

COPYRIGHT AND THE FALL LINE

DAVID NIMMER*

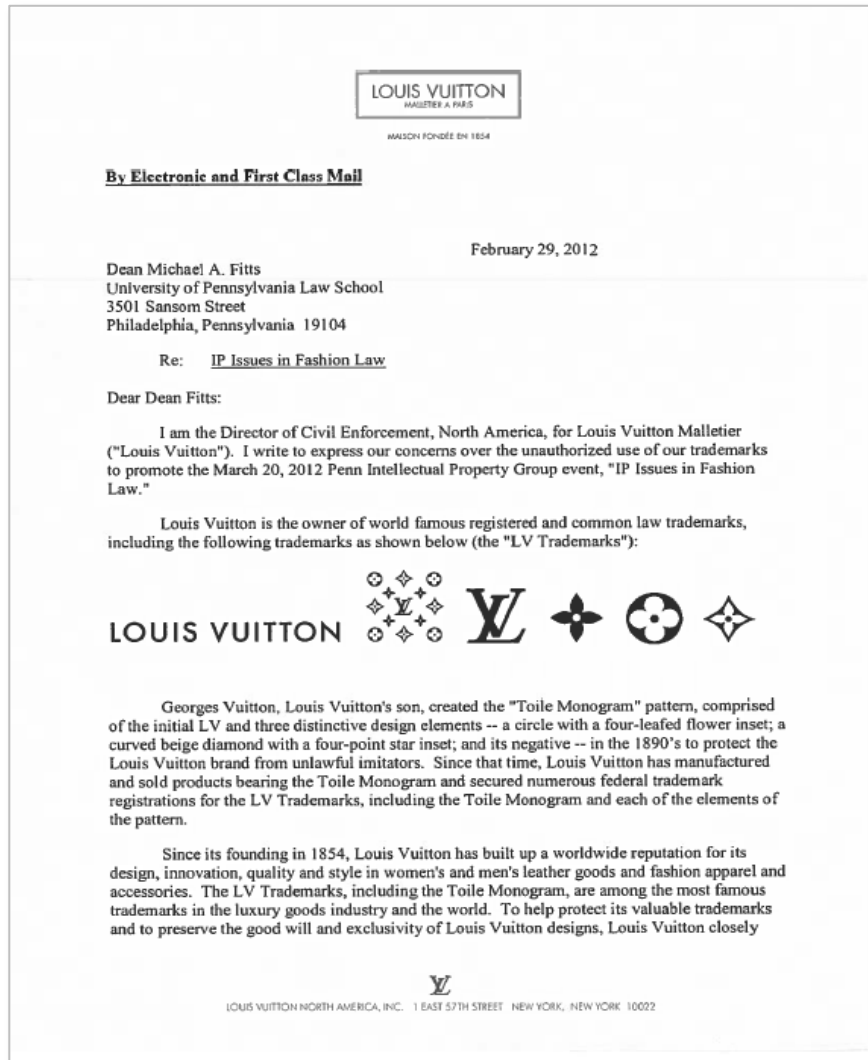
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EDITOR'S NOTE

In March 2012, the Penn Intellectual Property Group hosted a symposium on the topic of Fashion Law at The University of Pennsylvania Law School. Keynote speaker David Nimmer assessed a proposed bill amending the Copyright Act to add protection for fashion designs. While teaching a seminar at Cardozo Law School in January 2013, Professor Nimmer delivered an illustrated lecture on his experience at the symposium and more recent developments with respect to the fashion bill. The following Article is an edited transcript of Professor Nimmer's lecture and its accompanying graphics.

* The author thanks Shyam Balganes and the Penn Intellectual Property Group for the initial invitation that prompted this lecture, adding tremendous gratitude to Agatha Cole and the Cardozo Arts & Entertainment Law Journal staff for their willingness to publish an unorthodox piece that illustrates its propositions graphically. Stan Baryla gets credit as the impresario of those graphics. © 2013 David Nimmer.

N.B. To the extent that the graphic content integral to this Article does not accompany versions appearing on electronic databases, readers are strongly encouraged to obtain a PDF containing the full text plus graphics, which is available through various sources.



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Dean Michael A. Fitts
February 29, 2012
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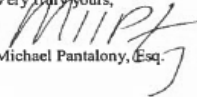
controls the sale of its products and the use of its trademarks, and has devoted and continues to devote substantial resources to protect the LV Trademarks.

While every day Louis Vuitton knowingly faces the stark reality of battling and interdicting the proliferation of infringements of the LV Trademarks, I was dismayed to learn that the University of Pennsylvania Law School's Penn Intellectual Property Group had misappropriated and modified the LV Trademarks and Toile Monogram as the background for its invitation and poster for the March 20, 2012 Annual Symposium on "IP Issues in Fashion Law." A copy of the invitation/poster is attached as Exhibit A.

This egregious action is not only a serious willful infringement and knowingly dilutes the LV Trademarks, but also may mislead others into thinking that this type of unlawful activity is somehow "legal" or constitutes "fair use" because the Penn Intellectual Property Group is sponsoring a seminar on fashion law and "must be experts." People seeing the invitation/poster may believe that Louis Vuitton either sponsored the seminar or was otherwise involved, and approved the misuse of its trademarks in this manner. I would have thought the Penn Intellectual Property Group, and its faculty advisors, would understand the basics of intellectual property law and know better than to infringe and dilute the famous trademarks of fashion brands, including the LV Trademarks, for a symposium on fashion law. (Louis Vuitton believes that education of the public about intellectual property issues is important and has sponsored such activities in the past. In fact, Louis Vuitton is a corporate sponsor of Fordham Law School's Fashion Law Institute).

