



Case No: HC 02 C03292

Neutral Citation Number: [2004] EWHC 2985 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday 21 December 2004

Before:

THE HONOURABLE MR JUSTICE LADDIE

IPC MEDIA LIMITED

Claimant

- and -

Highbury - SPL Publishing Limited

Defendant

Mr Martin Howe QC and Mr James Abrahams (instructed by **Arnold & Porter** for the Claimant)
Mr James Mellor and Ms Jessie Bowhill (instructed by **Wedlake Bell** for the Defendant)

Hearing dates: 5 – 8, 11 – 15 and 18 - 22 October, 2004

Approved Judgment

(subject to correction of typographical errors)

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Mr Justice Laddie:

1. The claimant in this action is IPC Media Limited (“IPC”). It is a well known publisher of a large number of magazines. One product within its portfolio of titles is the monthly magazine “IDEAL HOME” which is one of a large number of competing magazines directed at the home design and decorating market. IDEAL HOME is the market leader by way of sales. One of the competing products is a monthly magazine called “HOME” which is published by the defendant, Highbury – SPL Publishing Limited (“Highbury”). In this action IPC alleges that certain parts of certain issues of HOME infringe the copyright in equivalent parts of certain issues of IDEAL HOME. IPC is represented before me by Mr Martin Howe QC and Mr James Abrahams. Highbury is represented by Mr James Mellor and Ms Jessie Bowhill.
2. Many publishers put a great deal of effort into the design of both the outer cover and the contents of their magazines. Certainly that is the case with IPC and Highbury. Their magazines are the subject of a rolling process of design change and refinement. Thus, for example, not only do the contents of each month’s edition differ from those of preceding months but the covers and the layout of the internal pages of each month’s issue will differ from those of the preceding months. Some of those design changes will be substantial. For example each cover will be unique in the sense that it will contain at least one photograph which will not have been used on that magazine cover before and it will refer to the contents of that issue. Other design changes will be more subtle. For example there may be changes to the typeface and the size and “weight” of the fonts used for some of the words on the cover. In many cases the untutored and non-expert eye will not appreciate the details of such changes. The changes, both large and small, contribute to the overall visual impact of the cover or internal articles. Some features will hardly change at all from one issue to another. For example the masthead or logo on the cover may stay relatively unchanged, save for differences in colour, for a number of months.
3. IPC’s core complaint is that the outer covers and certain parts of the internal sections of the May, June, July and August 2002 issues of HOME are infringements of the copyright in certain earlier issues of IDEAL HOME. Since it takes some two months or more to go from design to publication of this type of magazine, the May 2002 issue of HOME must have been copied, if it was copied at all, from an issue of IDEAL HOME published on or before March 2002. In fact the April issue of IDEAL HOME was published in March, so this is the latest issue from which the May issue of HOME could have been copied. Similar timings apply to the other issues of HOME complained about. In fact the allegations of copyright infringement in this case are much more complicated than that, as I will explain later, but this statement of the core allegation will suffice to indicate the type of dispute with which this action is concerned. Although, at one stage, IPC alleged that all its IDEAL HOME magazines taken together constitute a compilation (rather like an encyclopaedia printed in monthly parts) and, on that basis, a literary work for copyright purposes, Mr Howe accepted that his client could not succeed in an allegation of infringement of this copyright (assuming it exists) if it did not succeed on its claims in relation to the individual covers and internal sections of the magazine. As a result, this case is now only concerned with allegations of infringement of copyright in artistic works.

4. Before considering the claim in detail, it may be useful to set out some basic principles applicable to this type of case. I will concentrate on cases relating to copyright in artistic works although in many respects the same considerations apply to other types of copyright material.
5. The Copyright, Designs and Patents Act 1988 provides at s 1(1) that copyright subsists in, inter alia, original artistic works. They are defined at s 4(1) as including photographs and “graphic works”. The latter in turn are defined in s 4(2) as including paintings, drawings, diagrams, maps, charts and plans. The copyright in an artistic work is infringed by copying it (s 16(1)) without a relevant licence, that is to say reproducing it in any material form (s 16(2)). When an author creates a discrete new drawing, painting or other artistic work, it is protected by its own copyright. Even if it is based in part on preceding works, it will obtain copyright if sufficient relevant skill and labour have gone into creating it. This is a common occurrence in the realm of literary works; the second edition of a book will have its own copyright even if it repeats much of what was in the first edition. The same applies to artistic works (see for example *Cala Homes (South) Limited and Others v. Alfred McAlpine Homes East Limited* [1995] FSR 818). The issue of infringement has to be considered in relation to each separate copyright work relied on by the claimant. He will need to identify which work or works he says has been reproduced by the defendant.
6. Occasionally a claimant may have difficulty in identifying which of his works the defendant has copied. In some cases this is because the defendant has not copied. In others it may be because the author of the copyright work has produced a large number of very similar works. In such a case it may be difficult to identify which of the individual works was copied. The copied material is present in all of them. This was the case in *King Features Syndicate Inc. v. O. & M. Kleeman Ltd.* [1940] Ch. 523 (High Court). [1940] Ch. 806 (Court of Appeal). As I indicated in *Cala* at p 872, the fact that there are numerous similar works produced by the author does not mean that he does not have to prove that one or more discrete copyright works have been copied. Rather, the court may be persuaded that the specific copyright works relied upon in the action are either the precise ones copied, directly or indirectly, by the defendant or that they substantially reproduce the earliest copyright work which was copied and therefore amount to evidence of what that earliest copyright work was like.
7. Although in this latter type of case it may be difficult to identify which of the many similar copyright works was copied, this is due to the number and similarity of such works. It is not due to any obscurity as to what works are said to be the subject of copyright. It is basic to this part of the law that copyright exists in discrete works. This was touched upon by the Privy Council in *Green v Broadcasting Corporation of New Zealand* [1089] RPC 700. There the plaintiff sought to assert that the general structure or format of a television programme called “Opportunity Knocks” was a dramatic work protected by copyright. Lord Bridge said:

“It is stretching the original use of the word “format” a long way to use it metaphorically to describe the features of a television series such as a talent, quiz or game show which is presented in a particular way, with repeated but unconnected use of set phrases and with the aid of particular accessories.

Alternative terms suggested in the course of argument were “structure” or “package”. This difficulty in finding an appropriate term to describe the nature of the “work” in which the copyright subsists reflects the difficulty of the concept that a number of allegedly distinctive features of a television series can be isolated from the changing material presented in each separate performance (the acts of the performers in the talent show, the question and answers in the quiz show etc.) and identified as an “original dramatic work”. No case was cited to their Lordships in which copyright of the kind claimed had been established.

The protection which copyright gives creates a monopoly and ‘there must be certainty in the subject matter of such monopoly in order to avoid injustice to the rest of the world.’ *Tate v Fulbrook* [1908] 1 KB 821, per Farwell J at page 832. The subject matter of the copyright claimed for the “dramatic format” of “Opportunity Knocks” is conspicuously lacking in certainty.” (p 702)

8. Thus the first step in a copyright action is for the claimant to identify what work or works he relies on.
9. The work must be “original” to be protected by copyright. That does not mean that it cannot utilise well known themes and ingredients. If an author puts sufficient relevant artistic effort into producing a drawing or other artistic work from known ingredients, it will be protected by copyright. Monet was, no doubt, not the first artist to paint water lilies, but his paintings of them were protected by copyright. They would also not have been deprived of copyright because they were very similar to earlier paintings by him dealing with the same subject matter.
10. Once the claimant has identified a copyright work, he must prove that the defendant has copied at least a substantial part of it. In many cases he will not be able to call upon a witness who observed the act of copying. He therefore will have to make out his case in other ways. Normally he will point to similarities between the alleged infringement and the copyright work, taking into account evidence of opportunity to copy and motive, and will ask the court to infer that copying has incurred. As a general rule, the greater the similarities between the alleged infringement and the copyright work, the greater the prospect of copying being inferred. However, similarities do not necessarily indicate copying. The author and the defendant may have worked quite independently from common sources, in similar environments, to achieve similar objectives and made use of similar common design techniques so as to produce works which have a degree of visual similarity.
11. Furthermore it is necessary to be alert to the possibility of being misled by what may be called similarity by excision. Michelangelo said of one of his sculptures “I saw the angel in the marble and I carved until I set him free”. In copyright cases, chipping away and ignoring all the bits which are undoubtedly not copied may result in the creation of an illusion of copying in what is left. This is a particular risk during a trial. Inevitably the court will be invited by the claimant to concentrate on the respects in which his work and the alleged infringements are similar. But with sufficient concentration one may lose sight of the differences. They may be just as important in deciding whether copying has taken place. The effect can be explained by an analogy.

Two individuals drop similar small quantities of sand on the floor. If one removes all the grains of sand which are not in equivalent positions, all you are left with are those which are in equivalent positions. If you look at those remaining grains it is possible to say that similar patterns of distribution exist. It is even possible to say that these similarities are surprising. But the similarities and the surprise they elicit are an artefact created by the very process of ignoring all the other grains. This type of artefact created by close attention only to the areas of similarity is a risk in any court proceedings.

12. Copyright protects the particular work in issue. The defendant must be shown to have copied that. Exact copying is not needed. This is illustrated particularly clearly in *Designers Guild Ltd v. Russell Williams (Textiles) Ltd* [2000] 1 WLR 241, [2001] FSR 11. What counts is whether the defendant has taken sufficient of the author's skill and labour which went into creating the copyright in the work. It is for this reason that in *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273, HL, Lord Pearce said;

"The reproduction of a part which by itself has no originality will not normally be a substantial part of the copyright and therefore will not be protected. For that which would not attract copyright except by reason of its collocation will, when robbed of that collocation, not be a substantial part of the copyright and therefore the courts will not hold its reproduction to be an infringement. It is this, I think, which is meant by one or two judicial observations that "there is no copyright" in some unoriginal part of a whole that is copyright". (p 293)

13. This is of particular significance where the author's artistic work was created by blending together known design features. It may well be that the skill and effort involved in that blending operation is sufficient to justify copyright protection. But in such a case, copying one or two of the individual features may not amount to the taking of a substantial part of the copyright work. Each case will depend on its own facts.
14. The need to prove copying involves showing a design nexus between the defendant's and the claimant's works. However it is a mistake to believe that any nexus will do. The law of copyright has never gone as far as to protect general themes, styles or ideas. Monet, like those before him, acquired no right to prevent others from painting flowers or even water lilies or, to take an example referred to by Mr Howe, Georges Seurat would not have obtained, through copyright, the right to prevent others from painting in a pointillist style. Even someone who is inspired by Monet to paint water lilies or by Seurat to paint using coloured dots would not infringe copyright. Such general concepts are not put out of bounds to others by the law of copyright. Needless to say, it is impossible to define the boundary between mere taking of general concepts and ideas on the one hand and copying in the copyright sense on the other. Judge Learned Hand in *Nichols v Universal Pictures Co* 45 F 2nd 119 (2nd Cir. 1930) said that wherever the line is drawn will seem arbitrary. He also said:

"Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times may consist of only its title; but there is a

point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his ‘ideas’, to which, apart from their expression, his property is never extended.” (p 121)

15. These principles apply to the copyright in artistic works. Although describing what is at too high a level of abstraction to be protected may be difficult, like the elephant, you recognise it when you see it. Similar principles were set out in the speech of Lord Hoffmann in the *Designers Guild* case

“[C]ertain ideas expressed by a copyright work may not be protected because, although they are ideas of a literary, dramatic or artistic nature, they are not original, or so commonplace as not to form a substantial part of the work. *Kenrick & Co v Lawrence & Co* (1890) 25 QBD 99, is a well-known example. It is on this ground that the mere notion of combining stripes and flowers would not have amounted to a substantial part of the plaintiff’s work. At that level of abstraction, the idea, though expressed in the design, would not have represented sufficient of the author’s skill and labour as to attract copyright protection.

