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When art is usable or wearable: works of applied art in the light of the Brazilian framework

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Abstract

The paper discusses the protection of the so-called works of applied art (also known as utilitarian works of art) through copyrights, under the Brazilian legal framework. After an introduction of the controversies around this issue, the authors discuss the relevant provisions of the Berne Convention, the Brazilian Industrial Property Act (Law #9,279/1996) and the Copyrights Act (Law #9,610/1998). The authors also sum up some relevant decisions on the issue rendered by Brazilian Courts. Afterwards, they present their opinion on the controversy.

Keywords: Works of applied art, utilitarian art, industrial design, copyrights.



Resumo

O presente artigo discute sobre a proteção de obras de arte aplicada (também conhecidas como obras utilitárias) através de direitos de autor, sob a perspectiva do direito brasileiro. Após uma introdução a respeito das controvérsias em torno da questão, os autores discutem as disposições relevante da Convenção de Berna, da Lei da Propriedade Industrial (Lei no 9.279/1996) e a Lei de Direitos Autorais (Lei no 9,610/1998). Os autores também apresentam algumas importantes decisões prolatadas pelos tribunais brasileiros. Ao final, eles apresentam sua opinião a respeito da controvérsia.

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Palavras-chave: *Obras de arte aplicada, obras utilitárias, desenho industrial, direitos autorais.*

Introduction

At the beginning of the 20th Century, a group of artists led by German architect Walter Gropius established a new school of art named Bauhaus then in the city of Weimar, Germany¹. A central conception embraced by Bauhaus is summed up by the German word *Gesamtkunstwerk*, that is, a piece of work bringing together different types of art. In the context of Bauhaus, one of the ideas behind *Gesamtkunstwerk* was to bring art to the everyday life of people. Due to this principle, and loosely inspired by the guild system of the Middle Ages, students at Bauhaus were exposed to different media and types of art and crafts, such as carpentry, weaving, pottery, typography, architecture, interior design, and painting, to name just a few. Among its teachers, Bauhaus counted on great artists like Vasily Kandinsky, Paul Klee, Josef Albers and Miles van der Rohe, László Moholy-Nagy.

Bauhaus was not exactly an isolated movement. Similar ideas were exposed by other avant-garde 20th Century modern movements like De Stijl (also known as Neoplasticism), artists of which dream of changing society through their art. De Stijl was a movement as well as the name of a magazine designed for divulging the movement's ideas and principles. It was led by the Dutch painter and architect Theo van Doesburg, who aimed to create new art for a new time. The movement counted on painters, architects, sculptors, amongst others. One of the iconic pieces of work by the group is the *Red and Blue Chair*, which was designed in 1917 by Gerrit Rietveld. The structure of the chair is limited to the basic shapes and colors that the movement is known for: squares, triangles and lines as well as blue, red and yellow. More than simply a chair, it can be seen as a sculpture summing up the main principles of the Dutch group. It is worth mentioning that the French fashion designer Yves Saint Laurent paid homage to the oeuvre of Piet Mondrian, the painter who took part of De Stijl, by launching in 1965 a collection of iconic dresses inspired by the Dutch artist's canvas in 1965.

1. From 1919 to 1925, Bauhaus was located in Weimar, but then moved to Dessau, where it operated between 1925 and 1932. Its last German address was Berlin, but it remained open there for a relatively short period (1932-1933), since it was forced to shut-down due to pressure from the Nazi party. In 1937, one of its teachers, László Moholy-Nagy, tried to reopen the school in Chicago, USA. Unfortunately, however, his plans fell short.

While *droit d'auteur* and copyrights² protect the so-called *literary and artistic works* at the origin, there are cases where definitions of what is artistic or is industrial are blurred. The two examples above illustrate that sometimes art and function are amalgamated, raising doubts on the appropriate means for protection. In this paper, the writers discuss the issue of protecting utilitarian work through author's rights under the Brazilian legal framework.

I. The issue of the applied work of art

Usually art merely requires contemplative experience from the viewer, and even when it invites direct interaction, the main purpose is to lead to a reflection or to an aesthetically pleasing experience. In turn, a utilitarian object, such as a doorknob, is designed mainly to satisfy a need from everyday life.

