

PUBLISH

UNITED STATES COURT OF APPEALS

July 21, 2020

FOR THE TENTH CIRCUIT

Christopher M. Wolpert
Clerk of Court

ZAHOUREK SYSTEMS, INC.;
JON ZAHOUREK

Plaintiffs Counterclaim
Defendants - Appellants,

v.

No. 18-1300

BALANCED BODY UNIVERSITY,
LLC,

Defendant Counterclaimant -
Appellee.

ZAHOUREK SYSTEMS, INC.;
JON ZAHOUREK

Plaintiffs Counterclaim
Defendants - Appellee,

v.

No. 18-1312

BALANCED BODY UNIVERSITY,
LLC,

Defendant Counterclaimant -
Appellant.

Appeals from the United States District Court
for the District of Colorado
(D.C. No. 1:13-CV-01812-RM-MLC)

David Nimmer, Irell & Manella LLP, Los Angeles, California (Dennis J. Courtney, Irell & Manella LLP, Los Angeles, California; Luke Santangelo and Nicole Ressue, Santangelo Law Offices, P.C., Fort Collins, Colorado, with him on the briefs), on behalf of the Plaintiffs Counterclaim Defendants.

Carolyn V. Juarez, Neugeboren O’Dowd P.C., Boulder, Colorado; John R. Posthumus, Polsinelli, Denver, Colorado (Gordon E.R. Troy, Shelburne, Vermont, with them on the briefs), on behalf of the Defendant Counterclaimant.

Before **BACHARACH** and **CARSON**,* Circuit Judges.

BACHARACH, Circuit Judge.

These appeals involves a sculptural work called “the Maniken,” which portrays the human body. The overarching issue is whether the Maniken is a “useful article” under the copyright laws. If the Maniken is a useful article, it wouldn’t ordinarily be protectible under the copyright laws. We conclude that a genuine issue of material fact exists on whether the Maniken is a useful article.

* The Honorable Monroe McKay served on the panel at the time of oral argument, but he passed away before we issued this opinion. He did not participate in the decision, and the two remaining panel members constitute a quorum. *See* 28 U.S.C. § 46(d); *Fish v. Schwab*, 957 F.3d 1105, 1110 n.* (10th Cir. 2020).

1. The Maniken portrays the human body.

Like a skeleton, the Maniken portrays the human body; but the Maniken dwarfs a standard classroom skeleton and facilitates education by allowing students to apply clay where human tissues would appear. On the left of each picture is the Maniken, and on the right is a standard skeleton.¹



2. Balanced Body University uses the Maniken, and Mr. Zahourek and his company sue for copyright infringement.

The defendant, Balanced Body University, bought several Manikens and used them to advertise and instruct students on human anatomy. Mr.

¹ These pictures show a later version of the Maniken.

Zahourek and his company sued for copyright infringement (among other claims). The district court granted summary judgment to Balanced Body University on the copyright-infringement claim, concluding that the Maniken was unprotected as a “useful article.” We reverse because the Maniken’s classification as a useful article turns on a genuine issue of material fact.²

3. A genuine issue of material fact exists on whether the Maniken is a useful article.

Federal law defines a “useful article,” and a genuine issue of material fact exists over whether the Maniken fits this definition.

A. The Standard of Review

We engage in de novo review of the grant of summary judgment, viewing the evidence in the light most favorable to the nonmoving party. *Blehm v. Jacobs*, 702 F.3d 1193, 1199 (10th Cir. 2012). With this view of the evidence, we consider whether Balanced Body University has shown the lack of a genuine dispute of material fact and entitlement to judgment as a matter of law. Fed. R. Civ. P. 56(a).

Within this framework, we consider the copyrightability of the Maniken as a mixed question of law and fact. *See Enterprise Mgt. Ltd. v. Warrick*, 717 F.3d 1112, 1117 n.5 (10th Cir. 2013). As a mixed question,

² Balanced Body University cross-appealed on the issue of attorneys’ fees. Because Balanced Body University is no longer the prevailing party, its cross-appeal is moot.

copyrightability could include “potential jury questions in the presence of materially disputed facts.” *Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc.*, 528 F.3d 1258, 1262 n.4 (10th Cir. 2008).

B. The District Court’s Ruling

The district court issued two orders addressing whether the Maniken is a useful article. In the first order, the court ruled that the Maniken is a useful article because it has “an intrinsic utilitarian function that is merely to portray the appearance of a life-like form.” Joint App’x vol. 4, at 843. In the second order, the district court reiterated that the Maniken is a useful article, adding that an article is considered useful if it has any “intrinsic utilitarian nature.” *Id.* at 925–26. The court considered the Maniken intrinsically utilitarian because it merely portrays its own appearance. *Id.* at 926 n.4.

C. The Misfit Between the District Court’s Reasoning and the Statutory Definition of a “Useful Article”

The district court focused on the usefulness of the Maniken. This focus appears sensible but doesn’t fit the statutory definition of a useful article. A useful article is defined as “having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information.” 17 U.S.C. § 101. Under this definition, an item is *not* a “useful article” if its usefulness derives solely from its appearance. *See Superior Form Builders v. Dan Chase Taxidermy Supply Co.*, 74 F.3d 488,

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