Generally speaking, in cases of artistic copyright, the more abstract and simple the copied idea, the less likely it is to constitute a substantial part. Originality, in the sense of the contribution of the author’s skill and labour, tends to lie in the detail with which the basic idea is presented.” (pp 12- 122)

16. All of these considerations play a part in this dispute. Highbury denies copying any of the works relied on. It says that the similarities relied on are trivial and go nowhere near raising an inference of copying, let alone proving it. Furthermore it says that the direct evidence of those in its small team responsible for designing its magazine is unambiguous in its denial of copying and credible. Such similarities as exist are, in virtually all cases, due to the use of design tricks and concepts which were common in this field. Since they are common, both IDEAL HOME and HOME employ them from time to time. Further the design of each of the covers and articles in issue is the result of a vast number of different design elements. The defendant argues that the similarities asserted by the claimant are misleading. IPC has ignored the enormous number and visual importance of the differences between the parties’ respective products so as to create similarity by excision. In addition to these points, the defendant argues that, even if it were to be held that there exists some nexus between the designs on and in the relevant issues of HOME and those relied on by the claimant, it could only amount to the adoption of the most general design concepts, not copying in the copyright sense.
17. Before turning to the details of the claim and defences to it, there are certain matters of terminology which need to be explained so that the allegations can be properly understood. I set out below a black and white image of the cover of a 1999 issue of IDEAL HOME which is marked up so as to illustrate some of the technical terms used in this case. The original cover was in colour. It is reproduced here in black and white.



18. The logo carries the name of the magazine. It is nearly always in the top quarter of the magazine. Immediately below it and on the left of the cover is the hotspot which is, apparently, an area to which potential purchasers pay particular, if only momentary, attention. Cover lines are descriptive passages intended to draw particular attention to some aspect of the magazine's contents. The main taster is in the bottom quarter, or basement, of the cover. It is like the hotspot although, when placed on a magazine rack in a shop, this part of may be obscured by competitor's products. A very small section of the bottom of the cover is called the sub-basement. The cover illustrated above includes devices designed to look like stamps. It is common for them to be at a slight angle to the horizontal. The cover also includes straplines as shown which consist of a very small piece of text. One of the straplines shown on this cover consists of a reversed out text box. That is a coloured box containing text which is made visible by being printed in white. This cover includes a photographic image which covers the whole page and over which the text on the cover is printed. The photograph is full page and, since it can be seen behind all or most of the text, including the logo, it is said to be full bleed.
19. Much reference was made during the course of the submissions and the evidence to fonts. I can do no better than set out below an extract from the evidence of Highbury's expert witness, Mr Michael Crozier, which explains most of the technical concepts which arise for consideration in this action on this subject. What is set out below is, I believe, not contentious.

“A typeface is a collection of letters, numerals and symbols designed by a typographer. For example, [the original of my report was] set in Garamond, which was developed by Claude Garamond in the early 1600s in France. (He was the first trade typefounder. By the mid-1600s, the Garamond letter had ousted the pre-existing Venetian design from favour and his original design was being emulated by printers all over Europe). A typeface, or type family, may have several fonts in it. A font is an assortment of, or set of, type all of one size and style, ie, Garamond has a Roman font, a **bold font**, an *italic font* and a **bold italic font** – all these also come in capitals and lower case. Some typefaces may

have many more fonts than these basic ones. There are approximately 6000 readily available typefaces; new ones are being designed every day.

Some typefaces are belong to serif genre, below left, and some are sans style, below right.



Serifs are the short lines stemming from or at an angle to the upper and lower ends of the strokes of a letter.



The size of a piece of type, or printed letter, is determined by “point size”. Point size is still based on an Imperial unit of measurement, ie, one inch measures 72 points.”

20. Another topic which will have to be considered in the course of this judgment is “dingbats”. Anyone who uses modern word-processing software on his computer will know that it is possible to make nested paragraphs each preceded by a “bullet”. IPC’s expert, Mr David Wadmore, explained as follows:

“15.7 ‘Dingbats’ is one of the names given to the small symbols used as eye-catchers in conjunction with text and small headlines. Sometimes known as bullets, these small symbols are often supplied in the form of a complete type font, with the different characters associated to different keystrokes on a standard computer keyboard.

15.8 One of the most commonplace fonts is Zapf Dingbats, designed by type designer Herman Zapf in 1978. A complete character set appears below:



15.9 There are six similar fonts available in the current Faces type suppliers catalogue, and many more globally.”

The Claim

21. As mentioned above, although the claim here is that the covers and various internal pages of the May to August 2002 issues of HOME were copied from and infringe the

copyright in earlier editions of IDEAL HOME, IPC's pleading is considerably more complex than that. The claim to subsistence of copyright is expressed as follows in paragraphs 5 and 6 of the Re-Amended Particulars of Claim:

“5. The claim herein concerns, in particular, the design, subject matter, theme and presentational style of the following covers and features of Ideal Home, which appeared in the editions identified:

- (a) the front cover (January 1999 to August 2002)
- (b) a decorating feature under the name “Find your perfect home style” (March 2001 to August 2001); this evolved from a feature originally called “Plan the perfect colour scheme” (January 1999 onwards);
- (c) a pair of decorating features under the names “IH Style File; Five looks for kitchens” and “IH Style File; Five looks for bathrooms” (November 2001 to August 2002); this evolved from a pair of features in alternate monthly editions featuring 3 bathrooms and 3 kitchens, the first of which was “Fabulous New Kitchen Looks” (January 1999 onwards);
- (d) a buyer’s guide feature under the name “Choose the Best” (February 2002 to August 2002); this evolved from a feature originally called “Choose the best fridge and freezer” (January 1999 onwards);
- (e) a buyer’s guide feature in a format which, in the March 2002 edition of Ideal Home, is called “16 family-friendly sofas” (August 2001 to August 2002); this evolved from a feature originally called “Choose the perfect sofa whatever your budget” (March 1999 onwards);
- (f) a reader’s question and answer feature under the name “Solve your Home Problems” (February 2002 to August 2002); this evolved from a feature originally in the March 1999 edition.

Copies of the aforesaid front covers and features are served with these Amended Particulars of Claim.

6. Each of the said covers and features constituted or comprised original literary and/or artistic works. The later covers and features in each subparagraph above substantially reproduced (Although sometimes with evolution thereof from edition to edition) the design, subject matter, theme and presentational style of the cover or feature in the respective earliest edition listed there, whilst being original in the text and photographs included therein.”

22. Two or three things need to be said about this plea. First, it would have been easy and normal for the claimant simply to have said that the cover and internal articles of each of its magazines is a copyright work. The first sentence of paragraph 6 says that and Mr Howe confirms that it is the artistic copyright in the identified covers and articles on which his client relies. However, that is not the main thrust of paragraph 5 and the second half of paragraph 6. Both of those concentrate on “the design, subject matter, theme and presentational style” of the covers and articles. This expression is not a

reference to the total design of each of the covers or articles in issue but to a part of it. This is apparent from paragraphs 3 and 7 of the Re-Amended Particulars of Claim:

“3. At all material times the Claimant has sought to maintain a consistently high standard of design, layout and content in each edition of Ideal Home. Each edition of Ideal Home comprises (1) a front cover, (2) a number of “features” as listed below, (3) other editorial matter, and (4) advertising. The design, subject matter, theme and presentational style of the front cover and of the said features usually remains consistent from edition to edition through a number of editions, although the specific texts and/or photographs used on the cover and in each feature will vary.

7. The design, subject matter, theme and presentational style of the said series of covers and of each of the said series of features constituted a substantial part of the original works mentioned in paragraph 6 above, such that the reproduction thereof in conjunction with substituted text and photographs is capable of amounting to the infringement of copyright therein. Such design, subject matter, theme and presentational style of the said series of covers and of each of the said series of features is hereafter referred to as the “Design Elements” thereof.”

23. Thus the copyright works are the individual covers and articles referred to, but the “design, subject matter, theme and presentational style” is part of those work. It is the artistic template or spine around which the finished covers and articles are said to be built. The text and photographs used from issue to issue will be different, but the Design Elements are said to remain, at least in substance, the same. IPC’s case continually focused in on these Design Elements to the extent that, for much of the time, it appeared that they were being put forward as protected. IPC appeared to be asserting copyright in those Design Elements rather than in the covers and articles themselves. This is illegitimate. For example, IPC claimed to have artistic copyright in the cover of the February 2002 edition of IDEAL HOME. At the trial Highbury did not dispute this. That cover is depicted in reduced form in Annex I. That copyright is not a legal millefeuilles with layers of different artistic copyrights. There is only one artistic copyright asserted for each cover and article, namely that in the cover or article as a whole. It may be that a substantial part of the copyright consists of the Design Elements, so that unlicensed copying of them by Highbury would amount to copyright infringement, but the way in which the Re-Amended Particulars of Claim and IPC’s evidence have been drafted has the effect of drawing one’s attention away from the covers and articles as a whole and concentrating only on the areas of alleged similarity as if those areas were covered by copyright in their own right.

24. Once one has disentangled this style of pleading one gets back to the core infringement allegations. Thus, for example, it is said that the front cover of the August 2002 issue of HOME infringed the separate artistic copyrights admitted to exist in the covers of each and every edition of IDEAL HOME from January 1999 up to and including that of June 2002. That means that this cover of HOME is alleged to infringe the discrete copyrights in the covers of 39 editions of IDEAL HOME. Some idea of what is involved can be seen in Annex II which depicts this cover of HOME and a small selection from the 39 IDEAL HOME covers.

