Protection of the Design of Useful Articles: Current Inadequacies and Proposed Solutions

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INTRODUCTION

The Constitution provides for the protection of "Writings and Discoveries." Two discrete statutory schemes have emerged to cover these different types of works. Copyright law secures exclusive rights in literary and artistic property, whereas patent law applies to items of "invention." Despite the broad range of creative products protected under these schemes, there remains a "twilight zone" of creative output that is inadequately protected by either system—the design of useful articles.

This note illuminates the policies underlying the legal protection of literary, artistic, and inventive creations, and shows why protection should extend to the design of useful articles. It contrasts the extent of protection provided by the copyright system with that of the patent system and compares the amount of effort required to trigger such protection on the part of an author with that of an inventor. The design of useful articles seems to fall in between these systems, and hence is left largely unprotected. This note examines the design area in an effort to develop a scheme of protection, and thus rectify the current inadequacy in the law.

The case law that has developed around the statutory framework has failed to fill the gap left by the copyright and patent statutes. As first confronted in Mazer v. Stein, and later addressed in

1. U.S. CONST. art. I, § 8, cl. 8. This clause gives Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Id.
2. See Mazer v. Stein, 347 U.S. 201, 219 (1954); infra notes 19, 21 and accompanying text.
3. 35 U.S.C. § 101 (1976); see infra notes 18, 20-21, 50 and accompanying text.
4. This note focuses exclusively on federal copyright and patent protection. Common law copyright protection for works that are fixed has become expressly preempted by the current federal statute. See 17 U.S.C. § 301(a) (Supp. V 1981).
5. 347 U.S. 201 (1954). For a discussion of Mazer, see infra notes 114-32 and accompanying text.
Esquire, Inc. v. Ringer6 and Kieselstein-Cord v. Accessories By Pearl, Inc.,7 the area of design protection has been treated by the courts in confusing and often conflicting ways. Judicial interpretation of the statutes—especially of the copyright statute—has not significantly clarified their meaning. The current statutory language has proved to be an unworkable standard for consistent application. A broader reading of the statutory language might provide greater consistency—essential to judicial determination of cases and to proper guidance for the bar—while at the same time providing adequate design protection. This note offers a construction of the existing statutory language to serve as a basis for future judicial resolution of the current conflicting interpretations of the law.

Other statutory schemes have been proposed to protect designs of useful articles not covered by copyright or patent law.8 The Senate passed a design bill9 at the time of the 1976 Copyright Act revision, but it was not adopted in the final version of the Act.10 The bill outlined a system of design protection, attempting to compensate for the inadequacy of the copyright law in this area. This note demonstrates that the proposed legislative treatment of the problem would have been an ineffective foundation for judicial interpretation, engendering further confusion and continued inadequate protection.11 Finally, this note proposes an alternative statutory solution to the problem of inadequate design protection. The proposal is intended to encourage the creation of designs by providing rights to protect against commercial exploitation but not extending those rights to the


7. 632 F.2d 989 (2d Cir. 1980). For a discussion of Kieselstein-Cord, see infra notes 174-93 and accompanying text.


11. See infra notes 261-67 and accompanying text.
utilitarian features of the protected article. The proposed plan is a hybrid of copyright and design patent law, protecting those designs that satisfy the threshold level of "originality" required by the copyright law but not the more stringent patent tests of "novelty" and "non-obviousness." The proposal attempts to overcome the shortcomings of the design bill by providing a framework amenable to judicial application that will effectively protect the design of useful articles.

Copyright Versus Design Patent Protection

Purposes of Protection

Copyright law applies to "Authors" and their "Writings;" patent law applies to "Inventors" and their "Discoveries." The fundamental purpose of copyright law—to encourage "the production of literary [or artistic] works of lasting benefit to the world," parallels that of patent law—"to promote the progress of science and the useful arts." To effectuate this common purpose, both systems provide a financial incentive to authors and inventors in the form of a monopoly over their creation for a limited period of time. Design protection stems from a definition in the current copyright statute, and from a separate chapter of the patent statute that serves to distinguish between design patents and utility patents. Design patent protection seeks to "encourage ornamentation and beautification in

16. See infra notes 262-81 and accompanying text.
21. See Hechling v. Universal City Studios, Inc., 618 F.2d 972, 974 (2d Cir.), cert. denied, 449 U.S. 841 (1980) (copyright case); Griffith Rubber Mills v. Hoffar, 313 F.2d 1, 3 (9th Cir. 1963) (patent case). The copyright or patent monopoly is considered "a fair return for . . . creative labor." Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).
manufactured articles so as to increase their saleability and satisfy the aesthetic sense of the purchaser.\textsuperscript{24} Utility patents are addressed to the workings of the articles themselves, protecting their functional, rather than aesthetic, qualities.\textsuperscript{25}

**Differences Between Copyright and Design Patent Protection**

Although both the copyright and patent systems offer design protection, they exhibit marked differences in several respects. The requirements for securing copyright protection differ from those for obtaining a design patent. Additional hurdles exist on the path to a design patent that are absent in the copyright scheme. Different bundles of rights inure to copyright and design patent owners. Along with those rights comes the ability to prevent different types of infringing activity, depending upon the type of protection obtained.

In order to be eligible for copyright protection under the Copyright Act of 1976, a work must be an "original [work] of authorship fixed in any tangible medium of expression."\textsuperscript{26} The requirement of "originality" can be satisfied by a minimum of independent\textsuperscript{27} creative\textsuperscript{28} effort.\textsuperscript{29} It is, essentially, a "prohibition of actual copying."\textsuperscript{30} An author can draw substantially from the works of others and still receive copyright protection for his work as long as it varies distinguishably\textsuperscript{31} from those works and represents the author's exercise of his "own skill, labor, and judgment."\textsuperscript{32}

Artistic works protected by the copyright statute are not subject to administrative or judicial examinations of their artistic merit or aesthetic value.\textsuperscript{33} This "nondiscrimination" principle, which prevents


\textsuperscript{27} See 1 M. Nimmer, NIMMER ON COPYRIGHT § 2.01[A], at 2-6 (1981).

\textsuperscript{28} While "creativity" and "originality" can be viewed as separate elements, such a distinction may be merely one of semantics. Id. § 2.01[B], at 2-13.

\textsuperscript{29} L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 490-91 (2d Cir.), cert. denied, 429 U.S. 857 (1976) (the mere translation of a work of art in the public domain into a different medium does not satisfy the originality requirement).

