. First, on the facts before me, given the rapid turnover of the Products in issue, it seems to me factually very unlikely that First, Second and/or Third Label Products would have ever appeared next to each other on shelves (and there was no evidence that they did). Further, even if they had, they are sufficiently different that I do not consider it likely that consumers would have been misled in relation to the Second and/or Third Label because of any proximity to the First Label, and there was no evidence to that effect.

Damage

140. Having found goodwill and a misrepresentation in relation to the First Label, in my judgment, damage would necessarily follow from that misrepresentation. That is sufficient for present purposes. However, counsel for the Claimants asked me to decide separately on each of the three alleged heads of damage claimed by the Claimants:
- i) the actual loss suffered in respect of the revenue which Ms Martin would have been able to receive from her licensing/endorsement business;
 - ii) the likely reduction in Ms Martin's ability to attract endorsement deals in the wine and alcohol sector; and
 - iii) damage to the distinctiveness of Ms Martin's signature Style.
141. Ms Martin's endorsement business was of prominent products with established marketplace reputation, and she gave evidence of her process in deciding which endorsements to accept and which to reject. As I have said, I accept that evidence. I also accept that, had she been asked, Ms Martin would have been unlikely to endorse the Products, which, on the evidence before me, were not prominent in the wine market nor of any extensive marketplace reputation. Endorsing the Products would therefore have been at odds with her goodwill, and the products which she was known for endorsing. I do not at this stage need to quantify it, but I find that the first head of damage is made out.
142. I do not accept that, were she to be (wrongly) thought to have endorsed the First Label Products, it is less likely that a third-party high-end wine provider would request her services. This submission was undermined by Ms Martin's invitation to participate in the Golden Vine awards in 2021, well after the First Label had been made available in the United Kingdom. Ms Martin gave evidence that she was asked to be Artistic Director of the "prestigious" Golden Vines awards, which celebrate wine producers who deliver exceptional quality. She created the trophy, and hosted the awards in 2021, including auctioning a live drawing at the awards ceremony held at Annabel's Private Members Club in London. There was no evidence that the convenors of the Golden Vine awards were concerned by the First Label Products. This may have been because the First Label Products were imported into the United Kingdom in only very small quantities, a matter to which I return below, and the fact that the advertising of the First Label Products was described as "minimal" by Mr Patch. This real-world example also undermines Mr Duff's evidence on this point, which was based on supposition, and his opinion. Mr Duff said "[i]f I had seen

[Ms Martin's] work on a bottle of wine in Asda then I would have been quite shocked". Mr Duff did not in fact see the Products in Asda, so what he would have done is supposition. Further, no permission was given for Mr Duff to adduce opinion evidence. He was not in any event in the wine or alcohol industry, so his opinion on this topic is not relevant. I do not consider that this head of damage is made out on the facts before me.

143. The third head of damage is said to be damage to the distinctiveness of Ms Martin's signature style. This seems to me to be likely on the facts of this case. I am not asked at this stage to quantify what that damage is likely to be (and I return to proportionality and quantum below).
144. Returning to the List of Issues, in my judgment protectable goodwill subsists in the United Kingdom in Ms Martin's work (although not in The Style as defined in the Particulars of Claim), including as generated by the endorsement of products sold in the United Kingdom, and that goodwill is owned by Ms Martin, having not been transferred to Found the Found. GM Drinks has misrepresented that the First Label Products are connected in the course of trade with Ms Martin's business, causing Ms Martin damage to her existing licensing/endorsement business and to the distinctiveness of her signature style.

