

Should 'Mona Lisa' belong to a single trademark owner?

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Several famous paintings - including 'Mona Lisa' by Leonardo da Vinci, 'Liberty Leading the People' by Eugène Delacroix, 'Luncheon of the Boating Party' by Auguste Renoir and significant Danish paintings - were accepted for registration in 2005 and 2014 by the Danish Patent and Trademark Office (DKPTO). Is it reasonable to obtain trademark registration of works of art in the public domain or are there reasonable grounds for rejection from a Danish perspective?

In the Danish Consolidate Trademarks Act (Article 14(1)(5)), copyright protected works of art are explicitly excluded from registration as a trademark if the work of art is protected under the copyright law (life + 70 years). As the copyright protection has lapsed for the above mentioned artworks, the DKPTO found no reason in law to reject them.

Article 7 EUTMR (and the Danish equivalent) states additional reasons for rejecting a trademark application. Under Article 7(1)(f) EUTMR trademarks which are contrary to **public policy** or to accepted principles of **morality** can be rejected.

Recently, the EFTA Court expressed, in Case E-5/16 'Vigeland', that certain works of art may enjoy a particular status as prominent parts of a nation's cultural heritage, an emblem of sovereignty or of the nation's foundations and values. A trademark registration may even be considered a misappropriation or a desecration of the artist's work, in particular if it is granted for goods or services that contradict the values of the artist or the message communicated through the artwork in question. Therefore, it cannot be ruled out that trademark registration of

an artwork in the public domain may possibly be perceived by the average consumer in the EEA State in question as offensive and therefore as contrary to accepted principles of morality. On this ground the applied for artworks – inter alia of the ‘angry boy’ – were denied trademark registration.

In the Vigeland-judgement, the EFTA Court concludes that trademark registration of a sign that consists of works for which the copyright protection period has expired is not in itself contrary to public policy or accepted principles of morality within the meaning of Article 3(1)(f) of the Trade Mark Directive (equivalent to Article 7(1)(f) EUTMR). The risk of misappropriation or desecration of an artwork may be relevant in this assessment. Registration of a sign may be refused on the basis of the **public policy** exception provided for in Article 3(1)(f) of the Trade Mark Directive only if the sign consists exclusively of a work pertaining to the public domain and if registration of that sign would constitute a genuine and sufficiently serious threat to a fundamental interest of society. The risk of misappropriation or desecration of an artwork may be relevant in this assessment in the sense that the better known the work of art, the greater the likelihood that the author or artist is known to the general public.

For this reason today the DKPTO has an excellent reason in law to reject famous paintings – such as ‘Mona Lisa’ by Leonardo da Vinci, ‘Liberty Leading the People’ by Eugène Delacroix and ‘Luncheon of the Boating Party’ by Auguste Renoir.