\textsuperscript{30} Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 103 (2d Cir. 1951) (footnote omitted).

\textsuperscript{31} Strong similarities between two works can establish copying. See Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946).

\textsuperscript{32} Dorsey v. Old Surety Life Ins. Co., 98 F.2d 872, 873 (10th Cir. 1938).

\textsuperscript{33} See Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251-52 (1903).
favoring one art form over another, stems from both the policy of protecting all forms of creative output and the perceived judicial incompetence in making artistic evaluations. The objective viewpoint this principle demands must be adhered to when analyzing copyrightability issues, but it is often consumed by more subjective considerations.

One category of "works of authorship" protected by the statute is that of "pictorial, graphic, and sculptural works." This category is defined to include the "form" of "works of artistic craftsmanship," and the "design of a useful article." To be eligible for copyright protection, a design of a useful article must contain "features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article." The drafters of the Act culled this language from Copyright Office Regulations in an effort to distinguish between copyrightable works of applied art and uncopyrightable industrial designs. The design features of an industrial product must be capable of either physical or conceptual separation from its utilitarian aspects in order for them to be given copyright protection. Case law fails to clarify the language of the statute and provides little guidance for applying the

34. See id. at 250-51. In granting copyright protection to circus posters, the court stated: "[T]he [copyright] act however construed, does not mean that ordinary posters are not good enough to be considered within its scope." Id. at 251.


36. This would occur where the individual analyzing copyrightability factored his own personal tastes and preferences into the analysis. An aficionado of classical art, for example, might be more inclined to uphold copyright protection for a classically designed useful article than for one of modern, abstract design. See infra notes 172-73 and accompanying text.


38. Id. § 101 (definition of "Pictorial, graphic, and sculptural works").

39. Id.

40. A "useful article" is defined as "an article having an intrinsic utilitarian function." Id.


42. 37 C.F.R. § 202.10(c) (1975) (repealed 1978).


44. Id. at 55, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 5659, 5668.
statutory criteria.\textsuperscript{45}

An article must meet more stringent requirements to qualify for design patent protection, and for patent protection in general, than for copyright protection. In addition to "originality," designs must be "new . . . and ornamental,"\textsuperscript{46} and be embodied in an "article of manufacture."\textsuperscript{47} They must also satisfy the general patent tests of novelty\textsuperscript{48} and non-obviousness.\textsuperscript{49} Protectable designs must rise to a level of "invention"\textsuperscript{50} beyond the requisite level of creativity required for copyright protection.

Ornamentality of a design is adjudged from the standpoint of an "ordinary observer."\textsuperscript{51} This criterion of design patentability is satisfied if the article exhibits rudimentary "aesthetic skill and artistic conception."\textsuperscript{52} Novelty exists when the article for which patent protection is sought has not been anticipated by another or by the inventor/designer of the article himself.\textsuperscript{53} A patent will not be granted if the article is found to have been anticipated.\textsuperscript{54}

The test of non-obviousness compares the claimed design with the prior art\textsuperscript{55} from the point of view of one having "ordinary skill in the art."\textsuperscript{56} The Supreme Court in \textit{Graham v. John Deere Co.}\textsuperscript{57} developed a three-pronged approach to facilitate analysis of this issue: first, a determination of the "scope and content of the prior art," second, identification of the differences between the claimed subject matter and the prior art, and finally, a resolution of the "level of

\begin{enumerate}
\item See I. \textsc{Nimmer}, \textit{supra} note 27, § 2.08[B], at 2-90; \textit{infra} notes 133-200 and accompanying text.
\item Id.
\item Id. § 102.
\item Id. § 103.
\item "Whoever invents any new, original and ornamental design for an article of manufacture may obtain a patent therefor . . . ." Id. § 171 (emphasis added).
\item See Popeil Bros., Inc. v. Schick Elec., Inc., 494 F.2d 162, 164 (7th Cir. 1974); 35 U.S.C. § 102 (1976). "Anticipation" refers to the "disclosure in the prior art of a thing substantially identical with the claimed invention." Smith v. ACME General Corp., 614 F.2d 1086, 1088 n.6 (6th Cir. 1980); \textit{see} Continental Oil Co. v. Cole, 634 F.2d 188, 195 (5th Cir.), \textit{cert. denied}, 454 U.S. 830 (1981); Popeil, 494 F.2d at 164.
\item See Smith v. ACME General Corp., 614 F.2d 1086, 1088 n.6 (6th Cir. 1980).
\item 383 U.S. 1 (1966).
\end{enumerate}
ordinary skill in the pertinent art."\textsuperscript{58}

Thus, works exhibiting ordinary skill may qualify for copyright protection while not meeting the degree of uniqueness required for design patent protection.\textsuperscript{69} The extent of design patent protection, however, greatly surpasses that of copyright protection.\textsuperscript{60}

Copyright protection for works created on or after January 1, 1978 lasts for the author’s life plus an additional fifty years.\textsuperscript{61} Copyright holders have the exclusive right to reproduce and distribute copies of the work,\textsuperscript{62} to use the work as the basis for a derivative work,\textsuperscript{63} and, in the case of “pictorial, graphic, and sculptural works,” to display the work publicly.\textsuperscript{64} The reproduction right in the case of “pictorial, graphic, and sculptural works” includes the right to reproduce the work “in or on any kind of article.”\textsuperscript{65} Copyright protection in such an article, however, does not include the right to manufacture it,\textsuperscript{66} nor does the copyright extend to the utilitarian aspects of the article.\textsuperscript{67} Pictures or photographs of such articles appearing in advertisements, “commentaries” or news reports would not infringe the rights of the copyright holder.\textsuperscript{68}

Infringement of copyright occurs upon violation of any of the exclusive rights of the copyright owner.\textsuperscript{69} The article must be copied without authority from the copyright owner.\textsuperscript{70}

\textsuperscript{58} Id. at 17.
\textsuperscript{59} See Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 102 (2d Cir. 1951).
\textsuperscript{60} See id. at 103.
\textsuperscript{61} 17 U.S.C. § 302(a) (Supp. V 1981). Copyright protection in works made for hire, id. § 101 (definition of “work made for hire”), lasts for “seventy-five years from the year of [their] first publication, or . . . one hundred years from the year of [their] creation, whichever expires first.” Id. § 302(c).
\textsuperscript{62} Id. § 106(1), (3).
\textsuperscript{63} Id. § 106(2).
\textsuperscript{64} Id. § 106(5).
\textsuperscript{67} The statutory definition of “pictorial, graphic, and sculptural works” provides for their protection “insofar as their form but not their mechanical or utilitarian aspects.” 17 U.S.C. § 101 (Supp. V 1981).
\textsuperscript{70} Mazer v. Stein, 347 U.S. 201, 218 (1954); Blumcraft of Pittsburgh v. Newman Bros., 373 F.2d 905, 906 (6th Cir. 1967); 2 M. Nimmer, supra note 27, § 8.01[A], at 8-10.
Design patents are granted for a term of fourteen years. The owner of a patent is afforded "the right to exclude others from making, using, or selling the invention." Thus, the patent confers a legal monopoly over the manufacture, use and sale of the invention for the duration of its term. The extent of this monopoly is defined by the specifications and claims of the patent. A design patent protects the design of an article of manufacture. Design patent protection does not extend to the functional aspects of the article, but only to its appearance.