Knowledge and Correspondence

145. Knowledge of passing off is not an element of the tort. GM Drinks can therefore be liable for passing off without knowing that it was doing so. As it may arise in relation to joint tortfeasorship, however, I do need to record that, whilst Ms Martin notified Mr Patch on 13 April 2020 of the existence of the Work and her allegations of copyright infringement, that email chain, headed Copyright Infringement, does not mention passing off. The first letter sent from lawyers on Ms Martin's behalf was from a US firm and sent on 18 June 2020: it threatened civil and criminal penalties under the CDPA, but not passing off. The first letter from English lawyers was sent on 7 October 2020 and purports to be a Pre-Action Protocol compliant letter before action. The allegation of criminal penalties is (rightly) not pursued, but there is no mention of passing off. A further letter from Ms Martin's then English lawyers on 15 December 2020 also fails to refer to passing off. Passing off was first alleged in a letter from Ms Martin's (new) English lawyers on 8 December 2021. That letter sets out elements of Ms Martin's goodwill. It was also the first time that allegations were levelled at anyone other than GM Drinks. Earlier correspondence had attached draft undertakings to be given by GM Drinks and no-one else. The 8 December 2021 letter also made allegations against BSH, and attached undertakings to be given by GM Drinks and BSH. No remedy was sought in relation to Mr Patch.
146. Mr Patch was first contacted in his own right on 6 January 2022, when a letter before action was sent, attaching undertakings drafted to be given only by Mr Patch on his own behalf, referring to copyright infringement and passing off.
147. Whilst I have found no copyright infringement and no passing off in relation to the Second Label and the Third Label, I record that these were first raised in correspondence on behalf of Ms Martin on 7 October 2020 and 6 January 2022

respectively. As noted above, the Defendants were advised in October 2020 that the Second Label did not infringe.

Joint Tortfeasorship

148. The last of the List of Issues for decision was agreed as follows: are the Defendants or any combination of them joint tortfeasors in respect of (i) copyright infringement, and (ii) passing off, such that they are jointly liable for any of the acts alleged?
149. My findings of copyright infringement and passing off above all relate to GM Drinks and all relate to the First Label. Some of the findings in relation to copyright infringement only relate to First Label products relevantly dealt with from shortly after 13 April 2020. The question therefore arises of whether either Mr Patch or BSH is jointly liable for those acts which have been found to be infringing.
150. The issue of joint tortfeasorship has recently been reconsidered by the Supreme Court in *Lifestyle Equities CV & Anov v Ahmed & Anor* [2024] UKSC 17; [2025] AC 1. In summary, the Supreme Court held that a defendant will only be held jointly liable if it can be established that they had actual or constructive knowledge of the essential facts which made the act of the primary wrongdoer tortious. Lord Leggatt, with whom Lord Lloyd-Jones, Lord Kitchin, Lord Stephens and Lord Richards agreed, summarised the position as follows:

“135. To summarise, there is a general principle of the common law that a person who knowingly procures another person to commit an actionable wrong will be jointly liable with that other person for the wrong committed. The liability of the procurer is an accessory liability. Where the primary wrong is a breach of contract, this accessory liability takes the form of a distinct tort. Where the primary wrong is a tort, however, there is no need to posit a separate tort of procuring another person to commit a tort. Where the general principle applies, the procurer is made jointly liable for the tort committed by the primary wrongdoer.

136. There is a further, distinct principle of accessory liability by which a person who assists another to commit a tort is made jointly liable for the tort committed by that person if the assistance is more than trivial and is given pursuant to a common design between the parties. On the facts of a particular case both principles may be engaged. But on the present state of the law assistance which falls short of procuring the primary wrongdoer to commit the tort cannot lead to liability unless it is given pursuant to a common design.

137. Although procuring a tort and assisting another to commit a tort pursuant to a common design are distinct bases for imposing accessory liability, they must operate consistently with each other and such that the law of accessory liability in

tort is coherent. Considerations of principle, authority and analogy with principles of accessory liability in other areas of private law all support the conclusion that knowledge of the essential features of the tort is necessary to justify imposing joint liability on someone who has not actually committed the tort. This is so even where, as in the case of infringement of intellectual property rights, the tort does not itself require such knowledge. As Paul Davies says in his excellent book on Accessory Liability (2015) p 211: ‘Strict liability might suffice for the primary tort but should not be sufficient for accessory liability.’”

151. Some guidance was provided on what the “essential features of the tort” are for the purposes of copyright infringement, but not in relation to passing off, to which I return below.
152. The Claimants set out their position in their opening written submissions. These were divided into pre-notification claims and post-notification claims, notification being said to be 13 April 2020 when Ms Martin notified Mr Patch of the existence of her Work and the allegation of copyright infringement. That understates the position. As I have set out above, the chain of correspondence shows that the allegation of copyright infringement was made against GM Drinks on 13 April 2020, but was not made against BSH until 8 December 2021, and was not made against Mr Patch personally until 6 January 2022. Allegations in relation to the Second Label date from 7 October 2020 and for the Third Label date from 6 January 2022.