25. IPC argues that each accused edition of HOME was designed by the Highbury design team with one or more published edition of IDEAL HOME in front it. It says that it is likely that the design team would have used the most recently published edition of IDEAL HOME. Thus it was argued that HOME of August 2002 was probably copied from IDEAL HOME of June 2002. Reduced size reproductions of these front covers are set out respectively in Annexes III and IV. It should be noted that in most cases this allegation of copying from the most proximate edition of IDEAL HOME is based on nothing more than timetable. IPC suggests that Highbury would have copied from the most recent edition simply because it was more likely to represent IPC's most up to date designs and it is those, it is alleged, which the Highbury design team most probably had in front of it when it was engaged in copying. In most cases, there is little else to point to the alleged copying having come from one rather than another edition of IDEAL HOME. This allegation of most proximate copying does not detract from the allegation that each of the accused covers of HOME infringes the copyright in dozens of covers of IDEAL HOME. Although the latter covers are substantially different from each other, the HOME covers are said to infringe the copyright in all of them. Similar considerations apply to the accused internal articles in HOME. This theory of most proximate copying is not universal. As I will explain below, if what IPC asserts are close similarities are to be seen in HOME and IDEAL HOME issues, the allegation of direct and deliberate copying is maintained even if the HOME magazine would have been months out of date at the time when the copying is said to have taken place.
26. The way IPC pleads its case has been the subject of criticism by Highbury. It argues that it is difficult to determine what it is said to have copied in the individual IDEAL HOME editions. After some judicial encouragement, IPC sought to make its case clearer by explaining what design features are said to have been taken and incorporated into HOME. The list of such features has fluctuated. For example all those covered by paragraph 5(c) of the Re-Amended Particulars of Claim were abandoned just before Mr Mellor made his closing speech. Others appeared to be added. In any event, by the second half of the trial, Mr Mellor was able to produce schedules of what he understood IPC to say were the copied element in relation to the covers and internal articles. Mr Howe does not suggest that Mr Mellor's schedules are inaccurate or missed anything out.
27. A second feature of the way in which IPC puts its case can be explained by reference to paragraph 5(b) of the Re-Amended Particulars of Claim. It will be seen that the first half of this refers to a decorating feature to be found in the March to August 2001 editions of IDEAL HOME. However, the paragraph ends as follows:
- “this evolved from a feature originally called “Plan the perfect colour scheme” (January 1999 onwards);”
28. The question arises whether IPC is asserting infringement of the artistic copyright in those earlier features as well. The answer to this is to be found in paragraph 6A of the Re-Amended Particulars of Claim;

“6A. With regard to sub-paragraphs 5(b) to (f) inclusive, the Claimant primarily relies upon the series of editions first pleaded, the first of which was an occasion upon which a new or significantly altered design was adopted. The

Claimant relies upon the earlier editions from which each of the features was evolved: (1) in order, to the extent that the design, subject matter, theme and presentational style of the primary pleaded features is not original by reason of having been copied from such earlier editions, to rely upon the copyright in the features in those earlier editions; and (2) to the extent that the Defendant may assert that any details in its editions hereafter complained of were included in previous editions of Home which pre-dated the primary pleaded features, to contend that those details were copied from those earlier editions of Ideal Home.”

29. Highbury argues that it was faced with a moving target. If it could be shown that there was no copying from the “primary series of editions” of IDEAL HOME because Highbury could demonstrate that it had adopted a particular feature before it appeared in one of those editions, IPC simply moved the goal posts and relied on earlier editions. Although Mr Mellor was unhappy with this, he was prepared to deal with this case as and when it arose. Indeed, in one sense, it supports his client’s case. He argues that IPC have simply trawled through their magazines and found any instance where some, in most cases superficial, similarities could be found to what was in HOME and has relied on them as cases of copying by Highbury. When Highbury can prove that it could not have copied from the editions of IDEAL HOME primarily relied on, IPC simply moves backwards in time and, having found that the particular design feature or something like it had been used by it at some earlier date, accuses Highbury of having copied that earlier issue. Since, according to Highbury, virtually all the design elements relied on are commonly used in this field, it is hardly surprising that IPC can show it has used some of them or design elements like them at an earlier date. Furthermore this approach forces IPC to stick to its case that Highbury had been engaged in copying its designs over a number of years. It has to do that so as to justify the reliance on earlier magazines.
30. Finally in respect to IPC’s claim to copyright, I should refer to paragraph 6B of the Re-Amended Particulars of Claim. It reads as follows:
- “6A. In respect of the covers and each of the said features identified in paragraph 5 above, progressive evolution of the design, subject matter, theme and presentational style took place from edition to edition. In relation to the cover, significant changes occurred in the November 2001 edition. For the avoidance of doubt, the Claimant relies herein upon the relevant design, subject matter, theme and presentational style both in the earliest primary pleaded edition in each sub-paragraph of paragraph 5 above, and as it evolved in the later editions pleaded therein; it also relies upon the features from which they evolved in the manner indicated in paragraph 6A.”
31. Once again, this serves to illustrate that IPC’s claim is to subsistence of copyright in covers and internal articles spread over many years and to infringement of all of them in the four editions of HOME relied on.

The allegation of copying.

32. Thus far I have considered primarily IPC's claim of copyright subsistence. To succeed in an infringement action, the claimant must prove copying. This is addressed in paragraph 15 of the Re-Amended Particulars of Claim:

“15. In about September 2001 the Defendant began to copy aspects of the design, subject matter, theme and presentational style of Ideal Home in its Home magazine. This followed an earlier period from about mid-1999 onwards where the Defendant had copied certain elements (identified in Annex G) of the Ideal Home front cover, in particular its use of numbers, but had ceased to do so by the August 2001 edition of Home. From September 2001, The degree of copying became more extensive and obvious in subsequent editions of Home and, in particular, in the May, June, July and August 2002 editions thereof (“the Infringing Magazines”). Copies of the Infringing Magazines are attached hereto in Annex C. For purposes of comparison, a copy of the August 2001 edition of Home, which exhibits the magazine’s original format (that is to say, before any apparent copying of the design, subject matter, theme and presentational style of Ideal Home), is attached hereto in Annex D.”

33. Thus, although IPC alleges that Highbury infringed copyright in its May to August 2002 editions, its case of copying, which was maintained throughout the trial, was that, over a period of nearly 4 years, Highbury had been engaged in a policy of systematic and ever more extensive copying. This is important. Mr Howe disavows any intention of asserting “subconscious” copying. What Highbury was involved in was deliberate copying. IPC argues that the most likely scenario is that the Highbury team was studying issues of IDEAL HOME closely as it designed HOME. It alleges that the design team, consisting primarily of Ms Giles, Mr Danny Morris, Ms Nadia van den Rym and Mr Stephen Powell, who worked together closely, must have had relevant covers and internal articles from IDEAL HOME in front of them as they designed HOME. All of these individuals gave written witness statements and all of them, save for Ms van den Rym who could not attend for medical reasons, were subjected to lengthy cross-examination.

34. In support of its case, IPC pleads “Particulars of Copying”. These consist of a list of alleged similarities which IPC asserts indicate that copying took place. It is important to notice two things about this plea. First, although the list of similarities overlaps the list of features which IPC alleges have been taken from its copyright works and which, together, amount to a reproduction of a substantial part, it is not so limited. Anything which IPC believes point to copying is referred to even if it is not copying of any part of the copyright works. For example, although only artistic copyright is relied on, IPC pleads in support of the allegation of copying, that its magazines had the strapline “Britain’s best-selling decorating magazine” whereas the defendant used the strapline “The UK’s best home-interest magazine”. Mr Howe accepts that the words used could not be part of any artistic copyright – they would be part of literary copyright if anything. But he argues that when Highbury chose its strapline it must have copied it from IDEAL HOME. If it copied that, it is likely to have copied IDEAL HOME’s design as well. If the premise is true, there is something in this point. If Highbury’s design team was so

lacking in ideas that it had to base HOME's strapline on IPC's then there is an increased chance it would have copied a lot of other things as well.

35. The second point to make about the Particulars of Copying is that it is introduced by the following paragraph;

"Pending disclosure and/or further information the Claimant is unaware of the full extent of the evidence of the Defendant's copying, but will rely at trial upon all facts and matters of which it becomes aware. In the interim the Claimant will rely upon the following:"

36. IPC gave effect to this warning. In its evidence and during cross-examination, additional allegations of copying popped up. Mr Mellor was unhappy about this but he made no formal objection. In the end I do not think it seriously disadvantaged his client or its witnesses.

37. I should also say something about the defence. There is no dispute that the onus is on IPC to prove that Highbury copied. Highbury might have chosen simply to deny copying in its defence. That is not the course it took. Instead the defence, which is over 50 pages long, includes an explanation of how each of the accused covers and articles in HOME was developed from antecedent HOME covers and articles. Mr Mellor tells me that his client hoped that, on reading the defence, IPC would realise, if it did not before, that the accusation of copying was baseless. It would abandon the action. If that was the hope, it was not realised. That in part may explain why some of Highbury's evidence and Mr Mellor's opening skeleton argument are expressed in strong terms. Highbury asserts that this action is baseless and is being pursued, not to prevent infringement of copyright, but to harm a weaker but irritating competitor. I have seen nothing which suggests that IPC did and does not believe that its allegations are arguable.

38. The other point which should be mentioned is that, with one exception, Highbury asserts that all the design features complained of by IPC were, at the time they were adopted by Highbury, common in this trade. Although this is said to go to the question of originality of the copyright works (see Defence paragraph 145), the primary purpose is to support Highbury's case that IPC's allegations of copying were baseless. Such similarities as exist are said to be due to the fact that both the defendant and the claimant designed their magazines in accordance with common design conventions utilizing common design expedients.

Expert Witnesses

39. On 19 July of this year, Rimer J made an order which included the following:

"Each party may call one expert witness in this action from the field of magazine design to address the following issues:-

(i) the significance or otherwise of the design features in issue of the respective magazines and similarities between such design features having regard to the design conventions and practice in the magazine industry; and

(ii) the process by which magazines are designed.

With particular reference to the field of home interest magazines from 1997 to 2002.”

40. As Counsel agree, the decision as to whether there has been copying and, if so, whether it is sufficient to amount to the reproduction of a substantial part of the copyright works in issue, is a matter for the court. Sometimes the court will benefit from tutoring from experts to appreciate the similarities and differences between the claimant’s and defendant’s work and to appreciate better how those in the art design the type of works with which the action is concerned. They can also give valuable evidence of what are common design techniques in the trade. The latter, in particular, may help the court to decide for itself whether the alleged similarities are likely to have been arrived at independently. Rimer J’s order was directed to providing that sort of evidence. However what the order did not do was invite the parties to put in evidence in which the experts expressed opinions as to whether there had or had not been copying. Both experts seemed to believe that it was their task to express views on that topic. I found that part of their evidence of no value. As far as Mr Crozier was concerned, he said that he had come to the conclusion:

“That no publisher, editor or designer would set out to copy another’s design, subject matter, theme and presentational style of an established magazine. It has been known for large publishers deliberately to run “spoilers” to see off newcomers. In such a case designers would have been asked to make direct copies of certain design features.”

