

AS LONG AS THERE'S ANOTHER WAY: *PIVOT POINT V. CHARLENE PRODUCTS* AS AN ACCIDENTAL TEMPLATE FOR A CREATIVITY-DRIVEN USEFUL ARTICLES ANALYSIS

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ABSTRACT

This article opens with a summary of the utilitarian theory of copyright law and a discussion of the balance struck between creative incentive and the public benefit. It then reviews the numerous poorly conceived measures of copyrightability. Through a review of useful articles doctrine, the article attempts to show a thorough lack of consistency in the varying judicially- and scholarly-proposed tests by which “separability” is measured. With this summary in view, the article proposes that, at least in the recent decision of *Pivot Point International, Inc. v. Charlene Products, Inc.*, courts have tied their useful articles analysis to a more fundamental test for copyrightable creativity, one which determines copyrightability based on an abstract idea of the work at issue and the number of alternatives capable of expressing that idea. The article then argues that the use of a creativity-based test could adequately incentivize currently under-incentivized creative outlets. The additional protection a creativity-based test may provide to currently under-protected articles further serves the utilitarian theory of copyright law by appropriately defining the scope of copyright in works of industrial design, while remaining consistent with the constitutional mandate for copyright protection. As such, the application of a “creativity test”

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to measure the copyrightability of a useful article may not be such a harmful proposition after all.

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INTRODUCTION

After more than thirty years of judicial ferment since its modern statutory inception, the copyright law’s treatment of useful articles persists in a state of flux.¹ Faced with a congressionally mandated prohibition on copyright protection for articles with intrinsic utility, such as toasters, automobiles, mannequins or chairs, courts have developed numerous tests purporting to determine what

¹ Richard G. Frenkel, *Intellectual Property in the Balance: Proposals for Improving Industrial Design Protection in the Post-TRIPS Era*, 32 LOY. L.A. L. REV. 531, 545 (1999) (“[E]xamination of case law dealing with useful articles does not reveal any consistency as to what constitutes ‘useful.’”); see Robert Denicola, *Applied Art and Industrial Design: A Suggested Approach to Copyright in Useful Articles*, 67 MINN. L. REV. 707, 707 (1983) (noting, as early as 1983, the emergence of a “patchwork of ad hoc decisions”).

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non-utilitarian elements of a work might be “separable” from the utilitarian elements and, therefore, copyrightable. The application of these tests, however, has resulted in a line of decisions that are short on consistency and long on subjective judgment.

Despite the present state of flux and inconsistency, the statutory origin for the copyrightability of useful articles might seem rather innocuous. Two provisions of the Copyright Act of 1976 are most relevant. First, 17 U.S.C. § 101 defines “useful article” as “an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information.”² Furthermore, “[a]n article that is normally a part of a useful article is considered a ‘useful article.’”³ In view of this definition, the second relevant statutory provision, 17 U.S.C. § 102, attempts to distinguish the copyright treatment of useful articles within the larger scheme of “pictorial, graphic, and sculptural works [which] include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans.”⁴ Such works include

works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.⁵

As the statute later clarifies, pictorial, graphical and sculptural works merit copyright protection.⁶

The upshot of this pictorial, graphic and sculptural works definition is the inclusion of useful articles for copyright protection insofar as such works present elements that may be “identified separately” from the utilitarian aspects of the articles.⁷ Yet even a cursory understanding of the concept of “separabili-

² 17 U.S.C. § 101 (2006).

³ *Id.*

⁴ *Id.* (alteration added).

⁵ *Id.* This section of the statute provides copyright protection for pictorial, graphical and sculptural works that do not fall within a useful articles designation.

⁶ *See id.* § 102(a) (“Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories: . . . (5) pictorial, graphic, and sculptural works . . .”).

⁷ *Id.*

ty” requires a few additional historical notes. When enacting the Copyright Act of 1976, Congress intended to codify the Supreme Court’s *Mazer v. Stein*⁸ decision by mandating separability of otherwise useful articles.⁹ The *Mazer* Court granted copyright protection to a statuette of a female dancer interwoven into the base of a lamp.¹⁰ In so holding, the Court clarified that the statuette’s incorporation in a work of industrial design did not nullify the work’s copyrightability.¹¹ Furthermore, because the statuette arguably could not be removed from the underlying lamp without depriving the lamp of its essential base, *Mazer* stands for the proposition that the copyrightability of sub-parts of useful articles is not predicated on the physical removability of such sub-parts.¹² Rather, such sub-parts need only be “conceptually separable” from the overarching work.¹³ When enacting the Copyright Act, the House of Representatives used precisely this language when discussing the copyrightability of useful articles: “Unless the shape of . . . [the] industrial product contains some element that, physically or conceptually, can be identified as separable from the utilitarian aspects of that article, the design would not be copyrighted under the bill.”¹⁴ Accordingly, in line with the views of both the *Mazer* Court and the House, courts have generally mandated either physical or conceptual separability of a useful article’s non-utilitarian aspects to surmount the copyrightability bar.¹⁵

⁸ 347 U.S. 201 (1954).

⁹ See, e.g., Peter Schalestock, Comment, *Forms of Redress for Design Piracy: How Victims Can Use Existing Copyright Law*, 21 SEATTLE U. L. REV. 113, 118 (1997) (stating the premise that Congress intended to codify *Mazer*’s holding in the Copyright Act of 1976).

¹⁰ *Mazer*, 347 U.S. at 214.

¹¹ *Id.* at 213.

¹² *Id.*; Schalestock, *supra* note 9, at 118–19. One might argue that the statute could have been shaved from the lamp base, but little, if any, of the base, would have remained. Accordingly, little weight should be given to commentators who claim that the statuettes were “easily physically separable from the lamps.” Regan E. Keebaugh, Note, *Intellectual Property and the Protection of Industrial Design: Are Sui Generis Protection Measures the Answer to Vocal Opponents and a Reluctant Congress?*, 13 J. INTELL. PROP. L. 255, 266 (2005). This opinion reflects a faulty view of what the *Mazer* lamp inherently required. It is disingenuous to argue that the lamp is essentially the same if the bases were removed entirely. Conceptual separability thus seems an appropriate interpretation of the Court’s holding in *Mazer*.

¹³ See, e.g., Carol Barnhart, Inc. v. Econ. Cover Corp., 773 F.2d 411, 414 (2d Cir. 1985) (flatly stating that works need only be “physically or conceptually separable” (emphasis added)).

¹⁴ H.R. REP. NO. 94-1476, at 55 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5668 (alteration added).

¹⁵ Pivot Point Int’l, Inc. v. Charlene Prods., Inc., 372 F.3d 913, 922 (7th Cir. 2004) (“It seems to be common ground between the parties and, indeed, among the courts and commentators, that the protection of the copyright statute also can be secured when a conceptual separability

At the low watermark of “physical or conceptual separability,” courts and commentators have cast widely divergent interpretations of the language. No fewer than seven tests have been proposed to make sense of the congressional edict.¹⁶ Several of the tests offer entirely distinct focal points, such as a work’s marketability as art, its ability to fit within traditional notions of art, the designer’s process in creating the work or the viewer’s ability to absorb the work as utilitarian and aesthetic at different times.¹⁷ It requires no great stretch of imagination to conclude that the meaning of separability—particularly conceptual separability—has posed significant interpretative problems in practice.

Beyond the mere practical, however, the fact that multiple tests have been propounded to interpret Congress’s statutory mandate strongly suggests that a normative element is applicable to the useful articles analysis. Indeed, the fact that courts have applied disparate tests suggests an implicit judicial need to reach results that, although possibly inconsistent with other tests, embody a higher fidelity to equity and policy concerns.

In view of such normative concerns, this article further posits that protection of industrial design is in fact desirable. At present, the uncertain outcome associated with a given useful articles case, springing from judges’ differing aesthetic perceptions, undermines the efficacy of the useful articles regime as applied.¹⁸ More significant and consistent protection for useful articles would obviate these issues.

Moreover, the use of separate tests for similar goods produces unusual, seemingly counterintuitive, results that follow from a fuzzy distinction between useful articles and pictorial, graphic and sculptural works. Why, after all, would Pygmalion hypothetically enjoy copyright protection for his Galatea,¹⁹ while Andrew McCarthy might be snubbed for his equally deserving Ema ‘Emmy’ Hesire, simply because the latter might display clothing in addition to offering a creative appearance?²⁰ The consistent application of a test more protective of

exists between the material sought to be copyrighted and the utilitarian design in which that material is incorporated.”)

¹⁶ See *infra* Part II.

¹⁷ See *infra* Part II.

¹⁸ 17 U.S.C. § 101 (2006).

¹⁹ OVID, *METAMORPHOSES* 394 (David Raeburn trans., Penguin Books 2004).

²⁰ *MANNEQUIN* (Twentieth Century-Fox Film Corp. 1987). The mention of Andrew McCarthy refers to this late-1980s film. In this modern cinematic adaptation of the myth of Pygmalion and Galatea, McCarthy’s personage fashions his own model of perfection, Emmy, for use in a department store vitrine. *Id.* Ultimately, the mannequin becomes animate as an ancient Egyptian played by Kim Cattrall. *Id.*

useful articles would enable courts to avoid threading such distinctions without a difference.

Furthermore, protection under alternative intellectual property tests fails to compensate adequately for copyright's under-protection. A useful article could qualify for design patent protection if it satisfies the requirements, *inter alia*, of novelty and non-obviousness.²¹ However, the administrative delays associated with processing and approving a patent application render patent law "an impractical source of protection."²² Further, patents are costly to obtain and may set an unduly high threshold for protection of certain useful articles.²³ Trademark protection suffers similarly poor tailoring to the protection of useful articles. Because trademark law is designed to enable consumers to identify the source of goods in commerce, it only protects those goods whose use in commerce is capable of triggering such an association.²⁴ Thus, while the shape of the Coca-Cola bottle enjoys trade dress protection, the purely artistic design of individual bottles would not enjoy trademark protection, as it is unlikely that only the shape of the bottles will create an association to Coca-Cola in the consumer's mind. In other words, the level of aesthetic value in the famed Coca-Cola bottle shape may be no greater than that which an artist designing multiple distinct bottles would be able to achieve. Yet, that artist's work is not likely to generate an association in the consumer's mind sufficient to bring the artist's bottles within trademark protection.

Finally, the fact that works of industrial design and applied art are already created without the promise of copyright should not weigh against broader copyright protection. Certain useful articles like automobiles, clothing, toasters and staplers will always be manufactured to satisfy economic demand. While the manufacturers of these goods invest considerable creativity and effort in

In any event, support for the proposition that a mannequin might not be worthy of copyright protection stems from *Carol Barnhart, Inc. v. Economy Cover Corp.*, 773 F.2d 411, 418 (2d Cir. 1985). The copyright law's treatment of a lifeless object that becomes animate is unclear. While such an object would likely cease to be fixed in a tangible medium of expression upon animation, the outcome of such a case cannot be predicted. Or, in the words of one slogan for the movie *Mannequin*, "When she comes to life, anything can happen!" The Internet Movie Database, Photos from *Mannequin*, <http://www.imdb.com/media/rm4187594496/tt0093493> (last visited Aug. 8, 2008).

²¹ 35 U.S.C. §§ 102–103, 171 (2006).

²² Schalestock, *supra* note 9, at 116; see Anne Theodore Briggs, *Hung Out to Dry: Clothing Design Protection Pitfalls in United States Law*, 24 HASTINGS COMM. & ENT. L.J. 169, 179 (2002).

²³ Briggs, *supra* note 22, at 179.

²⁴ Schalestock, *supra* note 9, at 116.

producing articles both functional and aesthetically pleasing, the fact that design pirates may easily misappropriate such creativity and effort suggests that these manufacturers may not enjoy wholly adequate incentives under the current copyright regime.²⁵

One means of accomplishing greater copyright protection for useful articles is to design a test that sets a lower threshold for determining creativity. The Supreme Court articulated this lower threshold for creativity in *Feist Publications, Inc. v. Rural Telephone Service Co.*²⁶ This test, in its most effective permutation, predicates copyrightability on the presence of a “modicum of creativity.”²⁷ When a sufficient number of variations are available to the creator, a work is found to be creative and, therefore, copyrightable. This article posits that this test serves the statutory requirement of separability in practice, while also limiting protection to what ought to be protected.

At least one recent case may prove the former point. In *Pivot Point International, Inc. v. Charlene Products, Inc.*,²⁸ the manufacturer of a mannequin head that doubled as a cosmetology training tool sued a competitor for producing an eerily similar sculpture.²⁹ The Seventh Circuit found the mannequin head copyrightable, and the competitor accordingly infringing, on grounds that the process that led to the creation of the mannequin was largely unconstrained.³⁰ Yet closer review of the case suggests that the court could not and, in fact, did not apply such a test in its holding. Rather, the court relied heavily on the alternatives available to the creator of such a mannequin; in short, the creativity of the mannequin.³¹

Before reaching this point, however, Part I of this article steps back to capture a more general view of copyrightability. Part I primarily reviews two important concepts in copyright law: the idea/expression dichotomy and the creativity standard set out in *Feist*. This section also dismisses the inapplicability of several potential bases for copyrightability, including, *inter alia*, the labor expended in the pursuit of authorship, the intent of the creator and the process by which the creator achieved a result. Part II transitions the article to a discussion of the various tests articulated to delimit the scope of copyright protection for useful articles containing separable elements. This section concludes that

²⁵ Briggs, *supra* note 22, at 170 (noting the prevalence of design piracy of clothing designs).

²⁶ 499 U.S. 340 (1991).

²⁷ *Id.* at 362.

²⁸ 372 F.3d 913 (7th Cir. 2004).

²⁹ *Id.* at 915–16.

³⁰ *Id.* at 931–32.

³¹ See *infra* notes 270–278 and accompanying text.

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none of the commonly proposed tests adequately resolves all possible useful articles cases appropriately. Instead, the tests merely highlight different regions along a function/utility spectrum in their parsing of both the statute and potentially copyrightable works.

With this background in mind, Part III then shifts the dialogue back to the creativity-based alternatives theory of copyrightability and presents *Pivot Point* as exemplary of that approach. Accordingly, this section argues that the alternatives test represents an additional useful articles test already subject to judicial application. This article ultimately concludes in Part IV that, far from subverting congressional intent, the alternatives-based creativity test is at once normatively desirable and consonant with the statutory language underpinning the useful articles doctrine.

I. THE IDEA/EXPRESSION DICHOTOMY AND OTHER COPYRIGHT BASICS

A. *Copyright Policy*

In order to fully appreciate the *Pivot Point* decision, a discussion of certain copyright doctrines—the idea/expression dichotomy and the creativity requirement—merit further attention. With this more detailed discussion of copyright, the nuances of the various tests for separability and the benefits of the *Pivot Point* holding will become clearer. A recent observation of the Sixth Circuit provides a high-level introduction.

