

Copyright Law

Prof. Madison

University of Pittsburgh School of Law

Topics:

- Copyright Protection for Specific “Boundary” Cases
- Copyright Protection for Pictorial, Graphic & Sculptural (PGS) Works
- Section 101 of the Copyright Act: Definition of PGS work

Boundary problems: 2D and 3D works, “idea,” “usefulness,” and “expression”

Squishmallows Original Product



Skoosherz Copycat Product



New for Feb. 2024: Squishmallows (Jazwares) v. Skoosherz (Build-A-Bear)

Boundary problems: 2D and 3D works, “idea,” “usefulness,” and “expression”

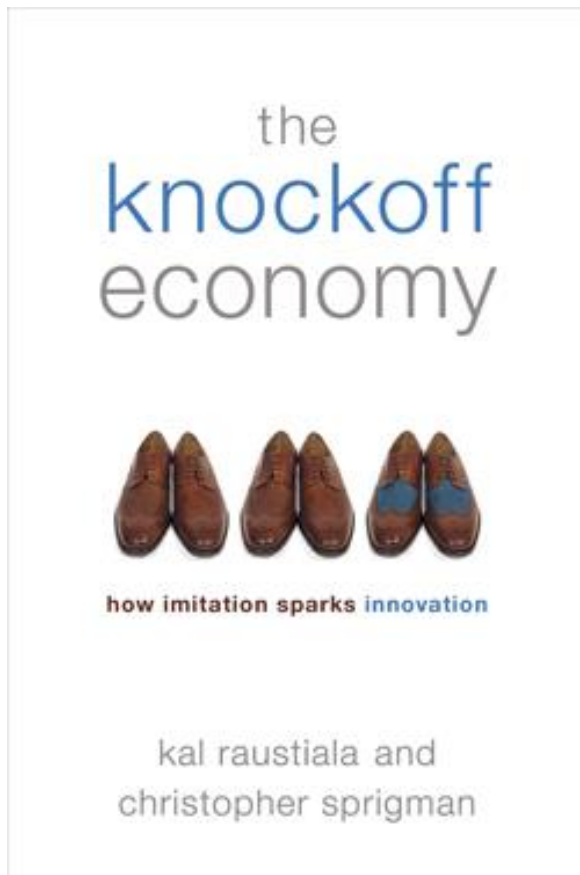


**Find the
copyrightable
work of
authorship.**

But: how?

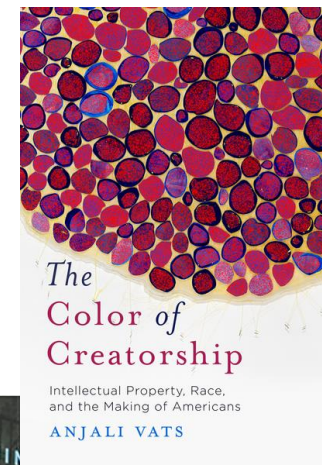
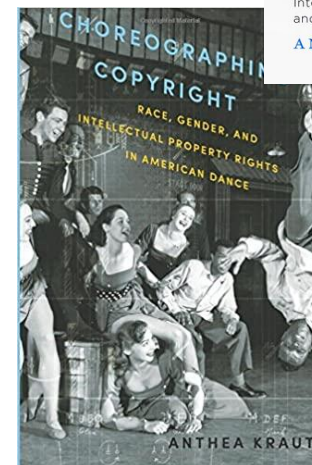
**Poe v. Missing
Persons
(9th Cir. 1984)**

Boundaries: what copyright does and does not do ... and to and for whom (especially relevant to advocacy and understanding your clients' context): In *form*, copyright is a neutral tool. In *practice*, copyright privileges (recognizes, gives the benefit of the doubt to, and otherwise accepts) certain "right" sorts of creativity (via enforcement of © or acceptance of certain sorts of claims of non-infringement, including fair use) and punishes (excludes via various doctrines, construes narrowly, and even rejects) certain "wrong" sorts of creativity. Is that a feature of the law, or a bug? *Watch for it.*



Example 1: Despite abundant economic evidence that knockoff fashion items (and other knockoffs) often are welfare-enhancing (they allow people without a lot of money to access versions of fancy (high social value?!) things, while not reducing the income of IP rights owners), IP law almost always punishes the (low social value?!) "counterfeiter."