41. He tried to explain this under cross-examination, but it appears to me that he started his examination of the complaints in this action with the firm view that no one in this trade, save for malicious big companies, ever copies. Even had he professed to be an expert in copying, which he did not, his views would have been undermined by this fixed preconception.

42. Mr Wadmore’s evidence on copying was worse. He was given a copy of the defence at the very outset. It appears that he thought it was part of his remit to consider whether copying had taken place. Yet he appears to have decided that he need not consider Highbury’s explanation of independent design. He simply looked at areas of similarity and opined that they indicated copying. In some case he asserted copying even when IPC accepted that there was none. Further, he often expressed the view that copying had been deliberate when there was no material upon which such a conclusion could reasonably have been based. He asserted that Highbury was attempting to confuse members of the public – an assertion expressly disclaimed by Mr Howe. Even when it was clear beyond argument that a particular design feature was not copied from IPC, not least because it was entirely different, all that Mr Wadmore was prepared to concede was that the two features were “not exactly the same”. In the end, Mr Howe does not place much reliance on his expert’s report. In my view he is right not to do so.

43. This does not mean that the experts' reports are of no value. Both gave evidence as to what were common design techniques and ideas in this field. Just before the trial, the two experts met and produced a helpful schedule of such common features. However, in the end there appeared to be little dispute between the parties. Mr Howe concedes (Transcript Day 12 p 1520) that many of the design techniques in issue were common. Indeed it seems to me that, on the evidence, all the individual design features relied on by IPC, with one possible exception, were common or were the sort of thing that a designer could arrive at readily and without copying by applying known techniques to the task of designing a magazine destined for this market. IPC's case is that, taken together, the similarities are too close and numerous to be put down to mere coincidence.

44. I can now turn to the specific alleged infringements in issue here. For reasons explained below, I will concentrate almost exclusively on the allegations made in relation to the covers.

The Covers

45. The same issues of copying and independent design arise in relation to all the accused covers and articles. The evidence relating to each extends over a wide field. Mr Howe has spent many days cross-examining Ms Giles, Mr Powell and Mr Morris on the minutiae of the allegations of copying. It seems to me that, were there to have been copying and infringement, it is in the covers that it would have been most apparent. There was no dispute that it is the covers which do most of the work in getting customers to purchase. If, as IPC alleges, Highbury were imitating its successful design, it was the covers which would be the most important part to copy. Indeed, it is apparent that when Highbury decided to redesign HOME magazine in 1999, at the beginning of what IPC said was its process of protracted and deliberate copying, it was the cover which was redesigned first and into which a great deal of effort went. Accordingly, the reasons why the claimant fails in this action can be explained by reference to the case relating to the four accused covers.

46. Although all four of the accused HOME covers are said to be infringing copies of the 35-odd prior covers of IDEAL HOME, IPC puts its case no more strongly than in respect of the alleged copying of the HOME cover of August 2002 from the IDEAL HOME cover of June of that year. These are the covers depicted in Annexes III and IV respectively. I have already given some indication of the scope of the allegation in Annex II which compares the August 2002 cover of HOME with some of the 39 IDEAL HOME covers the copyright in which are said to be infringed by it. For a proper understanding of the following paragraphs of this judgment it is necessary also to have regard to the designs of the other three accused covers. These are reproduced in Annexes V, VI and VII. In addition it will be useful to have in mind the design of the April 2002 cover of HOME which is said to be a copy, but not an infringing copy, of the numerous earlier IDEAL HOME covers. This is reproduced in Annex VIII.

47. As I have said, Mr Mellor produced a list of the features in the accused HOME magazines which IPC alleged were similar to and copied from equivalents in the IDEAL HOME magazines and which, taken together, represent a reproduction of a substantial

part of IPC's copyright works. The list of such features in the HOME covers are set out below:

Magazine Cover Design Features relied on
(1)(a) title printed in shadowed Rotis Sans Serif (Bastardised) font directly upon a full page bleed photograph;
(1)(b) the title is underlined by a strap-line written in lettering upon a reversed out box;
(1)(c) the wording of the strap-line in Ideal Home, namely "Britain's best-selling decorating magazine" is very similar to that of the strap-line in Home, namely "the UK's best home-interest magazine";
(1)(d) the "hot spot" is dominated by a large number written in very large numerals (one numeral of which is always in a larger font size than the other two) typically in the same colour as the title, adjacent to which is a descriptive phrase printed in letters of a contrasting colour and in Tranquillity Roman font;
(1)(e) immediately below the "hot spot" an eye catching word or phrase is presented in white letters upon a reversed out box of a striking colour (usually matching that of the title), under which is text in Stone Sans font;
(1)(f) to the right of the "hot spot" is set out a list of four lines of text together with numbers. In each case the text is set in a font which looks like Stone Sans and the numbers thereof appear in a contrasting colour and/or a larger font. [NB May 02 does not have numbers in larger or contrasting font; July 02 has only two numbers].
the said numbers are not arranged in a neat vertical line but in an irregular but generally vertical line (except May 02).
(1)(g) text appears across the bottom quarter of the cover.
(1)(g) text across bottom is written in three (occasionally four) lines, in Tranquillity Roman and Stone Sans font, with the lower two lines (occasionally just the lowest one) being written in a larger font;
(1)(h) text listed at the bottom edge of the page, highlighted by bullet points in the shape of coloured diamonds with concave edges;
(1)(j) For March 02 edition of Ideal Home and May 02 edition of Home:
(i) overall use of pinks and beiges in the context of a brightly lit living room
(ii) central pale beige/off white item of soft furniture (a sofa in Ideal Home and an armchair in Home), accessorised by contrasting pink cushions
(iii) Bright lighting being provided by floor to ceiling windows set behind and slightly to the left of the central piece of furniture
(iv) Central piece of furniture being contrasted by an edge of frame chair in a striking purple colour
(1)(k) for June 02 edition of Ideal Home and August 02 edition of Home:
(i) very similar use of yellows and dark pink/purples in the context of a

- | | |
|--------------------------|--|
| brightly lit living room | |
| (ii) | central item of furniture being a two seater sofa, accessorised by contrasting dark pink/purple cushions |
| (iii) | the lighting being provided by floor to ceiling windows set next to, and slightly in front of, the said sofas (from the perspective of a person sitting on the said sofas) |
| (iv) | the said window is framed by floor to ceiling curtains made of a yellow material featuring a floral motif |
| (v) | a yellow armchair, accessorised by red and yellow cushions, is positioned in front of the said window |
| (vi) | the opposite side of the cover to the said sofa features a vase of reddish pink flowers placed in front of the said window |
| (vii) | each cover features, on the opposite side to the said sofa, a coffee table positioned upon a rectangular rug |
| (viii) | to the left of each said window is positioned a free standing lamp bearing a simple white shade in the shape of a truncated cone |

T1/26₁₆ Use of beige armchairs

T1/26₂₄₋₂₅ Sofa and little coffee table with similar colours

T1/35₂₃₋₂₄ Style of photographs is looking into a furnished room

The use of similar typography for elements 1(a), (b), (d), (e), (f) [except May 02], (g) and the coverlines generally, as for the equivalent text in *Ideal Home*. In the case of the coverlines, this includes the use of coverlines with multiple text sizes (e.g. compare *Ideal Home* March 02 (Y8) "Brilliant ideas for every room" with *Home* July 02 (Z16) "New ideas to copy" – wording of this text is not alleged to infringe).

The use of stamp-type devices at a particular, slight angle (e.g. "Ideas for every room" on *Home* May 02 (Y14) – wording of these stamp devices not alleged to infringe).

48. It is important to bear in mind that IPC does not argue that taking one or a few of these features would amount to infringement. Were it otherwise, on its case of progressive copying, it would have had to argue infringement in respect of all HOME covers from Spring 1999 to date. Its case is that Highbury has taken all, or substantially all, of the features listed. It is the totality which amounts to the reproduction of a substantial part of the copyright works. Furthermore, because this is a case of artistic copyright, it does not complain of words used on HOME, save as evidence of copying. But it does complain in some cases of the styles and fonts used. The latter are part of the typographical arrangement and therefore contribute to the visual impact of the page.
49. To go through all the features would be burdensome and unproductive. I will concentrate on some to illustrate the nature of the parties' arguments.

(i) The Logo

50. This is of particular significance because it is the in the top quarter of the magazine cover and is what first strikes the eye of the potential customer. It will be seen from Mr Mellor's list that the following features of the IDEAL HOME logo are said to be copied in HOME: (i) The title is printed in Rotis San Serif. (ii) It is bastardised – that is to say it is modified from the authentic Rotis San Serif font. As Mr Howe explains, a designer has played around with the typeface and its spacing to achieve the overall typeface design he wants. (iii) The letters of the title are shadowed – that is to say each casts a shadow which has the effect of accentuating the shape of the letter. (iv) The logo is printed on a full page bleed photograph. (v) The title is underlined by a strapline. (vi) The strapline consists of lettering in a reversed out box.
51. I think it would be useful to start by pointing out some of the features which are not specified in this list of similarities. There is no reference to the colour, size or location (i.e. whether left, right or centre) of the magazine name. The claim covers a title in any font size. Although IPC relies on the fact that the font is bastardised, it makes no claim to any particular type of bastardisation. It is the fact that the original font has been modified, not the type of modification which is relied on. Although it relies on the letters in the title having a shadow, it makes no claim to any particular "weight", style or colour of shadowing. As far as the use of a full page bleed photograph is concerned, no reference is made to the type of photograph used. In other words it makes no difference to IPC's claim that the full page photograph is wholly different to the ones used by it. It is, no doubt, for this reason that it can say that each of the accused covers infringes, in the same way, all 35-odd prior IDEAL HOME covers even though they all have quite different photographs on them. Although reliance is placed on the use of a strap line under the title, this is not restricted to any particular size or colour. Nor is there any limitation as to where the strapline should be either in relation to the title of the magazine (save that it should be below it) or the cover as a whole. Finally, reference to the strap line consisting of lettering in a reversed out box is not limited to any particular size or font of lettering.
52. The absence of greater specificity is not an accident. As Mr Mellor argues, IPC have identified design features at a high level of generality, in many cases leaving out features which make a significant visual contribution to the logo on the two covers. As he also points out, both in relation to the covers and the accused articles, the selection appears opportunistic. When IPC found, at whatever level of generality was necessary, that HOME had a design feature which was in some way similar to the equivalent in IDEAL HOME, it would assert that it got there by copying and that it was a feature of visual significance. Thus, for example, when, in relation to a particular part of a cover or inside article, it believed that Highbury had copied its typeface, that was advanced as a significant design element. However, when it was clear that Highbury's typeface was different and not copied, the difference and its visual importance were ignored. This is exemplified in the case of the logo. IPC apparently believes, wrongly as it happens, that Highbury copied its use of Rotis Sans Serif for the magazine's title. It therefore relies on this. On the other hand, when it comes to the lettering of the reversed out strap line, it ignores the fact that IDEAL HOME's lettering is lower case whereas that used on HOME is upper case. I should make it clear that in other parts of its case IPC relies on

occasions where Highbury used capitals, lower case or bold as demonstrating copying of visually significant design element when a similar use had been adopted for IDEAL HOME and again ignores differences in these features in the numerous places where such differences exist.