[T]he general copyright statute, 17 U.S.C. § 101 . . . has been with us in one form or another since 1790 and grants copyright protection to ‘original works of authorship fixed in any tangible medium of expression,’ [17 U.S.C.] § 102(a), but does not ‘extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery,’ [17 U.S.C.] § 102(b).³²

The two statutory provisions quoted by the Sixth Circuit, § 101 and § 102, set forth the preconditions for copyright and the limits to its scope.

On a more fundamental level, though, both the preconditions and limits noted by the Sixth Circuit are predicated on important policy considerations mandated by the underlying utilitarian theory of American copyright jurisprudence.³³ The Supreme Court has framed the theory as follows: “[c]reative work

³² Lexmark Int’l, Inc. v. Static Control Components, Inc., 387 F.3d 522, 528 (6th Cir. 2004) (alterations added).

³³ The utilitarian theory typically stands in contrast to the so-called “moral rights theory” of copyright protection. See David Vaver, *Moral Rights Yesterday, Today and Tomorrow*, 7 INT’L J.L. & INFO. TECH. 270, 271 (1999) (“Moral rights grew up in continental Europe dur-

is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.”³⁴ In other words, copyright attempts to incentivize the creation of works by granting those works certain protections with the ultimate goal of providing the maximum public good. This quid pro quo inheres a certain tension between protection and availability of works, both to the consuming public and the subsequently creating public.³⁵ If, on one hand, works enjoyed absolute protection—where the protection foreclosed the creation of other works in the first work’s broad genre—the level of protection might incentivize a small set of hastily produced initial creations. However, the public would thereafter be denied the benefit of large swaths of subsequently created works in previously appropriated genres.³⁶ Clearly, such a situation would not strike the appropriate balance between private incentive and public good. Equally unavailing would be the opposite situation—where protection was so minimal as to be non-existent. In that case, the public would retain broad rights to create subsequent works, even to the degree of pirating earlier works, but individual creators would enjoy little incentive to create. Somewhere between these obvious extremes lies a range of possible theoretical fulcra. It has devolved on courts and legislators to select the appropriate thresholds for, and scope of, protection in

ing the nineteenth century and find their philosophical justification there in the idea that an author’s work is an extension of the author: any assault on the work is as much an attack on the author as a physical assault.”). Because works are held in high regard, moral rights jurisdictions frequently provide authors with rights to prevent mutilation of their works and to have their works attributed to them. *Id.* at 270. See generally Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TUL. L. REV. 991 (1990) (examining the principles and policies behind the early French and U.S. copyright laws and noting that while the U.S. copyright regime implemented utilitarian policies and the revolutionary French copyright regime reflected the moral rights theory, the two systems actually shared important similarities).

³⁴ *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

³⁵ See Jane C. Ginsburg, *Four Reasons and a Paradox: The Manifest Superiority of Copyright Over Sui Generis Protection of Computer Software*, 94 COLUM. L. REV. 2559, 2571 (1994) (“Whether or not the court acknowledges its inquiry, judges in copyright cases are attempting to gauge what level of protection is necessary to encourage initial creation on the one hand, while seeking to leave ample room for subsequent innovation on the other.”).

³⁶ *Nash v. CBS, Inc.*, 899 F.2d 1537, 1540 (7th Cir. 1990). The circumstances noted here are, in some measure, addressed by the *scènes à faire* doctrine. That subset of merger denies copyright to stock elements essentially concomitant to certain genres. See, e.g., *Alexander v. Haley*, 460 F. Supp. 40, 44–45 (S.D.N.Y. 1978) (denying protection to certain aspects common to novels set in the antebellum South). This doctrine is underinclusive in that the exclusion of stock elements of certain genres could foreclose original (and accordingly non-stock) plots or characterizations within that genre.

order to adhere to the utilitarian theory most faithfully. A number of doctrines, most notably the idea/expression dichotomy and the requirement that a work exhibit a “modicum of creativity,” attempt to attain such a faithful adherence.³⁷

B. The Idea/Expression Dichotomy

The idea/expression dichotomy flows from an axiom of some historical pedigree in copyright law: only the expression of ideas, and not the ideas themselves, is afforded copyright protection.³⁸ William Patry supports this distinc-

³⁷ A few others bear mention as an aside. Infringement analysis, for one, requires that the would-be infringer have access to the allegedly infringed work. *Bright Tunes Music Corp. v. Harrisons Music, Ltd.*, 420 F. Supp. 177, 180–81 (S.D.N.Y. 1976). Such access typically requires that a work be published, at the very least, to the infringer, and in most cases, much more broadly. Thus, just as one cannot hoard trademarks without a use in commerce, one equally cannot prove infringement without publication. *See Cent. Mfg., Inc. v. Brett*, 492 F.3d 876, 882 (7th Cir. 2007) (reflecting a judicial castigation of Leo Stoller’s failed attempts to hoard trademarks without a use in commerce). This incentive for publication clearly supplements the public’s benefit in the utilitarian quantum.

Furthermore, fair use, as set forth in 17 U.S.C. § 107 (2006), allows subsequent creators to make an otherwise infringing use of an earlier copyrighted work on the basis of a four-factor test. Such fair use rights inure to the public benefit by allowing, for example, criticism and parody of prior works. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 594 (1994). Fair use may also grant the public certain rights to build computer programs that interoperate with other programs and operating systems. *See Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1527 (9th Cir. 1993); Robert L. Oakley, *Fairness in Electronic Contracting: Minimum Standards for Non-Negotiated Contracts*, 42 HOUS. L. REV. 1041, 1091–96 (2005).

The duration of copyright represents another means of striking a balance between incentives to create and public availability. Longer protection, of course, limits availability while arguably increasing incentives for creation. This area of the law has been a matter of some controversy in the past decade with the passage of the Sonny Bono Copyright Term Extension Act in 1998, which expanded the protection of works from the life of the author plus fifty years to the life of the author plus seventy years. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (codified as amended in scattered sections of 17 U.S.C.). The Supreme Court subsequently upheld this legislation in *Eldred v. Ashcroft*, 537 U.S. 186, 194 (2003), in which Justice Breyer argued that the extra twenty years actually added no economic value in the work. *Eldred v. Ashcroft*, 537 U.S. 186, 267 (2003) (Breyer, J., dissenting). Professor Lawrence Lessig has yet to recover from his failure to win over the Court on this point at oral argument. *See* Lawrence Lessig, *How I Lost the Big One*, LEGAL AFFS., Mar.–Apr. 2004, available at http://www.legalaffairs.org/issues/March-April-2004/story_lessig_marapr04.msp.

³⁸ *Baker v. Selden*, 101 U.S. 99, 107 (1880). It is typical for both courts and copyright scholars to draw support for this proposition from this oft-cited case. *See, e.g., Autoskill Inc. v. Nat’l Educ. Support Sys., Inc.*, 994 F.2d 1476, 1491 (10th Cir. 1993); Edward Samuels, *The Idea-Expression Dichotomy in Copyright Law*, 56 TENN. L. REV. 321, 326 (1989). In truth, the prevalence of that citation is probably more the product of inertia in the field of copyright

tion with a more concrete example by offering an idea similar to the Steinberg map: “an original illustration of . . . a myopic New Yorker’s view of the world in the form of a fanciful map of Manhattan and the world.”³⁹ Anyone wishing to express this idea, Patry notes, would be free to do so provided that the creator did not copy another person’s expression of the same idea.⁴⁰ This basic concept traces the utilitarian theory as follows: a creator cannot obtain ownership in the idea of putting a given concept into a cartoon or a painting.⁴¹ In that way, other creators may further develop the range of permutations of that idea, thereby enriching society with their output. Since each creator may obtain a copyright for a given expression, those creators enjoy a stimulus to produce.

The example of the Steinberg map, along with other similar examples offered by courts and commentators, provides little more than a high-level push in the right direction.⁴² Accordingly, certain refinements are necessary to approach a working understanding of the idea/expression dichotomy. Judge Learned Hand, in *Nichols v. Universal Pictures Co.*,⁴³ offered one such refinement of the basic idea/expression statement where he addressed the copyrightability of a play:

than of historical reality. The case uses the word “idea” only twice, and the court declined to find infringement of a set of accounting tables because the second-comer’s tables appropriated only the system and not any copyrightable expression. *Baker*, 101 U.S. at 99. Moreover, the principle that ideas are not subject to protection as property appears to be of much older vintage; some commentators have cited this proposition to first-century Rome. Robert Yale Libbott, *Round the Prickly Pear: The Idea-Expression Fallacy in a Mass Communications World*, 14 UCLA L. REV. 735, 737 (1967). But see Pamela Samuelson, *Why Copyright Law Excludes Systems and Processes from the Scope of its Protection*, 85 TEX. L. REV. 1921, 1924–28 (2007) for a recent and much lengthier discussion questioning the validity of citing *Baker* as the fountainhead of the idea/expression dichotomy.

³⁹ William F. Patry, *Copyright and Computer Programs: It’s All in the Definition*, 14 CARDOZO ARTS & ENT. L.J. 1, 33 (1996). Patry evoked the image of the oft-reproduced Saul Steinberg map where New York City dominates the page’s surface area, with other, less recognizable vistas like Nebraska relegated to detail-less, somewhat misplaced labels filing rectilinearly to the horizon. *Id.* The map in question was indeed the subject of a copyright case. See *generally* Steinberg v. Columbia Pictures Indus., 663 F. Supp. 706 (S.D.N.Y. 1987) (holding that a promotional poster for a movie infringed Saul Steinberg’s copyright on an illustration on the cover of a magazine and noting that the illustrations were substantially similar).

⁴⁰ Patry, *supra* note 39, at 34.

⁴¹ *Id.*

⁴² *Superior Form Builders, Inc. v. Dan Chase Taxidermy Supply Co., Inc.*, 74 F.3d 488, 492 (4th Cir. 1996) (“Several sculptors may copy a deer, even the same deer, in creating a sculpture, and each may obtain copyright protection for his or her own expression of the original.”). Here, the “idea” is clearly “the sculptural portrayal of a specific deer” and the expression is each artist’s original rendering of that subject matter. *Id.*

⁴³ 45 F.2d 119 (2d Cir. 1930).

Upon any work, . . . a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist of only its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his ‘ideas,’ to which, apart from their expression, his property is never extended.⁴⁴

This statement essentially fills in the interstices of Patry’s example. Where Patry identifies only an idea and an expression of that idea, Hand notes that works in fact simultaneously exist at numerous levels. The “expression” to which Patry refers only represents a work’s most specific, readily protectible level.⁴⁵ From that level, a work might be described in successively less specific ways along a spectrum that eventually reaches the broad “idea” that Patry describes. Although Patry identifies a relatively specific idea level, both more specific and less specific abstractions could be applied to his example. One could point to Steinberg’s exact expression of the idea as a more specific abstraction of the “idea.” On the other hand, one could convert the New Yorker to a generic urban dweller or to any myopic person for a less specific abstraction of the same idea.

Hand’s expansion on Patry’s simplified spectrum is, however, not without its share of ambiguity. Judge Easterbrook has aptly framed the limits of Hand’s methodology as follows: “[s]ometimes called the ‘abstractions test,’ Hand’s insight is not a ‘test’ at all. It is a clever way to pose the difficulties that require courts to avoid either extreme of the continuum of generality. It does little to help resolve a given case”⁴⁶ Since the mere determination of abstraction levels does little, if anything, to determine copyrightability in a given case, courts must choose a point along the abstractions spectrum where copyrightability ceases.⁴⁷ Indeed, as Hand noted, an ambiguous point among the spectrum of abstractions must delimit copyright.⁴⁸

The placement of the idea/expression delimiting point has a double importance, which parallels an idea’s dual purpose in animating a given work. In addition to functioning as a delimiting point on a copyright spectrum, therefore, the “idea” also serves as a constraint on the expression itself. Put differently, inasmuch as a work expresses an idea, certain incantations, brushstrokes or ar-

⁴⁴ *Id.* at 121.

⁴⁵ Robert A. Gorman, *Copyright Courts and Aesthetic Judgments: Abuse or Necessity?*, 25 COLUM. J.L. & ARTS 1, 19 (2001).

⁴⁶ *Nash v. CBS, Inc.*, 899 F.2d 1537, 1540 (7th Cir. 1990).

⁴⁷ *See id.* (noting the consequences of choosing different points along the spectrum).

⁴⁸ *See id.*

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rangements may be necessary to convey that idea to a reader or viewer.⁴⁹ To that extent, the work cannot receive copyright protection.⁵⁰ The choice of the “idea,” therefore, becomes important. With a broad selection of “idea,” a work may achieve expression and, therefore, copyright protection at higher levels of abstraction. With a narrow selection of “idea,” by contrast, a work may achieve copyright protection in little beyond the expressive content itself, and that expressive content will likely be constrained by the adjacency and specificity of the chosen “idea.”⁵¹

Indeed, certain works will be so thoroughly constrained by an idea that expression is not possible.⁵² In other words, the idea will dictate the expression such that the two concepts are said to merge. The work therefore is uncopyrightable, as a grant of copyright in the work would be tantamount to the creator’s ownership of an idea.⁵³ For instance, in *Morrissey v. Procter & Gamble Co.*,⁵⁴ the plaintiff sued for the infringement of his copyright in a set of box-top promotional sweepstakes instructions.⁵⁵ Procter & Gamble defended on grounds of lack of access and uncopyrightability.⁵⁶ While the First Circuit was not con-

⁴⁹ See *Computer Assocs. Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693, 707–08 (2d Cir. 1992); Glynn S. Lunney, Jr., *Lotus v. Borland: Copyright and Computer Programs*, 70 TUL. L. REV. 2397, 2402 (1996). Lunney noted that the First Circuit’s decision to reverse a finding of copyrightability in *Lotus Development Corp. v. Borland International, Inc.*, 49 F.3d 807 (1st Cir. 1995), *aff’d*, 516 U.S. 233 (1995) may have been a result of selecting a more constrained idea than necessary. *Id.* at 2402–04. That is, where the district court allowed for significant creativity by determining that the idea at issue was the creation of a computer menu interface, the First Circuit quashed such creativity, restricting the idea to the creation of the specific interface at issue. *Id.* While Lunney’s discussion probably misconceives the First Circuit’s holding, the larger idea/expression point is still apt.

⁵⁰ See *Kern River Gas Transmission Co. v. Coastal Corp.*, 899 F.2d 1458, 1463–64 (5th Cir. 1990) (noting that creation of a map of a pipeline requires depiction of a fixed pipeline path); *Alexander v. Haley*, 460 F. Supp. 40, 44–45 (S.D.N.Y. 1978).

⁵¹ See Ginsburg, *supra* note 35, at 2570.

⁵² *But see* N.Y. Mercantile Exch., Inc. v. Intercontinental Exch., Inc., 497 F.3d 109, 118 (2d Cir. 2007). The Second Circuit was willing to presume that the New York Mercantile Exchange’s selection of stock prices involved sufficient creative choice, and concluded that the idea and expression merged. *Id.* Although this decision may be correct as a matter of result, its application of the merger doctrine is wholly contorted. A more rational explanation for the court’s opinion: the court is giving indirect effect to a different set of policy objectives. This suggestion, however, offers a mere introductory point for a separate article.