Patent infringement occurs upon unauthorized manufacture, use or sale of a patented invention. The specific test for design patent infringement, as articulated in Gorham Co. v. White is:

if, in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same, if the resemblance is such as to deceive such an observer, inducing him to purchase one supposing it to be the other, the first one patented is infringed by the other.

The design patent need not be copied to be infringed, since even independent creation of an article can infringe a patented design.
Articles Left Unprotected

While there is the potential for overlapping copyright and patent coverage for certain articles, judicial application of the statutory design provisions has left a gap in the fabric of legal protection. This gap can be attributed to the general reluctance of courts to award copyright protection to the design of a useful article that approaches an industrial design, along with the difficulty of applying the statutory tests of separability and independent existence of an article's design features. These factors, coupled with the inherent difficulty of obtaining a design patent, and the minimal chance of maintaining its validity once granted, leave the design of useful articles devoid of statutory protection.

Designs that have been held copyrightable include designs on glassware, dinnerware, fabric, jewelry designs, the design of an ornamental jewelry box, and that of a doll. Those that have been denied copyright protection include typeface designs, a watch.

more complex, rigorous and time-consuming than that for a copyright. Its application must include specifications, id. §§ 111-112, and, where necessary, drawings of the claimed subject matter, id. §§ 111, 113; models or specimens may also be required, id. § 114. The application is then examined and a prior art search is conducted to determine the patentability of the claimed design. Id. § 131.


85. See infra text accompanying notes 206-14.

86. For a more detailed and select case discussion, see infra notes 114-200 and accompanying text.

87. See infra note 99.

88. Ackerman: Protection of the Design of Useful Articles: Current Inadequacies Published by Scholarly Commons at Hofstra Law, 1983
Copyright protection seems to be granted to those designs that are "on" an article, and denied to designs that serve a basically functional purpose.  

Examining empirical data is one way of determining the effectiveness of design patents as a means of legal protection.  Rather than succumbing to the pitfalls of numerical analysis, the following overview of the range of articles that have received design patent protection is offered as an indication of the scope of this form of protection.

Design patents have been granted to silverware, pipes, and a garment rack. Pitchers, pens, and a tire tread have been denied design patent protection. A distinction similar to that drawn in the case of copyrights can be made here: If the design is fundamentally functional, it can only be protected, in that capacity, by...
utility patent.107

Desirability of Design Protection.—Legal protection for designs of useful articles is necessary to effectuate fully the purposes of the constitutional provision which gives Congress the power to grant limited monopolies to “Authors and Inventors.”108 Encouragement of the arts for public benefit is the fundamental goal of both the copyright and design patent statutes.109 Although this need has been recognized, it has not been adequately realized through the application of the statutes.110

The creator of an aesthetically appealing design should be allowed to reap the benefits of his or her efforts, which will ultimately serve the cause of public cultural advancement.111 His or her designs are no less worthy of legal protection than those which have been traditionally granted copyrights or design patents. Unintelligible standards112 and rigorous requirements113 should not bar protection for the design of useful articles.

CASE LAW CONFUSION

Mazer v. Stein

The Supreme Court’s major foray into the field of legal protection of the design of useful articles occurred in Mazer v. Stein.114 In Mazer, the Court addressed the question of the copyrightability of statuettes of human figures intended for use as lamp bases. Stein created and molded these original statuettes and registered them as “works of art” under the 1909 copyright law. The statuettes were sold as such, but were marketed predominantly as lamp bases. Mazer copied these statuettes, embodied them in lamps, and sold the

109. See supra notes 19-24 and accompanying text.
110. See Senate Report, supra note 9, at 161.
111. See 1980 A.B.A. SEC. PAT. TRADEMARK & COPYRIGHT L. 150 (committee reports). After the expiration of the term of design protection, the work would fall into the “public domain”—become available for the free use of the public.
113. The requirements of novelty, 35 U.S.C. § 102 (1976), and non-obviousness, id. § 103, demand a high level of uniqueness of design.
114. 347 U.S. 201 (1954). The Court granted certiorari to resolve a conflict between lower court decisions based on nearly identical facts. Id. at 203.
lamps without Stein’s authorization. Stein sued Mazer for copyright infringement. The district court dismissed the complaint, refusing to grant the design of the lamp copyright protection. The court of appeals reversed, stating that Stein’s use of the statuettes in an article of manufacture did not affect his ability to protect the statuette against infringement.

The Supreme Court held the statuettes to be copyrightable “works of art,” and upheld the validity of their registration despite their subsequent use in a manufactured product. The decision laid the groundwork for the sections of the current statute that pertain to this area of the law. The Court sought to define the parameters of protection for such “works of art” consistent with the goals of the Copyright Act. Industrial use of an article was thus found not to detract from its copyrightability. Protection extended to the right of the creator of the statuettes to “prevent use of copies of [his] statuettes as such or as incorporated in some other article.” This language indicates that both useful and nonuseful articles which copy a protected design can be found to infringe the copyright.

In establishing guidelines for copyright protection, the Court in Mazer held that “artistic articles are protected in ‘form but not [in] their mechanical or utilitarian aspects.’” The potential patentability of the statuettes was held not to bar copyright protection. Overlapping copyright and design patent protection thus became a very real possibility.

