

PUBLICATION

A Tale of Two Cakes: Can Copyright Law Protect this Cake Design?

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Duff Goldman of Charm City Cakes, one of our hometown heroes in Baltimore, a.k.a. the Ace of Cakes, created a striking cake for President Obama's 2013 inauguration. The cake design caught the eye of the incoming presidential administration that ordered a different pastry chef, Buttercream Bake Shop, to create a replica of the Ace's creation.

Can the pastry chef that produced the replica cake be held liable for stealing the Ace's cake design?

In theory, a three-dimensional design may be protected under [copyright](#) or patent law. Patent law generally protects utilitarian inventions but a designer may obtain a [design patent](#) that protects the ornamentation of the design for 15 years. To obtain such patent protection, the designer must successfully 'prosecute' a design patent application until the Patent Office is satisfied – a costly several yearlong process.

Copyright law intends to be more user-friendly and less costly. Copyright protection 'attaches' to the design upon [fixation in a tangible medium](#). Copyright does not require the designer to first register the copyright, or meet other formalities, so protection is immediate and free. The cake design is fixed upon the drying of its icing and copyright protection attaches. Easy, right?

Not so fast. Bringing a lawsuit for copyright infringement requires a valid [copyright registration](#). Yes – I did say copyright attaches without formalities, but copyright law requires registration of copyrights prior to litigation for three reasons. A copyright registration provides (1) proof of ownership of the copyright; (2) a presumption the copyright is valid; and (3) the option to elect to recover [statutory damages](#) if the registration date precedes the infringement. Opting to request statutory damages as a remedy allows the court to decide the amount and calculation of damages without proof of the owner's losses or the infringer's profits from the design. However, if a copyright registration was not filed prior to infringement, the owner may request [expedited registration](#) from the Copyright Office and seek actual damages and any additional profits of the infringer in federal court.

So if the Ace filed an application for copyright registration in 2013, the allegedly infringing cake design created in 2017 could immediately be called into court for copyright infringement, and if the Ace proves that there is copyright infringement, statutory damages would be available. Great fact, the second pastry chef admitted she was commissioned to reproduce the original design on the cake that the President and Vice President would cut with a ceremonial sword. Slam-dunk!

Again, not so fast. A valid copyright must be [protectable copyright subject matter](#) and meet minimum standards of creativity. Copyright law does not protect functional features, geometric shapes, including cylinders, stripes, color, or lines. Layer cakes as food are functional.

Unlike some of the Ace's fanciful sculptural cakes, this inaugural cake design is unlikely to comprise copyrightable subject matter. The cake deploys stacked cylindrical layers, solid color layers, striping, narrow bands of color, stars, and coin-shapes that are not protectable. This leaves the bunting, presidential seal, and the seals of the army, navy, marines, air force, and coast guard. The government seals belong to the federal government and are forbidden for non-official use; and bunting is unprotectable as '[scene au faire](#)' in connection with government galas.

Moral rights (rights protecting the integrity of an artist's name and designs, depending on applicable law) might protect the Ace's cake design but not in the United States. U.S. Copyright law provides **limited moral rights** to protect certain eligible artworks by visual artists. Cake design is not an eligible artwork.

1/24/2017 Correction: The original cake was created in 2013 and the replica cake was created in 2017. Also, if a copyright registration was not filed prior to infringement, the copyright owner may obtain copyright registration, file in federal court, and request actual damages. H/t Kevin Madigan for pointing this out.