⁵³ Ginsburg, *supra* note 35, at 2568.

⁵⁴ 379 F.2d 675 (1st Cir. 1967).

⁵⁵ *Id.* at 676.

⁵⁶ *Id.* at 677.

vinced that Procter & Gamble lacked access to the instructions,⁵⁷ the court found no infringement, as the instructions themselves did not merit copyright protection.⁵⁸ Accordingly, even though Procter & Gamble's instructions tracked the plaintiff's with remarkable similarity, and "there was more than one way of expressing even this simple substance," the topic offered "a limited number" of possible expressive outcomes.⁵⁹ Were the court to hold otherwise, it felt that the "subject matter [of writing a simple box-top sweepstakes instruction] would be appropriated by permitting the copyrighting of its expression."⁶⁰ Such an outcome would run counter to the utilitarian theory of copyright law, because it would permit a party to appropriate the idea to the significant detriment of the public.

Merger cases like *Morrissey*, however, are superficial in the sense that they ask only the basic Boolean question of whether a work is copyrightable or not. As the analysis moves away from the simple merger case, that simple question yields to a more nuanced one. Copyright becomes not a question of whether a work is copyrightable, but *how* copyrightable it is. Another famous Hand lemma furnishes a foothold for this statement: "[Copyright] cannot be limited literally to the text, else a plagiarist would escape by immaterial variations."⁶¹ In view of that fact, copyright protection must, in some instances, expand beyond the literal words on the page to those more specific levels of abstraction capable of simultaneously covering the original work and the immaterially altered copy. Yet, because neither Hand's abstractions test nor his above quote adequately set a hard threshold for copyrightability, protection remains a proposition mobile in its extent. Accordingly, the degree of copyright protection in a given work may shift from "thick" protection, where protection may extend into the realm of abstractions, to "thin" protection, where little, if anything, more than the specific expression is protected depending upon the work.⁶²

⁵⁷ *Id.*

⁵⁸ *Id.* at 679.

⁵⁹ *Id.* at 678.

⁶⁰ *Id.* at 679 (alteration added). This rule is correct in principle, but the court's wielding of it is arguably unduly aggressive.

⁶¹ *Nichols v. Universal Pictures Co.*, 45 F.2d 119, 121 (2d Cir. 1930) (alteration added).

⁶² Typically, "thick" protection is afforded to works such as books and plays. *See, e.g.*, *Fleener v. Trinity Broadcasting Network*, 203 F. Supp. 2d 1142, 1149 (C.D. Cal. 2001) ("Capable of infinite expression, [books] are accorded 'thick' copyright expression." (alteration added)). Functional works such as maps and compilations, however, receive thinner protection. *See, e.g.*, *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) ("[C]opyright in a factual compilation is thin.").

As copyright becomes a matter of degree rather than a simple “if,” the inquiry into the desirability of protection at certain levels becomes more nuanced. Generally, courts should follow opposite tendencies at opposite ends of the abstractions spectrum. At higher levels of abstraction, copyright protection should typically be denied, even in fanciful works, where the grant of copyright would amount to a grant of ownership on the “idea.” The court in *Dymow v. Bolton*,⁶³ for example, obeyed this premise by denying infringement where such a finding would be tantamount to granting a copyright in the very limited overlap in plot movement and characterization between two plays.⁶⁴ At the more specific end of the spectrum, however, one commentator has opined that “the better response in most cases is not for the court to deny copyright altogether but rather to grant a ‘thin’ copyright, as we routinely do with maps and functional works; this will afford deserved protection against the literal copier . . . without unduly inhibiting later creative work by others.”⁶⁵

C. The Feist Creativity Standard

The creativity doctrine, as with the idea/expression dichotomy, also serves to limit the scope of copyright. In *Feist*, the Supreme Court added a “modicum of creativity”⁶⁶ requirement for copyrightability, which reworked the utilitarian theory’s point of balance. In that case, the Court was confronted with a telephone company’s claim of infringement of the white pages of its telephone book.⁶⁷ Defendant Feist Publications, Inc. (“Feist”), in an attempt to produce a telephone directory covering the broadest possible geographical area, sought licensing rights to the names and telephone numbers distributed by smaller telephone directory producers across Kansas.⁶⁸ When plaintiff Rural Telephone Service Co. (“Rural”) declined Feist’s license request, Feist countered by copying Rural’s telephone book, including certain fake names inserted to trap poten-

⁶³ 11 F.2d 690 (2d Cir. 1926).

⁶⁴ *Id.* at 692.

⁶⁵ Gorman, *supra* note 45, at 19; see *Carol Barnhart, Inc. v. Econ. Cover Corp.*, 773 F.2d 411, 421 (2d Cir. 1985) (Newman, J., dissenting) (“Any concern that copyright protection may accord a monopoly to advances in functional design, is adequately met by confining the scope of copyright protection to the precise expression of the proprietor’s design.”).

⁶⁶ *Feist*, 499 U.S. at 362.

⁶⁷ *Id.* at 342–44.

⁶⁸ *Id.* at 343.

tial infringers.⁶⁹ Rural accordingly sued to enforce the copyright in its white pages.⁷⁰

The Court held that the white pages were not in fact worthy of copyright protection.⁷¹ The Court reached this result by re-interpreting the constitutional requirement that works exhibit “originality” in order to qualify for copyright.⁷² Under traditional theories, that requirement demanded only that a work originate with its author and, implicitly, that the work be the result of the author’s labor.⁷³ The Court fretted that this low originality standard permitted works comprised solely of facts arranged in unoriginal ways to be appropriated as one creator’s intellectual property.⁷⁴ Because the “garden-variety”⁷⁵ white pages at issue in *Feist* failed to exhibit even the relatively undemanding “modicum of creativity” required, the Court rejected Rural’s copyright claim and declined to find *Feist* liable for infringement.⁷⁶

The *Feist* decision propagated judicial discord because the Court set out a new “creativity” standard without pronouncing a test for determining if a work was sufficiently creative.⁷⁷ In order to comply with the decision’s ambiguity, courts have employed numerous tests to varying degrees of effectiveness. In cases assessing insurance documents, for example, courts might apply the “blank forms” doctrine, which asks whether a form conveys any information.⁷⁸ In a case where used car prices were at issue, the court held them protectable because setting prices entailed the creation of soft facts.⁷⁹ Yet for whatever me-

⁶⁹ *Id.*

⁷⁰ *Id.* at 343–44.

⁷¹ *Id.* at 364.

⁷² *Id.* at 346. The Court had previously derived this requirement from the Constitution’s use of the word “authors.” *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884).

⁷³ Howard B. Abrams, *Originality and Creativity in Copyright Law*, LAW & CONTEMP. PROBS., Spring 1992, at 3, 7.

⁷⁴ *Feist*, 499 U.S. at 357.

⁷⁵ *Id.* at 362. The Court also used the word “commonplace” when describing Rural’s alphabetization. *Id.* at 363.

⁷⁶ *Id.* at 364.

⁷⁷ Compare, for example, the heavy-handed treatment by the court in *BellSouth Advertising & Publishing Corp. v. Donnelley Information Publishing, Inc.*, 999 F.2d 1436, 1442–44 (11th Cir. 1993) (denying copyright protection for yellow pages under *Feist*) with the less exigent discussion in *Kregos v. Associated Press*, 937 F.2d 700, 704–05 (2d Cir. 1991) (finding tables of pitching statistics sufficiently creative).

⁷⁸ *Bibbero Sys., Inc. v. Colwell Sys., Inc.*, 893 F.2d 1104, 1106–07 (9th Cir. 1990).

⁷⁹ *CCC Info. Serv., Inc. v. MacLean Hunter Mkt. Reports, Inc.*, 44 F.3d 61, 67 (2d Cir. 1994).

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rit these tests may offer,⁸⁰ they may be limited in application to cases involving the copyrightability of insurance forms or used car prices.

At least one court has offered its own litmus test for creativity by following a pre-*Feist* standard of potentially more general applicability.⁸¹ In *Universal City Studios, Inc. v. Kamar Industries, Inc.*,⁸² the court set forth a pre-*Feist* test for creativity based on whether a work is “readily recognizable.”⁸³ In that case, the court granted Universal City Studios a preliminary injunction preventing Kamar Industries from using the phrases “E.T. Phone Home!” and “I love you, E.T.” that were used in the plaintiff’s exceptionally popular film *E.T.: The Extraterrestrial*.⁸⁴ Little disbelief need be suspended for one to conclude that such lines were “readily recognizable” due to the popularity and publicity surrounding the film, and not from the creativity of the lines themselves. In fact, both lines were singularly uncreative as the film’s writers faced an extreme paucity of alternative methods of expression in view of the constraints imposed by the simple ideas conveyed and the fact that the conversation was between children and an animated leather bag. Thus, although the court may have applied the “readily recognizable” test appropriately in the absence of *Feist*’s creativity requirement, modern application would wholly contravene *Feist* by equating creativity with either popularity or financial investment. Clearly, such fortuities do not properly fit within any reasonable definition of creativity.

⁸⁰ Their merit is likely quite limited. The blank forms doctrine, for instance, predicates copyright on the presence of highly constrained elements typically devoid of creativity. See *Bibbero Sys.*, 893 F.2d at 1106–07. Indeed, the sort of information conveyed on certain forms might merge more readily than even the highly informative boxtop instructions in *Morrissey*.

⁸¹ See *Universal City Studios, Inc. v. Kamar Indus., Inc.*, 217 U.S.P.Q. (BNA) 1162, 1166 (S.D. Tex. 1982).

⁸² 217 U.S.P.Q. (BNA) 1162 (S.D. Tex. 1982).

⁸³ *Id.* at 1166.

⁸⁴ See *id.*

The inscriptions on the defendant’s products would be readily recognizable to the lay observer as key lines of dialogue from the copyrighted movie and, therefore, the test for copyright infringement has been satisfied. . . .

The [c]ourt also concludes that there is a substantial likelihood that the plaintiffs will prevail on their copyright infringement claim by reason of the defendant’s unauthorized appropriation and use of the “E.T.” character and name.

Id. At the time the court decided the case, “‘E.T. The Extra-Terrestrial’ ha[d] grossed approximately \$230,000,000.00, making it second only to ‘Star Wars’ as the greatest box office success of all time.” *Id.* at 1164 (alteration added).

The Sixth Circuit applied this test in a post-*Feist* context in *Murray Hill Publications, Inc. v. ABC Communications, Inc.*⁸⁵ The court addressed a Detroit-based radio station's allegedly infringing use of the line, "[t]his is J.P. on JR in the A.M. Have a swell day,"⁸⁶ in support of certain morning programming when the line had originated from a movie.⁸⁷ The court denied the claim of infringement on two bases. First, the line was highly constrained by the information that it attempted to convey—"whose morning show, what radio station, and what time."⁸⁸ Second, and more relevant here, the line was not a "readily recognizable" portion of the infringing movie.⁸⁹ More specifically, the line did not rise to the level of a "key line[] of dialogue from the copyrighted movie."⁹⁰ Thus, the plaintiff's copyright infringement claim was denied because the line was not copyrightable material.⁹¹

While "readily recognizable" may have some merit as a measure of a work's creativity, the test suffers from a certain degree of unpredictability.⁹² For instance, it is unclear how "readily recognizable" is to be viewed. Conceivably, "readily recognizable" could be viewed from an "average consumer"⁹³ or an

⁸⁵ 264 F.3d 622 (6th Cir. 2001).

⁸⁶ *Id.* at 627.

⁸⁷ *Id.* at 628. Apparently the radio station had used the phrase as part of a larger advertising campaign.

⁸⁸ *Id.* at 633. As such, the court performed a miniaturized application of Judge Learned Hand's abstractions test and found the idea highly constraining.

⁸⁹ *Id.*

⁹⁰ *Id.* (alteration added).

⁹¹ *Id.* More specifically, the court found that the line did "not come even close to being as 'readily recognizable.'" *Id.*

⁹² It is entirely possible that recognizability is coextensive with the presence of creativity in a large number of cases. An ordinary observer would essentially be asked to play a game of "Name That Tune," "Name That Book" or the like in order to sift out a least common denominator of copyrightable creativity. Generally speaking, no single word, note or collection of words or notes, would merit copyrightability. Thus, the checks on copyrightability that the utilitarian theory demands are maintained, for no single word, note or small grouping thereof would trigger recognizability.

Note that I use "generally speaking," because entirely coined words, such as Will Ferrell's "scrumtrillesscent," which was part of his James Lipton impersonation on an "Inside the Actor's Studio" Saturday Night Live skit, might indeed be readily recognizable. See *Inside the Actor's Studio*, <http://snltranscripts.jt.org/00/00pactors.phtml> (last visited Oct. 27, 2008). However, the merit of copyrighting new coined words is the appropriate topic of another article.

⁹³ This flows from trademark law where courts must determine the "likelihood of confusion" between two marks from the perspective of an average consumer. See, e.g., *Pocono Int'l Raceway v. Pocono Mountain Speedway*, 171 F. Supp. 2d 427, 437 (M.D. Pa. 2001).

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“ordinary observer”⁹⁴ standpoint. The choice of such a lens could be determinative of the outcome in a given case.⁹⁵ Further complicating the “readily recognizable” framework is the need to prove a connection with the challenged tagline and the unidentified observer or consumer.⁹⁶ It is also unclear what level of recognizability would pass muster. A court could, for example, require merely hearing the tagline as sufficient to find it “readily recognizable” or it may require the tagline to identify the source.⁹⁷

In *American Dental Association v. Delta Dental Plans Association*,⁹⁸ the court articulated the most effective means for measuring a work’s creativity. There, the court held that a dental procedure taxonomy was creative and, there-

⁹⁴ *Carol Barnhart, Inc. v. Econ. Cover Corp.*, 773 F.2d 411, 419 n.5 (2d Cir. 1985) (“Congress has made it reasonably clear that copyrightability of the object should turn on its ordinary use as viewed by the average observer.”).

⁹⁵ *Id.* (indicating that a standard alone can be outcome determinative when applied according to different criterion).

⁹⁶ *Id.* According to the majority, the dissent’s proposed application of the “average observer” standard

would have copyrightability of a utilitarian article turn on “whether visual inspection of the article and consideration of all pertinent evidence would engender in the [ordinary] observer’s mind a separate non-utilitarian concept that can displace, at least temporally, the utilitarian aspect.” The difficulty with this proposal is that it uses as its yardstick a standard so ethereal as to amount to a “non-test” that would be extremely difficult, if not impossible, to administer or apply.

Id. (alteration in original).

⁹⁷ *See Murray Hill Publ’ns, Inc. v. ABC Commc’ns, Inc.*, 264 F.3d 622, 633 (6th Cir. 2001) (“[T]he [tagline at issue] does not come even close to being as ‘readily recognizable’ in terms of its relationship to the [m]ovie as ‘E.T. phone home’ is to its movie source.” (alteration added)). *See generally* *Anti-Monopoly, Inc. v. Gen. Mills Fun Group, Inc.*, 684 F.2d 1316, 1326 (9th Cir. 1982) (holding the registration of a trademark no longer valid because the trademark identified the product rather than the source; in other words, it became generic).