The boundary between copyrightable works of “applied art” and industrial designs not subject to copyright protection, as defined

115. Id. at 202-03.
116. Id. at 203, 204.
118. Stein v. Mazer, 204 F.2d 472, 481 (4th Cir. 1953), aff’d, 347 U.S. 201 (1954).
119. 204 F.2d at 477.
120. 347 U.S. at 218.
122. 347 U.S. at 218.
124. 347 U.S. at 218 (quoting 37 C.F.R. § 202.8 (1949)).
125. Id. at 217.
126. Courts have since recognized overlapping coverage. See, e.g., In re Yardley, 493 F.2d 1389 (C.C.P.A. 1974).
DESIGN PROTECTION FOR USEFUL ARTICLES

in *Mazer*, has been incorporated into the current copyright statute. Copyrightable "pictorial, graphic, and sculptural works" include "works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects." The legislative history specifically refers to the *Mazer* decision as providing for the protection of works of "applied art . . . embodied in useful articles, regardless of factors such as mass production, commercial exploitation, and the potential availability of design patent protection." The exclusive rights provided under the statute for "pictorial, graphic, and sculptural works" echo the scope of protection outlined in *Mazer* by affording the copyright owner reproduction rights in both useful and nonuseful articles. Either kind of article can thus infringe a copyrighted work.

*Mazer* provides a framework for the development of the design protection aspects of the current Copyright Act. Its principles, however, as codified in the Act, have generally been subject to narrow construction. The following cases demonstrate the difficulties in applying the rules established in this area and the conflicting legal interpretations that have resulted.

Esquire and Kieselstein-Cord—Conflicting Results

*Esquire*, Inc. v. *Ringer*.—The decision in *Esquire* concerned the copyrightability of outdoor lighting fixtures. Esquire attempted to register the designs of its elliptically-shaped, contemporary outdoor lighting fixtures with the Copyright Office as "works of art." Its application was denied on the basis of a regulation which required that the design exist independently of the useful functions of the article. Esquire then brought suit in district court to com-

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127. See 347 U.S. at 218. Industrial design refers to the mechanical or utilitarian aspects of an article.
129. *Id.*
131. 17 U.S.C. § 113(a) (Supp. V 1981). For a listing of the exceptions to these exclusive rights, see *id.* § 113(c) and *supra* text accompanying note 68.
134. *Id.* at 798.
135. *Id.*
pel copyright registration for the design of its fixtures. That court, basing its decision on Mazer,\textsuperscript{138} held for Esquire, stating that modern art forms are entitled to the same protection as traditional art.\textsuperscript{139} The circuit court evaluated the Register of Copyrights' interpretation of the regulation, as well as its application to the facts.\textsuperscript{140}

Giving the Register's interpretation considerable weight,\textsuperscript{141} the court denied Esquire copyright protection for its lighting fixtures.\textsuperscript{142} The Register had construed the regulation to bar copyright protection for the overall shape of the fixtures, despite their aesthetic appeal.\textsuperscript{143} This construction flowed from the Register's perception of the congressional policy of denying copyright protection for industrial designs.\textsuperscript{144} The Register feared that extending such protection would open the floodgates to most useful consumer products, which are often characterized by "aesthetic considerations."\textsuperscript{145}

The court relied on the legislative history\textsuperscript{146} of the Copyright Act of 1976\textsuperscript{147} for further support of the Register's decision.\textsuperscript{148} It cited the House Report as indicative of congressional intent to deny copyright protection for the "overall design . . . of a utilitarian object, even if it is determined by aesthetic as well as functional considerations."\textsuperscript{149}

The court distinguished Mazer because that case dealt with invalidation of the copyright registration resulting from industrial use of a copyrighted article, while the Esquire issue hinged on initial copyrightability of the overall shape of an article.\textsuperscript{150}

The court also dismissed the contention that to deny these designs copyright protection would improperly discriminate against


140. 591 F.2d at 799.
141. Id. at 801, 802.
142. Id. at 806.
143. Id. at 800.
144. Id.
148. 591 F.2d at 803, 804.
150. See id. at 804-05.)
modern abstract sculpture in favor of more traditional forms. While conceding the "disproportionate impact" that the Register's interpretation of the regulation placed upon abstract sculpture, the court found this result to be unintentional and outweighed by the congressional policy against copyright protection of industrial designs. Ultimately deferring to the discretion of the Register, the court found her application of the regulation to the facts of the case to be appropriate and reasonable.

The court skirted some crucial issues in assessing the decision of the Register, and ignored more persuasive interpretations of the applicable statutory and regulatory provisions. Since the Register recognized the aesthetic appeal of the fixtures, and *Mazer* provides for copyright protection of design features despite an article's utilitarian purpose, it seems inconsistent that such protection should be denied to the design of *Esquire*'s fixtures based on fears of unwarranted extension of copyright coverage to industrial designs. A judicial doctrine of necessity could be applied to curb such an extension of protection. If the design of a useful article must be fashioned in a particular way to accomplish its utilitarian function, it would not be afforded copyright protection. Industrial products that offered no embellishment of these fundamental and necessary design features would remain unprotected by the copyright statute.

The legislative history of the Copyright Act of 1976 was an inappropriate authority for the court to rely upon. In addition to the fact that the effective date of the Act renders it inapplicable to *Esquire*, its provisions reflect significant changes in statutory and regulatory language. The applicable regulation denies copyright pro-

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151. *Id.* at 805.
152. *Id.*
153. *Id.* at 806.
156. 347 U.S. at 218.
tection to an article if its "sole intrinsic function" is utility, while the 1976 Act provides an arguably broader definition of a "useful article" as one with "an intrinsic utilitarian function." The court, in what Professor Melville Nimmer terms a "neat bit of judicial leg- erdemain," deemed the alteration in terminology a mere codification and took the liberty of applying the language of the 1976 Act to deny the overall design of the fixtures copyright protection. The court should have applied the language of the regulation, however, since it differed significantly from that of the 1976 Act. This would have resulted in the granting of copyright protection to the overall design of the fixtures, since utility was not their "sole intrinsic function." Proper consideration of the legislative history, if pertinent, should include a discussion of separating an article's functional and design elements on a conceptual level, and then providing copyright protection to those design aspects. In particular, the shape of an article should receive copyright protection upon meeting the conceptual separateness requirement. The Esquire court chose to avoid such a discussion, and instead relied on what it perceived to be the overall tone of the legislative history. The court should have focused on the provision in the applicable regulation, and examined the questions of separate identification and independent existence of design.