Example 2: Copyright has a long history of accepting and validating claims of creative authorship by white creators and by men, often treating creation by or about Black Americans and by or about women as less than "original" in copyright terms or as unworthy of © (e.g., blues music that was treated as *public domain* source material for rock 'n roll compositions; Black and female choreographers and dancers struggled to be recognized as copyright creators).



Boundaries: Copyright and/vs. trademark law and/vs patent law

Practical applications – and a preview of coming attractions.

When / how should *fashion designers* receive copyright protection?



Design 078
Registration No. VA 1-413-421



Design 298B
Registration No. VA 1-318-226



Design 8815
Registration No. VA 1-675-965



Design 299A
Registration No. VA 1-318-228



Design 074
Registration No. VA 1-411-535

**Star Athletica, LLC v.
Varsity Brands, Inc.**
(U.S. 2017)

Are cheerleader uniforms protectable PGS works (i.e., protected by copyright)?

Should they be? Why / why not?

What about protection for their functionality?

What about protection for the “distinctive” style of a fashion designer (e.g., Chanel)?

Boundary problems: Key takeaways

IP systems create (potential) **benefits** and also inflict (potential) **harms**.

Benefits = incentives / rewards to creators / inventors / innovators / entrepreneurs mean more / better this-gen creation, invention, innovation, entrepreneurship (static benefits = here and now).

Harms = concentration of legal, economic power (monopolies?) in owners of IP rights creates barriers to next-gen creation, invention, innovation, entrepreneurship, including competition and other social/economic benefits (knowledge, culture, growth, jobs, community flourishing) (dynamic costs = future).

Each IP system calculates scope of IP protection (what is protected v what is public domain; what is infringing use v what is fair / free use) based on some “tailoring” of **benefits v costs relative to the subject matter** type of “knowledge content” involved (culture [**copyright**] v useful tech [**patent**] v industrial design [**design patents**] v advertising / marketing [**trademark**]).

Failure to **keep an IP system “in its lane”** (by permitting expansion of copyright rules too far into tech areas, for example) means mis-aligning the benefit/cost equation and the subject matter field. Some lane-overlap is OK. When/how should “lane maintenance” be performed in the legal system? In Congress? In specific cases?

Boundary problems: 2D and 3D works, “idea,” “usefulness,” and “expression”



VS.



With boundaries, beware of:

[1] **Anti-competitive uses/effects** of copyright protection (incumbent producer using copyright law to suppress competitors). Lack of competition makes © works more expensive than they would be in a competitive market.

[2] **Biases as to what is eligible for copyright protection**, and what is not.

- Bias as to “this sort of thing traditionally is / is not covered by copyright” and
- Bias as to “these people [as creators/authors] are typically eligible for copyright protection for their works,” and those people are not.

In other words: © has costs – micro and macro – as well as benefits. (How much do §§ 102(b) and 107 help?)

Boundary problems in intellectual property law

Works of authorship include the following categories:

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works;
- (7) sound recordings; and
- (8) architectural works.

17 U.S.C. § 102(a) (2022)

Boundaries in copyright and in IP (*blurred lines*):

- [Intangible] Work of authorship v. tangible medium [the fixed copy]
- Part v. whole [patterns of generality]
- Natural v. created (authored)
- Copied v. not copied (original)
- Source v. adaptation
- Which category of § 102 work
- Idea v. expression
- Solo v. joint authorship v. WMFH
- © subject matter v. patentable subject matter (utility / design) v. TM subject matter

Boundary problems: 2D and 3D works, “idea,” “usefulness,” and “expression”

Works of authorship **include** the following categories:

- (1) literary works;
- (2) musical works;
- (3) dramatic works, . . . ;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;**
- (6) motion pictures and other audiovisual works;
- (7) sound recordings; and
- (8) architectural works.