53. Even bearing in mind the level of generality at which IPC puts its case, does HOME's logo look like it's been copied from IDEAL HOME? In my view it does not. This is really a matter of visual impact. Ignoring, as I must, the fact that both titles incorporate the word "home", the treatments are quite different. In the case of IDEAL HOME, IPC has chosen a title block which spreads across the whole width of the cover. Highbury's title is ranged left so as to leave a substantial gap on the right of the cover which is used as a second "hot spot" in which to put important or eye-catching messages. Further, because IPC spread its title across the page and chose to use tall letters, the words had to be compressed laterally. This is achieved by bastardising the font so that each letter is squeezed from side to side. I have been informed that the gaps between letters were reduced as well. The effect is to produce a cramped title. None of this applies to HOME. Although there has been bastardisation of the typeface used by Highbury (based on Frutiger 55, a different sans serif font), it is not suggested that it is bastardised in the same way. On the contrary the letters in the HOME title are opened out and give a rather spacious feel. In addition to these points, as explained particularly by Mr Crozier, the treatment of the strap line in HOME is quite different to that in IDEAL HOME. In the latter, the strap line is always in a contrasting colour to the lettering of the words "ideal home" and always ranged right. They underline part of the word "home" only and extend beyond the right hand end of that word and reach the edge of the cover. That result is that, visually, the strap line is detached from the title. By contrast, in HOME the strap line is always in the same colour as the title and exactly underlines it across its whole width and no further. As was explained in the oral evidence, this has the effect of preventing the word "home" from appearing to "float" on the page. It acts as a kind of foundation on which the title stands.

54. On this issue, IPC's allegation of copying was not helped by the following passage in the cross-examination of Mr Wadmore:

"Q. If we turn to the "Home" logo, the underline extends across the full width of the logo, does it not?

A. Yes.

Q. It obviously forms part of it because it is always in the same colour as the logo, is it not?

A. That is right.

Q. I think the designer of this, Mr. Powell, says that if you have those letters "H-O-M-E" on a full bleed photo there is a tendency for the letters to float. You understand what he means by "float"?

A. Yes, I do.

Q. The purpose of putting this underline in there was to anchor the logo, to stop it floating. That is a sensible credible explanation, is it not?

A. Yes.

Q. That is good design work, is it not?

A. It is what we call bog standard design work, yes.

Q. If you please, but it is good design work, is it not?

A. It is a basic idea, yes.

Q. But it is good execution, is it not?

A. It is well executed, it is well balanced.

Q. I would suggest that underline is nothing like in design terms the Ideal Home underline. Do you agree?

A. Yes, of course.” (Transcript Day 7 page 840)

55. This is not the only occasion on which Mr Wadmore said or agreed that what Highbury had done was “bog standard”. Furthermore it must be borne in mind that none of the individual ingredients within this section of the claim is other than standard or common in this trade. This is consistent with many of the covers of other magazines produced for the hearing.

56. So, simply from a visual inspection, and bearing in mind what is common in this trade, there is nothing about these features which suggests that they were copied from IPC. But, appearances aside, were they copied? All of Highbury’s witnesses of fact, Mr Foskett, the company’s former managing director, and the four members of the design team referred to above, denied copying. All of those called for cross-examination denied it in the witness box. More than that, a sensible and credible explanation of how they arrived at the features of the cover for HOME was put forward. One part of that explanation deserves particular consideration.

57. In the Re-Amended Particulars of Claim it is said that in about September 2001, Highbury started copying elements of the design of IDEAL HOME but that this “followed an earlier period from about mid-1999 onwards where the Defendant had copied certain elements [of the cover design]”. Thus some copying is said to date back to mid-1999. However HOME used a full page bleed photograph for its front cover from well before that date. That continued to be used until the September 1999 issue (see Annex IX). At that point, far from moving to a design more similar to IDEAL HOME’s, HOME moved in the opposite direction. Annex X depicts the October 1999 cover of HOME. Why it should have moved away from the use of a full page bleed photograph if it was intent on copying IDEAL HOME was not examined by Mr Howe in cross-examination.

58. Furthermore, if the allegations in the Re-Amended Particulars of Claim were correct, the second burst of copying started in September 2001. Once again, it would have been simple for Highbury to revert to the full page bleed photograph style it had used before. It did not do so. Instead it investigated what sort of design it should use for its front cover. This resulted in it publishing a split issue for November 2001. About half the print run for that issue continued to use the same type of design which had been adopted in October 1999 and continued through to October 2001 (i.e. without use of a full page photograph) and the other half used a full page bleed photograph. These two covers are reproduced side by side in Annex XI. IPC could offer no sensible explanation, consistent with its allegations of copying, for why Highbury should have gone to this trouble and expense, particularly when, as Mr Howe frequently points out, they were working on a tight budget and when it would have been simple just to copy the IDEAL HOME cover in this respect. IPC does not suggest that this was an elaborate smokescreen designed to hide the copying going on in HOME's design department.
59. What happened thereafter is also difficult to reconcile with the allegation of copying. Having tried out a full page bleed photograph in November 2001, one would have thought that Highbury would have stuck with it if it was trying to imitate IDEAL HOME. In fact that is not what happened. Up to and including its April 2002 issue, HOME stuck to its 1999 and 2000 type of design (see Annex X). The reason for this was given by Highbury's witnesses. The design team (whose members were alleged to have been leading and responsible for the copying exercise) did not want to use a full page bleed photograph. It was only Mr Foskett who wanted it. None of this evidence was seriously challenged under cross-examination.
60. In addition to this, when Highbury moved to the use of the full page photograph for the May 2002 cover, instead of continuing to use a logo which extended right across the page, as it had done for a long time, and which, in this respect, would have been similar to IDEAL HOME's title, it chose to reduce the size of the logo and move it to the left, that is to say away from the IDEAL HOME design.
61. None of this supports a claim for copying. It is consistent with Highbury's version of events, namely that it worked out its own design for itself.
62. The case that IPC puts against this is that the similarities are too numerous and close to be explicable by coincidence. As will be apparent from what I have said above, I am not persuaded by this argument. It seems to me that, whether taken by themselves or together with all the other features in the cover and internal articles relied on, there is nothing here which undermines the coherent story of independent design advanced by Highbury. The concentration by IPC on areas of some similarity divorced from the numerous differences and also divorced from the essentially routine nature of the design elements relied on, gives a misleading picture. The way in which IPC approaches the issue is well illustrated in the following passage in the cross examination of Mr Wadmore. Although this is concerned with the allegation of copying of an internal article, the same approach is adopted by IPC to the claim that IDEAL HOME covers had been copied.

“Q. Is it your evidence that we should either ignore or leave on one side the fact that at Home they had been using large coloured la Gioconda for their titles for three years with sans standfirst and the captions style that we have seen, we should leave all that out of account and say “no, they must have copied that from Ideal Home”?

A. I think it is the overall combination that has come together that has produced the effect of copying. It is not the individual items. Mr. Crozier and I agreed very early on that individuals items such as coloured type and captions styling and sans-serif are bog standard. It is just the way that they have come together in the issues that are in dispute that led me to believe that there had been some influence from Ideal Home.” (Transcript Day 7 page 787).

63. This is the approach adopted by IPC throughout. No matter how good the explanation of independent design for each feature and no matter how trite such features are, the assertion is that the combination of all them points to copying. This approach ignores all the factors pointing the other way. In the end adding zero to zero sometimes produces zero. This is such a case.

(ii) The wording of the strapline

64. Another feature of the cover relied on by IPC is that in paragraph 1(c) of Mr Mellor’s Schedule:

“the wording of the strap-line in Ideal Home, namely ‘Britain’s best-selling decorating magazine’ is very similar to that of the strap-line in Home, namely ‘the UK’s best home-interest magazine’”

65. This allegation is not concerned with the design of the strap line. It is a complaint about the wording used in it. As pointed out above, this can not constitute part of the copyright in an artistic work and it should not really appear in the list as one of the features which, together with others, constitutes a substantial part of the pleaded copyright works. I understand that Mr Howe accepts that to be so. However I will deal with it here because it is an example of the sort of matter IPC relies on to show that Highbury are copyists and because, apparently, this is something IPC takes particularly seriously.

66. As far as the latter point is concerned, Ms Ramsden, the publishing director responsible for IDEAL HOME, gave the following evidence:

“93. I remember being annoyed by the *Home* cover as I felt that the strap-line ‘Britain’s best decorating magazine’ was a direct attempt to run on the back of *Ideal Home*’s ‘The UK’s best-selling decorating magazine’.” (First witness statement paragraph 93)

“I believed that at the time it was taking elements of our strapline and misleading the consumer into believing it was the UK’s best selling, it was replicating Ideal Home’s strapline.” (Transcript Day 5 page 543)

67. IPC claims to be so concerned about this that, without contacting Highbury in advance, it complained to the Advertising Standards Authority. Unsurprisingly that complaint was rejected. Highbury’s evidence that its team thought up this strapline for itself without copying is wholly credible. IPC’s argument that it must have copied is not. Indeed initially I was surprised that IPC persisted in relying on this assertion. It is consistent with IPC’s inflated and unrealistic views about its claimed proprietary rights.
68. The essential allegation is that IPC adopted its strapline “Britain’s best-selling decorating magazine” in its December 2000/January 2001 issue and that, when HOME introduced the strapline “the UK’s best home-interest magazine” in its June 2002 issue, it copied from IDEAL HOME.
69. Both straplines are utterly trite. The only words in common are “best” and “magazine”. Even if one considers the two straplines without regard to their respective histories and what was common in the trade, there is really nothing to point to copying. But the other matters reinforce how unmeritorious this assertion is. For a start, immediately prior to the June 2002 issue, HOME had used, for nearly a year, the strapline “The UK’s best decorating magazine”. IPC does not assert that that is a copy of its strapline, even though it is closer to it, since it also includes the word “decorating”. Highbury’s version of events is that its accused strapline was arrived at by taking the pre-existing version and replacing the single word “decorating” with the words “home-interest”. This was part of the implementation of a decision to take the magazine away from the do-it-yourself market so that it could become more “inspirational”. As Ms Giles pointed out, this had the effect of moving the HOME strapline away from IDEAL HOME’s. I do not understand how it could seriously be argued that one should infer that, instead of taking this credible and small step, Highbury must have copied from IDEAL HOME’s rather different strapline. Furthermore this weakness of IPC’s assertions is reinforced when one bears in mind just how trite these lines are. They are the sort of wording which any magazine in this trade could have adopted without need to copy from IPC. Examination of the front covers of a small number of magazines emphasises the point. Besides the strapline in issue, IDEAL HOME had used “Britain’s best-loved decorating magazine” (September 1999 onwards) and “Britain’s top-selling decorating magazine” (May 2002). In addition to its two straplines referred to above, HOME had also used “The UK’s fastest growing home magazine” (September 1999), “the best source of imaginative ideas for your home” (April 2000) and “The best source of festive ideas” (December 2000). I set out below a table of similar straplines to be seen on the small number of competitors’ magazine covers produced at the trial:

Magazine	Strapline	Date
YOUR HOME	Britain’s fastest growing home magazine	February 1999
HOMES & IDEAS	The No. 1 magazine for ideas	October 1998 onwards

HOUSE BEAUTIFUL	Britain's best-selling home interest magazine	October 1998
HOUSE BEAUTIFUL	The top-selling homes & decorating magazine	November 1998 onwards
HOUSE BEAUTIFUL	The UK's top-selling homes magazine	(December 1999)
THE REAL HOMES MAGAZINE	The fastest growing homes magazine	May 2001 onwards
GOOD HOUSEKEEPING	Britain's best-selling quality magazine	March 1996

70. In my view this part of IPC's case is detached from reality. The strapline IPC relies on is little more exclusive than the words "international No 1 best seller" which seem to appear on most books nowadays. This allegation of copying lends support to Highbury's argument that what IPC has done is trawl through HOME magazine to find anything which is arguably similar to some feature to be found in some issue of IDEAL HOME, no matter how small and inconsequential that feature is, and then to accuse Highbury of deliberate copying, no matter how unlikely that is.