On the other hand, when this utilitarian object is made not only to perform a given function but also aesthetically pleases its user, it is a work of applied art, also known as utilitarian art. In this field, there are numerous examples and possibilities ranging from doorknobs and taps to books. For instance, a simple doorknob does not require anything special to perform the function of opening doors. However, there is nothing preventing a highly creative artist from developing a doorknob encompassing a highly unique design. Utilitarian work goes beyond the pure functional field and deserves protection for its artistic features.

Literary and artistic works grant their creators more freedom to create, as there are no limitations related to functional features that need to be observed. This sort of work results from the conjugation of an idea plus the creative expression used by the author (idea-expression dichotomy). Applied works of art, by their term, are somewhat limited to the function they are intended to perform. Thus, they are defined by conjugation of the function that they perform plus the artistic expression used by the creator (function-expression dichotomy).

These dichotomies sometimes give rise to discussions over what would be the more appropriate means of protecting the design of such objects, bearing in mind that in these cases the boundaries of categories like fine art and industrial object become blurred. From a traditional perspective, it is possible to say that copyrights and *droit d'auteur* were created to protect,

2. Author's rights and copyrights refer to two different systems: the latter follows the Anglo-Saxon tradition and the former is based upon the French tradition. Although each one has its own idiosyncrasies, they are sometimes used as synonyms for the purposes of this paper.

in principle, artistic work. On the other hand, utilitarian objects encompassing industrial or technological features should be protected by industrial property rights, such as patents and industrial design registrations.

As the reasons for protection and the nature of the protected subject matter are different, each system has its own idiosyncrasies. As a general rule, Copyright Acts around the world do not require registration for the copyright to exist or indeed for the enforcement of the rights by the owner of the copyrightable work. As a matter of fact, the Berne Convention (which will be discussed in the next Chapter) establishes in Article 5 (2) *that the enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work*. Moreover, the author's rights usually last for a considerable amount of time. The Berne Convention establishes a general minimum term comprising the life of the author plus 50 years after his/her death³.

By contrast, industrial property law usually presents more formal requirements for granting legal protection and the terms afforded are much less generous than under Copyright Law. According to Brazilian Industrial Property Act (Law #9,279 of 14th May 1996) an industrial design is registrable if it is new, original and presents industrial application. Moreover, it must serve an aesthetic (and not technical) function⁴. In order to comply with the novelty requirement, the industrial design should not be anticipated by any document available in the state of the art, except where the disclosure happened within 180 days preceding the filing date or the date of the priority claim. This period is known as the grace period⁵. With regard to its term, an industrial design registration is in force for a 10-year period from the filing date, which is renewable for three successive 5-year periods (Section 108 of Law #9,279/96). This means that a registration will last for a maximum period of 25 years.

Therefore, each system has its advantages and disadvantages. The main advantage of a patent is that it affords a broader protection than a co-

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3. As per the Brazilian Author's Right Act, such term is 70 years from the first January 1° after the author's death.
 4. According to Section 95 of Brazilian Industrial Property Act, *an industrial design is considered to be the ornamental plastic form of an object or the ornamental set of lines and cores that can be applied to a product, providing a new and original visual result in its external configuration and which can serve as an industrial manufacturing type*.
 5. The grace period exception is only applicable in cases where the party responsible for the disclosure is either the applicant him/herself, the Brazilian Patent and Trademark Office by a publication in the official gazette based on information provided by the application him/herself or someone who received information directly or indirectly from the inventor or due to his/her acts.
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pyright. This is because copyrights only protect the means of expression of the author, while patents assure the right-holder that the inventive conception will not be used by third parties, regardless of the means used by them to reach the same technical solution⁶.

On the other hand, copyright protection does not depend upon any formality and its terms are much longer than patent rights (as general rule, the whole life of the author plus, at least, 50 years). However, the protection under one or the other system should not depend upon its advantages or disadvantages, but should be based upon the fact that one system better satisfies the needs in a given case.

II. The Berne Convention

The Berne Convention for the Protection of Literary and Artistic Works is an international agreement, the original provisions of which resulted from a conference held in Rome in 1882. Its first version was signed in Berne on September 9th, 1886, and it has undergone many amendments throughout the years (the last major amendment was signed on July 24th, 1971 in Paris).

A movement demanding an international protection system for artistic works was led by the French writer Victor Hugo and the Association Littéraire et Artistique (the association was founded by him in 1878), resulting in the original text of the Berne Convention. At that moment, the main source of knowledge, entertainment and news was actually through written means. As a consequence, the main concern was the unauthorized copying of texts in other countries⁷.

