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Copyright Protection and Useful Article in the US

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Useful Articles are Not Protected

- United States copyright law protects original, creative expression fixed in a tangible medium, such as sculptures, paintings, and musical recordings.
- But, subject to limited exceptions, copyright protection often does not extend to the design of useful articles, such as furniture or clothing.
- Useful articles are protectable by copyright only to the extent they have artistic elements that are separable from their utilitarian aspects and capable of independent existence

Useful Article

- A useful article is an article having intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information
- But what about the creative design elements of an otherwise utilitarian product, such as a statuette forming the base of a decorative lamp? Copyright protection may extend to the lamp as a sculptural work to a degree, but the scope of protection is limited.
- Further, copyright protection simply cannot extend to the creative design of many useful articles because the design is so intertwined with the functionality of the thing that is considered "inseparable" from its function
 - Seeking protection for arrangement of all parts of article will defeat separability

Features of a Design of a Useful Article

- “[P]ictorial, graphic, or sculptural features” of a “design of a useful article” may only be protected under US copyright law as artistic works if the features “can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article” – 17 U.S.C. § 101
- What are tests for separate identification and independent existence?

The Two-Part Test

- The Supreme Court held that a feature incorporated into the design of a useful article is eligible for copyright protection *only if* the feature
 - can be perceived as a two- or three-dimensional work of art separate from the useful article, and
 - would qualify as a protectable pictorial, graphic, or sculptural work—either on its own or fixed in some other tangible medium of expression—if it were imagined separately from the useful article into which it is incorporated.

Star Athletica, LLC v. Varsity Brands, Inc.

- Varsity Brands obtained 200+ U.S. copyright registrations for two-dimensional designs appearing on the surface of their uniforms and other garments.
- These designs are primarily “combinations...and arrangements of elements” that include “chevrons..., lines, curves, stripes, angles, diagonals, inverted [chevrons], coloring, and shapes.”

Varsity Brand Designs



Design 259A

Design 259B



Design 074



Design 078



Design 0815

Registration of Varsity Brands Designs

- Varsity Brands registered each two-dimensional design as a separate article
 - Not registered as an article of clothing
 - Two-dimensional designs are applied to clothing
- Court held that did not matter that designs were registered separate from article, must still conduct analysis under two-part test since the two-dimensional designs were, in fact, “incorporated into the ‘design of a useful article.’”

Application of Test to Varsity Brands

- The Court found that the designs did meet the two-part test, and were eligible for protection
- The first requirement—separate identification—is not onerous. We need only be able to look at the useful article and spot some two- or three-dimensional element that appears to have pictorial, graphic, or sculptural qualities

Application of Test to Varsity Brands

- The independent-existence requirement is ordinarily more difficult to satisfy. We must determine that the separately identified feature has the capacity to exist apart from the utilitarian aspects of the article.
- The feature must be able to exist as its own pictorial, graphic, or sculptural work as defined in §101 once it is imagined apart from the useful article

Application of Test to Varsity Brands

- The “combinations...and arrangements of elements” that include “chevrons..., lines, curves, stripes, angles, diagonals, inverted [chevrons], coloring, and shapes” were protectable.
- Of course, Varsity could not prevent Star Athletica from making identical size, shape uniforms, so long as the designs were not included therein

Other Cases

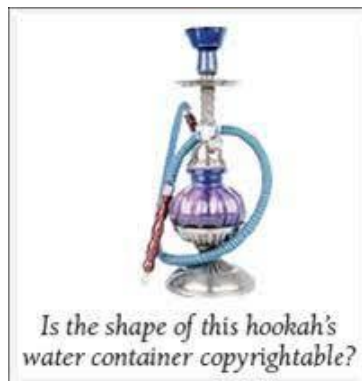
- Consistent with *Mazer*, a 1954 case decided under the 1909 Copyright Act. The respondents copyrighted a statuette depicting a dancer. The statuette was intended for use as a lamp base, “with electric wiring, sockets and lamp shades attached” but was also sold separately as a statuette.
- Clear separate identification and independent existence

Other Cases

- Separable and independent



- Shape of hookah not separable



Conclusion

- To have copyright protection for a design incorporated into a useful article, the design must have separate artistic features (pictorial, graphic or sculptural qualities) and be capable of an independent existence
 - Actual independent existence (e.g., Mazer) can be dispositive

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