162. 17 U.S.C. § 101 (Supp. V 1981) (emphasis added); see 1 M. Nimmer, supra note 27, § 2.08[B], at 2-93, 2-94. Most useful articles have a utilitarian function, not serving as their sole function. The Copyright Act definition thus narrows the range of copyright protection for articles in general because the "useful article" finding triggers the more difficult tests of separability, not applied to nonuseful articles. See Kieselstein-Cord v. Accessories By Pearl, Inc., 632 F.2d 989, 993 (2d Cir. 1980); see also supra notes 64-66 and accompanying text; infra notes 204-06.
163. 1 M. Nimmer, supra note 27, § 2.08[B], at 2-92.
164. 591 F.2d at 803.
165. Id. at 804. See generally 1 M. Nimmer, supra note 27, § 2.08[B], at 2-89 to -94 (discussion of the limits of copyright protection to applied works of art).
166. The fixtures also serve to beautify the landscape.
168. See 591 F.2d at 803-04. The court summarily dismissed the conceptual separability concept and focused instead upon "the overall design or configuration of a utilitarian object." Id. at 804.
169. 37 C.F.R. § 202.10(c) (1976) (repealed 1978). This regulation permitted copyright registration for "the shape of a utilitarian article [which] incorporates features . . . which can be identified separately and are capable of existing independently as a work of art." Id. (emphasis added).
features of the shape of the article as copyrightable aspects of a utilitarian article. It relied largely on policy considerations for its decision, rather than employing them as just one relevant factor in the determination of the case.

Finally, the court gave short shrift to the principle of "nondiscrimination" articulated in Bleistein v. Donaldson Lithographic Co. While recognizing the burden its decision would have on modern, abstract designs, it found that the congressional policy against providing copyright protection for industrial designs counterbalanced such a burden. Proper analysis would have tipped the balance toward copyright protection for the fixtures, because their design elements, although modern and abstract, are no more "industrial" than those of more classical fixtures which are commonly given protection.

Kieselstein-Cord v. Accessories By Pearl, Inc. is a case, which, as the court recognized, straddles the "razor's edge of copyright law." It concerned the copyrightability of ornately sculptured belt buckles. The buckles were designed and hand-crafted by Kieselstein-Cord and cast in gold and silver. Of the two designs considered, one was registered under the Copyright Act of 1909, the other under the 1976 Act. Pearl had admittedly copied the designs and was sued by Kieselstein-Cord for copyright infringement. The district court granted Pearl's motion for summary judgment, holding both copyrights invalid for lack of "separability and independent existence of the artistic features."

The Second Circuit Court of Appeals reversed the decision of the district court by upholding the copyrights of the designs of the

170. See id.
171. The court cited the "congressional policy against copyrighting industrial designs."
172. 188 U.S. 239, 251-52 (1903). See supra notes 33-35 and accompanying text.
173. 591 F.2d at 805.
174. 632 F.2d 989 (2d Cir. 1980).
175. Id. at 990.
176. Id.
178. 632 F.2d at 991.
179. Id.
181. 489 F. Supp. at 738.
182. Id. at 736.
belt buckles. It held that the buckles' primarily ornamental nature was conceptually separable from their secondary utilitarian function. Relying on the legislative history of the 1976 Act, the court found the conceptual separateness notion not violative of congressional policy against copyright protection for industrial designs.

This case, along with Esquire, delineates the current judicial boundaries of protection for the design of useful articles based on the Copyright Act of 1976. Protection is afforded when an article's design is of primary importance and denied when an article is primarily functional. The cases are irreconcilable, however, on the issue of separability of design from utility. If the test of conceptual separability had been applied to the lighting fixtures in Esquire, the opposite result might have been reached. The overall shape of the fixture can be described without considering its functional aspects, such as wiring. The criterion of separate identification of design features would thus be met. Conceptual independent existence of the overall design of the fixture is also conceivable if thought of in structural, rather than functional, terms. Similarly, if this test had not been adopted by the Kieselstein-Cord court, it might have decided not to grant protection to the belt buckle design because the design was not physically separable from the functional aspects of the article.

The cases also reach opposing conclusions as to the application of the congressional policy against copyright protection for industrial designs. The Esquire court viewed it as an overriding factor, whereas the Kieselstein-Cord court did not accord it as much weight. The Kieselstein-Cord court focused its inquiry instead on

183. 632 F.2d at 990, 994.
184. Id. at 993. Query whether this test, as articulated in the legislative history of the 1976 Act, should be applied to the buckle design registered before the effective date of the new Act? Arguably it should, since it is primarily an analytical tool, rather than a fundamental change in congressional policy.
186. 632 F.2d at 993.
189. See 632 F.2d at 993.
190. Compare 591 F.2d at 801 with 632 F.2d at 993.
191. See 591 F.2d at 800, 801.
192. See 632 F.2d at 993.
the issue of separability, the "industrial" nature of belt buckles being less of an obstacle to copyright protection than that of the lighting fixtures in *Esquire*.

A more recent consideration of the issue of copyright protection for the design of useful articles occurred in the case of *Gay Toys, Inc. v. Buddy L Corp.* That case concerned the validity of the copyright of the design of a toy airplane. Buddy L designed the plane to be both attractive and compact. It marketed the plane and registered its design with the copyright office. Gay Toys designed and marketed a similar toy airplane. After being informed by Buddy L that its plane infringed the Buddy L copyright, Gay Toys sought a judgment declaring Buddy L's copyright invalid or, alternatively, not infringed by its plane.

The court, relying heavily on *Esquire*, held the design of Buddy L's toy airplane not copyrightable, finding its design features incapable of separate identification and independent existence from the utilitarian aspects of the plane. The court cited two aspects of utility: the function of the toy to "let [a child's] imagination soar," and the function of the shape of the plane to allow more planes to be shipped in less space. The court also held the overall design to be basically functional, because it required simulation of a real airplane. The shape and appearance of the plane were held to be separately identifiable from its utility as a toy, but not from its utility as an economically packaged plane. Finally, the court found the plane's sculptural features incapable of either physical or conceptual independent existence from its utilitarian aspects as a toy and as an economical package.

*Gay Toys* provides no new significant insight to the problem of interpreting and consistently applying the copyright statute. The opinion cites the statutory language in conclusory terms, with little analysis of the issues of separability of design from function. We are

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193. *See id.* at 992-94.
195. *Id.* at 624.
196. *Id.* at 623-24.
197. *Id.* at 625.
198. *Id.*
199. *Id.* The finding of design mandated by function could provide the basis for an argument of necessity of design as a bar to copyright protection. Query, though, whether the plane's unique appearance—stubby wings and short fat body—was fashioned out of necessity? *See infra* notes 219-21 and accompanying text.
left with confusion and conflict between the circuits over the proper mode of analysis.