Due to this background, the Berne Convention was, at its origins, focused on literary works, explaining the reason why this sort of work was expressly mentioned in the title of the Convention and repeated in article 2°, instead of using more generic terms. However, the wording of the provision

6. Except for the process patents, which protect the means to reach the same solution. According to Section 42, §2, of Law #9,279/96, *the process patent rights (...) shall be deemed to have been infringed if the holder or owner of a product fails to prove, by a specific judicial ruling, that his/her product was obtained by a manufacturing process different from the process protected by the patent.*

7. GINSBURG et. al. reports that in XIX Century the piracy of literary works was a major concern (GINSBURG J. C., RICKETSON S. (2005), *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, 2006, v. 1, p 20): *The history of international piracy of work goes back nearly as far as that of the system of privileges; and, at times, this activity even received official support and patronage. Countries with high level of literary and artistic output were clearly most at risk, particularly where the pirate printers and publishers were resident in a country which was geographically proximate or which shared a common tongue. Thus, English authors suffered from the activities of Irish pirates until the Act of Union with Ireland in 1800, and from those of United States' publishing houses throughout the nineteenth century.*

has evolved since then, in order to establish that *the expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression.*

In fact, Masouyé⁸ clarifies that the terms *literary* and *artistic* should not be understood as two different categories of work, though they have their particularities:

2.5. Although paragraph (1) of Article 2 refers to literary and artistic works, it must not be taken to intend a division into two mutually exclusive categories. True, the genesis of an artistic work (drawing, painting, sculpture, etc.) is rather different from that of the purely literary work. The latter is expressed by its words: the writer conceives the plan of his work and then makes it known; it is this expression which gives rise to copyright. With an artistic work, the plan (mock-up, sketch, etc.) is already, in itself, capable of protection, since from this moment, the idea finds concrete form in lines and colours, with a more personal and direct execution than in the case of writings: the painter makes his own brush marks and the sculptor his statue, whereas it is of no importance whether the novelist himself puts pen to paper or dictates his text to someone else. As to musical works, they are at once artistic, with the exception that the sounds replace the lines and colour, and literary, to the extent that words accompany the melodies.

It should be added that, while there are some literary works that can be classified as artistic, there are others that can be understood as literary but not artistic, such as scientific essays. So, although the adjectives artistic and literary belong to the same categories, they are not exactly – or, at least, not always – synonyms.

The issue of the applied art has been raised many times throughout the history of the Convention. In the beginning of the 20th Century, France took a radical approach on the subject by establishing the unity of art thesis, according to which no distinction should be made between the categories of "applied/industrial art" and "pure art". The doctrine avoids creating degrees of protection for "major art" and "minor art" based on an aesthetical assessment. A group of countries led by France tried to bring the unity of art thesis into the provisions of the Berne Convention, but most other countries were reluctant to accept such amendment. At that time, countries like

8. MASOUYÉ C. (1978), *Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971)*, p. 13. Available at www.wipo.int/edocs/pubdocs/en/copyright/615/wipo_pub_615.pdf, accessed: on 22.11.2016.

United Kingdom only provided applied art with protection through industrial design.

In the Berlin Act (1908) and the Rome Act (1928), the issue was subtly dealt with in Article 2° (4) which states that: *Works of art applied to industrial purposes shall be protected so far as the domestic legislation of each country allows*. The effects of such provision were rather limited, since it simply let each Union country decide whether or not to grant author's rights over works of applied art. As the provision did not require reciprocity, Article 2° (4) could give rise to situations where the work of art was not protected in its country of origin but its author could claim his right in countries where the protection was granted. As a consequence, France and Tunisia – countries that had far wider protection for works of applied art based on the unity of art doctrine – ratified the Berlin Act with the reservation that the provisions for Article 2(4) would only apply to foreigners on a reciprocity basis, that is, the foreign country should also grant copyright protection for French works of art.

From the Brussels Act (1948) onwards, a more substantial provision for the protection of industrial applied art was finally included in the Convention. The current provision is set forth in its Article 2 (7)⁹. However, the solution found by the Union countries has its flaws since it does not establish a standard protection for works of applied art within the Berne system. Indeed, each country is entitled to decide the more appropriate way of protecting these sort of works. In order to satisfy demands from countries like France, the protection of foreign works of applied art in another Union Country is granted on a reciprocity basis. In other words, the protection of a work of applied art from one Union country in another will depend upon the protection that the country of origin affords similar work. For instance, France, which adopts the unity of art doctrine, will only grant copyright protection for works of applied art from a different union country if the latter also grants similar protection for French works. It is worth mentioning that Article 2° (7) does not refer to work of *industrial* applied art, since, according to the United Kingdom, the word *industrial* would restrict the scope of this provision too much.