[Latter part of 17 U.S.C. § **102(a)** (2022)]

[**Nb.** Copyright subsists only in “original,” “authored,” and “fixed” aspects of PGS works, per the first part of § 102(a).]

“The terms “including” and “such as” are illustrative and not limitative.” 17 U.S.C. § **101** (2022)



Boundary problems: 2D and 3D works, “idea,” “usefulness,” and “expression”

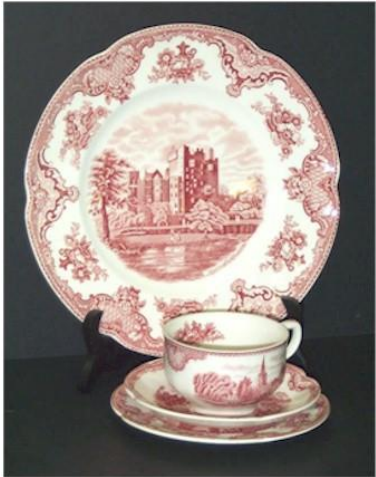
“Pictorial, graphic, and sculptural works” include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans. **Such works shall include works 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.**

17 U.S.C. § 101 (2022)

Boundary problems: 2D and 3D works, “idea,” “usefulness,” and “expression”

Applied Art

(works of authorship fixed in tangible media of expression)



Industrial Design

(new, original, and ornamental designs of articles of manufacture)



Boundary problems: 2D and 3D works, “idea,” “usefulness,” and “expression”



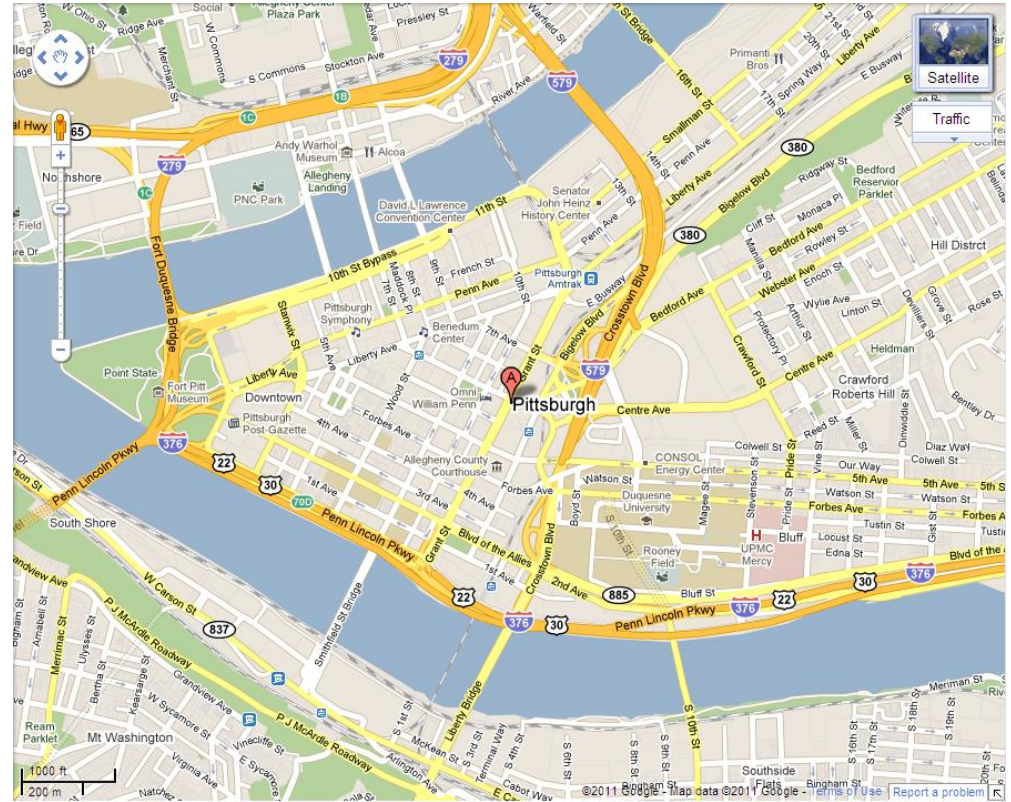
Mazer v. Stein (U.S. 1954): mass-produced [i.e., “industrial”] status of “sculptures” used as lamp bases does not preclude registration of the bases as copyrightable “works of art.”