PROPOSAL FOR JUDICIAL RESOLUTION OF THE CONFLICT

The courts have failed to establish a consistent approach to the analysis of the design issue. The boundary line of copyrightability seems to have been drawn at the point where function predominates over the aesthetics of an article, thus causing the article to fall into the category of "industrial design"—suitable only for patent protection.\textsuperscript{201} Courts' use of the "industrial design" label as a convenient tool to deny copyright protection to the overall shape of an article is improper since overall shape is a design "feature" worthy of legal protection as the product of creative effort.\textsuperscript{202}

The foundation for proper expansion of copyright coverage to articles primarily functional but containing design aspects deserving of protection lies in the copyright statute. Analytical guidelines for application of the statutory tests are thus offered in an effort to provide a methodology geared toward adequate design protection that does not exceed the area circumscribed by Congress.\textsuperscript{203}

The article in question must first meet the threshold characterization as a "useful article," as defined in the Copyright Act.\textsuperscript{204} Such an article may have a myriad of purposes incorporated into its design, but as long as one of them is utility, it falls into this category.\textsuperscript{205}

Having been properly characterized as "useful," the article must then be subject to the crucial double-edged test of separate identification and independent existence of the design features apart from utilitarian aspects.\textsuperscript{206} This seems to present the most analytical difficulty of any of the prerequisites for design protection. When the design sought to be protected is "on" the useful article, such as a

\textsuperscript{201} See supra notes 133-200 and accompanying text.

\textsuperscript{202} Hearings, supra note 8, at 1855-58 (statement of Barbara Ringer, Register of Copyrights) (advocates the protection of three dimensional designs despite the fact that they are incapable of physical separation from the article itself).

\textsuperscript{203} Copyright protection must not infringe on the domain of the patent system by covering an article's function through protecting the design of the article. See infra note 286 and accompanying text; see also House Report, supra note 10, at 55, reprinted in 1976 U.S. Code Cong. & Ad. News 5659, 5668.


\textsuperscript{205} See supra note 40; note 162 and accompanying text.

\textsuperscript{206} 17 U.S.C. § 101 (definition of "Pictorial, graphic, and sculptural works").
design on a glass or a pattern printed on fabric, it is not difficult to identify it separately from the function of the article itself. This involves description of the aesthetic aspect of a useful article without describing its utility.

The design features’ capability to exist independently of the utilitarian aspects of the article can be analyzed from either a physical or conceptual point of view. Physical separability requires the article’s design features to remain intact after removal of its functional features. Professor Nimmer’s example of a hood ornament on an automobile is illustrative of this principle: remove the automobile and the ornament remains intact. The analysis becomes more difficult when considering the shape or overall design of an article as the subject of protection. In this case, the design of the article often embodies its functional features, making separate identification and independent existence nearly impossible to realize from a physical standpoint. At this juncture, conceptual analysis becomes vital. While physically separating the overall design of an article may leave little, if anything, of the object, its shape can clearly be visualized apart from those aspects that make it useful.

The standards developed for the analysis of design patents might provide a useful framework for discussion of the overall design separability issues in the area of copyright protection. Because design patents protect the article’s appearance as a whole, they are analyzed from the point of view of an “ordinary observer”—specifically, the deceptive effect of two similar designs on

208. See Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487 (2d Cir. 1960).
209. 1 M. Nimmer, supra note 27, § 2.08[B], at 2-95. This is analogous to drafting a design patent claiming only the design elements, not the functional features, of an article.
210. See id. at 2-95 to -96; see also HOUSE REPORT, supra note 10, at 55, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 5659, 5668.
211. 1 M. Nimmer, supra note 27, § 2.08[B], at 2-95.
212. Id.
213. Esquire, Inc. v. Ringer, 591 F.2d 796 (D.C. Cir. 1978), cert. denied, 440 U.S. 908 (1979), court wrongly perceived an absolute bar to copyright protection for the shape of useful articles. The current statute, as specifically outlined in its legislative history, HOUSE REPORT, supra note 10, at 55, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 5659, 5668, expressly provides for such copyrightability upon meeting the separability tests.
214. Such analysis was provided for by the legislative history. See HOUSE REPORT, supra note 10, at 55, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 5659, 5668.
such a person. Function does not factor into such a determination since the articles compared have the same utilitarian purpose. Applying this principle to copyright analysis, the overall design of the useful article emerges as a separate entity—its appearance as a whole being the subject of protection.

Consider the application of this method of analysis to a water faucet in the shape of a fish. It clearly satisfies the threshold characterization as a "useful article," performing the utilitarian function of channelling water from pipes into a sink or bathtub. Separate identification of design features can be accomplished by describing the "fishy" aspects of the faucet: its mouth, scales, fins, etc., as well as overall shape. The utility of the faucet as a water conduit does not enter this discussion. Independent existence of the design features would be difficult to analyze from a physical standpoint—remove the fish, and the faucet does not remain as such. Conceptual independent existence, however, is analytically feasible: the fish design can exist apart from its function as a faucet, even as a scaled-down piece of jewelry. The ultimate conceptual separation would occur at the point where the thinnest inner layer of metal tube from the inside of the fish would suffice to perform the function of a water channel and the remaining metal would encompass the design. Having passed the statutory tests, the article would be entitled to copyright protection.

Under current case law analysis, the fish faucet would be deemed primarily functional and thus considered an uncopyrightable "industrial design." Physical and conceptual separation would not be found, since overall design was the "feature" under consideration. The proposed method of analysis expands the range of copyright protection as currently drawn by the courts to include articles with the same characteristics as that of the faucet in the example above.

As an ultimate check on the propriety of granting the design of a useful article copyright protection, and to guard against unwarranted expansion of the copyright realm into that of industrial design, a rule of necessity could be applied. Such a rule would pro-

216. This test is used to determine infringement. Gorham Co. v. White, 81 U.S. 511, 528 (1871).
218. Overall design has not been eligible for copyright protection. See, e.g., id. at 804-05.
219. For a discussion of such a rule, see Morrissey v. Procter & Gamble Co., 379 F.2d 675, 678-79 (1st Cir. 1967). Without this rule it would be difficult to limit the application of
hibit copyright protection for the design of a useful article where the article necessarily requires a particular design in order to perform its function. In those cases, copyright of the design would, in effect, extend to the function itself—an undesirable result since only the patent system can protect functional features.

This final test, as applied to the fish faucet example, is not an obstacle to copyright protection. There are many ways a water faucet can be designed—it need not assume the figure of a fish to perform its function. Thus, granting copyright protection to the fish faucet will not prevent other people from designing faucets in other ways nor from making faucets altogether.

