IP Whiteboard Look-Alike Get Up Score Card

|  | **Scoring factors**  | **Comment**  | **SCORE** |
| --- | --- | --- | --- |
|  | Identify the Work (artistic, literary) |  |  |
| **Copyright** | 1. Assess the similarity of the artwork or name (not as a matter of impression but by engaging in a precise examination of content and layout).
 |  | [Score out of 10] |
| 1. Determine whether there is evidence of copying (as distinct from general inspiration, or the use of generic elements indicative of the category of goods)
 |  | Y/N |
| END HERE If score is < 5 on item 1. Or you have answered No to item 2. Otherwise, continue to item 3. |  |  |
| 1. If the elements look objectively similar and there is evidence of copying, consider whether - qualitatively or quantitatively – this amounts to a ‘substantial part’ taken
 |  | [Insert emoticon] |
| **Misleading or deceptive conduct** | 1. In assessing the conduct, consider whether this is an attempt to be derivative, or not
 |  | Y/N |
| If No, END HERE. If Yes, CONTINUE |  |  |
| 1. Assess the likelihood that an ordinary consumer could pick up this product under the mistaken impression it is another brand, having regard to the overall impression which might include consideration of:
* Both brands
* Whether you think it is meant to present as a ‘look alike’ product
* Whether the original brand is so ‘famous’ customers are likely to search for its key brand elements before selection
* Other products sold (or not) in stores
* The price point of the goods (premium? inexpensive?)
* The likely shopping habits of consumers in supermarkets and in relation to the item in question (impulse v considered)
 |  | [Score out of 10][Insert emoticon] |
| **Passing off \*** | 1. Does the original brand have reputation in the Australian marketplace amongst relevant consumers?
 |  | Y/N |
| 1. Assess the likelihood of mistaken impression, having regard to the same matters as for misleading or deceptive conduct
 |  | [Score out of 10][Insert emoticon] |
| **Trade mark infringement**  | 1. Is the mark or trade indicia a registered trade mark?
 |  | Y/N |
| If Yes, CONTINUE. If No, END HERE. |  |  |
| 1. Is the mark or trade indicia being used as a ‘brand’ (ie to indicate source of goods) or simply to describe the product or its attributes?
 |  | Y/N |
| If Yes, CONTINUE. If No, END HERE. |  |  |
| 1. Is any resemblance really close (ie ‘almost identical’), thereby deserving a side by side comparison?
 |  | Y/N |
| If Yes, move to Q.4. If No, move to Q.5. |  |  |
| 1. In comparing the brands side by side, considering their similarities and differences and having regard to their “essential features”, is the total impression one of resemblance or dissimilarity?

Note: Aural impression can be relevant, not just visual impression |  | [Score out of 10][Insert emoticon] |
| 1. Consider if the resemblance is more impressionistic, likely taking us to the realm of ‘imperfect recollection’.
 |  | Y/N |
| If Yes, move to Q.6 If No, END HERE |  |  |
| 1. Now consider the prospect of confusion for a hypothetical consumer which may have limited regard to surrounding circumstances such as:

Trade channelsFame of original markNote: Aural impression can be relevant, not just visual impression |  | [Score out of 10] |