But see Douglas, J.: Is copyright law meant to cover only “artistic” objects? *Raises problems of monopoly control of objects – manufactured things, a/k/a technology – w/o Patent Office exam.*

Boundary problems: 2D and 3D works, “idea,” “usefulness,” and “expression”

A “**useful article**” is an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally part of a useful article is considered a “useful article.”

17 U.S.C. § 101 (2022)



Is a map a “useful article”?

Boundary problems: 2D and 3D works, “idea,” “usefulness,” and “expression”



TIP: If you encounter a functional or potentially functional (including three-dimensional) work, it may be (or may include) a “PGS” work.

IF the PGS work is part of a “useful article,” you must separate features that are “applied art” (protectable as PGS works) from those that are “industrial design” (not protectable in © but possibly protectable via design patents).

Boundary problems: 2D and 3D works, “idea,” “usefulness,” and “expression”

Physical separability is (relatively) easy:

The Rolls-Royce “Spirit of Ecstasy” hood ornament is a PGS work; the car is the useful article.

[Nb. the patterns-of-generality problem in defining the relevant “thing.”]



Boundary problems: 2D and 3D works, “idea,” “usefulness,” and “expression”



Pictorial design for a functional thing copied to a lunchbox: the design of the costume is protected; the lunchbox infringes.

Pictorial design for a nonfunctional thing copied to an article of clothing: the design (the painting) is protected; the article of clothing infringes.



In *Star Athletica*: **Pictorial design for a functional thing, copied to a functional thing.** The graphic design is influenced by its functionality (making the wearer look slimmer, taller, “curvier,” “more like a cheerleader”). Does the design lose protection when applied to an article of clothing?

- What if the design (a cheerleader uniform) is (allegedly) what makes the article what it is (a cheerleader uniform)?
- Does it matter that the plaintiff is trying to control the market for these uniforms and exclude the defendant (producer of cheaper alternatives)?

Boundary problems: 2D and 3D works, “idea,” “usefulness,” and “expression”



**Star Athletica, LLC v.
Varsity Brands, Inc.**
(U.S. 2017)

**Are cheerleader uniforms
protectable PGS works (i.e.,
protected by copyright)?**

Should they be? Why / why not?

Star Athletica, LLC v. Varsity Brands, Inc. (U.S. 2017):

The imagination test.











“[A]n artistic feature of the design of a useful article” “is eligible for copyright protection only if the feature (1) can be perceived as a two-dimensional or three-dimensional work of art separate from the useful article and (2) would qualify as a protectable pictorial, graphic, or sculptural work – either on its own or fixed in some other tangible medium of expression – if it were imagined separately from the useful article into which it is incorporated.”

1/ Is the plaintiff trying to enforce a copyright in the *design of a useful article*?

2/ If so, can the design be identified *separately* from the article?

3/ Nb. the overall shape of a useful article is *not* copyrightable without a *separability* analysis, even if the overall shape is artistic or creative.