9. Article 2° (7): Subject to the provisions of Article 7(4) of this Convention, it shall be a matter for legislation in the countries of the Union to determine the extent of the application of their laws to works of applied art and industrial designs and models, as well as the conditions under which such works, designs and models shall be protected. Works protected in the country of origin solely as designs and models shall be entitled in another country of the Union only to such special protection as is granted in that country to designs and models; however, if no such special protection is granted in that country, such works shall be protected as artistic works.

Moreover, Ginsburg et. al.¹⁰ clarify that where the jurisprudence of the country of origin of the work applies a more restrictive approach towards such work (on a case-by-case basis), the courts of the foreign Union country where the rights are being claimed is not entitled to limit the protection of such work based on the case law of the former country. This is because reciprocity operates on a legislative level. In cases where the differences in protection are due to case law, reciprocity should not be claimed. Indeed, Article 2° (7) starts by noting that *it shall be a matter for legislation...*

In any event, a form of protection must be granted for works of applied art under Article 25 of the TRIPs Agreement, which was also signed and ratified by Brazil. This specific provision of the TRIPs Agreement establishes that every country member must grant protection for industrial designs¹¹. In this sense, it is important to stress that the TRIPs Agreements, in general, establish a minimum standard of protection that country members must follow. Included through the Paris Act, Article 7(4) introduced a specific provision for the protection term of the works of applied art. Under the provision, each Union country will be allowed to establish the duration of protection for photos and works of applied art, provided that such protection lasts for, at least, 25 years.

Brazil signed and ratified the Paris Act of the Berne Convention, which entered into force in the country on April 20, 1975. The Treaty, however, does not bring a definitive solution for the controversy, since it only obliges the Union countries to offer the same protection – whether through copyright or through industrial and model design – for foreign works of applied art that is afforded to their own nationals under similar conditions. The relevant provisions of the Brazilian Author's Rights Act will be discussed in the following chapter.

III. The Brazilian Author's Rights Act

The former Brazilian Author's Rights Act (Law #5,988/1973) established in its Section 6, item XI, *that intellectual works are the creations of the spirit, however externalized, such as (...) works of applied art, provided that their artistic value may be dissociated from the industrial character of the*

10. GINSBURG J. C., RICKETSON S. (2005), op. cit., v. 1, p. 465.

11. The Paris Convention for the Protection of Industrial Property, which was signed by Brazil since the beginning of the Treaty (i.e. March 20th, 1883), in its Article *5quinquies* obliges Union countries to afford protection for industrial design.

object to which they are superimposed. In other words, the former Copyright Act afforded protection for works of applied art as long as the artistic aspect of the work could be separated from the industrial one.

Such provisions from Law #5,988/1973 were somewhat compatible with the understanding of a group of Brazilian scholars from that time. For instance, Cerqueira¹², one of the most traditional Brazilian jurists in the field of industrial property law, asserted (before the enactment of that statute) that in some exceptional cases the works of art should be either protected as copyright or as industrial design or model:

In the point of view of the protection of copyrights, the distinction between works of arts and designs and models does not cause any harm, with aim to submit them into different systems. In exceptional cases that we referred to, the author will always have either the legal protection over the artistic property [i.e. copyrights] or by the law for industrial designs and models. In accordance to the interests that are intended to safeguard and protect. Moreover, in certain cases, a double legal protection should be applied.

The most important point is that the artist, as well as the industrialist, know that they can count on the defense of their rights.

The reproduction of a work of art by industrial processes or its industrial application does neither change its nature nor its artistic feature.

Although Cerqueira understood that there was no harm to protect some works of applied art as industrial designs or models, as stressed in the quote above, he was not totally against the idea of double protection legal system in some special cases.