(iii) The Hot Spot

71. Another set of features relied on relate to the hot spot, that is to say the area of the front cover just below and to the left of the logo. This is recognised as an important part of the magazine because it is likely to be noticed by the potential customer when the magazine is on display racks in shops. Like the logo itself, the hotspot is not likely to be obscured by rows of magazines stacked in front and slightly below it. This set of features is referred to in paragraph (1)(d) of Mr Mellor's schedule. I think it would be preferable to set it out as expressed in IPC's Re-Amended Particulars of Claim:

"Each of the relevant covers of Ideal Home contains the following details, each of which is also present on each of the covers of the Infringing Magazines, in an identical or almost identical form:

d) the "hot spot" (being the name given to the area on the left hand side of the cover just below the title) is usually dominated by a large number written in very large numerals (one numeral of which from August 2001 Ideal Home onwards is always in a larger font size than the other two) typically in the same colour as the title, adjacent to which is a descriptive phrase printed in letters of a contrasting colour and in Tranquillity Roman font"

72. The use of the words "usually" and "typically" are inappropriate in particulars of copyright infringement. Either the copyright work has a particular feature and it has been copied by the defendant or it has not, in which case it cannot be relied on. This is another

example of the way in which the pleading blurs the infringement claim. The reference to design features which happen to be common (usually) to a number of issues of IDEAL HOME, takes one's eyes off the essential issue, namely whether a particular issue of HOME infringes the discrete artistic copyrights which exist in particular issues of IDEAL HOME.

73. In order to support its case of copying of a large number of IDEAL HOME covers, IPC has drafted these particulars at a high level of generality. For example the words "one numeral of which from August 2001 Ideal Home onwards is always in a larger font size than the other two" leaves many design features out of account. This does not specify the font, the relative size of the font, whether it is larger than the other numerals, adjoining text or the artistic work, i.e. the cover, as a whole, or the location of the largest numeral compared to the others. This is not an accident. Prior to August 2001, IDEAL HOME used large numerals in the hot spot but they were always of the same size as each other. An example of this is to be seen in Annex XII which is a reproduction of the front cover of the April 2001 issue of IDEAL HOME. This is said to be infringed by the covers of the May to August issues of HOME (see Annexes III to VII). Incidentally none of the September to December 2002 covers of HOME (one of which is reproduced in Annex XIII), all of which were on sale before the issue of the claim form, are said to be infringements. Why that was so has not been explained by Mr Howe.
74. Ignoring this and returning to the issue of the single super-enlarged numeral in the hotspot, IDEAL HOME only used two versions of this. Either the largest number was the first of the three or it was the last. It was never placed in the middle so as to make the design of the numerals symmetrical. It should be remembered that it is the design of the numerals, rather than the numerals themselves, which is relevant to this artistic copyright. It is the symmetrical design which is used in some of the accused HOME covers. IPC's pleading is at a sufficient level of generality to miss this important visual difference. Further, when one looks at the IDEAL HOME covers, the copyrights in which are said to be infringed, they all differ significantly one from another even in the hot spot area. Once again this illustrates the high level of generality at which IPC has asserted its claim. The number of numerals (sometimes 2, sometimes 3), the style of numerals (i.e. the fonts and whether they are capitalized or not), their placing on the page (in some cases they are not even in the hot spot) and their colour (including whether they are in the same colour as the logo or not) change from issue to issue. Similarly, the location of the "adjacent" text varies in relation to the numerals. Sometimes it is above, sometimes it is below, sometimes to the side, sometimes a mixture of two or more of those. Similarly the style of text (colour, font, font size, capitals or lower case, whether a mixture of capitals and lower case, number of lines, whether text forms a block or is "stacked", and whether there is a stamp in the text) varies from cover. The allegation of infringement is only maintainable in relation to all these covers by describing the relevant design features at such a high level of generality that all the numerous and important visual differences are sidelined.
75. Once again this illustrates the unsatisfactory nature of IPC's claim. Each of the four accused covers has to be compared with each of the 35-odd IDEAL HOME covers it is said to be copied from. The list of differences is extensive and visually important but it differs from cover to cover.

76. In turn this throws light on the issue of copying. The IDEAL HOME covers illustrate the variety of styles in which the hot spot can be and has been designed by IPC. With one possible exception, all of these design variations are the product of the application of common design techniques and ingredients. It is to be expected that someone else approaching a similar design objective and using standard design techniques will arrive at a design which, at a suitably high level of generality, includes similar visual features. In such circumstances, the presence of such similarities is little or no indication of copying.

77. The one exception referred to above, is the use of a super-enlarged numeral beside the other ones. In its pleadings, Highbury accepts that this was not, at the time, run-of-the-mill. It is also a feature which Ms Pates of IPC admitted she had taken from an American competitor's magazine. It was not something which originated with IPC.

78. In the end I understand that IPC's case on copying of features in this part of the magazine comes down to the following. It used large numerals. One numeral was larger than the others and there was prominent text used somewhere near it. All these features at this level of generality are to be seen in the accused covers. However, not only do the accused covers look quite different to the IDEAL HOME covers they are alleged to have been copied from, both in respect of the hot spot and elsewhere, but even a quite cursory examination of IPC's claim reveals its flaws.

79. First let me consider the allegation that the use of large numbers in the hot spot in the accused covers was copied from IDEAL HOME. For this purpose I am not considering the allegations concerning the use of the super-enlarged numeral. IPC's case on this is complicated by the fact that HOME had been using large numerals on its front covers, without objection, for years. To get round this problem, IPC amended paragraph 15 of its Particulars of Claim. I have set out this pleading above, but it is convenient to repeat it here:

“In about September 2001 the Defendant began to copy aspects of the design, subject matter, theme and presentational style of Ideal Home in its Home magazine. This followed an earlier period from about mid-1999 onwards where the Defendant had copied certain elements (identified in Annex G) of the Ideal Home front cover, in particular its use of numbers, but had ceased to do so by the August 2001 edition of Home.”

80. Annex G to this pleading reads as follows:

“For the purposes of the issues raised in this action, the “certain elements” referred to in the second sentence of paragraph 15 of the Amended Particulars of Claim which the Claimant relies on are set out in the table below. During the period referred to in that sentence, the same appeared on the front covers of the issues of Home indicated.

Element	Issue of Home
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The use of a large number in the hotspot (see paragraph 21(1)(d) of the Amended Particulars of Claim)

July 1999, August 1999,
September 2000, October 2000

81. Ignoring for the present the fact that the numerals used in the hotspots on the front covers of those 4 issues of HOME are different in style to the numerals used in earlier IDEAL HOME issues identified in the pleadings' Annex G from which they are alleged to have been copied, what the paragraph 15 plea fails to have regard to is the fact that in the period from July 1999 until September 2001, HOME used large numerals elsewhere on its covers. These front covers are not alleged to have been copied from any IDEAL HOME cover. The reason for this is that IPC does not claim that HOME copied the idea of using numerals but only the idea of putting them in the hotspot. The only material relied upon by IPC to support this allegation of copying is the fact that, in the case of the 4 covers identified in Annex G, there happens to be large numerals in the hot spot. Since they are there, there must have been copying.
82. This is quite hopeless. There is no dispute that the use of large numerals on the covers of these types of magazines was commonplace as was the appreciation of the significance of the hotspot. There is no material at all to suggest that Highbury had not simply worked out for itself that the hotspot was a, but not the only, place where large numeral could be used. This was not even an idea which IDEAL HOME claims to have been the first to deploy. For example, among the third party magazine covers produced at the trials are those of YOUR HOME of mid 1997 and HOMES & IDEAS of October 1998. Both were using large numerals in the hotspot before IDEAL HOME. If there was copying by Highbury, there is no material to suggest that it copied from IDEAL HOME rather than these or other early users of this feature.
83. In addition, IPC's allegation makes little sense. If, in mid-1999, Highbury was going to copy IDEAL HOME, why did it only copy this minute and trivial feature? Why didn't it copy other things as well? What was the benefit to Highbury of limiting its copying in this way? None of this was explored with the witnesses. IPC is prepared to make this allegation of dishonest conduct against its competitor without the beginnings of the evidence to support it.
84. The only point which appears to get to the level of being arguable is the assertion that Highbury copied from IDEAL HOME the concept of using a super-enlarged numeral. This allegation does not apply to the first two accused covers because they do not have this feature. Strangely this feature is to be found in the covers of the September and October 2002 issues of HOME which are not said to infringe. In any event, even were the allegation made out, it would not get IPC home. Mr Howe does not suggest that the copying of this feature alone would amount to an infringement of copyright.
85. As I have noted above, Highbury accepts that this feature is not commonplace although it has been used by others: the American magazine from which IPC took it in the first place and YOUR HOME in July 2002 et seq. Highbury's evidence is that the

designer of July 2002 issue of HOME was faced with a draft in which the middle number in the hotspot was partly obscured by being overprinted with a large yellow stamp bearing the words “PLUS 20-PAGE bathroom special” (See Annex VII). Because of this, he decided to increase the size of this number so that most of it was not obscured by the stamp and could still be seen. Once that had been done, it was realised that it was an eye-catching design detail and it was retained in the next three covers.

86. Having seen the witnesses and having considered IPC’s alternative version of events, namely that the story of the yellow stamp was untrue and used by Highbury to camouflage a deliberate act of copying, I have come to the conclusion that Highbury’s explanation is plausible. IPC has failed to prove that Highbury has copied this feature.

