



## Copyright Protection on Works of Applied Art

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In recent years, we received many inquiries from clients regarding whether the design of industrial products which are well-designed could be protected as works of applied art based on the Chinese Copyright Law. The clients who raised these inquiries were mainly individuals or companies from the countries as France, Italy, the Northlands, Sweden, which are famous for art or have well developed market of applied art. Normally, the clients wish to protect their product design through Copyright Law, under the situation that they didn't file design patent application in China before their products entering into Chinese market or their design right expired. Copyright protection and design protection are two different systems, and they are different in the aspects of protection object, level of protection, protection period, etc. The author will introduce the differences and similarities between the copyright protection and design protection in the following and make an analysis on the requirements of copyrightable design.

### **1. Relevant laws regarding copyright protection of works of applied art**

The term "works of applied art" is a concept in the copyright field. As the name implies, works of applied art refer to the works which are having both practical and artistic value. According to Glossary of Terms of the Law of Copyright and Neighboring Rights edited by WIPO, works of applied art refer to the works of art which could be practically used, no matter it is a handwork product or industrial product. From the above definition "works of art which could be practically used", "works of art" plays an essential role. It can be seen that copyright protection to works of applied art put more emphasis on artistry than practicality.

In China, the legal basis of copyright protection to the works of applied art was originated from the Berne Convention for the Protection of Literary and Artistic Works (hereinafter referred to as "Berne



Convention”). Works of applied art was listed as one kind of literary and artistic works in Berne Convention. As a contracting party, China undertakes obligations of the convention. Article 6 of "Regulations for the Implementation of International Copyright Treaties", which was promulgated and implemented by the State Council of the P.R.C in 1992, stipulated that the protection period for the foreign works of applied art is 25 years from the completion of the work. Except for the above regulation, the Copyright Law of the P.R.C has no definition of works of applied art, and no stipulation of how to protect the copyright of works of applied art, scope and period of protection, etc. Thus, it is disputable how to protect the works of applied art in China. In legal practice, the Chinese courts usually protect works of applied art by invoking the relevant laws regarding works of art in the Copyright Law.

## 2. Differences between the copyright protection and patent protection

An industrial product is possible to be protected in double way through copyright and design patent. But these two ways are substantially different in obtaining right, protection period, object of protection, elements of infringement, etc.

	Protection object	Means of obtaining the right	Requirements of enforcing the right	Protection period	Infringement determination
Copyright protection	Only the part of aesthetics is protected, and the part of practicability is not protected.	Automatically generated upon completion of the work	Replicability, originality, relatively high aesthetic value	1. Life time of the author plus 50 years after his/her death for individual works is.  2. 50 years from the first publication date of the work for entity works is. If the work has not been published, the protection period is 50 years from the year, which the work was created.	Without authorization of the right owner, the act of reproducing or distributing the work constitutes infringement.
Design	The new	A design	A design to be	10 years from filing	After the design patent is



patent protection	design of a product's shape, pattern or the combination thereof, and the combination of the color and the shape or pattern of a product, which creates an aesthetic feeling and is fit for industrial application.	application should be filed by the applicant and be granted for patent upon preliminary examination by SIPO.	granted cannot be identical with or substantially similar to a prior design.	date	granted, without permission of the patentee, it will constitute infringement of design patent if the entity or individual manufactures, offers to sell, sells, or imports the patented product
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From the above comparison, compared with design patent, copyright protection to the design of industrial products has unique advantages. In the aspect of the means of obtaining rights and protection period, copyright is automatically generated from the date of completion of the work, and the right holder can obtain the right without filing a copyright registration. Besides, Regulations for the Implementation of International Copyright Treaties stipulates that the protection period of the works of applied art is 25 years from the completion of the work. However, as we mentioned above, in practice, the works of applied art, if they meet the requirements of works of art, will be protected as art works based on the Copyright Law in China. And the protection period to the property rights of the art works, such as the right of reproduction, the right of distribution, etc., is 50 years. Moreover, Copyright Law is higher in terms of legislation than Regulations for the Implementation of International Copyright Treaties which is an administrative regulation, for which Copyright Law shall govern when there is conflict between the two. Thus, in theory, 50 years of protection period may be claimed for the work of



