FILED
United States Court of Appeals
Tenth Circuit

July 21, 2020

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ZAHOUREK SYSTEMS, INC.; JON ZAHOUREK

Plaintiffs Counterclaim Defendants - Appellants,

v.

BALANCED BODY UNIVERSITY, LLC,

Defendant Counterclaimant - Appellee.

No. 18-1300

ZAHOUREK SYSTEMS, INC.; JON ZAHOUREK

Plaintiffs Counterclaim Defendants - Appellee,

v.

BALANCED BODY UNIVERSITY, LLC,

Defendant Counterclaimant - Appellant.

No. 18-1312

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,

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.