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| COMPLAINT NUMBER | 18/303 |
| COMPLAINANT | C O'Brien & K Oliver |
| ADVERTISER | Mackit Architecture & Construction |
| ADVERTISEMENT | Digital Marketing |
| DATE OF MEETING | 9 October 2018 |
| OUTCOME | Not Upheld |

SUMMARY

The website advertisement for Mackit Architecture and Construction features three rendered images of a modern residential house. The surrounding houses are white featureless images. The accompanying wording details the simple minimalist form, modern design and earthquake resilient properties of the design.

The Complainants are concerned the advertisement uses images of their home and detail about the construction without consent.

The Advertiser states copyright gives them a moral right to be recognised as the author of the work. It said there was no infringement as the images were abstract design with no reference to the building location, setting or owners.

The Complaints Board said its consideration was limited to the wording of Rule 10 of the Code of Ethics relating to genuine endorsement. The Board said in its view there was nothing stated or implied in the rendered images of the property on the website that indicated support for the Advertiser. The lack of such endorsement for this design was further emphasised by written endorsements for other projects on the website.

The Complaints Board ruled the advertisement did not refer to the property in a way that conveyed the impression of a genuine endorsement and was not in breach of Rule 10 or Basic Principle 4 of the Code of Ethics.

The Complaints Board ruled the complaint was Not Upheld.

[No further action required]

Please note this headnote does not form part of the Decision.

COMPLAINTS BOARD DECISION

The Chair directed the Complaints Board to consider the advertisement with reference to Basic Principle 4 and Rule 10 of the Code of Ethics.

Basic Principle 4 required the Complaints Board to consider whether the advertisement had been prepared with a due sense of social responsibility to consumers and to society.

Rule 10 required the Complaints Board to consider whether the advertisement had, without obtaining prior permission, portrayed or referred to any persons in a private or public capacity or referred to any person's property, in a way likely to convey the impression of a genuine endorsement.

The Complaints Board ruled the complaint was Not Upheld.

The Complaint

The Complainants are concerned the advertisement uses images of their home and detail about the construction of the house without consent. The Complainant says the presence of these images implies an endorsement for the services of the design company when this was not the case.

The Advertiser Response

The Advertiser states copyright gives them a moral right to be recognised as the author of the work. It said there was no infringement as the images were abstract design with no reference to the building location, setting or owners.

The Advertiser noted that other properties on the website have written endorsements of owners' experiences working with the Advertiser.

The Complaints Board Discussion

Preliminary Matters

The Complaints Board noted that the advertisement did not refer to the property owners. Therefore, for the purposes of considering this complaint, the focus of Rule 10 of the Code of Ethics was whether reference to a person's property in an advertisement conveyed the impression of a genuine endorsement of the Advertiser. The Complaints Board confirmed that other matters between the parties, intellectual property rights and any general privacy issues are outside the jurisdiction of the Complaints Board.

The Board acknowledged the wider privacy issues raised by the Complainants but reiterated its focus was the requirements of Rule 10 of the Code of Ethics relating to endorsement.

The Complaints Board noted the Facebook element of the complaint had been addressed by the removal of the post featuring the building image by the Advertiser and would not be considered as part of the Board's deliberation.

The Complaints Board discussed the likely consumer takeout of the website advertisement and agreed it showcased a piece of work produced by the Advertiser, highlighting a design with a low presence and with earthquake resilience.

The Complaints Board said whilst the image was recognisable to those familiar with the actual property, for other consumers, the use of rendered images rather than an actual photo of the property could leave the impression the house was still at the design stage.

The Complaints Board noted the property was distinctive and recognisable for some who are familiar with that part of the city, but for others would not be known or able to be easily located.

Was the advertisement a genuine endorsement?

The Complaints Board noted the Cambridge English Dictionary definition of the word endorsement was "The action of saying that you approve of or support something or someone." The Board said there was nothing stated or implied in the images of the property of the website to convey support for the Advertiser by the property owners. The lack of

endorsement for this design was further emphasised by the personal written endorsements for other projects on the website.

The Complaints Board considered it was not unusual for companies to list clients or examples of past projects without that being a genuine endorsement or evaluation of the quality of the company's work.