The current Author's Rights Act, Law #9,610/98, does not expressly mention works of applied art. Section 7 states that *protected intellectual works are the creations of the spirit, expressed by any means or fixed in any medium, tangible or intangible, known or to be invented in the future, such as...* The definition provided by Law #9,610/98 is broad enough to cover a wide variety of works of art. Moreover, the words such as reinforce the idea that the long list which follows this definition only exemplifies the types of intellectual works that are protected by the Act. The intellectual creations mentioned in Section 7 include literary works; dramatic works (such as plays); choreographies and pantomimes; musical compositions; audiovisual works;

12. CERQUEIRA, J. G. (1946), *Tratado da Propriedade Industrial*, vol I, p. 292 apud Chaves, A. (1984), *As Obras de Arte Aplicada no Direito Brasileiro*, p. 4.

photography; drawings, paints, engravings, sculptures, lithography and kinetic arts; illustrations and maps; projects, drafts and visual arts related to geography, engineering, etc.; adaptations and translations; software; encyclopedias, dictionaries and databases.

It is noteworthy that Section 98 of the 1996 Patent and Trademark Act establishes *that works of a purely artistic nature are not considered to be industrial designs*. In fact, there is no doubt that works of a purely artistic nature are protected by copyrights. In contrast, works of a dual nature (both industrial and aesthetic), may be protected by industrial design registrations.

Basically, according to Silveira¹³, there are three legal systems regulating the issue around the world. The first system which was already mentioned above, is the Unity of Art Theory created by French scholar Pouillet, which allows for the protection of works of applied art either by copyrights or industrial property rights, exclusively based on the choice made by the right-holder. The second system is named Dissociability Theory, which separates the pure artistic value from the industrial aspect. According to this view, work of applied art could only be protected by copyrights in cases where its pure artistic aspect is dissociable from the industrial one. This theory was previously adopted by the former Brazilian Author's Rights Act. Finally, the last system is applied in Germany, as well as in the Benelux and Scandinavian countries. It allows the copyright protection of works of applied art that bear a certain degree of artistic expression.

Obviously, the lack of clear provisions regulating the matter in the Brazilian legal system brings many doubts concerning the protection status of works of applied art in the country. On the other hand, regardless of the lack of clear guidance for the issue, it is pretty reasonable to assume that these intellectual creations can be protected through copyrights, especially as there is no provision anywhere forbidding this. Additionally, the definition provided by Section 7 of Law #9,610/98 is broad enough to encompass a wide variety of artistic works. In the Online Oxford Dictionary¹⁴ the adjective "artistic" is defined as *1. Having or revealing natural creative skill: 1.1 Relating to or characteristic of art or artists; 1.2 Aesthetically pleasing*. Thus, in principle, any artistic work can be protected by copyrights, regardless of the fact that it also has an industrial nature.

13. SILVEIRA N. (2012), *Direito de Autor no Design*, p.

14. Available at <https://en.oxforddictionaries.com/definition/artistic>, accessed on April 21, 2017.

Additionally, as is the case with any other copyrightable work protected by Law #9,610/1998, the following requirements of creativity and originality must be met: (a) the work of applied art must be the outcome of a *creative* effort, that is, to create something different from anything previously created by others; (b) under an objective analysis, it must have its own elements that allow it to be distinguished from the work of others.

It should be stressed that the fact a work of art can be reproduced on an industrial scale is irrelevant, since in the digital age many traditional art pieces can be mass-produced¹⁵. In fact, the main point is assessing whether the work of applied art presents some artistic nature in order to justify its protection through copyrights.

IV. Brazilian Case Law

There are several decisions rendered by the Brazilian courts recognizing protection for utilitarian works through copyrights. These cases most often involve fashion items.

1. The Max Mara Case

In lawsuit #0119585-04.2009.8.26.0011 filed before the First Civil Court of the Ninth Regional Venue (Pinheiros neighborhood) of São Paulo/SP, a franchisee of the Italian fashion house Max Mara sued the owner of an upscale shopping center in the City of São Paulo named Cidade Jardim, which had used Max Mara clothes in a Mother's Day advertisement. The Defendants contended that the ad did not show the brand name of the clothes and that the Plaintiff could not bring this matter before court, since it was not the owner of the trademark in question. The Trial Judge granted the infringement claims and awarded moral and material damages in favor of the Plaintiff. He found that, as a franchisee, the Plaintiff was entitled to protect the trademark in the country and was the actual owner of the clothes worn by the model in the advertisement at issue. The judge also asserted that the plaintiff's use of the clothes without consent gave rise to the infringement of the copyrights, since only the franchisee had such right. With regard to the issue of protecting fashion designs by copyrights, the Judge asserted the following:

15. As a simple example, it is possible to mention the drawings made by the British artist David Hockney using an iPad tablet. As a work of art created through digital means, there is no doubt that can be massively reproduced. On the other hand, nobody says that they lack an artistic character.