⁹⁸ 126 F.3d 977 (7th Cir. 1997). In a previous work, I was critical of Judge Easterbrook’s approach in this case. Thomas M. Byron, *Tying Up Feist’s Loose Ends: A Probability Theory of Copyrightable Creativity*, 7 WAKE FOREST INTELL. PROP. L.J. 45, 89 (2007). However, my criticisms were not lofted at the soundness of his methodology but rather at its applicability to the circumstances of the case. In some marginal cases, in which works such as the serial numbers at issue in *American Dental* are almost entirely unconstrained in expression, I posited that copyright was ill-suited to examine the work. *Id.* Accordingly, I referred to Judge Easterbrook’s application of the test to the *American Dental* facts as “grant[ing] a copyright in chaos.” *Id.* (alteration added). This article is not a renunciation of the framework I have previously suggested but rather seeks to limit itself to the endorsed “alternative” methods of measuring creativity practically applied at present.

fore, copyrightable, because the creator had several alternative methods of expressing the idea.⁹⁹ Judge Easterbrook reasoned that:

Einstein could have explained relativity in any of a hundred different ways; another physicist could expound the same principles differently.

So too with a taxonomy-of butterflies, legal citations, or dental procedures. Facts do not supply their own principles of organization. Classification is a creative endeavor. Butterflies may be grouped by their color, or the shape of their wings, or their feeding or breeding habits, or their habitats, or the attributes of their caterpillars, or the sequence of their DNA; each scheme of classification could be expressed in multiple ways. Dental procedures could be classified by complexity, or by the tools necessary to perform them, or by the parts of the mouth involved, or by the anesthesia employed, or in any of a dozen different ways. [American Dental's] Code[] descriptions don't "merge with the facts" any more than a scientific description of butterfly attributes is part of a butterfly. There can be multiple, and equally original, biographies of the same person's life, and multiple original taxonomies of a field of knowledge. Creativity marks the expression even after the fundamental scheme has been devised.¹⁰⁰

Just as with Patry's New York City depiction,¹⁰¹ Judge Easterbrook suggests an idea level and then focuses on the number of alternatives that could satisfy that idea. Presumably, if the creator has a sufficient number of such alternatives within the idea constraint, then the work is sufficiently creative to warrant copyright protection.¹⁰² In contrast, if a creator's idea significantly limits alternative methods of expression, then the work will fail to exhibit a "modicum of creativity."¹⁰³ The test yields the results, then, of using a merger-style framework, while shifting the threshold for copyrightability from one or few alternatives.¹⁰⁴

The test's effectiveness derives from dovetailing creativity and the idea/expression dichotomy. If a work can be articulated via numerous embodiments while still expressing the same idea, the grant of ownership in a single embodiment incentivizes the creation of the work without foreclosing necessary

⁹⁹ *Am. Dental*, 126 F.3d at 979.

¹⁰⁰ *Id.* (alterations added).

¹⁰¹ *See supra* notes 39–40 and accompanying text.

¹⁰² *See Am. Dental*, 126 F.3d at 979 ("There can be multiple, and equally original, biographies of the same person's life, and multiple original taxonomies of a field of knowledge. Creativity marks the expression even after the fundamental scheme has been devised.").

¹⁰³ *Id.*

¹⁰⁴ *See Dymow v. Bolton*, 11 F.2d 690, 691 (2d Cir. 1926) ("[I]f the same idea can be expressed in a plurality of totally different manners, a plurality of copyrights may result, and no infringement will exist.").

means of communication. The test thereby achieves an adequate balance in view of the utilitarian theory of copyright law.

D. Inadequate Measures of Copyrightable Creativity

The alternatives test tailors findings of creativity to the appropriate constitutional focal point: the work as measured against certain external constraints largely identifiable from the work itself. By filtering copyright analysis through the work itself, the alternatives test avoids predicating copyright protection on a number of factors that have no strong correlation with copyrightability. For instance, one of the consequences of the *Feist* decision was to deny copyright in works based solely on the “sweat of the brow.”¹⁰⁵ The telephone books in *Feist*, which required a great expenditure of time but minimal creative investment, undoubtedly fall into this category.¹⁰⁶ By contrast, one could equally create a copyrightable drawing or poem in ten minutes, or even ten seconds, and be rewarded with a fully-warranted copyright.

Similar to the “sweat of the brow” doctrine, an author’s artistic intent in creating a work is neither indicative nor dispositive of its copyrightability, as shown in *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*¹⁰⁷ The court in this case upheld copyright in engravings that mimicked the prior work of famous artists, while specifically noting that the supposed exact copies might still incorporate copyrightable variations despite the fact that those mimicked elements of the work were already in the public domain.¹⁰⁸ The court reasoned that “[a] copyist’s bad eyesight or defective musculature, or a shock caused by a clap of thunder, may yield sufficiently distinguishable variations.”¹⁰⁹ Further, “[h]aving hit upon such a variation unintentionally, the ‘author’ may adopt it as his and

¹⁰⁵ *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 359–60 (1991) (expenditure of labor, without more, is not indicative of copyrightability; for example, one might industriously work for long periods of time and still fall short of generating the requisite “modicum of creativity”).

¹⁰⁶ *Id.* at 362–63. *Contra* *Hutchinson Tel. Co. v. Fronteer Directory Co.*, 770 F.2d 128, 132 (8th Cir. 1985) (holding Hutchinson’s expended efforts in compiling the telephone directory were sufficient to meet the “sweat of the brow” test and thus warranted the finding that the “telephone directory [was] an original work of authorship and therefore . . . copyrightable” (alteration added)).

¹⁰⁷ 191 F.2d 99, 104–05 (2d Cir. 1951).

¹⁰⁸ *See id.* at 103 (“It is clear, then, that nothing in the Constitution commands that copyrighted matter be strikingly unique or novel. Accordingly, we were not ignoring the Constitution when we stated that a ‘copy of something in the public domain’ will support a copyright if it is a ‘distinguishable variation’ . . .”).

¹⁰⁹ *Id.* at 105.

copyright it.”¹¹⁰ Notwithstanding the pre-*Feist* vintage of *Alfred Bell*, the court’s statement is not entirely inaccurate. For example, a poet seeking to generate an entirely arbitrary work¹¹¹ may end up with a coherent sonnet in iambic pentameter.¹¹² Such a result, despite the lack of precise intent of the author, clearly merits copyright protection. Consider a second example where a lawyer, intending to pen an exceptionally *uncreative* set of contest instructions, ultimately finds that several *creative* phrases slip into the instructions.¹¹³ In each hypothetical—the poet who sought an entirely arbitrary result and the lawyer who sought a particular uncreative result—the creator’s intent, if effectuated, would yield an uncopyrightable result. Yet, both examples yield the same result regardless of the intent involved: copyrightable subject matter. In short, a creator’s intent does not provide a suitable means for determining creativity.

Creative process is similarly ill-equipped as a measure of copyrightability. The creator’s process for attaining an ultimate result may limit or entirely stifle creativity, thus directly impacting copyrightability.¹¹⁴ In view of *Feist*, copyrightability may be stifled entirely where the process dictates chronological or alphabetical ordering.¹¹⁵ But even highly constrained processes may produce

¹¹⁰ *Id.*

¹¹¹ See *Southco, Inc. v. Kanebridge Corp.*, 390 F.3d 276, 285 (3d Cir. 2004) (holding part numbers were not copyrightable because “they [were] mechanically produced by the inflexible rules of the Southco system” (alteration added)); *Mitel, Inc. v. Iqtel, Inc.*, 124 F.3d 1366, 1373 (10th Cir. 1997) (holding arbitrary selected command codes uncopyrightable because the “arbitrary selection of a combination of three or four numbers required de minimis creative effort”); *Toro Co. v. R & R Prods. Co.*, 787 F.2d 1208, 1213 (8th Cir. 1986) (holding that an arbitrary part numbering system lacked originality and therefore did not merit copyright protection). Specifically, the *Toro* court stated “[t]he random and arbitrary use of numbers in the public domain does not evince enough originality to distinguish authorship. . . . We are left, then, with the accidental marriage of a part and a number . . . such a marriage [does not] produce[] an original work of authorship.” *Toro*, 787 F.2d at 1213 (alterations added).

¹¹² Justice Scalia has suggested in the gerrymandering context the existence of an “incompetent retrogressor”—that is, one whose purpose is to enact retrogressive districting but fails to do so in fact. *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 332 (2000). This article merely posits the existence of the “incompetent creator.”

¹¹³ For example, consider the contest instructions found uncopyrightable due to merger in *Morrissey v. Proctor & Gamble Co.*, 379 F.2d 675, 679 (1st Cir. 1967).

¹¹⁴ *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 363 (1991) (stating “there is nothing remotely creative about arranging names alphabetically in a white pages directory,” and thus the process of alphabetizing may not in itself yield a copyrightable result depending on the field of application); see *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102 (2d Cir. 1951) (indicating the process of directly copying a work may yield a copyrightable result so long as there is a “distinguishable variation”).

¹¹⁵ See *Feist*, 499 U.S. at 363.

anomalous results, which in turn demonstrate creativity; for example, distinguishable variations in an engraving copied directly from a prior work may be found to be creative.¹¹⁶ Conversely, creative processes intended to operate without constraint may produce uncopyrightable monochromatic tableaux or basic alphabetical lists. Thus, intent as mapped to process offers a thoroughly illogical basis for predicting a work's copyrightability.

This is precisely what happened to the manufacturer of a sinusoidal bicycle rack in *Brandir International, Inc. v. Cascade Pacific Lumber Co.*¹¹⁷ In that example, the creator's intent was unconstrained but filtered through a constrained manufacturing process, which led the court to hold the bicycle rack uncopyrightable.¹¹⁸ Yet, a creator might run a similarly unconstrained intent through precisely the same highly constrained process by the limits of both metal bending and utilitarian concerns to form a less rigidly structured sculpture that both supports bicycles and merits copyrightability. Both copyrightable and uncopyrightable outcomes might equally follow from an unconstrained intent effectuated through an unconstrained process. On one hand, the arranger of a list of animal veneries could use a random number generator to order the list. Although such an arranger would possess unconstrained intent, the output of the generator could be a list that is arbitrarily or systematically arranged, or somewhere in between.¹¹⁹ While the two extremes of the arrangement spectrum in the previous example would not merit copyright protection,¹²⁰ one in the middle might.¹²¹ These examples of the unpredictability of the copyrightability of an output are not the only conceivable ones. Regardless of the particular constraint level of process or intent, one cannot note a logical relation between the con-

¹¹⁶ See *Alfred Bell*, 191 F.2d at 102.

¹¹⁷ 834 F.2d 1142, 1143 (2d Cir. 1987) (indicating the lack of intent or unconstrained intent with the statement, "a bicycle rack made of bent tubing . . . is said to have originated from a wire sculpture"); see discussion *infra* notes 177–179 and accompanying text.

¹¹⁸ See *Brandir*, 834 F.2d at 1146.

¹¹⁹ Similar proofs may be undertaken for the four remaining combinations of constrained or unconstrained process and intent. Those cases are (1) constrained intent, constrained process and uncopyrightable result; (2) constrained intent, constrained process and copyrightable result; (3) constrained intent, unconstrained process and copyrightable result; and (4) constrained intent, unconstrained process and uncopyrightable result. In the interest of space, I will leave it to the reader to imagine scenarios satisfying each of these cases.

¹²⁰ See *Southco, Inc. v. Kanebridge Corp.*, 390 F.3d 276, 285 (3d Cir. 2004); *Mitel, Inc. v. Iqtel, Inc.*, 124 F.3d 1366, 1373 (10th Cir. 1997); *Toro Co. v. R & R Prods. Co.*, 787 F.2d 1208, 1213 (8th Cir. 1986).

¹²¹ See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 362 (1991); *Lipton v. Nature Co.*, 71 F.3d 464, 470 (2d Cir. 1995).

straint of the process or intent and the final work's copyrightability. Simply put, neither process nor intent offers any discernible fit to a work's copyrightability.

Aesthetic appeal should also not be determinative of copyrightability. This inveterate premise flows from the early twentieth century Supreme Court decision in *Bleistein v. Donaldson Lithographing Co.*,¹²² in which the Court granted copyright protection for circus lithographs used as advertisements that drew little interest from museum curators and other aesthetes.¹²³ Specifically, the Court opined that “[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations.”¹²⁴ In other words, a work's appeal, or lack thereof, to any group—effete or Philistine—must not factor into judicial determinations about a given work's worthiness of copyright protection. By extension, should appreciation of a work translate to increased sales, such marketability should equally have no bearing on the work's copyrightability.¹²⁵

Finally, the context in which a work appears should not affect the work's eligibility for copyright protection.¹²⁶ Professor Denicola has aptly provided the following example: “[t]he walls of numerous garages and basements . . . attest to the attraction of well-polished hubcaps, yet that should not automatically remove such objects from the realm of industrial design.”¹²⁷ In other words, one's election to offer wall space to a certain work should not shift the work's copyrightability. Conversely, a work's failure to be recognized in a museum, or even a more humble setting, such as a garage, should not obviate the work's eligibility for copyright protection. Rather, copyrightable creativity should depend primarily on the following two issues: (1) the magnitude of alter-

¹²² 188 U.S. 239 (1903).

¹²³ *Id.* at 251–52.

¹²⁴ *Id.* at 251.

¹²⁵ See *Homer Laughlin China Co. v. Oman*, 22 U.S.P.Q.2d (BNA) 1074, 1076 (D.D.C. 1991) (“[P]laintiff contends that the commercial success, expense, human effort, professional skills and expertise of the designer, and artistic recognition qualify [plaintiff's china] for a copyright. . . . [T]he Court finds that there was no abuse of discretion for failing to consider the commercial success of [plaintiff's china]” because as *Feist* indicates, originality is the “touchstone of copyright protection.” (alterations added)); Denicola, *supra* note 1, at 735 (“Attempts to equate the statutory requirement of separability with consumer assessments of merit or value are simply incompatible with the legislative decision to eschew aesthetic distinctions.”). *But see Bleistein*, 188 U.S. at 252 (indicating a nexus between commercial value and aesthetic value for determining copyrightability).

¹²⁶ See Denicola, *supra* note 1, at 734 (indicating the flawed nature of a copyrightability test when the context of a work is considered).

¹²⁷ *Id.* Note that should something fall in the “realm of industrial design,” it is not copyrightable. *Id.* at 735.

natives expressing the same idea available to a work's creator at the time of the work's genesis and (2) the creator's ability to adopt one such alternative.