Joint tortfeasorship for copyright infringement – pre-notification

153. The Claimants’ opening written submissions set out their pre-notification position in relation to copyright as follows (with my comments interpolated):
- i) GM Drinks was said to be liable as a primary tortfeasor under section 18 of the CDPA – I have found that allegation made out in relation to the First Label only.
154. Thus, I need to assess joint tortfeasorship by BSH and Mr Patch in relation to GM Drinks’ liability under section 18 of the CDPA in relation to the First Label. This might be described as strict liability copyright infringement – even though GM Drinks did not know it was doing anything unlawful, it was. However, there was no evidence at all that BSH or Mr Patch knew of Ms Martin’s Work prior to 13 April 2020, and Mr Patch gave evidence that he did not know of her Work prior to that date. In my judgment, the allegation of secondary liability in relation to pre-notification copyright infringement fails.

Joint tortfeasorship for copyright infringement – post-notification

155. The Claimants’ opening written submissions set out their post-notification position as follows (with my comments interpolated):

- i) *Section 18 infringement*: the Claimants submitted that Mr Patch and BSH were both aware that the First Label Products were for circulation in the United Kingdom, and were in fact circulated, and therefore had knowledge of the relevant acts of trade. They were both put on notice that the First Label was an infringing copy from 13 April 2020 (Mr Patch because he read it directly in the email from Ms Martin, and BSH because Mr Patch forwarded Ms Martin's email to them). I accept that submission. In my judgment, from shortly after 13 April 2020 Mr Patch and BSH were aware of the essential elements of the tort, and so are joint tortfeasors with GM Drinks. As set out above, this relates to only a small quantity of the First Label Products – approximately 5,880 bottles of wine.
- ii) *Section 22, 23(a) and 23(b) infringement*: The Claimants submitted that Mr Patch and BSH are joint tortfeasors in relation to section 22 infringement (importing) in relation to the Second Label and Third Label, because they were made aware on 13 April 2020 that the First Label infringed. I am not sure that is right, but it does not matter, because I have found that the Second and Third Labels do not infringe. The same is said to be true in relation to section 23(a) infringement (possessing) and section 23(b) infringement (selling or offering or exposing for sale). Again, as I have found that the Second and Third Labels do not infringe, the issue does not arise. I cannot find in the Claimant's skeleton argument a joint tortfeasorship claim in relation to Mr Patch and BSH and the First Label for copyright infringement under sections 22, 23(a) and 23(b) of the CDPA – however, it is pleaded, and so I need to deal with it. I consider Mr Patch and BSH to be joint tortfeasors in relation to this infringement for the same reasons as I have set out above in relation to section 18 infringement, but only in relation to the small number of bottles dealt with as from shortly after 13 April 2020.

Joint tortfeasorship for passing off – pre-notification

156. The Claimants' opening written submissions set out their pre-notification position in relation to passing off as follows (with my comments interpolated):
- i) GM Drinks was said to be liable as a primary tortfeasor for passing off – I have found this to be the case in relation to the First Label only;
 - ii) BSH was said to be liable as a primary tortfeasor under the doctrine of instruments of deception – I have found this not to be made out, on the basis that BSH has done nothing at all the United Kingdom on which to found primary liability.
157. Thus, I need to assess joint tortfeasorship by BSH and Mr Patch in relation to GM Drinks' liability for passing off in relation to the First Label. As with copyright infringement as set out above, prior to 13 April 2020, there is no evidence that BSH or Mr Patch knew of the existence of the Work, or of Ms Martin or her work more generally, until they were informed by her. Thus, any allegation of joint tortfeasorship prior to 13 April 2020 fails.

