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## A tale of statues and camels: mass-produced items eligible for copy- right protection

On March 23 2017, the Court of Cassation, the highest Italian court, upheld an appeal filed by Italian company Thun Spa against a 2012 judgment of the Venice Court of Appeal, which found that Thun's porcelain statues were not eligible for copyright protection. Thun had filed the case against a competitor, Egan Srl, which manufactured statues similar to those produced by Thun. The Venetian judges held that mass-produced items were ineligible for copyright protection under Italian law because copyright is designed to protect "unique" creations, and not porcelain statues produced by the thousands. In so holding, the lower court specified that although the statues at issue were "decorative and characterized by a certain aesthetic attractiveness", they lacked the "connotations of artistic creations".

### Facts

In 2006 Thun, an Italian company well-known for its high-quality small porcelain statues, which are particularly popular as Christmas gifts, sued Egan on two grounds:

- Egan had infringed both Thun's registered designs and copyright in its statues; and
- Egan's actions amounted to unfair competition.

### Lower Court Decision

On February 13 2008 the Court of Venice held that:

- Egan did not violate Thun's design rights, as the Egan statues were sufficiently different and an informed consumer would not have confused them with Thun's products;
- there was no copyright infringement as Thun's statues, being mass-produced and mass-marketed products, lacked artistic value and were ineligible for copyright protection; and
- Egan's actions constituted unfair competition with respect to a single small statue of a camel, since in that case Egan had clearly copied Thun, and therefore the average consumer might easily mistake Egan's camel for a Thun product.

Both parties appealed, and in a November 22 2012 decision the Venice Court of Appeal rejected both appeals. Thun filed a further appeal to the Court of Cassation.

## Court of Cassation decision

The Court of Cassation stated that the Court of Venice was correct to deny copyright protection to Thun statues under Article 2(4) of the Copyright Law. Thun argued that this article had been amended in 2001 during the implementation of the EU Designs Directive (98/71/EC), and that the part requiring an “artistic value” that is conceptually “separable” from the industrial use of a product had been eliminated. However, the Court of Cassation maintained that, even as amended in 2001, Article 2(4) still requires a “creative product realized as one of a kind or in a limited number of pieces”. However, the Court of Cassation argued that the 2001 reform also introduced Article 2(10) into the Copyright Law, granting copyright protection to “industrial design works that present creative character and artistic value”.

Accordingly, the Court of Cassation concluded that, while not copyrightable under Article 2(4), Thun’s statues were eligible for copyright protection under Article 2(10), which the Court of Venice failed to consider. Unlike the works cited in Article 2(4), those in Article 2(10) cannot be excluded from copyright because they are reproduced in the thousands, nor because they are based on simple ideas and notions. A certain artistic value is still required and, although not necessarily defined, this can be measured objectively through criteria such as:

- recognition by cultural and institutional authorities;
- the opinions of reputable independent critics;
- being displayed at exhibitions or museums;
- awards;
- creation by well-known artists; and
- a market price higher than what would be justified by the mere function of the product.

In granting Thun’s appeal, the Court of Cassation referred the matter back to the Venice Court of Appeal for examination in the light of Article 2(10).

## Comment

The Court of Cassation’s decision has clearly opened the door to the possibility of obtaining and enforcing copyright on industrial design products that are mass-produced in Italy. The court clarified that “the artistic value required for protecting a work of industrial design is not excluded by the fact that the corresponding product is mass-produced”, and therefore also mass-marketed. There are, the court stated, objective criteria for determining whether a certain required degree of “artistic value” is present in these products, making them eligible for copyright protection. It will be interesting to see whether the Court of Venice finds that, in this case, Thun’s statues are worthy of such copyright protection.

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