II. USEFUL ARTICLES DOCTRINE

Although the idea/expression dichotomy and *Feist's* creativity standards apply equally to works deemed "useful articles," those standards are framed with additional requirements set out in the statute and amplified by significant, though disparate, case law. Useful articles are only copyrightable to the extent that they contain elements that are physically or conceptually separable from the article's underlying functionality.¹²⁸ However, in codifying *Mazer v. Stein*,¹²⁹ Congress provided little, if any, guidance in defining the notion of "separability," thus leaving courts and commentators the task of interpretation, with the result of numerous, widely varying quanta. At least the following seven tests have been employed to meet this task: (1) physical separability,¹³⁰ (2) the test advanced by *Carol Barnhart's* majority,¹³¹ (3) the test advanced by *Carol Barnhart's* dissent,¹³² (4) the *Brandir-Denicola* test,¹³³ (5) Professor Goldstein's test,¹³⁴ (6) the *Kieselstein-Cord* test,¹³⁵ and (7) Nimmer's test.¹³⁶ Courts may also follow an eighth tack, avoiding the labyrinthine list above, by refusing to apply the useful article designation to an arguably functional work if the work's function is "merely to portray [its] appearance."¹³⁷ This section will describe each of the foregoing tests and track the weaknesses inherent in each before further arguing that the tests advance no overarching consistency.

¹²⁸ See discussion *supra* Part I.

¹²⁹ See the definitions for "[p]ictorial, graphic, and sculptural works" and "useful article" under 17 U.S.C. § 101 (2006).

¹³⁰ *Esquire, Inc. v. Ringer*, 591 F.2d 796, 803–04 (D.C. Cir. 1978).

¹³¹ *Carol Barnhart, Inc. v. Econ. Cover Corp.*, 773 F.2d 411, 418 (2d Cir. 1985).

¹³² *Id.* at 419 n.5, 422–23.

¹³³ *Brandir Int'l, Inc. v. Cascade Pac. Lumber Co.*, 834 F.2d 1142, 1145 & n.2, 1146–47 (2d Cir. 1987).

¹³⁴ 1 PAUL GOLDSTEIN, COPYRIGHT § 2.5.3.

¹³⁵ *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989, 991–93 (2d Cir. 1980).

¹³⁶ See *Brandir*, 834 F.2d at 1144 (discussing the Nimmer test). In the interest of space, I have pretermitted discussion of William Patry's test, one that grants copyright protection in a work whose "artistic features are not utilitarian." 1 WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE 285 (1994). Note, however, that this test has not witnessed judicial adoption.

¹³⁷ See the definition of "useful article" under 17 U.S.C. § 101 (2006) (alteration added).

A. *Physical Separability*

The D.C. Circuit's decision in *Esquire, Inc. v. Ringer*¹³⁸ offers a typical application of the limiting "physical separability" test.¹³⁹ The court dealt with the copyrightability of a visually appealing light fixture pursuant to a regulation adopted under the 1909 Copyright Act.¹⁴⁰ The court declined to find copyrightability, because "the overall design or configuration of a utilitarian object, even if it is determined by aesthetic as well as functional considerations, is not eligible for copyright."¹⁴¹ In order to achieve copyrightability, the court sought features of a work that could be physically separated.¹⁴²

Physical separability has been referred to as "irrational,"¹⁴³ and with good reason. The test depends in large part on the fortuitous attachments between sub-components of an otherwise useful article. Put differently, physical separability leads, for instance, to the inconsistent result of granting copyright protection in a gargoyle that perches on the ledge of a pencil sharpener, while denying protection for the same gargoyle if it happens to be incorporated in the body of a pencil sharpener.¹⁴⁴

¹³⁸ 591 F.2d 796 (D.C. Cir. 1978).

¹³⁹ *Id.* at 803–04.

¹⁴⁰ *Id.* at 798–99.

¹⁴¹ *Id.* at 804.

¹⁴² *Id.* at 804–05.

¹⁴³ Denicola, *supra* note 1, at 735.

¹⁴⁴ *Id.* at 736–37 (indicating articles such as "hubcaps, mechanical games, and toy airplanes" have been denied copyright protection while other seemingly similar "useful articles" were granted copyright protection: "shapes of pajama bags and of molds employed in the manufacturer [sic] of ceramic figures . . . and the antique telephone shape utilized for the pencil sharpener in *Ted Arnold Ltd. v. Silvercraft Co.*"). As Regan E. Keebaugh noted:

[T]he physical separability test is of little use to many aesthetic aspects of useful articles, specifically those that clearly would be copyrightable if they were capable of existing independently from the useful article they adorn. For example, a design stained onto a silk robe or a carving on the back of a wooden rocking chair would both be eligible for copyright protection standing alone, but under the physical separability test, because they cannot be physically removed from the useful objects to which they are attached, they would not be eligible for copyright protection.

Keebaugh, *supra* note 12, at 266–67. Put more mathematically, the degree of orthogonality between internal and external surfaces of a work should not bear any relation to the overall copyrightability of the work.

Due to this unusual predicate for copyrightability, the test also conflicts with the holding in the still-valid *Mazer* decision.¹⁴⁵ The D.C. Circuit in *Esquire* attempted to distinguish its holding from *Mazer* on grounds that the *Mazer* lamp bases were “undeniably capable of existing as a work of art independent of the utilitarian article into which they were incorporated” and thus clearly copyrightable;¹⁴⁶ but this rationale reflects the aesthetics-based caprice lampooned by the court in *Bleistein*.¹⁴⁷ Furthermore, as posited by Professor Robert Denicola, consider the result if the *Mazer* statuette lamp base was internalized in precisely a manner that would have failed copyrightability under a physical separability test.¹⁴⁸

Physical separability is better conceived as an under-inclusive¹⁴⁹ test well suited to easy cases and facile outcomes.¹⁵⁰ To the degree that a portion of an otherwise utilitarian object can be removed without impairing the remainder of the object, that portion is not useful at all and may not fit within any utilitarian abstraction of the overall work. Further, such a sub-part lends itself to ready identification and ablation by a court. Anything incorporated into a work—in other words, those features that raise difficult issues of copyrightability—are merely denied copyright with a wave of the hands and a talismanic incantation.

B. Carol Barnhart Tests

The Second Circuit’s decision in *Carol Barnhart* yielded two discrete tests for separability. The court passed judgment on the copyrightability of “four human torso forms” that served as partial display mannequins for shirts and sweaters.¹⁵¹ After a lengthy summary of the legislative history and statutory

¹⁴⁵ *Mazer v. Stein*, 347 U.S. 201, 213–14 (1954).

¹⁴⁶ *Esquire, Inc. v. Ringer*, 591 F.2d 796, 804 (D.C. Cir. 1978).

¹⁴⁷ *Esquire* addressed this concern and rejected it in favor of granting the Register of Copyrights latitude in effectuating the congressional intent to deny copyright in works of industrial design. *Id.* at 805.

¹⁴⁸ Denicola, *supra* note 1, at 738. The *Pivot Point* court, discussed *infra* Part III, refused to apply the physical separability test, reasoning that “*Esquire* arose in a much different procedural and legal environment.” *Pivot Point Int’l, Inc. v. Charlene Prods., Inc.*, 372 F.3d 913, 923 (7th Cir. 2004).

¹⁴⁹ See Frenkel, *supra* note 1, at 546 (“As a preliminary matter, there are very few cases involving physical separability; conceptual separability is where there is much debate.”).

¹⁵⁰ See, e.g., Denicola, *supra* note 1, at 738 (“The only justification for the whimsical approach espoused in *Esquire* is the desire for “a levee to hold back the flood.”).

¹⁵¹ *Carol Barnhart, Inc. v. Econ. Cover Corp.*, 773 F.2d 411, 412 (2d Cir. 1985).

authority in the useful articles domain, the two-member majority concluded that “since the aesthetic and artistic features of the Barnhart forms are inseparable from the forms’ use as utilitarian articles[,] the forms [we]re not copyrightable.”¹⁵² The court elaborated that “the features claimed to be aesthetic or artistic, [for example], the life-size configuration of the breasts and the width of the shoulders, are inextricably intertwined with the utilitarian feature, the display of clothes.”¹⁵³ In reaching this conclusion and having distinguished the earlier Second Circuit opinion in *Kieselstein-Cord v. Accessories by Pearl, Inc.*,¹⁵⁴ the court opined that the belt buckles had passed copyright muster because, unlike the surfaces of the torso mannequins, “the ornamented surfaces of the buckles were not in any respect required by their utilitarian functions.”¹⁵⁵

Judge Newman, in dissent, offered his own useful articles test.¹⁵⁶ While he agreed that the mannequins were useful articles,¹⁵⁷ he sharpened his focus on the notion of “conceptual separability,” a principle he viewed as “something other than ‘physical separability.’”¹⁵⁸ After noting the flaws in several tests, Judge Newman propounded a “conceptual separability” test that finds copyrightability where a work “stimulate[s] in the mind of the beholder a concept that is separate from the concept evoked by its utilitarian function.”¹⁵⁹ He elaborated: “I think the requisite ‘separateness’ exists whenever the design creates in the mind of the ordinary observer two different concepts that are not inevitably entertained simultaneously.”¹⁶⁰ Due to his finding that the mannequins satisfied such a “temporal sense of separateness,”¹⁶¹ Judge Newman deemed them copyrightable.¹⁶²

Both the majority and dissenting opinions in *Carol Barnhart* suffer from certain analytical flaws. The majority’s test clarified its position by contrasting its ruling with the earlier *Kieselstein-Cord* decision.¹⁶³ Specifically, the majority conceived of the *Kieselstein-Cord* belt buckles as entirely superfluous

¹⁵² *Id.* at 418 (alterations added).

¹⁵³ *Id.* at 419 (alteration added).

¹⁵⁴ 632 F.3d 989 (2d Cir. 1980).

¹⁵⁵ *Carol Barnhart*, 773 F.2d at 419.

¹⁵⁶ *Id.* at 422–23 (Newman, J., dissenting).

¹⁵⁷ *Id.* at 420 (majority opinion).

¹⁵⁸ *Id.* at 421 (Newman, J., dissenting).

¹⁵⁹ *Id.* at 422 (alteration added).

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 423.

¹⁶² *Id.*

¹⁶³ *Id.* at 419 (majority opinion).

in creation, while the mannequins were the inevitable, constrained result of utilitarian concerns.¹⁶⁴ This reasoning, however, is a faulty interpretation of *Kiesels-tein-Cord*, because *some* surface is required to create a belt buckle, otherwise the “buckle” utility would be nonexistent. Therefore, the ornamented surfaces of the belt are not separable at an abstract level any more than the less ornamented surfaces of the mannequins. The court failed to understand abstraction—*something* was required for each and embellishments were applied to both. As an additional criticism of the “inextricably intertwined” test set forth by *Carol Barnhart*, some have suggested the test “borders on the ludicrous” for the unduly high hurdle for copyrightability that the test sets.¹⁶⁵ The Second Circuit also later cast derision on the mannequins as “little more than glorified coat-racks.”¹⁶⁶ But this view qualifies as inappropriate aesthetic judgment. Further, the test too closely traces the contours of physical separability. In other words, a work’s aesthetic features will likely only escape inextricable intertwinement where those features can be physically separated from the underlying work.¹⁶⁷ As noted above, physical separability sets too parsimonious a limit for copyrightability.

Regarding Judge Newman’s “temporal displacement” in the “[ordinary] observer’s mind” requirement, the majority aptly labeled this “a standard so ethereal as to amount to a ‘non-test’ that would be extremely difficult, if not impossible, to apply.”¹⁶⁸ One commentator in particular has questioned the efficacy of the ordinary observer when put to such a task.¹⁶⁹ Furthermore, “temporal displacement” may not be apparent in cases where a work ought to be copyrightable, for example, taxidermy mannequins.¹⁷⁰ In any event, such “temporal

¹⁶⁴ *Id.*

¹⁶⁵ Frenkel, *supra* note 1, at 548.

¹⁶⁶ *Hart v. Dan Chase Taxidermy Supply Co., Inc.*, 86 F.3d 320, 323 (2d Cir. 1996).

¹⁶⁷ *Id.*

¹⁶⁸ *Carol Barnhart*, 773 F.2d at 419 n.5 (alteration in original). The majority also offered a strong suggestion that Judge Newman’s test lacked a rational schema or end-point by labeling it “a ‘bottomless pit.’” *Id.*

¹⁶⁹ Frenkel, *supra* note 1, at 549 (“While this test is perhaps truer to the definition of conceptual, it obviously is not a simple task to determine what is in ‘the mind of the ordinary observer.’”).

¹⁷⁰ See Nathan C. Rogers, *Copyright Protection: A Dead Fish for Sculptors of Taxidermy Mannequins?*, 6 J. INTELL. PROP. L. 159, 171 (1998).

Under [Judge] Newman’s test, the outcome would depend on whether the taxidermy mannequins stimulated a concept other than utility in an ordinary observer. . . . The taxidermy mannequins would likely pass this test, because an ordinary observer would either only recognize the nature of the portrayal of the animal (invoking the definition of the Copyright Act) or be able to distin-

displacement” seems a chore not for a judge, ordinary observer or a judge’s conception of an ordinary observer, but rather for one capable of time travel, for example, a wild-haired scientist and a DeLorean equipped with a 1.21 gigawatt flux capacitor.¹⁷¹

C. *Brandir-Denicola Test*

In a 1983 law review article, Professor Robert Denicola suggested a useful articles methodology focused on the creative process that informed the ultimate work.¹⁷² While rejecting numerous other possible avenues of analysis, Denicola posited that “pictorial, graphic, and sculptural works” containing “pictorial, graphic, or sculptural features” under § 101 should be interpreted as “pure art, regardless of the context in which they appear.”¹⁷³ Entertaining this “pure art” concept, Denicola further posited that works incorporating such features “are not the product of industrial design.”¹⁷⁴ To that end, he offered that “[b]ecause the dominant characteristic of industrial design is the influence of nonaesthetic, utilitarian concerns, copyrightability ultimately should depend on the extent to which the work reflects artistic expression uninhibited by functional considerations.”¹⁷⁵ Lest the quotation mislead, the focus of Denicola’s test lies in the industrial designer’s utilitarian and aesthetic judgment and choice in developing the resulting work; in other words, the process of creation.¹⁷⁶

The Second Circuit in *Brandir* saw Denicola’s test receive its first application. The *Brandir* court denied copyright protection for a sinusoidal “bicycle rack made of bent tubing that [was] said to have originated from a wire sculpture.”¹⁷⁷ The court noted that conceptual separability hinged on the presence in a work of “design elements [that] can be identified as reflecting the de-

guish that portrayal from the form’s utility (satisfying conceptual separability).
A possible outcome under the displacement test, however, could be that the forms would be seen as objects simply used to “stuff” animals with no other recognizable artistic qualities.

Id. (emphasis added) (alteration added).

¹⁷¹ For background on this allusion, watch *BACK TO THE FUTURE* (Universal Pictures 1985).

¹⁷² See generally Denicola, *supra* note 1.

¹⁷³ See 17 U.S.C. § 101 (2006); Denicola, *supra* note 1, at 742 (providing copyrightable useful articles analysis).