Does this standard give anyone useful guidance as to what is / is not covered by ©?

| Varsity's Copyright Registrations | Star's Accused Catalogue Designs |
|---|---|
|  <p>Design 078 Registration No. VA 1-417-427</p> |  |
|  <p>Design 083 Registration No. VA 1-675-905</p> |  |
|  <p>Design 209 Registration No. VA 1-319-226</p> |  |
|  <p>Design 205A Registration No. VA 1-319-228</p> |  |
|  <p>Design 074 Registration No. VA 1-411-535</p> |  |

Boundary problems: 2D and 3D works, “idea,” “usefulness,” and “expression”



**Star Athletica, LLC v.
Varsity Brands, Inc.**
(U.S. 2017)



©?



Fig. 4: Marcel Duchamp,
“In Advance of the Broken Arm”

©?

Boundary problems: 2D and 3D works, “idea,” “usefulness,” and “expression”



Tear Drop Light Set



Advance Light Set



Jetmax Ltd. v. Big Lots, Inc. (S.D.N.Y. 2017)

The deft moved for summary judgment on the ground that the plaintiff possessed no valid copyright in the “Tear Drop Light Set.”

Boundary problems: 2D and 3D works, “idea,” “usefulness,” and “expression”



**Star Athletica, LLC
v. Varsity Brands,
Inc. (U.S. 2017)**

9. On or about September 25, 2017, Rasta Imposta discovered that Ligeri's company Kangaroo had copied the Banana Design and was offering Kangaroo Item Nos. 10477 and 10478, pictured below alongside Rasta Imposta's Banana Design:

RASTA IMPOSTA



KANGAROO ITEM 10477



KANGAROO ITEM 10478



10. Rasta Imposta discovered the infringement when it was forwarded a copy of Kangaroo Costume's 2017 Halloween catalogue by a third party.

**Silvertop Associates v. Kangaroo Manufacturing, Inc.
(3d Cir. 2019)**

Boundary problems: 2D and 3D works, “idea,” “usefulness,” and “expression”

Physical separability:

**Home Legend v.
Mannington Mills**
(11th Cir. 2015)

(design of faux hardwood material intended to look like real maple floors and affixed to laminated flooring material)

(Note: Pre-*Star Athletica*)



Distressed Maple Mendocino



Glazed Maple

Boundary problems: 2D and 3D works, “idea,” “usefulness,” and “expression”



Kieselstein-Cord v. Accessories by Pearl, Inc. (2d Cir. 1980):

Belt buckle as PGS work? Yes.
(Note: Pre-*Star Athletica*)

- * “**conceptually** separable sculptural elements”;
- * “primary ornamental aspect”;
- * buckles “rise to the level of creative art”

Is this still good law?

Boundary problems: 2D and 3D works, “idea,” “usefulness,” and “expression”

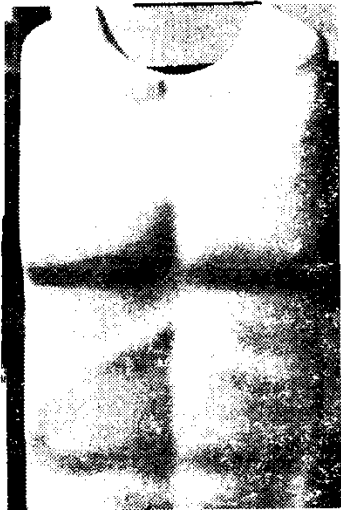


Figure 1



Figure 2



Figure 3



Figure 4

Carol Barnhart Inc. v. Economy Cover Corp. (2d Cir. 1985):

Mannequin as PGS work? No.

“features claimed to be aesthetic or artistic . . . are inextricably intertwined with the utilitarian feature, the display of clothes”

Kieselstein-Cord: “ornamented surfaces of the buckles were not ... required by their utilitarian functions; [they] could thus be conceived of as ... added to ... an otherwise utilitarian article.”