(iv) The bottom quarter of the cover

87. This is set out in paragraph (1)(g) and (h) of Mr Mellor’s schedule. Once again, I think it is useful to set out how these points are pleaded by IPC in the Re-Amended Particulars of Claim:

“a summary of the theme or general content of the magazine appears across the bottom quarter of the cover. The text thereof is written in three (occasionally four) lines, in Tranquillity Roman and Stone Sans font, with the lower two lines (occasionally just the lowest one) being written in a larger font;

in nearly all cases other contents of the magazine are listed at the bottom edge of the page, highlighted by bullet points in the shape of diamonds (substituted with stars in the December 2001 Ideal Home Issue) usually with concave edges.”

88. I need not repeat my criticisms of the use of words or expressions such as “occasionally”, “in nearly all cases” and “usually”. Furthermore it cannot be suggested that artistic copyright covers the literary content of the cover. For that reason the statement that “a summary of the theme or general content of the magazine appears across the bottom quarter of the cover” cannot mean that such a summary is a feature which, together with others, amounts to a substantial part of the copyright work. I assume that it is for this reason that Mr Mellor’s schedule refers to this as “text appears across the bottom quarter of the cover”. Mr Howe does not dispute that this is the correct way to interpret IPC’s pleading. With that in mind, for analysis purposes it is convenient to split this into the sub-headings set out in Mr Mellor’s schedule while bearing in mind that it is the combination of all or substantially all of those sub-headings which is relied on by IPC.

(a) There is text in the bottom quarter of the cover.

89. Although IPC pleads this point, as far as I could tell it is not relied on by Mr Howe. The reason for this, I assume, is because it is hopelessly weak. As far as I can tell, every magazine in this trade has text in the bottom quarter of the cover. This is because virtually all magazines obey what was called the “rule of quarters” in accordance with

which the cover is notionally split into quarters and content is placed in each one. This was accepted by Mr Wadmore (Transcript Day 7 p 824).

(b) *The number of lines and the font used for them.*

90. There appears to be some confusion in IPC's pleading. This can be understood by reference to Annex IV which reproduces the cover of the June 2002 issue of IDEAL HOME. The summary of the theme or general content consists of three lines;

The only looks you'll want
Summer
decorating special

91. As the pleading identifies, it is the lower 2 of these 3 lines which is printed in a larger font. The pleading then refers to "other contents" being listed at the bottom of the page and being highlighted with bullet points. This is a reference to the line at the bottom of the page containing the words "Gorgeous new colour schemes" and "clever ideas for the family", each preceded by a triangular dingbat with concave sides.

92. The inaccuracy in the pleading is that it asserts that the summary contents, i.e. that consisting of three lines of text as illustrated above, is in Tranquillity Roman (a serif font) and Stone Sans (a sans serif font). In fact these three lines are all in Tranquillity Roman. It is the separate sub-basement lines which are in Stone Sans. I do not understand the parties to be in any doubt that this is what IPC meant to plead. Mr Mellor's schedule is consistent with this.

93. I will consider first IPC's covers, bearing in mind that it is alleged that the four accused covers infringe all the IDEAL HOME covers back to and including that of the January 1999 issue. The number of lines of text in issue does not include the lines containing dingbats because the latter are said to be lines of text with "other" elements. Unsurprisingly, the number of lines of text fluctuates wildly from issue to issue, depending on what are the main contents of the magazine. The number of lines in the covers said to have been infringed varies from 1 to 7.

94. The second allegation is that the text is in Tranquillity Roman (a serif font) and Stones Serif (a sans serif font) with the lowest of the two lines being in a larger font. Once again, in many of the relevant IPC covers, either a serif or sans serif font is used alone, not together as alleged in the pleading. Further, in may cases it is not true to say that the lowest one or two lines are in larger font. Although there are some with this feature, frequently it is some other line which has the largest font.

95. The third feature is the list of contents being located at the bottom edge of the page (that is to say in the sub-basement), highlighted by diamond shaped bullet points, such bullet points having concave edges from October 2001 onwards. Again it is clear that

many of the IDEAL HOME covers which are alleged to have been copied do not have these features. Many do not have a list of contents in this location at all (e.g. January and February 1999, February and June 2000, April, August and September 2001 and April 2002). Even when they do, some do not use bullet points to highlight them. Even if they do, the bullets are normally straight sided diamonds, not diamonds with curved sides. This variation is important not only because it supports Highbury's case that these are the sort of features which any competent designer would adopt, play with and alter, but also because it illustrates one of the difficulties in IPC's allegations of copying. Because IDEAL HOME's cover design was in a constant state of flux, it is difficult for IPC to put its finger on one or more specific issues which it can allege have been copied.

96. In addition to this, even if one ignores the pleaded IPC covers which do not contain the pleaded features, what is apparent is the very high level of generality at which this is pleaded. This was the subject of a great deal of evidence and discussion during the trial. It would not be useful to try to analyse all of it in this judgment. However what emerged was that most of the visually significant features of the bottom quarter of the IPC magazines were omitted from the claim to copying because, no doubt, they were not present in the HOME covers. It was only at a high level of generality that similarities could be identified.
97. Furthermore, as with virtually all the rest of the pleaded features, all of these were common. This was a fact which was reinforced by looking at the third party covers which were exhibited in the action. Thus there is nothing about the superficial level of similarity between the IDEAL HOME and HOME covers in relation to these features which raises a *prima facie* inference of copying.
98. In my view, some parts of this allegation of copying verge on the absurd. I will give one example. I have already explained what dingbats are and how they are readily available. They are a nuts and bolts item in a designer's armoury. I have included an illustration of standard Zapf dingbats above. As far as I can see, standard dingbats of various shapes have been used on numerous third party covers. The styles used include boxes, rounds, stars, diamonds, arrows, ticks and crosses. IDEAL HOME also has used a variety of standard dingbats over the years. So too has Highbury. From the exhibits in this case it can be seen that such design devices have been used in HOME's front covers from at least June 1999. It has used squares, ticks, rounds and diamonds. It is only the latter which are alleged to have been copied from IDEAL HOME. In particular, it is said that diamonds with curved edges were copied. The only material to support this allegation is the fact that IPC appears to have used such a dingbat on its cover before Highbury did.
99. However examination of the relevant chronology emphasises how thin this argument is. The first time HOME used curved dingbats on its cover appears to have been for the April 2002 issue. Based on its theory of proximate copying, IPC would argue that this cover is most likely to have been copied from the February 2002 or, possibly, December 2001 issue of IDEAL HOME. However neither of these use the curved diamond dingbat. The former uses straight sided diamonds, the latter (being the Christmas issue) uses stars. So, if the April 2002 issue of HOME could not have copied

this feature from the most proximate issues of IDEAL HOME, where did it copy from? It could not have copied from the November 2001 issue of IDEAL HOME because that cover only used straight-sided diamonds and rounds. In fact straight-sided dingbats appear to have been used almost consistently on the covers of IDEAL HOME from the March 2001 issue onwards. The exception to this is the October 2001 issue. Thus, IPC's case is that when, in February 2002, Highbury's design team was settling the style of the April 2002 issue of HOME, it chose not to copy the dingbats then being used by IDEAL HOME, and used almost consistently for a year, but decided instead to go back to an issue of IDEAL HOME which was nearly 6 months old to copy this feature. Furthermore this particular design feature is so trivial it is hard to believe, and was not suggested, that anyone in the Highbury team could have remembered it. In other words it is extremely unlikely that anyone on Highbury's design team in January 2002 would have remembered that a single issue of IDEAL HOME, which had been put on sale in September 2001 (these magazines are usually put on sale before the month indicated on their covers), had curved sided dingbats. It follows that Highbury's team would have needed to have the October 2001 issue of IDEAL HOME in front of it in order to copy this little feature.

100. In my view this is highly improbable. When one looks at the cover of that issue of IDEAL HOME, it is apparent how unlike any of the HOME covers it is. There is nothing which makes IPC's version of events likely. What is much more likely is that Highbury simply looked at the standard dingbats available to it and chose a new one, as it had done in the past. Indeed, it is difficult to see why Highbury's design team would have bothered to copy this non-current design for HOME. That there was an advantage to be secured by using the non-current design was not put to any of Highbury's witnesses by Mr Howe. I would only add that Mr Powell's evidence on this issue had a ring of truth about it. Not only could he not remember the IDEAL HOME dingbats, he could not remember that Highbury used dingbats either. It is likely that he would have remembered if he had engaged in copying as alleged.

101. If one looks at the other features said to have been copied, and adopts the proximate copying theory, once again the differences between the accused covers of HOME and those which they are supposed to have been copied from stand out. Consider first the June 2002 issue of IDEAL HOME (Annex IV) and the August 2002 issue of HOME (Annex III) said to be copied from it. It is true that each has three lines of text above the dingbats but the design treatment is quite different. In IDEAL HOME the first line is the smallest font, it is lower case and ranged left. In HOME it is also the smallest font, but it is capitalised and centred. In IDEAL HOME the bottom two lines are in a bigger font to the first line but are the same size as each other. Both lines are lower case, the upper one is moved inwards away from the left margin while the lower one is ranged left. In HOME the bottom two lines are also bigger than the first, but the bottom line is much bigger than the one above it. Furthermore the bottom line is capitalised and centred while the one above it is lower case and ranged left. As far as the fonts used are concerned, once again the differences are numerous and visually significant. It will be recalled that IPC pleaded that two fonts are used, Tranquillity Roman and Stone Sans. It will be seen that it is the sub-basement line containing the bullets which uses the Stone Sans font. The rest uses Tranquillity Roman. By contrast, HOME does not employ a sans serif font in this location at all and the serif font it uses is La Giacinda, a font which IPC is forced to admit Highbury had adopted a long time ago and without copying. In

addition, it should be noted that the IDEAL HOME cover has one line of text in the sans font whereas HOME has two. If the same analysis is applied to the other three pairs of covers (IDEAL HOME May 2002/HOME July 2002, IDEAL HOME April 2002/HOME June 2002 and IDEAL HOME March 2002/HOME May 2002) similar pronounced differences are to be seen.

102. There is one other point which can be made about the IPC allegations in relation to this part of the HOME covers. The history of development is inconsistent with the allegation of prolonged and ever closer copying of IDEAL HOME. In particular, prior to May 2002 Highbury used a sans font in lower case in the sub-basement. In both respects the sub-basement was similar to the equivalent design in the IDEAL HOME cover. However, in May 2002, rather than move towards IDEAL HOME, HOME moved away from it in both these design aspects.

103. In my view there is little point in subjecting the other pleaded features of the covers to close scrutiny. Essentially the same points arise in relation to all of them.

104. For reasons set out above, a credible case of copying has not been made out based on the alleged similarities between the accused HOME covers and the various IDEAL HOME covers relied on by IPC. The similarities are minor and at a high level of generality. This is a particularly clear case of similarity by excision as explained at paragraph 11 above. There are, however, a number of other matters which deserve consideration before leaving the issue of copying.