I will give an example of the art of creating garments. The fashion designer Coco Chanel was born in Salmour on 19th August 1883 and died in the Ritz Hotel Paris on 10th January 1971. She collaborated with the well-educated artists Igor Strawinski, Pablo Picasso, Luchino Visconti, Guillaume Apollinaire. This last one and she collaborated with the film director Visconti and they created sets for plays and movies. I am talking about Coco Chanel because I am mentioning a cliché. This makes me say that the Defendant had good taste in choosing the pieces of the Plaintiff. Chanel was from the first European artistic avant-garde movements of the 20th century and this evidences the clear artistic value of fashion, which also falls within the orbit of the copyrights.

The Defendant never appealed from the decision on the merits. When the Plaintiff started the execution of phase of the lawsuit, the parties reached an agreement in relation to the damages to be paid.

2. The Birkin and Kelly Handbags Case

Another relevant case involved the French fashion house Hermès International S.A. in lawsuit #0187707-59.2010.8.26.0100. In 2010, a shop in the city of São Paulo (i.e. Village 284) launched a line of clothes and accessories named "I Am Not the Original," which was a sort of homage to / free-ride on iconic fashion items, such as Laboutin shoes, Burberry trench coats and Hermès handbags (in particular Birkin and Kelly bags). The French fashion house sent a cease and desist letter demanding that Village 284 refrained from selling their handbag models. As the parties did not reach an agreement over the controversy, Village 284 filed a lawsuit against Hermès requesting a declaration from the court that they were not infringing Hermès' rights, since the handbags in question were in the public domain (there was no industrial design in force covering these handbag designs).

In response, Hermès filed a counteraction seeking an order compelling Village 284 to cease the infringement and to pay damages to the fashion house. The Trial Judge granted injunctive relief in favor of the Hermès determining that the Plaintiff immediately cease to produce and sell the bags in question under penalty of paying a daily fine. In May 2011, a decision on the merits was rendered confirming that the Plaintiff's activities were illegal. According to the judge, the title of the line - "I Am Not Original" – was a clear evidence that the Plaintiff's intention was basically to copy third parties' intellectual property, which is an act of unfair competition. The Trial Judge rejec-

ted the argument that the handbags models were within the public domain based on the understanding that they were protected by copyrights, which did not require registration for their protection:

A number of photographs reproduced in the many briefs that take part of the lawsuit files show the clear imitation of the essential elements, which, considered as a whole, make these goods, not only single bags of utilitarian nature, but true works of art.

It can be seen that the bags produced by the Defendants have value on the basis of their artistic nature. They are adornment and ostentation goods placing making their functional and utilitarian aspects of background importance. It is a masterpiece endowed with originality and aesthetics, which is protected by the Author's Rights Act and by the international conventions that govern the matter, of which Brazil is a signatory. The fact that the handbags are produced on a larger scale by the Defendants does not take from them the nature of works of art. It is known that any work of art can be reproduced on a large scale by the copyrights holder or under his authorization, similar to what happens with the editing of books, records and movies.

Village 284 appealed this decision. In August 2016, the São Paulo Court of Appeals again ruled in favor of Hermès, upholding the decision rendered by the Trial Court. The conclusions of the Appellate Judges were quite similar to those of the Trial Judges. According to the Court of Appeals, the handbags were protected by copyrights and, as such, registration was unnecessary. The Appellate Judges also expressly confirmed the possibility of works of applied art being protected simultaneously by different intellectual property rights:

It is worth remembering that double protection is permitted both by the Copyright Act and the Industrial Property Act, for works / creations that have at the same time the aesthetic character and the utilitarian connotation...

(...)

It should be noted that in the list of protected works of the current Brazilian legal framework on the subject (Section 7 of Law 9,610/98) does not expressly mention (which does not imply lack of protection since the list merely provides non-exhaustive examples) *"applied art, provided that their artistic value can be dissociated from the industrial character of the object to which they are superimposed"*.

Indeed, as far as Copyright Law is concerned, it is well known that the protected legal value is the creation or intellectual work, whatever its genre, form of expression, merit or destination, provided that the work bears aesthetic character and some originality.

(...)

In this context, fashion goods and accessories, once original in their form of expression, are considered artistic creations in the industrial and globalized world.