¹⁷⁴ Denicola, *supra* note 1, at 742.

¹⁷⁵ *Id.* at 741.

¹⁷⁶ See Frenkel, *supra* note 1, at 569 (criticizing the Denicola test).

¹⁷⁷ *Brandir Int’l, Inc. v. Cascade Pac. Lumber Co.*, 834 F.2d 1142, 1143 (2d Cir. 1987) (alteration added).

signer's artistic judgment exercised independently of functional influences."¹⁷⁸ The court concluded that, while the bicycle rack was based on more fanciful sculpted versions that probably merited copyright protection, the final rack design depended on numerous utilitarian constraints, including the radial limitations of pipe-bending apparati, the functional needs related to the space occupied by the rack and the number of bicycles that the rack could accommodate.¹⁷⁹

At least three primary flaws mar the efficacy of the *Brandir*-Denicola test.¹⁸⁰ First, the test fails to give ample breadth to conceptual separability. One commentator opined that "[i]f any functional influence whatsoever on the design process disqualifies the work for protection [under the *Brandir*-Denicola test], then even the lamp bases in *Mazer* probably would not have been copyrightable because their design could have been influenced in some way by their functional role."¹⁸¹ The same logic might apply to any number of other copyright-worthy sub-parts of useful articles because, inasmuch as a sub-part serves a use as part of a larger system, its design will likely have answered to utilitarian concerns on some level. Second, the test's focus on artistic judgment has led to haphazard wielding by courts forced to opine on matters outside their bailiwick.¹⁸² For example, the Second Circuit's application in *Brandir* has been criticized for basing copyrightability on "fortuitous circumstances."¹⁸³ Finally, as Part I above discusses, process is at best an imprecise focal point for copyrightability; there is no logical relation between the constraints of a process and a final work's copyrightability.

¹⁷⁸ *Id.* at 1145 (alteration added).

¹⁷⁹ *Id.* at 1147.

¹⁸⁰ This article will treat the test propounded by the *Brandir* court as consistent with Denicola's. At least one commentator has disagreed with lumping Denicola's article with the *Brandir* decision on grounds that Denicola looks to the extent to which utilitarian concerns influenced the design process while the *Brandir* decision only reviews *if* utilitarian concerns influenced the design process. Frenkel, *supra* note 1, at 551.

¹⁸¹ Schalestock, *supra* note 9, at 120 (alteration added). Denicola unconvincingly disagrees with this critique as he does not view the form of the lamp bases in *Mazer* as "responsive to utilitarian demands." Denicola, *supra* note 1, at 743. Professor Denicola is, however, incorrect as the lamp bases do serve the utilitarian functions of providing an inherently required feature while concealing internal electrical wiring.

¹⁸² Frenkel, *supra* note 1, at 552.

¹⁸³ *Nat'l Theme Prods., Inc. v. Jerry B. Beck, Inc.*, 696 F. Supp. 1348, 1353 (S.D. Cal. 1988).

D. Goldstein Test

Professor Goldstein has suggested a test that ostensibly demands much of a work, notably that the “design of a useful article is conceptually separable if it can stand on its own as a work of art traditionally conceived, and if the useful article in which it is embodied would be equally useful without it.”¹⁸⁴ Both clauses within Goldstein’s test are flawed for a few reasons. As to the test’s first clause, it asks that a work comport with traditional notions of art, precisely the determinative criteria struck down in *Bleistein*,¹⁸⁵ and notions that have no legitimate place in a field already seemingly heavily invested in aesthetic judgments. As to the test’s second clause, the court in *Pivot Point* explicitly declined to apply it as it “is tied too closely to physical separability and, consequently, does not give a sufficiently wide berth to Congress’[s] determination that artistic material conceptually separate from the utilitarian design can satisfy the statutory mandate.”¹⁸⁶ The court’s disinclination seems apt, because the clause only grants copyright in elements of a work that have no utility; for if such elements had any utility, their removal would result in a lessening of the work’s overall utility. Such purely superfluous elements, then, almost certainly must be physically separable to pass muster under the Goldstein test.

E. Kieselstein-Cord Test

Prior to the *Brandir* and *Carol Barnhart* decisions, the Second Circuit posited its first useful articles test in *Kieselstein*. The plaintiff alleged infringement of his award-winning, museum-featured, high fashion, artful belt buckles bearing the suggestive names “Winchester” and “Vaquero.”¹⁸⁷ The buckles, whose designs drew on art nouveau and architectural influences, apparently attracted consumers interested in wearing them not as belt buckles, but as jewelry.¹⁸⁸ The court relied on this fact in finding the buckles copyrightable, stating that “[t]he primary ornamental aspect of the Vaquero and Winchester buckles [was] conceptually separable from their subsidiary utilitarian function.”¹⁸⁹ In the

¹⁸⁴ GOLDSTEIN, *supra* note 134, § 2:67.

¹⁸⁵ See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (“It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations . . .”).

¹⁸⁶ *Pivot Point Int’l, Inc. v. Charlene Prods., Inc.*, 372 F.3d 913, 924 (7th Cir. 2004) (alteration added).

¹⁸⁷ *Kieselstein-Cord v. Accessories by Pearl*, 632 F.3d 989, 990–91 (2d Cir. 1980).

¹⁸⁸ *Id.* at 991.

¹⁸⁹ *Id.* at 993 (alterations added).

court's opinion, the buckles "r[o]se to the level of creative art" as a latter-day analog of the "Tutankhamen or Scythian gold exhibits at the Metropolitan Museum."¹⁹⁰

The *Kieselstein-Cord* test, which finds separability based on a finding that a work's aesthetic or ornamental purpose is primary rather than subsidiary,¹⁹¹ has raised several concerns among courts and commentators. Commentators have "criticized this test as being beyond anything found in the statute or legislative history."¹⁹² On a theoretical level, one would wonder what outcome the test would produce in the case where the ornamental and utilitarian aspects are equal.¹⁹³ Professor Denicola has suggested that the test may be entirely futile: "Attempts to determine an article's 'primary' attraction to consumers will frequently prove fruitless. There is no reason to expect anything approaching unanimity on such an issue, and even individual consumers generally will have mixed motives that cannot be neatly ranked in the required hierarchy."¹⁹⁴ Finally, other commentators, fretting that the court placed undue concern on the aesthetic judgments of museum curators, opined that "[n]o doubt the court was aided in its decision by the fact that the Metropolitan Museum of Art had accepted the buckles for its permanent collection."¹⁹⁵ As such, "the decision stands for little beyond an artistic judgment"¹⁹⁶ and is precisely the sort of judgment that contradicts the *Bleistein* non-discrimination axiom.

F. Nimmer Test

Professor Melville B. Nimmer's test predicates a useful article's copyrightability on the opinion of a collective of consumers. In Professor Nimmer's test a useful article passes muster "where there is any substantial likelihood that even if the article had no utilitarian use it would still be marketable to some significant segment of the community simply because of its aesthetic qualities."¹⁹⁷

¹⁹⁰ *Id.* at 994 (alteration added).

¹⁹¹ *Id.* at 993.

¹⁹² Frenkel, *supra* note 1, at 548.

¹⁹³ Shira Perlmutter, *Conceptual Separability and Copyright in the Designs of Useful Articles*, 37 J. COPYRIGHT SOC'Y U.S.A. 339, 359 (1990).

¹⁹⁴ Denicola, *supra* note 1, at 734.

¹⁹⁵ Schalestock, *supra* note 9, at 119.

¹⁹⁶ *Id.*

¹⁹⁷ 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.08[B][3] (2008).

Professor Nimmer himself acknowledges certain shortcomings to this approach.¹⁹⁸ For one, like the Goldstein test, Nimmer's rationale fights the *Bleistein* Court's holding to the degree that aesthetic appeal translates to market success.¹⁹⁹ On a related matter, it disfavors those artistic works that do not appeal "to some significant segment of the community," but otherwise merit copyright protection.²⁰⁰ Further, Nimmer's methodology produces numerous questions as to the means of proving marketability. The term "significant" lacks any quantitative threshold to give it anchoring. The term "community" could be interpreted to represent different collectives, from a community defined by geographic region to a community defined by its patronage of the arts. To this effect, Professor Denicola adds: "Moreover, the difficulty with Nimmer's approach is particularly acute, since the standard generally will require conclusions concerning markets that do not in fact exist. The predictive nature of the inquiry can only underscore the significance of judicial perceptions of beauty and taste."²⁰¹

G. Avoiding Useful Articles Doctrine

Of course, works may survive scrutiny under any of these tests if they escape the "useful article" designation entirely.²⁰² This option received one possible treatment in the case of *Hart v. Dan Chase Taxidermy Supply Co.*²⁰³ There, the plaintiff taxidermist brought suit against a fellow taxidermist who had allegedly arrogated the mannequins by which the plaintiff shaped the stuffed quarry of a third-party customer's successful hunt.²⁰⁴ The court's opinion, authored by Judge Calabresi, first noted that "[m]annequins straddle the line between utilitarian and sculptural works."²⁰⁵ The court ultimately concluded, however, that the works fell on the sculptural side of the line because, "[i]n short, [a] fish mannequin is designed to be looked at. That the fish mannequin is meant to be viewed clothed by a fish skin, rather than naked and on its

¹⁹⁸ *Id.*

¹⁹⁹ See *supra* text accompanying notes 122–125.

²⁰⁰ See, e.g., *Carol Barnhart, Inc. v. Econ. Cover Corp.*, 733 F.2d 411, 422 (2d Cir. 1985) (Newman, J., dissenting) ("This 'market' approach risks allowing a copyright only to designs of forms within the domain of popular art, a hazard Professor Nimmer acknowledges.").

²⁰¹ Denicola, *supra* note 1, at 734.

²⁰² In that case, the work need only satisfy those generally applicable requirements for copyrightability discussed above in Part I.

²⁰³ 86 F.3d 320 (2d Cir. 1996).

²⁰⁴ *Id.* at 321.

²⁰⁵ *Id.*

own, makes no difference. The function of the fish form is to portray its own appearance.”²⁰⁶ As such, the fish mannequins did not constitute useful articles per se.²⁰⁷

While the court was arguably correct in its treatment of the facts, the “not a useful article” test suffers from the weakness of limited applicability. Indeed, even if Judge Calabresi were merely trying to accomplish an equitable result by punishing an apparently flagrant offender,²⁰⁸ a court’s ability to find works outside the realm of useful articles will only reach a relatively small number of cases that present works that arguably lack an intrinsic utility beyond portraying their own appearance. Most useful articles do not “straddle the line” between utility and sculpture; rather, they clearly offer an intrinsic utility and accordingly fall squarely within the useful articles domain.

H. Summary of the Spectrum of Tests

Yet, given their apparent failings, a more removed view of the tests discussed above provides some understanding of the useful articles domain. As an initial matter, if Denicola’s test cast useful articles in the wrong light, he did manage to sketch out an appropriate framework to the end of such general understanding. Denicola viewed useful articles as answering in different measures to utilitarian and aesthetic concerns.²⁰⁹ A few ironic examples help to demonstrate this duality. On one hand, one might treat the most intrinsically and mundanely useful object as art by, for example, affixing a coiled extension cord or basic house key to one’s wall. On the other hand, one might use one of Van Gogh’s paintings to swat flies, or ponder anything from Dante’s *Inferno* to *Saint Elmo’s Fire* while uneasily perched on the knee of Rodin’s *The Thinker*. Yet, glorifying the functional object by displaying it as art does not erase the underlying function of the object. Nor would the use of artistic works in the service of basic functional tasks render those works less intrinsically artistic. Thus,

²⁰⁶ *Id.* at 323 (alterations added).

²⁰⁷ *See id.* The court distinguished its seemingly inconsistent prior holding in *Carol Barnhart* by noting (1) that the mannequins in *Carol Barnhart* were stipulated to be useful articles and (2) that the mannequins in *Carol Barnhart* “were little more than glorified coat racks.” *Id.*

²⁰⁸ This was not the only litigation in which Dan Chase was accused of taxidermy piracy. *See Superior Form Builders, Inc. v. Dan Chase Taxidermy Supply Co.*, 74 F.3d 488, 491–92 (4th Cir. 1996).

²⁰⁹ Denicola, *supra* note 1, at 741 (“Because the dominant characteristic of industrial design is the influence of nonaesthetic, utilitarian concerns, copyrightability ultimately should depend on the extent to which the work reflects artistic expression uninhibited by functional considerations.”).

while all, or nearly all, objects may serve both aesthetic and utilitarian ends, different objects intrinsically serve these ends in varying degrees. Some, like the extension cord or house key, serve utility almost exclusively. Others, like a Van Gogh painting or Rodin's *The Thinker*, answer with equal exclusivity to aesthetics in spite of their fortuitous utility as a fly-swatter or chair.

In this sense, utility and aesthetics can be conceived of as operating along a spectrum somewhat akin to that present in the idea/expression dichotomy. At one end would lay the mundanely functional object whose aesthetic purpose borders on the infinitesimal. At the opposite end would sit a Van Gogh painting whose utility stretches credibility. In between these endpoints, more challenging works—like belt buckles and store mannequins—split their purpose in varying proportions between utility and aesthetics.

The series of useful articles tests described above merely attempt, for the most part, to place copyrightability thresholds at different points along this spectrum. At the highly aesthetic end of the spectrum, physical separability and the Goldstein test treat elements of useful articles as copyrightable only where they are wholly extrinsic to the utility of the overarching work. Accordingly, they respond almost exclusively to aesthetic purpose without serving any utility.²¹⁰ Towards the highly aesthetic endpoint of the spectrum, the *Carol Barnhart* majority and *Brandir-Denicola* tests allow copyright for certain sub-elements of useful articles bound into the overall utility of the work but which may, in the case of the *Carol Barnhart* majority, be extricated from the overall work or, in the case of *Brandir-Denicola*, be shown as answering to predominantly aesthetic concerns.²¹¹ Finally, the *Kieselstein-Cord* test operates at approximately the center of the spectrum, offering copyrightability to works whose aesthetic function slightly outweighs their utilitarian function.²¹² In Part IV, this article will argue that the useful articles domain contains one more test—a test whose threshold for copyrightability sits even farther in the direction of utility than *Kieselstein-Cord*'s.

²¹⁰ See discussion *supra* Parts II(A), II(D).

²¹¹ See discussion *supra* Parts II(B)–(C).

²¹² See discussion *supra* Part II(E). Both Nimmer's and Judge Newman's tests are disregarded here, as their placement in this spectrum is unclear. Nimmer's test, as based on the shifting currents of the marketplace, presumably sets a highly volatile threshold for copyrightability. See discussion *supra* Part II(F). Judge Newman's test—or non-test—confounds useful articles analysis to a point that no prediction in result is possible. See *supra* text accompanying notes 156–162.