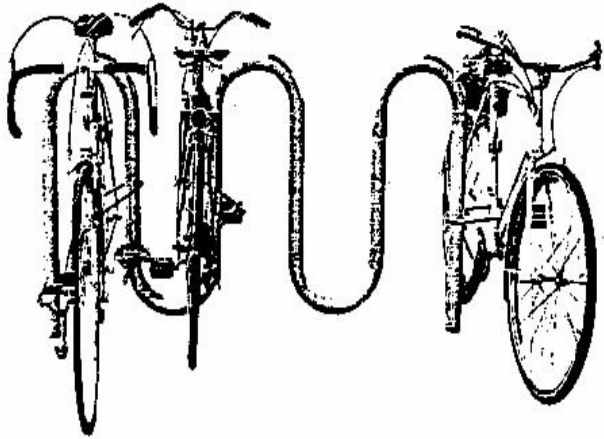
Is this still good law?

Boundary problems: 2D and 3D works, “idea,” “usefulness,” and “expression”



**Brandir Int’l v. Cascade Pac.
Lumber Co. (2d Cir. 1987):**

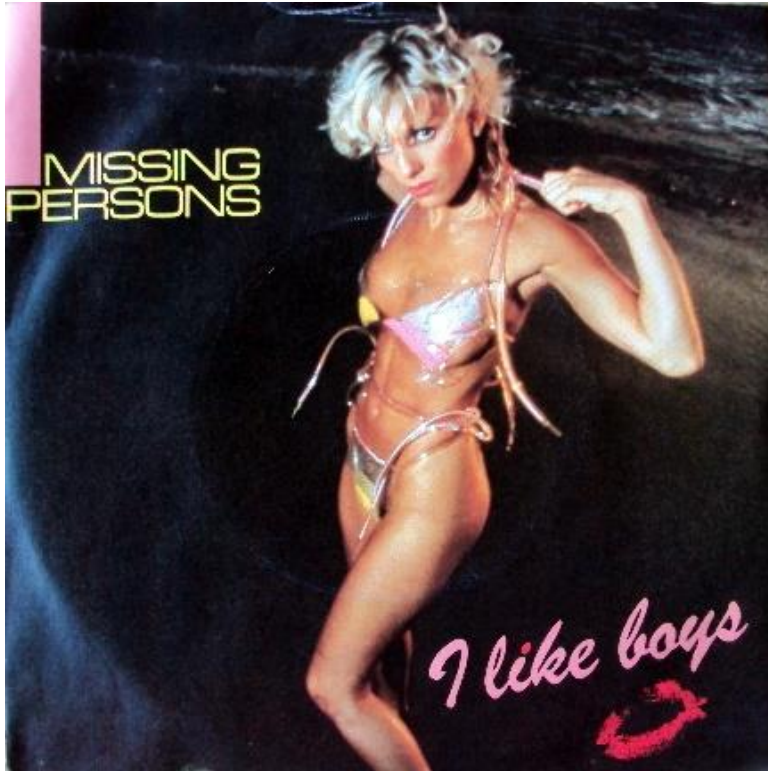
“Ribbon rack” bicycle rack as PGS
work? No.



“where design elements can be
identified as reflecting the
designer’s artistic judgment
exercised independently of
functional influences, conceptual
separability exists.”

Is this still good law?

Boundary problems: 2D and 3D works, “idea,” “usefulness,” and “expression”



**Poe v. Missing
Persons**
(9th Cir. 1984)

(a) Is this a useful article? Relevant evidence:

- (1) Expert testimony
- (2) Designer’s intent
- (3) Custom and usage in the art world and clothing trade
- (4) Marketability as art

Is this still good law?

(b) If so, is the work conceptually separable from the object?

Is the design a work of art?

Would the article be equally useful without it?

Boundary problems: 2D and 3D works, “idea,” “usefulness,” and “expression”

Squishmallows Original Product



Skoosherz Copycat Product



New for Feb. 2024: Squishmallows (Jazwares) v. Skoosherz (Build-A-Bear)



THE END



MADE IN HOLLYWOOD, U. S. A.

BY

Metro-Goldwyn-Mayer