105. First, as noted above, IPC relies on material in addition to the alleged adoption of similar design features to show copying has taken place. One of those was the choice of the strapline “the UK’s best home-interest magazine”. I have analysed that claim above. There are a number of others. For completeness, but as succinctly as possible, I will consider the more important of these.

(v) Copying of the photographs on the front covers

106. One of the points made by IPC is that the fingerprint of copying could be seen in the fact that Highbury used cover photographs which were similar to photographs on the covers of IDEAL HOME. This is not an allegation that Highbury’s cover photographs are copies of IDEAL HOME’s but rather that they were selected so as to be as similar as possible to them. In fact most of Highbury’s cover photographs are taken, with permission, from the catalogues of major retailers such as Laura Ashley. Thus the allegation is that Highbury’s design team looked at the covers of IDEAL HOME and then searched through suppliers’ catalogues until they found something similar in composition and colour. IPC alleges that this was done twice. The photograph used on the May 2002 edition of HOME is said to be selected so as to be similar to the photograph on the cover of the March 2002 issue of IDEAL HOME. Similarly the August 2002 cover photograph on HOME is said to have been chosen by the Highbury team because it looked like the photograph on the cover of the June 2002 issue of IDEAL HOME.

107. In my view there is little point in listing the differences between these photographs. They are easy to see. Suffice to say that there is nothing to suggest, merely from a visual inspection, that any such exercise of selection to imitate was undertaken by Highbury. Furthermore, it is difficult to understand what the motive would have been for doing what IPC alleges. As Ms Giles explained, there would have been no benefit to Highbury if customers believed that they had seen the front cover, and therefore the magazine itself, some month or two earlier. IPC provides no counter to this. In addition, as Highbury explains, it would be more costly and time consuming to search through suppliers' catalogues for a match to a previous IDEAL HOME cover than simply to select a suitable cover photograph on its own merits. Highbury's design team was working to a tight budget. It is most unlikely that it would have embarked on a more expensive procedure for photograph selection to produce a predictably less saleable magazine. The unreality of IPC's suggestion is all the more apparent when it is borne in mind that the Highbury design team had been able to select suitable cover photographs for years without copying. Why should it move to a more expensive and less beneficial way of choosing photographs? I should mention that IPC does not offer an explanation for why Highbury should only have chosen to imitate these two cover photographs but none of the others.

(vi) Copying the hotspot from the April 2001 issue of IDEAL HOME.

108. IPC argues that Highbury's propensity to copy is demonstrated particularly clearly in the fact that the hotspot in the April 2001 issue of IDEAL HOME must have been copied in the September 2001 issue of HOME. They are respectively as follows:

“375 new ideas
for every room.
We love them – so will you!”

and

“375 Fresh
new ideas
for every room
Looks you'll love:

109. Once again, IPC does not claim that the alleged copying of these words and numerals amounts to a taking of any matter which is part of the artistic copyright work, nor is the cover of the September 2001 issue of HOME said to infringe of any IPC copyright.

110. It is difficult to discern any motive for this type of copying, if it was copying, and IPC did not suggest one. The terminology used, as will be illustrated below, is commonplace. It is not suggested that these words and numerals were likely to have a major marketing impact. Indeed, if they were memorable, it would have been a positive disincentive to copying. As with the previous heading, it would have harmed Highbury to put out a cover which customers would think they had seen before.

111. Perhaps it is because Highbury would not have gained anything by copying in this way, that IPC relies on it. It exemplifies how willing to copy Highbury, and particularly Ms Giles, were. No explanation is put forward for why Ms Giles would have copied this hotspot when she apparently was sufficiently good at here jot to be able to create all the other ones without copying. Furthermore, if Highbury and Ms Giles were so lazy as to copy this inconsequential bit of wording, one would have expected to find numerous similar examples of laziness, but one does not.

112. Over and above these considerations, it is necessary to emphasise how trite these words are. Ms Giles gave credible evidence that all of these words were common currency in this trade. This is confirmed not only by reference to IDEAL HOME and HOME covers, but from third party covers which included the following similar statements:

Magazine	Date	Words/Numerals used
YOUR HOME	Summer 1997	692 Bright ideas for every room
YOUR HOME	February 1999	18 Real life home packed with ideas
YOUR HOME	January 2000	283 Fresh ideas for Christmas 50 Brilliant ideas for the Bash of the Century
YOUR HOME	January 2000 to January 2001	Inspiration you'll love – ideas you can use
YOUR HOME	January 2001	427 Fresh and festive ideas for every room
YOUR HOME	July 2001	Big ideas for small rooms
YOUR HOME	November 2001	329 Fresh ideas
YOUR HOME	June 2002	45 New looks you'll love
HOMES & IDEAS	January 1999	47 Brilliant bathroom ideas
HOMES & IDEAS	February 1999	31 big ideas to transform small rooms
HOMES & IDEAS	March to May 2000	Creative looks for every room in every house
HOMES & IDEAS	September to November 2000	Inspiration for every room in your home
HOMES & IDEAS	November 2000	Instant facelifts for every room
HOMES & IDEAS	December 2000	Creative looks for every room in your home
HOUSE BEAUTIFUL	November 1998	101 Ideas for kitchens, bathrooms & living areas
HOUSE BEAUTIFUL	February 2002	32 Pages of style inspiration - looks you'll love for living rooms
BBC GOOD HOMES	January 2001	201 Brilliant ides for your home Delicious colour schemes plumy looks you'll love
BBC GOOD HOMES	April 2001	211 Fresh ideas for every room in the house
BBC GOOD HOMES	May 2001	New colours, styles and ideas for all your rooms
BBC GOOD HOMES	June 2001	30 family-friendly floors you'll love

BBC HOMES	GOOD	September 2001	247 Beautiful new ideas for every room in your home
BBC HOMES	GOOD	October 2001	270 inspiring ideas guaranteed to transform your home
BBC HOMES	GOOD	October 2001	The India influence – livable looks you'll love
BBC HOMES	GOOD	November 2001	305 inspiring ideas for every room and every budget
LIVING ETC		January 2000	500 + genius ideas for every room
LIVING ETC		January 2001	500 + beautiful ideas for every room
PERFECT HOME		January 2002	Cosy living real homes you'll love
PERFECT HOME		January 2002	259 ideas for the best ever Christmas
HOME FLAIR		February 1999	99 Fantastic ideas for the kitchen and bathroom

Most of these are located in the hotspot.

113. The only ingredient in the hotspot not shown to have been used on the front page of the small number of third party magazine covers exhibited in this action is the numeral “375”. If Highbury had really been copying IPC, it is not likely that it would have used the same number. It almost certainly would have used a larger number to suggest that it had more content.
114. Looked at in the context of what was common in this trade, IPC fails to raise a *prima facie* case of copying.
115. For the reasons set out above, IPC falls far short of making out its allegation of copying. In coming to that conclusion I have not made much reference to the evidence of Highbury’s witnesses. In my view, it is not necessary to do so. Once it is appreciated how slight, scattered and superficial the alleged similarities are, it is readily apparent that IPC have not raised a *prima facie* case.
116. If I had entertained any doubt on that score, it would have been laid to rest by Highbury’s witnesses. They were all subjected to lengthy cross-examination. Ms Giles was singled out for particularly thorough testing. Mr Howe made no headway with any of them. I had the opportunity to listen to the witnesses over a period of days. I detected no attempt to be evasive or to distort the truth. Their evidence was credible, mutually supportive and constant with the contemporaneous documentation. It was clear that, in denying copying, all of them were honest.
117. In coming to that conclusion I have had firmly in mind two matters on which Mr Howe places particular reliance. The first is the adoption by Highbury of Mr Fosbrook’s so-called “Power of 2” philosophy. Under this, Highbury assessed its progress and the quality of its publication not by reference to the numerous other magazines in the market sector but against the market leader. It wanted to aim high. To that end it analysed

IDEAL HOME and its performance in the market place. Mr Howe does not suggest that there was anything wrong in doing this. It is legitimate to compete. But he argues that Highbury had gone further and had copied. He relies, for example, on the fact that Highbury arranged for various mock-ups of HOME covers to be assessed by focus groups who compared them with a cover of IDEAL HOME. Such close attention to the market leader could have led to copying, at least subconsciously. As I have said, Mr Howe disclaims any suggestion of that type of copying. I have considered this part of IPC's case with care. The trouble is that I have found nothing which lends any weight to the suggestion that Highbury crossed the line and copied in any way.

118. The other point which merits particular attention arises as follows. Highbury, like IPC and probably all others in this trade, take out subscriptions or purchase copies of their competitors' products. This means that, amongst the various titles held, Highbury had copies of IDEAL HOME. Ms Giles' evidence was that they were not retained in a particularly methodical manner. Some were thrown away quicker than others. When Highbury gave disclosure, it listed all the copies of IDEAL HOME it retained and offered them for inspection. Perhaps surprisingly, bearing in mind the allegations made, they were not inspected by IPC. It transpired at an early stage in the trial that some of these copies had been partly mutilated in that some pages had been removed. IPC did not know that. There is nothing to suggest that whoever made up Highbury's list was aware that some pages were missing or that Highbury were trying to hide this fact.

119. Most of the pages removed had nothing to do with this action. However one internal article which had been torn out was one of those upon which IPC relied as having been copied. None of Highbury's witnesses could recall who or when these pages were removed or for what purpose. Indeed it appears that they were not aware that the pages had been removed. If they had been torn out as part of the deliberate campaign of copying which IPC allege, I am sure that they would have remembered. Mr Fosbrook offered some possible explanations but since, on his own admission, these were mere speculations, they did not resolve the issue.

120. Mr Howe seizes on this as a smoking gun pointing to copying of the article. He does not offer an explanation for why none of the other articles which were alleged to have been copied were torn out nor does he offer an explanation for why material which was not copied was torn out. But, most importantly, it is not clear why anyone needed to tear out any pages in order to copy them or would have benefited from doing so. In fact that is not how IPC alleges copying took place. It asserts that the Highbury design team must have had the numerous copies of IDEAL HOME open in front of them as they copied. Tearing sheets out was neither necessary or, as far as I can judge, useful. In the end this did not displace the weight of the evidence that Highbury did not copy.

121. Thus far I have not paid attention to the inside articles which are also alleged to have been copied. The evidence relating to these covered a wide area. There was much cross-examination on the minutiae. However the accusations are of the same type as I have considered above in relation to the covers. The defences and assertions of non-copying are also, in substance, the same. For the same reasons, I have come to the same conclusion that IPC gets nowhere near making out its case on copying. In relation to

these articles, as in relation to the covers, the similarities have been exaggerated by selective excision.

122. In the result, this action fails. There was no copying. Furthermore, even if, contrary to my findings, Highbury had been “inspired” in some of its design choices by what it saw in IDEAL HOME, it would have been at far too high a level of generality to amount to infringement of copyright.