III. THE *PIVOT POINT* DECISION

A. *Factual Background*

This article next turns to the Seventh Circuit's decision in *Pivot Point*, which involved the possible infringement of a mannequin head used as a cosmetology tableau. The court presumptively deemed the work at issue a useful article and subsequently invested considerable ink synthesizing precedent within that conceptual framework.²¹³

Pivot Point International, Inc. ("Pivot Point") had developed and manufactured educational aids for the hair design field since the mid-1960s.²¹⁴ To provide technical practice for would-be hair stylists, Pivot Point marketed mannequin heads, slip-on facial features and hair for otherwise featureless mannequins.²¹⁵ In the mid-1980s, Pivot Point sought to create a mannequin head based on the "hungry look" of high fashion models.²¹⁶ With that idea in mind, Pivot Point's founder commissioned Horst Heerlein, a German artist, to develop an original prototype of this mannequin concept.²¹⁷ Beyond a general requirement that the mannequin portray a "hungry look," Heerlein was free to exercise his judgment in creating the mannequin.²¹⁸ Heerlein's resulting creation bore the name "Mara."²¹⁹

Once created, Mara was subsequently converted to a mold and shipped to Hong Kong for large-scale production.²²⁰ The initial replications of Mara, however, did not conform to the mold, because their hairlines were too high.²²¹ The manufacturer remedied this defect by supplementing the mannequin's first hairline with a second, lower hairline.²²² The mannequin was implanted with hair as required, but the first hairline remained visible upon inspection.²²³

²¹³ *Pivot Point Int'l, Inc. v. Charlene Prods., Inc.*, 372 F.3d 913, 930–31 (7th Cir. 2004).

²¹⁴ *Id.* at 915.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

Pivot Point's creation met with significant economic success.²²⁴ To respond to customer demand, Pivot Point developed additional permutations of Mara featuring variations in skin tone and hair type.²²⁵ Each permutation bore its own distinct name, such as "Sonja" or "Karin."²²⁶

Around this time, Peter Yau, a former Pivot Point employee,²²⁷ began marketing a mannequin named "Liza" through his own business entity, Charlene Products, Inc. ("Charlene").²²⁸ Not only were Liza's facial features "strikingly similar" to Mara's, but Liza also bore a double hairline.²²⁹ Accordingly, Pivot Point filed suit claiming that Charlene had infringed its copyright in Mara through the creation and distribution of Liza.²³⁰

The district court found in favor of Charlene on grounds that Mara was a useful article that failed to pass separability scrutiny and was, therefore, not copyrightable material.²³¹ The court felt that Mara's function as a hairstyling practice tool rendered her a useful article.²³² The court then proceeded to apply physical and conceptual separability tests.²³³ On this point, the court determined that Mara "would not be *equally* useful if the features that Pivot Point want to copyright were removed."²³⁴

B. The 7th Circuit's Copyrightability Analysis

On appeal, the Seventh Circuit re-introduced the useful articles issue by reciting the appropriate statutory formulae.²³⁵ Although the court debated the extent of Mara's use as a surface for maquillage, it did not debate her utility as a

²²⁴ *Id.*

²²⁵ *Id.* at 915–16.

²²⁶ *Id.* at 916.

²²⁷ *Id.* at 916 n.2.

²²⁸ *Id.* at 916.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.* at 917.

²³² *Id.* at 916.

²³³ *Id.* at 917.

²³⁴ *Id.* (quoting *Pivot Point Int'l, Inc. v. Charlene Prods., Inc.*, 170 F. Supp. 2d 828, 833 (N.D. Ill. 2001)). The district court used the Goldstein test. *Id.*

²³⁵ *Id.* at 919.

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hairstyling tool.²³⁶ Accordingly, the court assumed that Mara was in fact a useful article.²³⁷

Having made this threshold determination, the court noted the somewhat inconsistent history of conceptual separability—an analysis made difficult by a lack of firm congressional guidance.²³⁸ The court also noted how the analysis had fractured into a myriad of tests for finding conceptual separability, including: (1) if “the artistic features are ‘primary’ and the utilitarian features ‘subsidiary,’”²³⁹ (2) whether “the useful article ‘would still be marketable to some significant segment of the community simply because of its aesthetic qualities,’”²⁴⁰ (3) if “the article ‘stimulate[s] in the mind of the beholder a concept that is separate from the concept evoked by its utilitarian function,’”²⁴¹ (4) if “the artistic design was not significantly influenced by functional considerations,”²⁴² (5) if “the artistic features ‘can stand alone as a work of art traditionally conceived, and . . . the useful article in which it is embodied would be equally useful without it,’”²⁴³ and (6) if “the artistic features are not utilitarian.”²⁴⁴

Pivot Point suggested a test that put the levels of artistic embellishment and copyrightability in lockstep, whereas Charlene offered its support for a recycling of the district court’s Goldstein application.²⁴⁵ The court, however, rejected each of these proposed tests for the following reasons: Pivot Point’s was too qualitative; Charlene’s because of its inevitable proximity to physical separability.²⁴⁶

Instead, the court charted a lengthy course through useful articles precedent in the hope of generating a representative test. The court reviewed several past opinions before mentioning *Mattel, Inc. v. Goldberger Doll Manu-*

²³⁶ *Id.* at 920 n.5.

²³⁷ *Id.*

²³⁸ *Id.* at 921.

²³⁹ *Id.* at 923 (citing *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989, 993 (2d Cir. 1980)).

²⁴⁰ *Id.* (quoting 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.08[B][3], at 2-101 (2008)).

²⁴¹ *Id.* (quoting *Carol Barnhart, Inc. v. Econ. Cover Corp.*, 773 F.2d 411, 422 (2d Cir. 1985)) (alteration in original).

²⁴² *Id.* (citing *Brandir Int’l, Inc. v. Cascade Pac. Lumber Co.*, 834 F.2d 1142, 1145 (2d Cir. 1987)).

²⁴³ *Id.* (quoting 1 PAUL GOLDSTEIN, COPYRIGHT § 2.5.3, at 2:67).

²⁴⁴ *Id.* (citing 1 WILLIAM F. PATRY, COPYRIGHT LAW & PRACTICE 285 (1994)).

²⁴⁵ *Id.* at 923–24.

²⁴⁶ *Id.* at 924.

facturing Co.,²⁴⁷ a case addressing the copyrightability of Mattel’s famous Barbie doll.²⁴⁸ In that case, the court found the doll sufficiently creative to satisfy *Feist*’s threshold, reasoning that “[t]here are innumerable ways of making upturned noses, bow lips, and widely spaced eyes.”²⁴⁹ Thus, while Barbie might not merit protection at the more abstract level such as the “idea” of an upturned nose, Mattel’s particular expression did merit protection.²⁵⁰

From this line of cases, the court interpreted “a progressive attempt to forge a workable judicial approach capable of giving meaning to the basic [c]ongressional policy decision to distinguish applied art from uncopyrightable industrial art or design.”²⁵¹ The *Pivot Point* court noticed a recent shift toward a more “process-oriented approach” for deciding copyright cases.²⁵² The court then decided that the test articulated in *Brandir* offered an appropriate synthesis in the useful articles domain.²⁵³ Using the *Brandir* test, Mara’s copyright would then be determined by “whether the design elements can be identified as reflecting the designer’s artistic judgment exercised independently of functional influences.”²⁵⁴

With that test in mind, the court held that it

must conclude that the Mara face is subject to copyright protection. It certainly is not difficult to conceptualize a human face, independent of all of Mara’s specific facial features, i.e., the shape of the eye, the upturned nose, the angular cheek and jaw structure, that would serve the utilitarian functions of a hair stand and, if proven, of a makeup model. Indeed, one is not only able to conceive of a different face than that portrayed on the Mara mannequin, but one easily can conceive of another visage that portrays the “hungry look” on a high-fashion runway model. Just as Mattel is entitled to protection for “its own particularized expression” of an “upturned nose[], bow lips, and widely spaced eyes,” so too is Heerlein (and, therefore, *Pivot Point* as assignee of the copyright registration) entitled to have his expression of the “hungry look” protected from copying.²⁵⁵

²⁴⁷ 365 F.3d 133 (2d Cir. 2004).

²⁴⁸ *Id.* at 133–34.

²⁴⁹ *Id.* at 135.

²⁵⁰ *Id.* at 135–36.

²⁵¹ *Pivot Point*, 372 F.3d at 930 (alteration added).

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.* at 931 (quoting *Brandir Int’l, Inc. v. Cascade Pac. Lumber Co.*, 834 F.2d 1142, 1145 (2d Cir. 1987)).

²⁵⁵ *Id.* (alteration in original) (citation omitted).

The court added that Mara was the sole result of Heerlein's artistic judgment.²⁵⁶ Beyond the prescription that the mannequin's features generally conform to a "hungry look," Heerlein was not required to mold his creation to any functional considerations.²⁵⁷ Finally, the court noted that unlike the "glorified coat-racks" in *Carol Barnhart*, "the creative aspects of the Mara sculpture were meant to be seen and admired."²⁵⁸ Accordingly, the court reversed the district court's grant of summary judgment.²⁵⁹

Judge Kanne filed a dissent, wherein he offered wholesale criticism of the majority's approach. While he agreed that Mara was in fact a useful article, he disagreed with the court's separability analysis.²⁶⁰ As an initial matter, he noted that Mara's features did not pass muster under a physical separability test, because the mannequin's very aesthetic qualities involved a certain degree of functionality.²⁶¹ Judge Kanne concluded, unlike the majority, that the district court had appropriately utilized Professor Goldstein's conceptual separability inquiry.²⁶² Furthermore, Judge Kanne opined that the majority's conceptual separability test failed on two counts. First, the *Brandir* test ignored the language of the statute, since it did not ask if the article incorporated features capable of both existing and being identified separately from the article's function.²⁶³ In that respect, the test contravened congressional intent.²⁶⁴ Second, Judge Kanne faulted the test for its process-centered approach.²⁶⁵ He contended that the article itself, and not the process of creation, should determine separability.²⁶⁶ Finally, Judge Kanne expressed some concern that the majority had allowed "Charlene's questionable business practices" to color its outcome.²⁶⁷ In view of these observations, Judge Kanne would have denied protection to Mara.²⁶⁸

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 932.

²⁵⁸ *Id.*

²⁵⁹ *Id.* In view of its result, the court remanded for a trial on the infringement claim. *Id.*

²⁶⁰ *Id.* at 932–33 (Kanne, J., dissenting).

²⁶¹ *Id.* at 933.

²⁶² *Id.*

²⁶³ *Id.* at 934.

²⁶⁴ *See id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.* Judge Kanne suggested, as a final counterargument, that other intellectual property regimes, such as design patent, trade dress, trademark or unfair competition laws, might provide substitute protection. *Id.* On this point, he is most likely guilty of overstatement.

C. An Analysis of the Pivot Point Decision

The court in *Pivot Point* spent considerable time synthesizing the useful articles doctrine. Ultimately, this synthesis led the court ostensibly to adopt the *Brandir*-Denicola test as the most appropriate summary of the sometimes dissonant useful articles tests.²⁶⁹ Upon closer analysis, however, the court's synthesis proves at once flawed and unapplied. Once divorced of this flimsy doctrinal support, the court's reasoning sloughs off to reveal a core holding grounded in pure creativity theory. Arguably, the court slipped into this more permissive standard as a result of the judicial realist impulse symptomatic of cases in the useful articles domain. But the case offers, as an unintended consequence of its use of the creativity test, yet another framework by which useful articles may be analyzed and, more importantly, a narrow glimpse into how the useful articles doctrine ought to be consistently applied. Normative theories, though, should await a detailed review of the decision.

Upon closer inspection, the Seventh Circuit's proffered basis for its decision in *Pivot Point*—the *Brandir* decision's process-oriented approach—proves specious. In navigating its way through prior precedent, the court distinguished the majority opinion in *Carol Barnhart* to be the result of the limits imposed by the creator's utilitarian concerns.²⁷⁰ Similarly, Judge Newman's dissent in *Carol Barnhart* conformed to a process-oriented inquiry, but only because the simultaneous entertainment of a utilitarian and aesthetic concept would be less likely to occur where a "product has reached its final form as a result of predominantly functional or utilitarian considerations."²⁷¹ In view of the discussion of useful articles in Part II above, the Seventh Circuit's attempted synthesis of the *Carol Barnhart* tests with the *Brandir* case seems strained. At bottom, the synthesis appears more the result of fortuitous facts than truly analogous useful articles tests. While the court was able to shoehorn the facts of several cases into a sampling of consistent results under differing tests, that reasoning fails more general scrutiny. In fact, numerous hypothetical factual scenarios would yield different results under what the court viewed as a consistent battery of tests. For example, the underlying premise of the *Brandir*-Denicola test—that a useful article will always result from a process constrained by utilitarian considerations—could fail. In that instance, a utilitarian-constrained process would fail to map to a utilitarian-constrained result. As a result, the work could theoretically fail copyright muster under the *Brandir*-Denicola test

²⁶⁹ *Id.* at 930 (majority opinion).

²⁷⁰ *Id.*

²⁷¹ *See id.* at 931.

while reaping copyright protection through the temporal displacement occasioned by the final, unconstrained result. Alternatively, if a work were to garner copyright per a finding of unconstrained process under the *Brandir*-Denicola test, the resulting work might not occasion a temporal displacement in the ordinary observer. Furthermore, in both cases, the work's utilitarian purpose could be deemed primary in relation to its subsidiary aesthetic purpose, or vice versa. Simply put, no macroscopic consistency in results under these tests is apparent.

More critically, though, the court never even applied the process-oriented test to the facts of the case. Nowhere in its opinion did the court review the process by which Mara was sculpted; rather, it only reviewed the result itself. Indeed, the court *couldn't* have applied the *Brandir*-Denicola test and reached its conclusion. Simply put, the creation of a mannequin that conforms to a high fashion "hungry look" requires creative obedience to numerous utilitarian constraints. As such, when the court treats Mara's creator's freedom as unfettered, its premise is incorrect. And were the ultimate decision in *Pivot Point* consistent with *Brandir*, such utilitarian constraints on the creation process would have nullified Mara's copyrightability.

Once stripped of its purported useful articles moorings, the *Pivot Point* decision reveals reasoning familiar to another area of copyright law—the test for "creativity" within the meaning of *Feist*. The court's specific language finding copyrightability is instructive on this point. Indeed, at first glance the court's reference to independence in its suggestion that one could "conceptualize a human face, independent of all of Mara's specific facial features"²⁷² evokes normal modes of separability analysis. Yet the court quickly recast this language by evoking the possibility of "another visage that portrays the 'hungry look' on a high-fashion runway model."²⁷³ The "hungry look" model, in the court's opinion, clearly serves as an abstraction of some generality in Learned Hand's hierarchy—the likes of Patry's "idea" of painting New York from a myopic point of view. By envisioning other possible "hungry look" mannequins, the court shifted its analysis to a level of higher specification, while suggesting that at least one alternative might serve its earlier generality. To emphasize this point, the court then leaned on a decision rooted in the *Feist* creativity standard, comparing the "'particularized expression' of [Barbie's] 'upturned nose[], bow lips, and widely spaced eyes'" with *Pivot Point*'s "hungry look" mannequins.²⁷⁴

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.* (quoting *Mattel, Inc. v. Goldberger Doll Mfg. Co.*, 365 F.3d 133, 136 (2d Cir. 2004) (first alteration added) (second alteration in original)).

