

ILN IP Insider



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Can a 3-D Work of Artistic Craftsmanship be Protected by a Copyright?

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Suppose that you create a unique three-dimensional display. You find out that your competitor has copied your three-dimensional display. Can you claim that the design of the display is a three-dimensional work of artistic craftsmanship to apply for a copyright registration to enforce against your competitor? The answer may be YES!

Under 17 U.S.C. § 101, “pictorial, graphic, and sculptural works” include three-dimensional works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects. The design of a useful article shall be considered a “pictorial, graphic, and sculptural work” only if, and only to

the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.

The Supreme Court in *Mazer v. Stein*, 347 U.S. 201, 100 U.S.P.Q. 325 (1954) held that the successive Acts, the legislative history of the 1909 Copyright Act, and the practice of the Copyright Office united to show that “works of art” and “reproductions of works of art” are terms that were intended by Congress to include authority to copyright statuettes intended primarily for use in the form of lamp bases to be made and sold in a quantity. *See also Copyright Office, Compendium II of Copyright Office Practices* § 505.03 (1984) (recognizing that a “carving on the back of a chair, or pictorial matter engraved on a glass vase, could be considered for [copyright] registration” on the basis of separability).

For example, the designs on cheerleading uniforms were recently upheld as copyrightable. In *Varsity Brands, Inc. vs. Star Athletica LLC*, No. 14-5237 (6th Cir. Aug. 19, 2015), the Sixth Circuit held that “[I]t is well-established that fabric designs are eligible for copyright protection. (citation omitted) We therefore conclude that a pictorial, graphic, or sculptural work’s ‘decorative function’ does not render it unable to ‘be identified separately from,’ or [in]capable of existing independently of, the utilitarian aspects of the article.” Based on this holding, the designs on the cheerleading uniforms created by Varsity Brands were held copyrightable to the extent that they were separated either physically or conceptually from the uniforms and were capable of existing independently.

Further, decorative designs on flooring have been held to be entitled to copyright protection. In *Home Legend, LLC v. Mannington Mills, Inc.*, No. 14-13440 (11th Cir. Apr. 29, 2015), the Eleventh Circuit reversed a grant of summary judgment and held that a two dimensional laminate flooring design was eligible for copyright protection because it reflected sufficient creativity, was severable from the flooring to which it was applied, and was directed at a design.

Let’s assume that the display has walls, columns, and platforms and materials arranged on these walls, columns, and platforms. If a 3-dimensional work of artistic craftsmanship is to be claimed in the design of the display, it has to be conceptually separated from the utilitarian aspects of the display. The selection and coordination of elements such as the particular arrangement and visual aesthetic appearance of the materials of the display must be conceptually separable from the structural aspects of the display.

In our example, the design begins by creating technical drawings of the display. The design concept consists of original combinations, positioning, and arrangement of materials on the walls, columns, and platforms. For example, the colors, writing, shapes, and arrangement are created. The artistic judgment of the designers is not constrained by functional considerations concerning how the display would be eventually made. These designs could also be applied to other displays.

The particular visual appearance of the display can have any suitable artistic features that can be imagined separately and independently. Your competitors have a limitless set of alternative designs for the visual aesthetic appearance and arrangement of a display. Certain artistic features are non-functional or could have been designed differently. For example, color, writing, and appearance of the artwork applied to the display could be any appearance such as round, rectangular, etc. As such, there are a limitless set of non-functional artistic appearances of alternative designs.

Based on the above law, we could claim a copyright in the 3-dimensional work of artistic craftsman for the display. The copyright would **not** be claiming any utilitarian aspects or function in the walls, columns, and platforms. The design of the particular visual aesthetic appearance of the display should be conceptual and artistically original to be copyrightable because it expresses original selection and creative coordination of elements. Further, its separability should make it eligible for copyright registration.

Based on the above scenario, the selection and arrangement of materials in the display is not essential to the use or purpose of the display, is conceptual, and is separable and should be eligible for copyright registration under the Copyright Act Section 101, 17 U.S.C. § 101, as a three-dimensional work of artistic craftsmanship. Once the copyright registration is received, you can sue to stop your competitor from reproducing your copyrighted display and/or to recover damages that have occurred. Therefore, your competitor can be liable for unauthorized reproduction of a copyrighted 3-D work of artistic craftsmanship.

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Headed by Eddie Powell of Fladgate LLP, London, and Norman Zivin of Cooper & Dunham LLP, New York, New York, the ILN's Intellectual Property Group provides the platform for enhanced communication, enabling all of its members to easily service the needs of their clients requiring advice on cross-border transactions. Members of the group meet regularly at ILN conferences and industry events, and have collaborated on discussions and publications of mutual interest.

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