**Legislative Solutions**

*The Design Bill*

At the time of the general copyright revision in 1976, the Senate passed its version of the bill which included a separate title to provide legal protection for “ornamental designs of useful articles.” This portion of the bill was not approved by the House and did not become part of the Copyright Act of 1976. This section highlights the reasons for its failure, focusing on the potential shortcomings of the design bill in providing adequate design protection, and proposes an alternate statutory scheme to provide such protection, consistent with the language of the Constitution.

*Why the Design Bill Was Not Enacted.*—Design bills have been proposed in the past but none have been enacted into law. The House Judiciary Committee deemed the design protection afforded conceptual separateness, since most industrial designs would be amenable to such analysis.

220. See *id.*

221. Functional features must be protected by mechanical patents, as they exhibit “utility.” See 35 U.S.C. § 101 (1976) (“[w]hoever invents or discovers any new and useful process, machine, manufacture, or composition of matter. . . may obtain a patent therefor . . . .”) (emphasis added).


223. *Id.* tit. II.


228. The Senate has passed design bills five times. *Id.* at 50, *reprinted in 1976 U.S. Code Cong. & Ad. News 5659, 5663.*
under Title II of the Senate bill\textsuperscript{229} to be a distinct form of protection, outside the scope of the copyright revision bill.\textsuperscript{230} It called for more hearings and reconsideration of design protection, specifically to consider which agency would handle the administration of such claims\textsuperscript{231} and to discuss the special problem of typeface designs.\textsuperscript{232} The committee also emphasized that the benefits of creating a new monopoly would not outweigh the burden of removing designs from free public use.\textsuperscript{233}

Scope of Protection of the Design Bill.—Although a specific design protection bill has not been enacted, certain provisions of the 1976 Copyright Act\textsuperscript{234} allow for such protection upon satisfying the statutory criteria.\textsuperscript{235} A comparison of the relevant provisions of the most recently proposed design bill\textsuperscript{236} and the 1976 Act will facilitate an examination of the scope of protection afforded by the design bill.

In order to receive protection under the proposed bill, a design must be "original"\textsuperscript{237} and "ornamental,"\textsuperscript{238} but may not be "staple or commonplace,"\textsuperscript{239} "dictated solely by a utilitarian function,"\textsuperscript{240} or a three-dimensional feature of apparel.\textsuperscript{241} The "originality" requirement parallels that of the Copyright Act,\textsuperscript{242} as interpreted by the courts,\textsuperscript{243} necessitating "independent creation [by] an author."\textsuperscript{244} "Ornamentality" refers to the attractiveness or distinctive appear-
The separate identification and independent existence requirements of the copyright law find no parallel in the design bill. The bill would merely prohibit designs "dictated solely" by the utility of the article. This seems to allow for expansion of the range of designs capable of protection to cover those articles which are primarily functional, but still not "dictated solely" by utilitarian concerns. This language might also be construed to accomplish the same purpose as a rule of necessity, as outlined earlier.

Protection under the design bill commences upon publication of registration, whereas copyright protection under the 1976 Act "subsists" from the time of fixation. The design bill provides for loss of protection if the application for registration of the design is not made within six months of the "publication" of the design. The term of design protection is five years, plus an additional five-year renewal term, unlike copyright protection which lasts for fifty years after the death of the "author."

Infringing action under the design bill consists of copying the protected work without the consent of the proprietor, paralleling the action prohibited under the Copyright Act. The design bill prohibits the making, importing, selling, or distributing of such an infringing article. Similarly, a copyright proprietor can prohibit unauthorized reproduction, sale, and distribution of copies of the work, and has the exclusive right to display it publicly. Pictures or photographs of the design or article do not generally constitute in-
fringing activity under either the design bill or the Copyright Act.\textsuperscript{260}

Is the Design Bill Effective?—The concept of the design bill furthers the constitutional goal of public betterment through private reward of "Authors" for their "Writings."\textsuperscript{261} How effectively it implements this goal is subject to question.

The most restrictive aspect of the design protection granted under the proposed bill is its short duration.\textsuperscript{262} The ten year maximum term\textsuperscript{263} may not be a sufficiently long period of time to warrant investing time and money in designing and marketing an article. Thus, the ultimate public benefit under such a plan might not be fully realized.

The design bill as proposed also might generate problems of interpretation, leaving this area of the law in its present state of confusion. The bill's denial of protection for designs "dictated solely" by utility\textsuperscript{264} might be construed to apply to those articles that are primarily functional, aesthetic appearance being of secondary concern. Denying legal protection to such designs would unjustifiably cut short the range of designs that should be covered by the bill.\textsuperscript{265} A more realistic construction of this language would permit design protection unless the article's function depended upon its particular appearance.\textsuperscript{266} Any design that would thus be "dictated solely" by the utility of the article could only be protected under patent law, if at all.\textsuperscript{267}

An Alternative Proposal

While similar in scope, and certainly in intent to the design bill,\textsuperscript{268} the proposal outlined in this section seeks to remedy the shortcomings of the design bill by providing legislative guidelines for

\textsuperscript{260} See 17 U.S.C. § 113(c) (Supp. V 1981); Design bill, supra note 9, § 908(d).

\textsuperscript{261} U.S. CONST. art. I, § 8, cl. 8.


\textsuperscript{263} Design bill, supra note 9, § 905(a).

\textsuperscript{264} Design bill, supra note 9, § 902(d).

\textsuperscript{265} Even the copyright law allows for protection of designs in this range, apart from the utilitarian aspects of an article, which meet the statutory criteria. See 17 U.S.C. § 101 (definition of "Pictorial, graphic, and sculptural works").

\textsuperscript{266} This inquiry parallels that of the rule of necessity developed earlier in this note. See supra notes 219-21 and accompanying text.

\textsuperscript{267} A patent would protect the "utility" of the article. See 35 U.S.C. § 101 (1976).

\textsuperscript{268} Both the design bill, see Senate Report, supra note 9, at 161, and this proposal seek to foster the development of the decorative arts through reward of creative effort.
designs that are subject to protection. Select portions of the design bill are modified under this proposal (modifications appear in italic type). The remaining sections of the bill are to be left intact.

**PROTECTION OF THE DESIGN OF USEFUL ARTICLES**

**DESIGNS PROTECTED**

SEC. 901. (a) The author or other proprietor of an original design of a useful article may secure the protection provided by this Chapter . . .