Unquestionably, the court's language in *Pivot Point* stirs echoes of Judge Easterbrook's language in *American Dental*.²⁷⁵ There, as in *Pivot Point*, the court in dicta predicated copyrightability on the number of permutations that a work might assume while still serving the same higher level abstraction²⁷⁶—again, whether that be depicting New York, describing relativity or designing a mannequin or a Barbie doll. Indeed, if the *Pivot Point* court could easily conceive of one alternative, surely the court imagined many others in an amount sufficient to pass muster under Judge Easterbrook's *American Dental* language.

To the degree that the *Pivot Point* majority applied an alternatives-based creativity test to Mara, the court's reasoning does not cohere with its proffered synthesized process-oriented test. In fact, the alternatives-based test would vastly expand copyright protection in useful articles, as compared to any other commonly employed useful articles test. One can imagine any number of useful articles whose process of manufacture or creation drew strongly on utilitarian concerns. The average chair, for instance, will likely contain certain features, including appropriate horizontal and vertical surfaces, to support its potential user. As Judge Newman noted in his *Carol Barnhart* dissent, such an object would never pass muster under the temporal displacement test.²⁷⁷ By extension, the same object would not pass muster under the *Pivot Point* court's test in view of the court's understanding that its process-oriented test would inevitably reach the same result as the temporal displacement test.²⁷⁸ While this understanding might be correct, in the sense that a chair in fact would not merit copyright protection under the *Brandir*-Denicola test because its creator would suffer numerous utilitarian constraints in the design process,²⁷⁹ the creativity test might well find the same chair copyrightable. Provided that one could imagine an abstraction of a chair that did not merge with the expression of a chair, the chair would warrant copyright protection. More specifically, a chair at a high level of abstraction²⁸⁰ does not dictate the width of its legs or the mere existence of legs—

²⁷⁵ See *supra* text accompanying note 100.

²⁷⁶ See *Pivot Point*, 372 F.3d at 930–32; *Am. Dental Ass'n v. Delta Dental Plans Ass'n*, 126 F.3d 977, 979 (7th Cir. 1997).

²⁷⁷ *Carol Barnhart, Inc. v. Econ. Cover Corp.*, 733 F.2d 411, 422 (2d Cir. 1985) (Newman, J., dissenting).

²⁷⁸ *Pivot Point*, 372 F.3d at 931.

²⁷⁹ *Brandir Int'l, Inc. v. Cascade Pac. Lumber Co.*, 834 F.2d 1142, 1145 (2d Cir. 1987) (“[W]here design elements can be identified as reflecting the designer's artistic judgment exercised independently of functional influences, conceptual separability exists.”).

²⁸⁰ By “high level of abstraction,” I mean a level similar to that suggested by the *Pivot Point* court when it used the idea of a hungry look, high-fashion model as the idea underlying Mara.

many chairs may be created even if one particular leg width, leg shape or leg configuration is granted a thin copyright. As such, the creativity test offered by the *Pivot Point* court sets a threshold for copyrightability farther to the utility end of the utility/aesthetics spectrum than any other test earlier suggested by either scholar or court.

IV. WHY A “CREATIVITY” TEST MAY NOT BE SO HARMFUL

Regardless of whether the Seventh Circuit inadvertently premised, or willfully dissembled premising, conceptual separability on a test more suited to the determination of the presence of creativity—and in particular, a test that grants more significant protection to useful articles—the question then arises whether such novel application of the test is in fact desirable. This article argues that it is.²⁸¹

Before proceeding to reasons supporting this argument, certain criticisms may well be aired to the contrary. The dissent in *Pivot Point*, for instance, chided the majority for its failure to adhere to congressional intent.²⁸² On this topic, the House Report attempted to limit the practical breadth of conceptual separability’s application, noting that “although the shape of an industrial product may be aesthetically satisfying and valuable, the Committee’s intention is not to offer it copyright protection under the bill.”²⁸³ Protecting works inasmuch as they satisfy creativity would certainly introduce protection to works based on the aesthetic satisfaction that may accompany creativity. Arguably, this is precisely what occurred in *Pivot Point*, and in this way, consistent use of a creativity test could fortuitously cast penumbral protection over those parts of useful articles that happen to offer appealing design and utility simultaneously.

In any case, Congress probably intended to erect a higher barrier for copyrightability of useful articles by singling out such works for more demanding treatment. Yet wholly clear from the inconsistent judicial and academic response to the expression of this intent is just how high that barrier is. By interpreting the constitutional requirement of originality as equally requiring a “modicum of creativity,” the Supreme Court may have raised the bar for basic copy-

²⁸¹ The French already protect certain useful articles, as a subset of the broader protection that the French Intellectual Property Code provides, to “all works of the mind, whatever their kind, form of expression, merit, or purpose.” C. PROPRIETE INTELLECTUELLE art. L112-1, available at http://195.83.177.9/upl/pdf/code_35.pdf (translated in English).

²⁸² See *Pivot Point*, 372 F.3d at 934 (Kanne, J., dissenting).

²⁸³ H.R. REP. NO. 94-1476, at 55 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5668.

rightability to a level coextensive with that intended by Congress for useful articles.

As a final counterargument to the application of a creativity test to useful articles, the *Pivot Point* dissent observed the possibility that the majority had acted on an impulse to punish inequitable conduct.²⁸⁴ Indeed, Yau and Charlene's mimicry of the double hairline, coupled with Yau's previous work in the service of *Pivot Point*, all but assured that he had enriched himself at the expense of *Pivot Point*'s potential market.²⁸⁵ The court's censure of such misappropriation smacks of an equitable result reached via the use of a generous test. Perhaps the court felt that it could not reach its desired result under the Newman or *Brandir*-Denicola tests. While such a contortion of outcome may have carried the day in *Pivot Point*, a more regularly applied test would not necessarily admit to such judicial realism. This is particularly true here, where the creativity test's true force lies in the distinct threshold it sets along the utility/aesthetics spectrum, as compared to the thresholds of other, unapplied tests.

In fact, the court could not have reached its result without resorting to the alternatives-based creativity test. As the dissent noted, the sculpture contained no elements that were physically separable from the utility of the sculpture as a cosmetology tool.²⁸⁶ The court, therefore, would have met with equal challenges in attempting to justify copyright under Goldstein's test. Even if the court were to presume that the sculpture could function as a work of art, as it is traditionally conceived, all elements of the sculpture served the function of providing a realistic training tool and the removal of any part would have lessened the utility of the whole. Further, the *Brandir*-Denicola test provides little support for the court's findings because Heerlein's design answered to numerous constraints evident in the creative process. Nor could the court have justified its result under the primary-subsiary test of *Kieselstein-Cord*, because Mara's ornamental value clearly paled in comparison to its practical utility to students. Finally, even under Judge Newman's abstract test, based on temporal displacement, Mara may not have merited protection. While the application of Judge Newman's test to a similar mannequin revealed such a displacement, the Seventh Circuit's brand of ordinary observer may not have agreed with such a finding with respect to Mara.

Along these lines, an alternatives-based creativity test may offer numerous additional benefits when applied to useful articles. For one, although a creativity test as applied to useful articles may run counter to the language of the

²⁸⁴ See *Pivot Point*, 372 F.3d at 934 (Kanne, J., dissenting).

²⁸⁵ See *id.* at 916 & n.2 (majority opinion).

²⁸⁶ *Id.* at 933 (Kanne, J., dissenting).

House Report, it does not necessarily run counter to the language of the statute itself. Elements of a useful article are copyrightable to the extent that they can be “identified separately from . . . the utilitarian aspects of the article.”²⁸⁷ As noted earlier, the requisite separability requires a certain degree of conceptual separability in keeping with the holding in *Mazer*.²⁸⁸ This separability could legitimately exist to the extent that a specific embodiment of a useful article is separable from a somewhat more generalized abstraction of an article.

Lest this approach be criticized as restricting the useful articles exclusion to an “abstraction,”²⁸⁹ the adoption of an idea/expression creativity approach in the useful articles area would necessarily be accompanied by the merger and associated *scènes à faire* doctrines. Accordingly, those elements of a useful article that are required by the idea of the useful article would not warrant copyright protection.²⁹⁰ For example, the expression of attaching four legs to the seat of a chair effectively merges with the idea of supporting a chair with those legs, as this expression tracks one of a few reasonably likely choices for leg numbers. Similarly, the *scènes à faire* doctrine would ensure that those elements concomitant to a certain useful article would not receive protection.²⁹¹ Accordingly, the idea of arranging a keyboard in a typical “QWERTY” layout, for instance, could not be copyrighted as such a stock element.

In view of these limits, and the requirement that a sub-part of a useful article embody one of a sufficient quantum of alternative designs,²⁹² adoption of a creativity standard allows courts—without straying afield of the statutory language—to adhere most faithfully to the utilitarian theory’s balance.²⁹³ That is,

²⁸⁷ 17 U.S.C. § 101 (2006).

²⁸⁸ See *supra* text accompanying notes 8–13.

²⁸⁹ See *Lotus Dev. Corp. v. Borland Int’l, Inc.*, 49 F.3d 807, 816 (1st Cir. 1995), *aff’d*, 516 U.S. 233 (1995). There, the First Circuit expressed its disapproval of the district court’s treatment of the “method of operation” exclusion embodied in 17 U.S.C. § 102(b) as limited to mere “abstraction.” *Id.* For whatever value this concern may have, it should have been allayed in that case, as it is suggested here, through retooled applications of the merger and *scènes à faire* doctrines. The Tenth Circuit, for one, appears to believe as much. See *Mitel, Inc. v. Iqtel, Inc.*, 124 F.3d 1366, 1372 (10th Cir. 1997).

Although the *Lotus* decision is open to serious criticism for its conversion of the “method of operation” exclusion into a wholly arbitrary limit on computer copyright—that further threatens to drain software of any meaningful copyright, coupled with an unusual aversion to copyright in seemingly literal expression—such criticism should be reserved for a different article. For a more thorough treatment of this, see generally Patry, *supra* note 39, at 58–63.

²⁹⁰ See *supra* text accompanying notes 54–60.

²⁹¹ See *supra* note 36.

²⁹² See *supra* text accompanying notes 249–250.

²⁹³ See *supra* notes 33–36 and accompanying text.

because an alternatives test is best tailored to the measure of creativity—and creativity is the appropriate focal point of copyrightability per the *Feist* decision—the alternatives test is best able to reward the creator’s copyrightable contribution. Moreover, because both a useful article’s idea and utility serve as constraints,²⁹⁴ neither may be appropriated. Accordingly, the public retains control over the utilitarian concepts underlying the article, even if one embodiment of that concept is appropriated. Because numerous alternatives are required, the public retains sufficient access to other expressions of either the article’s idea or utility.²⁹⁵

Finally, the use of a creativity test enables protection of works suffering from under-protection²⁹⁶ at present. As noted earlier in this article, certain sets of goods attract substantial investments of creativity and skill in the design of a final product only to see that design appropriated without recourse, owing to the product’s fortuitous utilitarian role.²⁹⁷ For instance, many aspects of textiles will fail to merit copyright protection despite the creativity inherent in those aspects; therefore, “creating a flattering neckline, designing the drape of a sleeve, or tailoring a suit”²⁹⁸ all struggle to pass separability muster.²⁹⁹ Still other useful articles encounter difficulty surmounting copyrightability hurdles; for example, a creatively designed measuring spoon having a heart-shaped bowl and arrow-

²⁹⁴ For an example of the types of constraints that can influence a useful article’s idea and utility in the computer software field, see *Computer Associates International v. Altai, Inc.*, 982 F.2d 693, 709–10 (2d Cir. 1992).

²⁹⁵ See *Dymow v. Bolton*, 11 F.2d 690, 691 (2d Cir. 1926).

²⁹⁶ On a related note, the adoption of a test offering broader protection to useful articles would further enable more stringent U.S. compliance with its international law obligations under the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPs”) section of the General Agreement on Tariffs and Trade. Frenkel, *supra* note 1, at 580. As Richard Frenkel notes, “TRIPs allows industrial designers to ‘prevent third parties not having the owner’s consent from making, selling or importing articles bearing or embodying a design which is a copy, or substantially a copy, of the protected design.’” *Id.* at 537. He does not believe that current industrial design protection sufficiently complies with TRIPs. *Id.* at 580.

²⁹⁷ See, e.g., Briggs, *supra* note 22, at 170.

²⁹⁸ *Id.* at 183.

²⁹⁹ See, e.g., *Galiano v. Harrah’s Operating Co., Inc.*, 416 F.3d 411, 419–22 (5th Cir. 2005). In this case, the court commented that “dress designs, which graphically set forth the shape, style, cut, and dimensions for converting fabric into a finished dress or other clothing garment, generally do not have artistic elements that can be separated from the utilitarian use of the garment, and therefore typically do not qualify for copyright protection.” *Id.* at 419. The court proceeded to adopt, without significant application, a Nimmer-style marketability test applicable to garment cases only. *Id.* at 421–22. In that case, though, the casino uniforms at issue may have failed this test as they could not be independently marketed outside of their native context. *Id.* at 422.

shaped handle³⁰⁰ attests to both labor and a modicum of creativity, but it will not be deemed to embody any separable elements under a usual analysis. A test that affords copyright protection to such works based on their creativity would more adequately and precisely incentivize the creative expenditures in these fields, while deterring currently unpunished inequitable conduct exercised by second-coming parties who may reap the reward of such creativity without investing in its creation.

V. CONCLUSION

A grant of copyright, according to the utilitarian theory of copyright law, is an attempt to incentivize the creation of works with the ultimate goal of providing the maximum public good. The idea/expression dichotomy and the creativity doctrine are a few of the means by which copyright law strikes a balance between creative incentive and public benefit. There are, however, many poorly conceived measures of copyrightability, including the labor expended in the pursuit of authorship, the intent of the creator and the process by which the creator achieved a result. Moreover, in the context of useful articles, there is a thorough lack of consistency in the varying judicially- and scholarly-proposed tests by which “separability” is measured. At least in the recent *Pivot Point* decision, courts have hitched, albeit unintentionally, their useful articles analysis to a more fundamental test for copyrightable creativity: one which determines copyrightability based on an abstracted conceptualization of the work at issue and the number of alternatives capable of satisfying that conceptualization. Far from disserving the useful articles field, the use of a creativity-based test could adequately incentivize currently under-incentivized creative outlets. Such added protection vis-à-vis the other useful articles may further serve the overarching utilitarian theory of copyright law by appropriately limning the scope of copyright in works of industrial design, all while remaining consistent with limits on protection necessary to works falling within the functional field. As such, the application of a “creativity” test to measure the copyrightability of a useful article may not be a harmful proposition at all.

³⁰⁰ Bonazoli v. R.S.V.P. Int'l Inc., 353 F. Supp. 2d 218, 220 (D.R.I. 2005).