applied art. In the current judicial cases, there is seldom a clear explanation of the period of protection. But either 25 years or 50 years is much longer than the protection period of the design patent. Besides, design patent is granted only upon preliminary examination in China. Even if being grant, it is possible to invalidate a design patent. While, there is no invalidation system to copyright. However, there are also some disadvantages protecting the design of the industrial product by copyright. In the aspect of determining copyright infringement, only the act of republication and distribution without authorization is considered as infringing act, while the act of selling, importing, etc., is not. Beside, in the aspect of protection object, as we mentioned above, as the work of applied art is protected by invoking the relevant provisions regarding the works of art in the Copyright Law, relatively high aesthetics is required. Although Patent Law of the P.R.C also stipulates that the design patent should have aesthetic feeling, there is no requirement regarding the degree of aesthetic feeling in the Patent Law, other relevant laws and legal practice. But "aesthetics" is a premise and a difficult point for whether the design of industrial products can be protected based on the copyright law, and it has a direct impact on whether the design of the products is protectable under Copyright Law. We will explain this point in details in the following.

### **3. Determination of protection object under Copyright Law**

Copyright Law doesn't expressly stipulate the substantial requirements for the protectable objects. According to Article 2 of Regulation for the Implementation of the Copyright Law of the People's Republic of China, a protectable object should be reproducible and original.

There is no provision regarding the standard of originality. Normally , the courts hold that originality should be judged based on the concrete facts and there is no uniform standard applicable to all the works. In fact, there are different requirements for different works in originality.

As for the works of applied art, usually practicality and artistry of the work is considered separately by the courts. The part of practicality will not be protected and the part of aesthetics will be protected invoking the relevant provisions regarding the works of art in the Copyright Law. Article 4(8) of Regulations for the Implementation of the Copyright Law stipulates that *works of art are two- or*



*three-dimensional works created in lines, colors or other medium which, when being viewed, impart esthetic effect, such as paintings, works of calligraphy, sculptures and works of architecture.*





Thus, in the cases, a focus of whether the design of industrial products is protectable under Copyright Law is that whether the work of applied art involved in the case is original.


As for the object, which has both practicability and aesthetics, whether it can be protected as a work of art depends **on the unique personality and creativity** in the intellectual work put in by the author in aesthetics. The part of intellectual work which doesn't relate to aesthetic has nothing to do with originality. Thus, whether the work is created independently and through their hard work is not a sufficient for an object to be protected based on Copyright Law.


Normally, courts will decide the originality by judging whether the work has sufficient aesthetic value. In the copyright infringement case of Lego company V. Guangdong Xiaobailong Cartoon Toys Industrial Co., Ltd. and Xidan Shopping Center Co., Ltd., the Supreme Court held that the involved toys were common designs in toy blocks and didn't meet the requirement of originality. Thus, it could not be protected by the Copyright Law. While, in the reproduction right infringement case of Yong Fu Co., Ltd., etc. V. Shanghai Duyi Trading Co., Ltd., in which the involved products are also toys, the court held the involved products are toys of cottages, wagons, elegant chapels or cottages with fairy tale features, which have complex structure, and they have certain degree of artistic beauty in terms of color combination, design of space, which reached the basic level of intellectual creativity, and meet the requirements of originality of the works of applied art.

As mentioned above, at present, there are no express and clear provisions regarding originality and aesthetics under the Chinese laws. The following table shows the tendency of the courts regarding whether the works meet the requirements of the works of art through a summary of various and a number of cases in the past years.


