

# Norway: Is a (famous) work of art contrary to accepted principles of morality or public policy under Article 3 of the Trade Mark Directive, part 2?

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*<http://trademarkblog.kluweriplaw.com/2017/11/17/norway-famous-work-art-contrary-accepted-principles-morality-public-policy-article-3-trade-mark-directive-part-2/>*

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This is a follow up to the blog post of [4 September](#), regarding Oslo Municipality's attempt to obtain trade mark protection for the body of works of art of Norwegian artist Gustav Vigeland.

Previously, the EFTA Court concluded that a trade mark consisting of a work of art may contravene accepted principles of morality or public policy under Article 3 of the Trade Mark Directive if the work of art is important enough.

The matter was referred to the EFTA Court by The Norwegian Board of Appeal, who requested a preliminary judgment on this issue. Based on the decision by the EFTA Court, the Board has now found that the Vigeland trade mark applications are contrary to public order due to the exceptional circumstances of the case.

Initially, the Board finds that the fact that a copyright reverts to the public domain

does not in itself preclude trade mark protection. A work of art may function as a trade mark.

However, in exceptional circumstances, a trade mark registration may conflict with the temporal limitation of copyright protection. Well-known artworks or artworks by well-known artists may be attractive as trade marks, thereby giving the trade mark proprietor an unjustified competitive advantage in a work of art which has reverted to the public domain. Furthermore, the copyright holder of a work in the public domain may be tempted to prevent use previously prohibited by copyright law by extending protection through trade mark protection.

Although the regular requirements for trade mark protection often will be sufficient in preventing conflicts between trade mark protection and the temporal limitation to copyright protection, the Board inter alia notes that the demarcation of the regular grounds for refusal is not necessarily so easy. The Board particularly mentions that the ground for refusal for the outer shape which adds substantial value is not applicable for classes of goods not related to the artwork. This provision would not prevent the registration of the depiction of an artwork on let's say a wine opener. Importantly, the Board refers to the EFTA Court when stating that there may therefore be a need to safeguard the public domain by applying the provision on public policy if a sign consisting of an artwork cannot be refused on other grounds.

Vigeland's body of works hold a significant cultural value, and must be considered as part of the Norwegian cultural heritage. The Vigeland Park in Oslo is one of the most visited cultural attractions in Norway. If a party acquires exclusive rights to the works in the park, they will gain a significant competitive advantage for the unforeseeable future.

The decisive factor for the Board's finding is that Oslo Municipality has sought trade mark protection for practically the entire Vigeland Park and Museum. According to the Board, the attempt of Oslo Municipality to maintain control of the works of art through trade mark protection contradict the fundamental interests behind the limitation of the term of Vigeland's works. Under these exceptional circumstances, the Board finds that registration of the marks would be contrary to public order.

The decision is available in full in [English](#).

Oslo Municipality will not appeal the decision.

On a more general note, under these decisions by the EFTA Court and the Board of Appeal, the accepted morality and public policy ground for refusal for artworks in the public domain is considered a safeguard provision. It is only applicable when there are exceptional circumstances in which trade mark protection will be contrary to the temporal limitation in copyrights, and the other grounds for refusal do not prevent trade mark registration.