Joint tortfeasorship for passing off – post-notification

158. The Claimants’ opening written submissions set out their post-notification position as follows (with my comments interpolated):

- i) *Passing off*: the Claimants allege that Mr Patch was personally aware of the “essential facts” of the tort of passing off after 13 April 2020 because he conducted online research into Ms Martin and was made aware of her reputation as an artist. The Claimants submit that knowledge of her reputation is sufficient to attach joint tortfeasorship to Mr Patch from that date. I disagree. Reputation is not the essential fact of the tort of passing off – there must be goodwill (customers) in the United Kingdom. I have no basis for concluding that Mr Patch was aware at any time before 8 December 2021 of Ms Martin’s goodwill in the United Kingdom. Whilst he was aware from his research that she hailed from London, that did not seize him of knowledge of goodwill in the United Kingdom, nor any other elements of a tort that had not at that time been alleged at all, let alone against him. Alternatively, it was put that joint liability stems from 18 June 2020, when the US firm wrote to GM Drinks (and Mr Patch read the letter). Again, I do not consider that to be sufficient given what was (and was not) described in that letter, as I have set out above.
- ii) It is also said that BSH is similarly jointly liable from 13 April 2020 on the basis that Mr Patch was forwarding to them the correspondence he was receiving from Ms Martin’s advisors. Again, I do not consider that to be sufficient for the same reasons. All the focus of Ms Martin’s early correspondence – both personally and through her representatives – was on copyright infringement. Whilst reputation was mentioned, that is not an element of passing off. Goodwill, including goodwill in the United Kingdom, was not mentioned until significantly later, when most, if not all, of the First Label Products had been sold. I therefore decline to find joint tortfeasorship in relation to passing off for the First Label.
- iii) As I have found that the Second and Third Labels do not constitute passing off, there can be no joint tortfeasorship in relation to those labels.

159. I should add that counsel for the Claimants submitted that the essential facts of the tort of passing off had not been considered in a reasoned judgment of the Court, and that this would be a good opportunity to do so. As the Defendants were unrepresented, and therefore the issue was not fully argued before me, I have declined that invitation. I am therefore not making any finding on what the essential features of the tort of passing off might be for the purposes of assessing joint tortfeasorship. Rather, my finding on the facts of this case is that the Claimants have not succeeded on the basis of what they say the essential facts of the tort are (namely, Ms Martin’s reputation and what the labels on the Products looked like).

Flagrancy

160. As I have set out above, parties should not expect matters not listed in the List of Issues approved by the Court at the CMC to be determined at the trial. However, if I am wrong in that, I set out below my views on flagrancy damages.
161. The Claimants seek additional damages for flagrancy of the copyright infringement following 13 April 2020 in accordance with Regulation 3 of the Intellectual Property (Enforcement, etc) Regulations 2006/1028 and/or additional damages under section 97 of the CDPA. Flagrancy damages are also sought in relation to passing off. This was pressed in the briefest of terms in the pleadings and the Claimants' submissions such that I can deal with it briefly. Usually, flagrancy damages would be dealt with at a damages enquiry, but I was asked to do so now.
162. I reviewed the law on flagrancy in *Original Beauty Technology Company and Ors v G4K Fashion Limited and Ors* [2021] EWHC 3439 (Ch) at paragraphs 140 to 147. I do not consider that the infringement I have found in this case was flagrant, and an award of flagrancy damages, even a small award, would not, in my judgment, be just in all the circumstances of the case. I do not consider an award of additional damages to be "effective, proportionate or dissuasive" in this case. As I have set out above, GM Drinks was unaware of Ms Martin, her work, or the Work until 13 April 2020. Whilst approximately 5,880 bottles may have been dealt with thereafter, these had already been purchased from BSH. There was nothing in the dealing of them that warrants any moral or other opprobrium, or requires damages other than those which would put the Claimants into the position they would have been in but for the infringement.

Summary

163. In summary:
- i) GM Drinks is liable to Found the Found under section 18 of the CDPA for copyright infringement of the Work for issuing to the public copies of the Work in the form of the First Label Products, but may not be liable for damages prior to shortly after 13 April 2020 if that infringement was innocent;
 - ii) GM Drinks is liable to Ms Martin for passing off the First Label Products as endorsed by Ms Martin;
 - iii) BSH and Mr Patch are joint tortfeasors only in relation to copyright infringement under sections 18, 22, 23(a) and 23(b) of the CDPA in relation only to the First Label Products relevantly dealt with from shortly after 13 April 2020; and
 - iv) no liability attaches to any of the Defendants in relation to the Second Label or the Third Label.