(b) For the purposes of this chapter—

(1) A "useful article" is an article which serves a functional or utilitarian purpose.

(2) The "design of a useful article" consists of those characteristics of an article which make its appearance distinguishable from an article performing the same or similar function, as perceived by an ordinary observer.269

. . .

**DESIGNS NOT SUBJECT TO PROTECTION**

SEC. 902. Protection under this Chapter shall not be available for . . .

(d) the design of useful articles which necessarily assume their particular design in order to perform their function.

. . .

**Scope of Protection**

SEC. 902.5 (a) An author or other proprietor who secures design protection under this title has the right to exclude others from applying or embodying the protected design on or in any article, useful or nonuseful.

**TERM OF PROTECTION**

SEC. 905. (a) Subject to the provisions of this chapter, the protection herein provided for a design shall continue for a term of ten years from the date of the commencement of protection . . . , but if a proper application for renewal is received by the Administrator during the year prior to the expiration of the ten-year term, the protection herein provided shall be extended for an additional period of five years from the date of expiration of the first ten years.

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269. This proposal omits § 901(b)(3) of the design bill, supra note 9, and leaves § 901(b)(4) intact.
How This Proposal Provides Effective Design Protection.—The provisions of this proposal are intended to afford design protection to articles that would not necessarily warrant design patent protection, for lack of novelty or non-obviousness,270 nor copyright protection, due to the difficulty of applying the standards of copyrightability.271 This scheme would bridge the gap left by the two existing forms of statutory coverage of the design area.

This proposal omits the word “ornamental” in the description of the designs protected under this title.272 Because no such requirement is present in the copyright law,273 and proposed design protection requirements possess copyright-type characteristics,274 no “ornamentality” prerequisite should be attached to design protection.

The focal point of the design analysis under this proposal is on the appearance of the article.275 The proposed test for protection of the design is its overall effect on an average observer.276 If such a person can perceive a distinguishable difference in appearance between an article with the design to be protected and one of comparable function, the design will warrant protection. This language attempts to present a more workable mode of analysis for design protection than currently exists under the Copyright Act, and to ultimately widen the umbrella of legal protection. It allows for the protection of shape and form, such as that of the fixtures in *Esquire*, by considering an article in its entirety, rather than in its component parts. The proposal also contains built-in limitations to the extension of design protection by prohibiting those designs that follow necessarily from the function of the useful article they adorn. This prevents “back-door” protection of function, suitable only for patent protection, by means of protecting design.277

272. This refers to § 901(a) of the proposal.
273. See supra notes 26-45 and accompanying text.
274. Requirements of novelty or non-obviousness of design have not been included in the proposed design legislation. See Design bill, supra note 9, §§ 901, 902.
275. This emphasis is manifested in § 901(b)(2) of my proposal.
276. See id.
277. One commentator has suggested extending copyright protection to all designs of useful articles. See Note, supra note 41, at 253. Such an extension would allow for unwarranted protection of function for those articles whose designs are necessarily derived from their functions.
The maximum term of protection under this proposal is fifteen years. This is longer than the coverage provided by the design bill,\textsuperscript{278} while still significantly shorter than the term of copyright protection.\textsuperscript{279} This term will offer sufficient reward to designers as a means of encouraging design creation for the general public good. It promises an ample period of time in which a designer can capitalize upon his or her efforts and still allows for free public use before the design becomes obsolete.\textsuperscript{280}

The proposed legislation attempts to facilitate readily accessible design protection with sufficient coverage so as to adequately "promote the Progress of . . . [the] useful Arts."\textsuperscript{281} Its standards are geared toward consistent judicial construction, as the courts attempt to present a workable mode of analysis for designs in question.

**CONCLUSION**

Legal protection for the design of useful articles has lagged behind the protection afforded other creative works, including non-useful articles. Among the obstacles blocking fullscale design protection are the practical problems plaguing the copyright system. There are difficulties in identifying the design aspects of an article so as not to protect its functional features, which are generally covered, if at all, by mechanical patents.\textsuperscript{282} Policy considerations can be conveniently used to circumscribe the range of protected articles in order to prevent the protection of industrial designs. There are also problems facing a potential design patentee, who must meet the relatively rigorous requirements of that scheme of protection.\textsuperscript{283} When coupled with the low success rate of design patents that are challenged in court, these factors serve as barriers to expansive design protection.

Two alternatives are available to fill in the gap left by the current statutory schemes. One would involve judicial construction of

\begin{itemize}
  \item \textsuperscript{278} The design bill provided for maximum protection of ten years. See Design bill, \textit{supra} note 9, § 905(a).
  \item \textsuperscript{279} The term of copyright protection is the author's life plus fifty years, for works created on or after January 1, 1978. 17 U.S.C. § 302(a) (Supp. V 1981). See \textit{supra} note 255 and accompanying text.
  \item \textsuperscript{280} Although any proposed term of design protection will ultimately be an arbitrary time period, other design protection schemes provide useful guidelines. England, for example, offers a maximum fifteen-year term of design protection. See Registered Designs Act, 1949, 12, 13 & 14 Geo. 6, ch. 88, § 8. The proposed term also comes within one year of the term of domestic design patent protection. See \textit{supra} note 71 and accompanying text.
  \item \textsuperscript{281} U.S. CONST. art. I, § 8, cl. 8.
  \item \textsuperscript{282} See \textit{supra} notes 25, 77 and accompanying text.
  \item \textsuperscript{283} See \textit{supra} notes 15, 46-58 and accompanying text.
\end{itemize}
existing statutes in an effort to develop workable standards for the
determination of often difficult design issues. While this option of-
fers expansion of design protection as a possibility, courts must still
grapple with the somewhat nebulous nature of the language used in
the statutes and the inherent difficulty of interpreting and applying
their principles.

Statutory protection seems to be a more attractive alternative
for providing design protection. If the guidelines established by stat-
ute are made sufficiently clear, judicial application becomes easier
and less haphazard. Such a scheme can also serve as an effective
indicator of legislative policy and thus remove the guesswork often
employed by courts in divining legislative intent.

The statutory scheme presented in this note strives to estab-
lish clear guidelines for design protection. Using the design bill as
its foundation, it carves out the realm of protectible designs to its
logical limit: the point where articles lose the element of design
choice. Under this scheme, design protection is granted where it is
rightfully deserved and is withheld where protection must be secured
under other statutory schemes.

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284. See supra notes 201-21 and accompanying text.
285. See supra text accompanying notes 268-70.
286. Design bill, supra note 9.