The Complaints Board acknowledged the Complainants' concerns about the inclusion of the project on the Advertiser's website, but it did not consider the rendered image and the statements about the design were in breach of Rule 10 of the Code of Ethics.

The Complaint Board ruled the information about the property in the website advertisement was not a genuine endorsement and therefore was not in breach of Rule 10 or Basic Principle 4 of the Code of Ethics.

Accordingly, the Complaints Board ruled the complaint was Not Upheld.

DESCRIPTION OF ADVERTISEMENT

The website advertisement for Mackit Architecture and Construction features three rendered images of a modern residential house. The surrounding houses are white featureless images. The accompanying wording details the simple minimalist form, modern design and earthquake resilience properties of the design.

COMPLAINT FROM C O'BRIEN & K OLIVER

J S Mackie & Co. Limited (trading as Mackit Architectural Design & Construction), provided design services to us as part of a new home build in a very prominent Wellington urban location at the corner of Tinakori Road and Hobson Street. The contracts for the development of our designs did not assign the copyright in these works to Mackit - those rights remained with us.

In 2015, during the design process, Mackit requested permission to place a design concept on their Facebook page. They agreed to strict conditions we imposed for the use of a single image of a rejected concept (not our actual design), with no features that might identify our property's location in Wellington. No permission was granted to publish details of our construction project. To our knowledge Mackit never used the image we approved.

In July 2017, after our home was built, we learned that Mackit's website and Facebook pages featured advertising using computer-generated renders of our property and actual design, and details of our project. We requested that Mackit remove this advertising, but they refused. Facebook subsequently took down Mackit's content from their platform at our request, but Mackit's Internet Service Provider declined to act without a Court order. Since late 2017 we have been seeking to have Mackit's professional society address the firm's behaviour, but after initially deciding to investigate our complaint, Architectural Designers New Zealand has recently informed us that we should approach the Advertising Standards Authority for a ruling on this matter.

The documentation attached to our complaint shows the Mackit advertisements that feature our home. This documentation also shows how our property is easily recognised (and has been recognised) from the advertisements Mackit has published.

Mackit does not have our permission to advertise its services using images that feature our property and design we commissioned from them, or details of our home's construction. Use of our home and project implies that we have granted our permission and endorse Mackit's

services. We would definitely not provide such an endorsement and, if asked, we would strongly advise any consumer against using Mackit or their services.

We believe Mackit's use of our property for advertising, against our express wishes, fails to uphold Principle 4 of the Advertising Code of Ethics and breaches Rule 10 of the Code.

CODES OF PRACTICE

CODE OF ETHICS

Basic Principle 4: All advertisements should be prepared with a due sense of social responsibility to consumers and to society.

Rule 10: Privacy - Unless prior permission has been obtained an advertisement should not portray or refer to any persons, whether in a private or public capacity, or refer to any person's property, in a way likely to convey the impression of a genuine endorsement.

RESPONSE FROM ADVERTISER, MACKIT ARCHITECTURE & CONSTRUCTION

Thank you for the opportunity to respond to the complaint made to the ASA by C O'Brien and K Oliver (hereafter known as 'The Complainants').

Firstly, I wish to state that I have sought legal advice on this issue. I can see no evidence that The Complainants have sought any independent legal advice on the matters raised in their complaint.

Secondly, the issue of the Facebook post. The post in question has already been removed from Facebook over a year ago and should therefore be disregarded from the complaint. I do however note that in The Complainant's supporting evidence, they are claiming that "Lauren Langford" instantly made the connection between the images we posted on Facebook and the site itself. I would like to clarify, that Mrs Langford was a past client (her Wadestown project also features on my company website) and was well aware that I was designing a house for that exact site due to several past conversations with me. She lived in the area and passed the site regularly. Claiming that her comment demonstrates that the images shown on the Facebook post (and website) have been easily and instantly recognized as The Complainant's site is therefore false. I note The Complainants has provided no further examples to support this claim.

The remaining issue of the images shown on my company website have been thoroughly considered by myself and my lawyer Alexandra Li, following The Complainants June 2017 claim to copyright. Ms. Li has reviewed these claims thoroughly, and I attach the legal correspondence in full for your review. These two documents reiterate that we disagree with The Complainant's assessment of the law, and clearly set out our legal position to them. I note that all responses received from The Complainants came directly from them, and I can see no evidence they took legal advice on the matter.