Next Steps

164. As is clear from the above, the Claimants have failed in many of the arguments they put forward, including in relation to the Second Label and Third Label. I

have found that the First Label infringes. Most of the arguments of joint tortfeasorship have also failed.

165. It would be usual at this point to list the matter for a hearing as to the appropriate remedies, but given the GM Drinks and Mr Patch are unrepresented, I set out here a little more information than I would usually to assist them. All of the below is subject to the parties having an opportunity to address the Court – nothing I say in the following paragraphs is intended to pre-judge any matters. I should add that I raised these issues expressly with the parties at the end of the first day of the trial, to encourage them to attempt to settle their differences.
166. In terms of injunctions, on a finding of copyright infringement/passing off, an injunction would usually issue in broad terms to prevent the Defendants from infringing Found the Found's copyright in the Work or passing off the Defendants' products as endorsed by Ms Martin. There was before me no evidence that the Defendants have dealt in the First Label Product for some years. Further, as I understand the *inter partes* correspondence, representatives for GM Drinks and Mr Patch offered undertakings in relation to the First Label Product but these were not taken further. The parties may therefore wish to consider whether injunctions are necessary/appropriate, and Mr Patch may wish to consider whether he and GM Drinks are prepared to offer again undertakings not to deal in the First Label Products.
167. In relation to financial remedies, counsel for the Claimants stated during the trial that the Claimants had already decided to seek a damages enquiry, as opposed to an account of profits. As I have already noted, total profits on the First Label Products were £924. Some of that profit was on bottles dealt with by GM Drinks prior to notification by Ms Martin of her rights on 13 April 2020 – although the amount involved does not appear to me to warrant the legal costs of working out precisely how many bottles predated that date, and how many fell afterwards (by my calculations, approximately 5,880 bottles were after). But in any event, section 97 of the CDPA provides:

Where in an action for infringement of copyright it is shown that at the time of the infringement the defendant did not know, and had no reason to believe, that copyright subsisted in the work to which the action relates, the plaintiff is not entitled to damages against him, but without prejudice to any other remedy.

168. Thus, on a preliminary view, it seems that in light of my findings, no damages will be available for copyright infringement prior to shortly after 13 April 2020, by which time the vast bulk of the First Label Products had been sold by GM Drinks. Section 97 does not apply to any damages for passing off.
169. I do not wish to shut the Claimants out from an election at this stage, now that they are aware of my findings. But my preliminary view based on the above, and taking into account the need for proportionality, is that the Claimants already have the information they need to make an election such that *Island Records v Tring* disclosure would be disproportionate and unnecessary at this stage.

170. The (open) *inter partes* correspondence indicates that the Claimants requested US\$200,000 from the Defendants, that being a sum said to reflect the amounts Ms Martin usually receives for her collaborations with third parties. Counsel for the Claimants before me put this based on a reasonable royalty that would be agreed in the circumstances. It is not pre-judging the matter to remark that each of the collaborations that was in evidence before me was very different to the infringement that I have found in this case. The Claimants are now also aware that the vast bulk of the Products (being the Third Label Products) do not infringe. Further, the low volume of First Label Products overall, and the very low volume dealt with from shortly after 13 April 2020, mitigate against a reasonable royalty at that level.
171. It seems to me on a preliminary basis and without judging the issue, that the appropriate course is to allow the parties a short period of time to attempt to settle the matter in light of my findings. If that cannot be done, I would propose transferring the quantum proceedings to the Small Claims Track of the IPEC and will hear the parties' submissions on that proposal.
172. Costs in the IPEC are to a scale. I was made aware of without prejudice correspondence between the parties, although not its content. If costs cannot be settled as between the parties, they can be dealt with at a short hearing – that seems to me more appropriate in the circumstances than deciding costs based on written submissions given that GM Drinks and Mr Patch are not represented.
173. I will, of course, hear the parties, but hope that they find this preliminary indication helpful.