In the *sub judice* hypothesis, the unique characteristics imprinted on the Hermès bags have made them globally known as synonymous with elegance and beauty.

The creative uniqueness of their form of expression is fundamentally in the combination of lines and colors that give the bags (the final work) unparalleled characteristics that have turned them into objects of desire in the fashion market.

This worldwide status reached by the Hermès handbag creations deserves notorious recognition and legal protection.

It should also be noted that in the market in which the products of the Appellants are inserted, the “beauty” factor – as an original aesthetic element – is decisive to consolidate the trajectory of success of these products in this competitive commercial field.

And while it is not unknown that the concept of beauty is difficult to understand, Umberto Eco, citing the celebrated French writer Victor Hugo, brings a relevant contribution to the topic by summarizing “*the beauty*”, *humanly speaking, as the “form considered in its most elemental relation, in its most absolute symmetry, in its most intimate harmony with our organism ...*

Thus, unlike what the Appellant claims, it is undeniable that Hermès handbags are original artistic creations, of an aesthetic nature, included within the scope of legal protection of Copyright.

At the moment of writing this paper, the lawsuit was still ongoing¹⁶ and it is likely that the Superior Court of Justice will have the final say on the dispute.

16. In September 2016, the Plaintiff filed a motion for clarification against the decision, but, as per the decision published in November 2016, it was fully rejected by the Court of Appeals. At the moment of the writing of this paper, no appeal has been filed yet.

3. The Doll Models Case

In May 2011, a doll manufacturer from the interior of São Paulo state started the copyright infringement lawsuit #0001450-23.2011.8.26.0315 against another toy factory. The Plaintiff contended that the Defendant was infringing its intellectual property rights by launching a doll that featured aesthetic elements from three different models developed and registered by the Plaintiff. An expert witness was hired to compare the product models of both parties and confirmed that the Defendant's model shared many similarities with the Plaintiff's. Hence, according to the expert's opinion, the dolls in question were so similar that they could be confused by consumers. Based on the Copyright Act, the Trial Judge found that the Defendant was indeed infringing the Plaintiff's rights and awarded damages in favor of the latter. The Defendant appealed alleging, among other arguments, that the dolls could not be protected by copyright but only by industrial property rights. In May 2014, the Court of Appeals again ruled in favor of the Plaintiff based on the understanding that the doll models were protected through copyright. It found that:

8. In fact, I understand that the Plaintiff is right, since the designs of the dolls are subject to protection by copyright, as set forth in article 7, item VIII, of Law No. 9,610/98, which states that: "Section 7 - The creations of spirit, expressed by any means or fixed in any medium, tangible or intangible, known or to be invented in the future are protected intellectual creations, such as: works of drawing, painting, engraving, sculpture, lithography and kinetic art;"

9. Therefore, considering that Section 18 of the aforementioned Law provides that "The protection of the rights referred to in this Law does not depend upon registration", it is concluded that the Plaintiff does not need to prove any registration with a competent body in order to have the right to exclusively exploits the dolls' designs.

10. Even if this were the case, the author has added Certificates of Registration issued by the School of Fine Arts of the Federal University of Rio de Janeiro evidencing the creation of the dolls since 2002 to the lawsuit records. This was also demonstrated through the catalogs from the evidence sets taken from another lawsuit with the same nature of this one. In turn, the Defendant failed to produce evidence that he manufactured its "Luck Mommy" doll before the year 2002.

The Defendant filed an appeal against this decision to the Superior Court of Justice. In May 2016, their final appeal was dismissed due to procedural law matters, and the decision in question became *res judicata*.

Conclusion

There is no obstacle in the current Brazilian legal framework to protect works of applied art through copyrights. If the work in question bears an artistic nature and complies with the creativity and originality requirements, it can be protected through the copyright system. Obviously, this is something to be assessed on a case by case basis. The fact that the work of applied art might also be protected by industrial property rights is not a hindrance either. Brazilian legal system affords other examples where there is the application of different legal systems over the same property. For instance, there is no doubt that a cartoon character is protected by copyrights as a drawing, but also as a trademark in cases where it is used to identify a given product or service.

In a nutshell, a rather restrictive interpretation of the statutory provisions pertaining to the subject matter would deny to some artists in Brazil the right to have their creations to be legally protected as what they truly are: works of art, regardless of their utilitarian feature. And this is not what the Brazilian legal framework sets forth.



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