Case	Involved product	Whether admitted by the court as	Grounds of determination


		object for protection	
<p>Copyright infringement case of Ouke Baby Co., Ltd. v. Cixi Jiabao Children's Products Co., Ltd.</p>	 <p><b>Figure 1 Spidy toilet</b></p>  <p><b>Figure 2 Ducky toilet pad</b></p>  <p><b>Figure 2 Buddy Bear bath chair</b></p>	<p>Yes</p>	<p>The involved products are combined by animal image and children's toilet, toilet pad and bathing chair. They are special in shape, and have aesthetic value, originality and can be reproduced. Thus, they meet the requirements of the works stipulated in the Copyright Law of China and should be protected based on Copyright Law.</p>
<p>Copyright infringement case of Intel IKEA System Co., Ltd. v. Taizhou Zhongtian Plastic Industry Co., Ltd.</p>	 <p><b>Figure 3 Marmot children's chair</b></p>	<p>No</p>	<p>The design of Marmot children's chair is mainly reflected in the shape and lines. The line is simple and smooth, trying to show a design idea of simpleness with childish style. But such idea cannot be distinguished from other common ideas of children's product design. From the aspect of the originality of the expression, excluding the details of the vertebral body and spindle bar stool legs, which are of certain difference from the other</p>

			<p>ordinary children's chair and stool, the overall shape of Marmot children's chair and stool has little difference from the vast majority of ordinary children's chairs and children's stool. Overall, the Marmot children's chair and the children's stool are relatively simple in design and they did not reach the aesthetic degree of the work of art.</p>
<p>Copyright ownership and infringement case of Zuoshangmingshe Household Products (Shanghai) Co., Ltd. v. Beijing Zhongronghengsheng Wood Co., Ltd., and Nanjing Mengyang Furniture Sales Center</p>		<p>Yes</p>	<p>"Tang Yun cloakroom furniture" is of certain aesthetic value and meets the requirement of work, due to its beauty in entirety from the overall shape, the combination of plate pattern lines, the match of mental part and the symmetry design with Chinese style . Meanwhile, it can be used for industrial mass production, and can be reproduced and used in practice.</p>
<p>Copyright infringement case of Wuxi Haiyi Craft Carving Co., Ltd. v.</p>		<p>Yes</p>	<p>As for the aesthetics, the court held the handle of seal was designed with the peculiar form of diamond styling, which could bring a sense of crystal clear, has a certain degree of aesthetic value, and has the aesthetics of works of applied art.</p>

<p>Shanjia LI (a natural person)</p>			<p>As for the originality, the court held the handle of the seal showed design originality in the combination, design and composition, and expressed the author's unique thought and has the originality stipulated by the copyright law.</p>
<p>Copyright infringement case of Lego Corporation v. Guangdong Xiaobailong Cartoon Toys Industrial Co., Ltd. and Xidan Shopping Center Co., Ltd.,</p>	<p>No picture of the involved product is found.</p>	<p>No</p>	<p>Although Lego Corporation independently created the toy blocks and a certain labor and capital had been invested, from the design of the involved toys block, they are common designs in toy blocks and didn't reach the degree of originality of work. Thus, the involved toys block didn't meet the requirement of originality stipulated in Copyright Law.</p>
<p>Copyright infringement case of Shijiazhuang Oriental City Plaza Co., Ltd. v. Huasi Industry Group and Suning Huasi Fur Leather Products</p>	<p>No picture of the involved product is found.</p>	<p>No</p>	<p>The involved clothing used some decorative elements, including animal fur, lace, boat neck and swallow collar. But it's just a combination of some usual elements in costume design. This kind of combination does not constitute original artistic expression created by Huasi company. Thus, the two kinds of clothing designed by Huasi Company are applied work and could not be protected as works of applied art based on Copyright Law.</p>



Co., Ltd.			
<p>Reproducti on right infringeme nt case of Yongfu Co., Ltd. and Shanghai Duyi Trading Co., Ltd.</p>	<p>No picture of the involved product is found.</p>	<p>Yes</p>	<p>These products are a cottage with complex structure and beautiful shape, a toy wagon with various carriages ( some carriages have bathroom, kitchen and other facilities ), elegant chapels or cottages with fairy tale style. The above products have certain degree of artistic beauty in the color collocation and design of space, reached the basic level of intellectual creativity, meet the requirements of originality of the works of applied art. Especially, Work 7 has the highest originality and aesthetics among all the products and in this work the author created two fairytale lakeshores which showed the artistic effect by using artistic expressions.</p>
<p>Copyright infringeme nt and packaging or decoration infringeme nt of famous commodity case of Aimulu Internation al Co., Ltd. v. Huizhou Xinlida Electronic</p>		<p>No</p>	<p>The involved product is a device in a common shape, focusing on practicality. The device itself lacks aesthetics and it cannot convey to the public what they want to express and what kind of appreciation value when it is displayed alone. Thus the tape cutter could not be deemed as work of applied art and could not be protected based on the Copyright Law of China and the Berne Convention for the Protection of Literary and Artistic Works.</p>

