

Copyright Quiz: Is The Pictorial Protectable?

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Here's a bright idea: protecting not only the utilitarian aspect of your design but the unique aesthetic element as well.

Think of the original LED light bulb. That odd spiral shape comes immediately to mind because you associate that shape with LED. In retrospect, perhaps the artistic intent of the bulb was to do just that: spark new thinking about how bulbs should both look and, most importantly, perform. And it worked! The shape of the LED bulb was, obviously, a bright idea. But is an aesthetic feature of a product independently copyrightable?

This was a question addressed by the Supreme Court in 2017 wherein the court created a specific test designed to determine whether copyright protection can extend not only to the performance element of a design but an aesthetic feature as well.



The Sluggie

Let's test your knowledge on the topic with the hypothetical item. The "Sluggie," a coozie for the

tumbler we all can't seem to live without. Read through the Sluggie's design elements and tell us: Is the pictorial, alone, protectable?

Insulated tumblers keep your coffee hot and your ice frozen for many hours. However, one complaint we have is: tumblers don't usually have grips or sleeves. Particularly for the larger cups, keeping a grip on the wide, bulbous container while juggling other things can prove difficult.

Cue the Sluggie®, a coozie for tumblers that, with its wrap-around finger grooves, makes it easier to hold than the previous groove-less girth of your favorite beverage holder. Particularly when used by hunters and workers who find themselves outdoors daily in chilly morning weather, the Sluggie also shields the hand from the cold air and shares the impressive warmth of the tumbler through the coozie to warm not only the coffee in the cup but also the hand holding it. Finally, because the wrap-around coozie resembles that of a boxing glove, the Sluggie's marketing team—smartly wanting to capitalize on the unique shape—developed the brilliant idea to call their new design “Sluggie, the huggie that packs a punch.”

Questioning the Copyright

Quiz time! Can the Sluggie team copyright both the utilitarian aspect of the Sluggie—*i.e.*, the benefits it provides in the form of a better grip on tumblers and added warmth to the user—as well as the aesthetic aspect—*i.e.*, the unique boxer-glove shape of the coozie as a separate artistic feature?

Now, if you were to research this topic, you would find the Copyright Act extends copyright protection to not only the design of a useful article but also “pictorial, graphic and sculptural” features of the article so long as they can be “identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.” 17 U.S. Code § 101. In an effort to clarify the dividing line between applied art in the copyright realm and industrial design, which is governed by patents, the Supreme Court applied Section 101 in [*Star Athletica, LLC v. Varsity Brands, Inc.*](#) and came up with the following test:

“[A] feature incorporated into the design of a useful article is eligible for copyright protection only if the feature (1) can be perceived as a two- or three-dimensional work of art separate from the useful article and (2) 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.”

Case No. 15-866 (Sup.Ct. Mar. 22, 2017).

Applying this test, how now do you come down on copyright protection for the “sculpture” that is the Sluggie? Still struggling? Perhaps this will help: In one of the first applications of the *Star Athletica* test, a New York District Court judge, in [*Jetmax Ltd. V. Big Lots, Inc.*](#), recently found the outer casing of string lights, due to their iridescence and resemblance to a hot air balloon and basket qualified as a separately-copyrightable aspect of the light design. Case No. 15-cv-9597 (S.D.N.Y. Aug. 28, 2017). In reaching her conclusion that the hot air balloon covers which do, arguably, contribute to the function of the lights (in that they reduce glare), warrant separate copyright protection, the judge found their “primary purpose” was artistic. How's that boxer-glove coozie looking to you now? While it does serve a utilitarian purpose (in shielding the user's hand from cold),

is its primary purpose artistic in order fulfill the design concept of being “the huggie that packs a punch?”

If you’re finding this difficult to answer, do not feel alone. Many commentators have [opined](#) the *Star Athletica* test may create more confusion than clarity. Whether you think the pictorial, graphic or sculptural test is just a bunch of hot air, when designing a product, considering a separately-identifiable aesthetic feature that may warrant additional protection of your IP may be a bright idea.

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