As detailed in the legal response (PDF attached), while The Complainants claim to copyright is still under dispute, even if their June 2017 claim to copyright persists, we refer to Section 73 of the Copyright Act 1994 ("the Act") which deals with the representation of certain artistic works on public display. 73(2)(c) clearly states that copyright is not infringed by communicating to the public a visual image of the work, which we have done through computer renders. Even if The Complainants can establish the renders to be a 'copy' of the building, the renders would fall under the exception set out in section 73(2)(a) where copyright is not infringed by making a graphic work representing it.

Furthermore, The Complainants have previously acknowledged that I could have taken photos of the building and clearly displayed such photos on the Mackit website and Facebook and that this would fall into the exception set out in section 73(2)(b) where copyright is not infringed by making a photograph or film of it. I also refer to Part 4 Moral Rights of the Act, where Section 94 states that I, being the original author of the work, hold the moral right to be identified as the author of the works. Section 94 (6), (6)(e) and (7).

Currently, we have chosen to make and display a graphic representation of the works through computer-generated renders, instead of photographs. We commissioned these renders at our own expense, using digital techniques in order to take the building out of its environmental context. Our aim was to display the building as we intended the design to look, and as a vehicle for explaining some of our specific professional skills, particularly our ability to design buildings with high earthquake resiliency.

It was not intended as a case study of a finished product, as several projects in our portfolio are - said projects are complete with many exterior and interior photos as well as client testimonials. This portfolio piece, as with several others in our portfolio, was merely a demonstration of the types of buildings my company designs with some computer generated images to support this.

I did not specify the building's location (merely "City House, Wellington") or make any mention of The Complainants anywhere in the supporting text. Usual practice in our 3D renders is to use photos of the site and surroundings, and superimpose the design in its intended environment. However, we took deliberate steps to make the surrounding cityscape and houses generic looking, and added more trees to the surrounding area also.

I note The Complainants have only provided one actual image to compare with our render. Exact comparison photos of the other two renders would show that the surrounding cityscape and background in our renders is different from the actual setting - please see the included screenshots taken from Google Street View.

In summary, The Complainants claim to copyright is still under dispute, but even if their claim to copyright persists, the Copyright Act 1994 gives us a moral right to be recognised as the author of the works. Plus no copyright is infringed by the communicating to the public the visual images of the work, and/or making a graphic representation of it. At this stage, we have only made graphic representations of the work through computer generated renderings, in an abstract setting without referring to the finished physical buildings location, setting, or owners. We feel we have acted in accordance with legal advice.

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| Contact person for advertising complaints | James Mackie |
| Name and contact at creative agency | N/A |
| Name and contact at media agency | N/A |
| A basic, neutral description of the advertisement | A webpage with three computer generated images of a house. |
| Date advertisement began | Unsure of exact date the images were loaded onto website - sometime during January 2017 |

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| Where the advertisement appeared (all locations e.g. TV, Billboard, Newspaper Website) | Only on a webpage on our company website www.mackit.co.nz |
| Is the advertisement still accessible – where and until when? | Yes, our webpage still exists. |
| A copy of digital media file(s) of the advertisement – if the complaint relates to on-screen graphic, please send a broadcast quality version. | Supplied by Complainants - or can be seen at https://mackit.co.nz/portfolio-items/city-house-wellington/?portfolioCats=17 |
| Who is the product / brand target audience? | Architectural designer website - targeting people interested in designing a house. |
| Clear substantiation on claims that are challenged by the Complainants. | **Please see next page |
| The response from the advertiser is included in the published decision. The ASA is not able to accept confidential or proprietary information. Please contact the Complaints Manager if this is an issue. | |
| For Broadcast advertisements: | |
| A copy of the script | N/A |
| A copy of the media schedule and spot list (Please remove all financial information) | N/A |
| CAB key number and rating | N/A |
| For Digital advertisements: | |
| What platform tools have you used to target your audience? | Google adwords for the website in general, not the specific page in question. |

APPEAL INFORMATION

According to the procedures of the Advertising Standards Complaints Board, all decisions are able to be appealed by any party to the complaint. Information on our Appeal process is on our website www.asa.co.nz. Appeals must be made in writing via email or letter within 14 days of receipt of this decision.