

Proving Originality Of An Applied-Art Work Or A Logo: Why Is It Challenging and What To Do?

When opposing or requesting the invalidation of a third party's trademark registration on the grounds that the trademark is a copy or contains a copy of a work protected by rights under Article 73.7 of the Intellectual Property Law ([IP Law](#)), or requesting administrative handling [copyright infringement](#), you may face a counter-statement that your logo lacks "originality" - one critical requirement to enable your logo to qualify copyright protection. Such claims can include arguments that your logo is composed of common, generic, or widely used elements that do not meet the threshold of originality – it lacks distinctiveness, meaning it does not possess unique characteristics that can distinguish it from other logos or generic designs; and/or it closely resembles or is substantially similar to existing logos or artworks, suggesting that it was derived from these sources rather than being independently created; and/or it does not exhibit sufficient creative effort or artistic expression. They could claim that the design process involved "assembling" or altering existing images or designs rather than creating something new; and/or if your logo has elements that are functional or utilitarian in nature, they might argue that these aspects cannot be copyrighted.

These challenges underline why proving the "originality" of a artwork can be a complex and resource-intensive task, especially in the context of legal regulations on copyright that still have many problems.

Proving originality is challenging: Why?

Regulatory gaps on "Originality" in IP Law

Vietnam's IP Law lacks a defined concept of "originality", merely indicating in Article 14.3 that for works to be protected, they must be original (*created directly by the author using intellectual labor without copying from the work of others*).

The absence of a clear definition for "originality" in Vietnam's IP Law poses significant challenges in establishing the originality of a work, due to its subjective nature and lack of specific criteria to determine when a work is considered to have met originality. Such ambiguity results in legal uncertainties, shifting the onus onto creators to demonstrate the originality of their work in the absence of a statutory standard. Consequently, this increases disputes and litigation due to unclear boundaries of copyright protection, complicating enforcement by Vietnamese authorities and making it difficult to comply with basic [copyright](#) standards.

Uncertainties in determining "Originality"

The lack of criteria as a basis for determining "originality" in the Intellectual Property Law, although Article 14.3 of the Intellectual Property Law requires that protected works be works "directly" "created" by the author using intellectual labor without copying from the work of others, poses significant challenges. A series of questions remain open such as: **(i)** How (*what standards*) to objectively measure/determine the author's level of creativity? **(ii)** What is the author's direct creation? The law stipulates that a work must be directly created by the author, but how to determine and verify this directness, especially in collaborative works or works that incorporate traditional knowledge? **(iii)** How can it be determined that a work is not a copy of existing works? As the world becomes saturated with creative content, ensuring that a work is not a copy becomes a challenge. What level of similarity to an earlier work is allowed so that a later work is not considered a copy? and **(iv)** What level of modification makes a derivative work a work that satisfies originality? If a work is inspired by or based on an existing work, how much modification is required to be considered original under the law?

The burden of proof is heavy

To establish originality, the copyright owner often needs to provide comprehensive evidence. This could include early sketches, drafts, notes, or any other material that can trace the logo's creative journey and prove that it was not copied from existing works. Gathering and organizing this evidence can be time-consuming and sometimes not feasible if such documentation was not maintained.

If the originality of a logo is challenged, especially in infringement cases, it often requires a detailed comparative analysis with the allegedly infringing work. This involves expert testimony and detailed

forensic examination of both the contested logo and the comparative works to identify unique creative elements. Hiring experts for this analysis can be costly.

If the matter escalates to legal proceedings, the process can become significantly resource-intensive. The legal burden of proving originality lies with the copyright owner, which means engaging with legal counsel, preparing a comprehensive legal strategy, and potentially enduring a lengthy litigation process.

Artistic works can be inherently subjective. What one might consider original and creative, another might view as derivative or trivial. This subjectivity adds an additional layer of complexity in legally establishing originality.

Mitigating legal risks: What to do?

Given these challenges, creators should take prudent steps to prepare for potential counterclaims in copyright infringement disputes. KENFOX IP & Law Office, as a qualified IP firm in Vietnam, recommends the following strategy to establish and defend the originality of your artwork:

[1] Document the creative process: You are advised to keep detailed records of the creation process, including sketches, drafts, notes, and revisions. In addition, date all documents and, where possible, use time-stamped digital files to establish a timeline. If the creation process involves brainstorming sessions or discussions with others, keep notes or minutes of these meetings.

[2] Collect evidence of independent creation: Show how the artwork was developed independently and was not copied from existing sources. This might include evidence of research, concept development, and the evolution of the design.

[3] Demonstrate a minimum degree of creativity: Illustrate how the artwork incorporates creative choices, no matter how small. This could involve color selection, arrangement of elements, or unique adaptations of common designs.

[4] Prepare comparative analysis: If you claim that someone infringes on your copyright, prepare a side-by-side comparison to demonstrate the similarities ("substantial similarities") between your logo and the alleged infringing logo. The comparison allows you to focus on and highlight the specific elements of your logo that are protected under copyright law. This includes unique design features, colors, shapes, and any creative choices that are original to your logo.

[5] Utilize copyright registration: While not required for copyright protection, [registering your work](#) with Copyright Office of Vietnam can provide a legal advantage. Registration creates a public record of your copyright and can be helpful in legal proceedings.

By following the above recommended steps, you can build a strong foundation to prove the originality of your artwork and protect your intellectual property rights effectively in Vietnam.

At KENFOX IP & Law Office, our team has extensive expertise in protecting and enforcing IP rights in Vietnam. Based on practical experience from resolving many large-scale and complex IP infringement cases, KENFOX IP & Law Office is always ready to support IP rights holders in consolidating evidence of originality of the work. We provide professional advice tailored to each specific case and develop solid legal strategies. We assist copyright owners in documenting the creation of works, preparing evidence and taking necessary legal actions to ensure that IP rights are effectively protected and enforced.

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