Tools Co., Ltd.,			
Copyright Ownership and infringement case of Beijing Zhonghang zhicheng Technology Co., Ltd. v. Shenzhen Feipengda Co., Ltd.		No	<p>The "J-10 Airplane" is a weapon of war and its shape indeed has aesthetics for the general public.</p> <p>From copyright law, the shape and style of "J-10 Airplane (single seat)" indeed has an original art expression and can be protected as a work of art under the Copyright Law, under the circumstance that the functional elements of the plane are excluded. But, generally speaking, the special shape and styling was produced mainly due to the functional performance of the airplane, that is, the practical function. The styling elements are integrated with the airplane's functional elements and cannot be physically or conceptually separated. This court cannot identify which elements in the shape and style of "J-10 Airplane" (single-seat) are purely artistic expression which can be separated from the functional performance of the aircraft, so that it is unable to determine whether "J-10 airplane (single seat)" constitutes work of art.</p>

**4. Suggestions**

Although copyright is automatically generated upon the completion of the work and filing copyright registration is not compulsory in China, according to the practical experience, filing copyright registration will bring great convenience in enforcement to the right holder.

Firstly, the Copyright Certificate could be used as a preliminary evidence of copyright ownership. Article 11(4) of Copyright Law stipulates that *the citizen, legal entity or organization whose name is*



*affixed to a work shall, without the contrary proof, be the author of the work.* The copyright holder indicated in the Copyright Certificate will be deemed as the right holder of the work by the court and the right holder doesn't need to provide other document(s) to prove ownership. Especially, as it is difficult for the overseas right holders to collect evidence and the evidence generated overseas can be admitted by the Chinese court upon being conducted a series of complex procedures such as notarization and legalization, submitting a Copyright Certificate is a simple way to prove ownership.

What is worthy of attention is that, if the copyright is registered long after the work is completed and the right holder could not provide other supporting evidence to prove the completion time of the work, usually the time of completion of the work indicated in the Copyright Certificate cannot be directly admitted as the time that the holder obtained copyright by the court. Thus, it is advisable to file copyright registration as soon as possible when the work is completed.

Secondly, when enforcing right by other ways, such as filing a complaint with Alibaba IP platform and Customs recordation, it is necessary to submit the Copyright Certificate as the proof of right. For example, Alibaba Group sent up an IP protection system for its six e-commerce platforms, including Taobao, Tmall China, Tmall Global, 1688.com (Alibaba China), Alibaba.com (Alibaba Global) and Aliexpress. When the copyright holder finds out product which is suspected of infringing the holder's copyright on the above e-commerce platforms, the right holder may require the Alibaba IP platform to delete the infringing links by providing the Copyright Registration as the proof of right.

Thirdly, when the right is enforced by sending a warning letter, the Copyright Certificate can also be a powerful weapon that could be used to frighten the infringers who produce and sell imitation products. As CPCC only conducts preliminary examination in copyright registration procedure, even if the aesthetic value of the design of industrial products is disputable, it could be registered and used as right certificate in practice if there is no contrary proof. When to send a warning letter to the suspected infringer, copyright certificate can be accompanied in the letter. This way helps urge the suspected infringer to stop imitation and infringement to a certain extent.



To sum up, copyright and design patent both have certain limitations for the protection of design of industrial products. Although the protection period of copyright is longer, the design of many industrial products does not meet the artistic level required by the Copyright Law which became the biggest obstacle for the design of industrial products to obtain copyright protection based on copyright laws. Thus, design patent is still a better way to protect the design of industrial products. However, under the situation that the product's design cannot obtain the protection of design patent or the protection period of design patent has expired, copyright protection is a good supplementary protection measure. Besides, if the industrial product is popular in the market, its design with certain characteristics can play a role in differentiating the source of the product, Unfair Competition Law may be applied to protect the design of such product.