

Newsletter No.

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**Swiss IP News** We provide you with updates on new decisions, the relevant legislative process and other trends in the fields of intellectual property and unfair competition law from a Swiss perspective.

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## “Fire Ring” qualifies as work of applied art under copyright law

In a recent decision, the Swiss Federal Supreme Court dealt with the questions under which conditions and to what extent utility articles are protected under copyright law as works of applied art ([4A 472/2021](#); [4A 482/2021](#) of 17 June 2022). It awarded the plaintiff’s grill unit (Fire Ring) with copyright protection and assumed such copyright to be infringed by certain versions of the counterparties’ grill devices (Grill Rings).

### Background

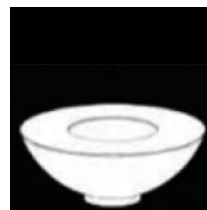
As a sculptor and steel practitioner, the plaintiff produces so-called “**Fire Rings**”. Fire Rings are steel bowls of different outlines and diameters with a horizontal steel ring in the centre of which a wood fire can be lit and on whose steel ring food can be cooked.



The defendants, who are creators and traders of decorative and functional products, created the following versions of the “**Grill Ring**”, the marketing of which was challenged by the plaintiff before the Commercial Court of the Canton of Aargau for copyright infringement and unfair competition:



*dimidius*



*conicum*



*hemisfär*



*dimidius altus*



*vesta*

The Commercial Court acknowledged copyright protection of the Fire Ring. It recognised an artistic design and an individual intellectual creation in the plaintiff's grill unit because the function of a wood fire grill did not require the specific form chosen. The Commercial Court stated that the plaintiff's Fire Ring would stand out from the shapes of other grill devices known at the time of the Fire Ring's creation. Thus, it assumed the required individuality for copyright protection. Furthermore, it held the "dimidius", "conicum" and "hemisfär" models to infringe such copyright as it assumed these models to be similar in design if compared to the protected Fire Ring. However, the Commercial Court denied copyright infringement by the "vesta" and "dimidius altus" models, stating that such models were outside the scope of copyright protection because in these two models the round half shell did not reach as far as the horizontal cooking ring, but a vertical section was inserted in between.

Both the plaintiff and the defendants filed an appeal against this judgement with the Swiss Federal Supreme Court (the Court). The plaintiff contended that its claims were also to be protected with respect to the "vesta" and "dimidius altus" models and the defendants claimed that the appeal was to be dismissed.

### Decision

At first, the Court examined the claim under copyright law. It reviewed in detail whether the Fire Ring constituted a work protected under the Copyright Act, in particular as a work of applied art according to Article 2 para. 2 lit. f of the Copyright Act. The crucial question was whether the Fire Ring entailed the individual character required by copyright law or whether it constituted a purely handcrafted product ("*handwerkliches Erzeugnis*") lacking any corresponding protection.

The Court first addressed the controversy discussed by legal scholars relating to

the protectability of works of applied art, in particular in connection with utility articles. On the one hand, the individual character of utility articles shall easily be recognised as there is usually little scope for design in such cases. On the other hand, a high degree of individuality shall be required because the purpose of use would usually dictate the design implying that such articles would rather constitute purely handcrafted products without any individual character. The Court then stated that **no different protection requirements applied to different categories of works**. Rather, the requirements for individuality were the same for all types of works. However, it held that **the criterion of individual character was relative to the respective type of work**. This is due to the fact that, for all works, the required individuality must be assessed with regard to the scope available for individual design. In the case of utility articles, this scope for design was – in contrast to works of art without a purpose – limited by its purpose of use. Hence, in the case of utility articles, the individual artistic design must result from the part which was not predetermined by the purpose of use. Consequently, the Court held that **the conditions for individual creation differed considerably for different types of works** and that **individuality was more difficult to fulfil when the purpose of use determined the form**. It added that, in view of the long term of protection under copyright law, the requirements for individuality were not too low for *all* works and not only objects of utility.

Evaluating the Fire Ring's individual character, the Court drew a distinction from design law. It observed that copyright law protected the "individual", while design law protected the "peculiar" creations and that the requirements of individuality under copyright law must be higher than the requirements of peculiarity under design law given the more extensive protection under copyright law. It held that, for the peculiarity under design law, the overall impression of the claimed form

must be decisively different from what was known before. **For the individuality of utility articles under copyright law, the artistic design must be so clearly distinguishable from previously known forms that it appears to be unique.**

The Court then held that the Fire Ring **clearly stood out artistically** from the then familiar set of shapes for grills – i.e. of objects with the same purpose – in its overall impression. It perceived the Fire Ring as **something new and unique** with a **surprising and unusual** appearance compared to previously known forms. The Court thus concluded that the Fire Ring was **more than a variation of a pre-existing design** and that it stood out in such a way from previously known forms that it was accorded individuality under copyright law.

Furthermore, the Court acknowledged that, apart from the purpose of use, restrictions on artistic freedom could also result from technical requirements, although copyright law does not explicitly say so. The defendants argued that the technicality in the concerned product did not leave any room for individual design. However, the Court held that the fact that the technical specifications did not allow any more leeway would have had to be presented by the defendants which they did not do.

In assessing the infringement of the copyrighted Fire Ring by the defendants' grill units, the Court acknowledged that the less significant the individual character conferred on the work by the exploitation of the scope of creativity, the narrower the scope of protection. In the present case, it assumed a limited scope of protection. However, it did not object to the Commercial Court's assessment that there was no apparent difference between the "dimidius", "conicum" and "hemisfär" models and the Fire Ring in their overall impression, despite minor deviations. Also, the Court held that, on the basis of the illustrations in the files, it was not objectionable for the Commercial

Court to assume that the lines and overall impression of the “vesta” and “dimidius altus” models clearly differed from the Fire Ring.

Against this background, the Court confirmed the decision of the Commercial Court. It also rejected the claims under unfair competition law. On the basis of the facts established by the Commercial Court, the sign relied on by the plaintiff (i.e. the Fire Ring) lacked priority of use and thus a requirement to be eligible for protection against likelihood of confusion under unfair competition law.

### Comment

Decisions on the protection of utility articles under copyright law are rather rare. Hence, this decision provides welcome guidance under which conditions copyright protection extends to utility articles and to what extent. The Court claimed that no different protection requirements applied to the different categories of works and that, in particular, the requirements for individuality were the same for all types of works. Nevertheless, it noted that the required level of individuality was relative to the scope available for individual design and that, therefore, the conditions for individuality differed considerably for the different types of works. In particular regarding utility articles, the Court held that the required threshold of individuality was more difficult to fulfil because the purpose of use set the object's form. This seems convincing. It is not a matter of increased protection requirements for utility articles. Rather, the question of copyright protection for such articles is about the limited scope for individual design, which must be overcome. Nevertheless, the decision implies that utility articles must clearly stand out from previously known forms, be unique, highly individual, surprising and unusual in order to be awarded with copyright protection, which ultimately sets a very high standard for protection of such articles considerably beyond the threshold

for design protection. Additionally, the scope of protection if reached is very narrow.

The Walder Wyss Newsletter provides comments on new developments and significant issues of Swiss law. These comments are not intended to provide legal advice. Before taking action or relying on the comments and the information given, addressees of this Newsletter should seek specific advice on the matters which concern them.

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