Louis Vuitton is proud of its reputation for protecting intellectual property and creativity. We hope, and expect now that this action has been brought to your attention, that immediate steps will be taken to stop all use of this invitation/poster that violates the LV Trademarks. Please contact me within five days to assure me that steps have been taken to avoid confusion and dilution of the LV Trademarks. Your understanding and anticipated cooperation is appreciated.

Very truly yours,


Michael Pantalony, Esq.

Attachment



**Penn Intellectual Property Group
Annual Symposium**

Fashion Law

March 20, 2012

4:30 p.m. to 7:45 p.m.
Reception to follow.

Levy Conference Center
University of Pennsylvania Law School

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With donations from



4:35 Panel 1
Trademark and the Fast Fashion Phenomenon
Moderator: Gideon Parchomovsky, Penn Law
Barton Beebe, NYU School of Law
Avery Fischer, G.C., Ralph Lauren
Young Kwon, G.C., Forever 21
Susan Scahill, Fordham Law School
Susanne White, Assoc. G.C., Coach, Inc.

5:40 Panel 2
**Copyright for Fashion Design:
Evaluating the IDPPFA**
Moderator: Shyamkrishna Balganesh, Penn Law
Johanna Blakley, Norman Lear Center, USC
David Faix, New York State Bar Association,
Fashion Law Committee Chair
Barbara Koleson, G.C., Stuari Weizman
Michelle Marsh, Kenyon & Kenyon LLP
Staci Riordan, Fox Rothschild LLP

6:45 Keynote
"Copyright and the Fall Line"
David Nimmer
UCLA School of Law, Irwin & Manella LLP

The program has been approved for 2 hours of substantive law credit and 0 hours of ethics credit for Pennsylvania lawyers. Credit may be available in other jurisdictions as well.

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March 2, 2012

Via Email M.Pantalony@us.vuitton.com and First Class Mail

Michael Pantalony, Esq.
Director, Civil Enforcement, North America
Louis Vuitton Malletier
1 East 57th Street
New York, NY 10022

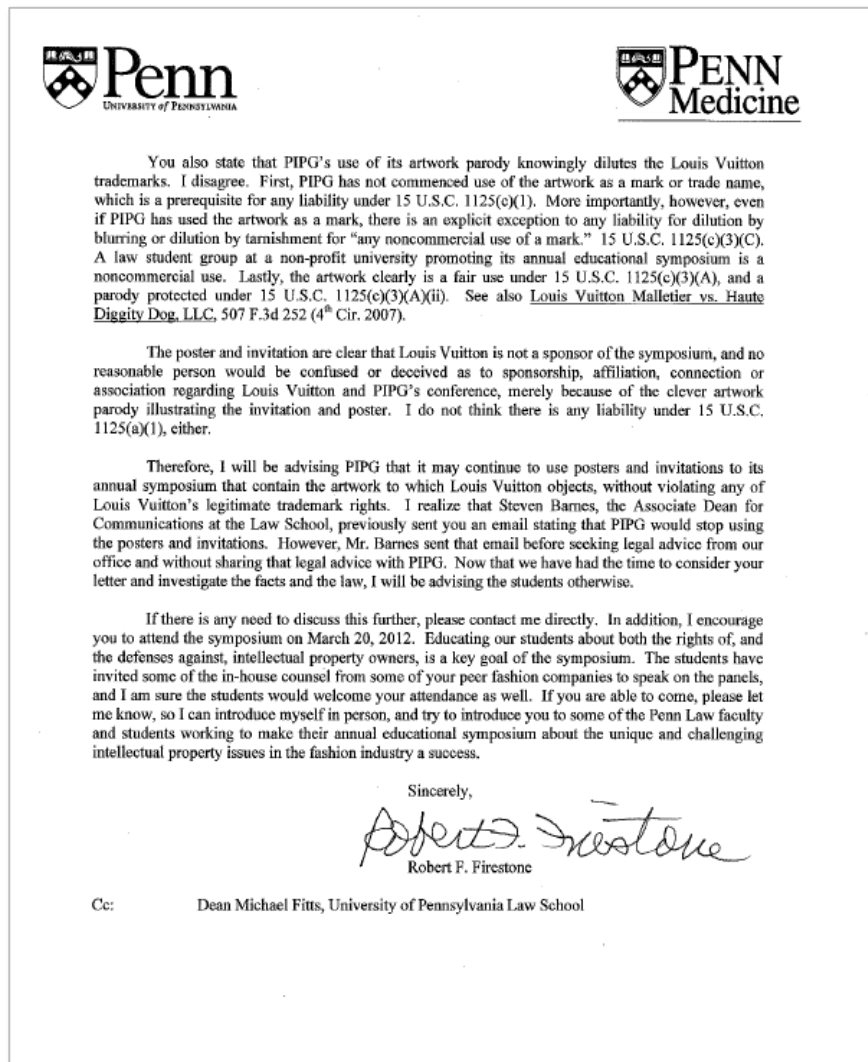
Dear Mr. Pantalony:

I represent the University of Pennsylvania, its Law School, and a student group at the Law School, the Pennsylvania Intellectual Property Group (PIPG), and Dean Michael Fitts forwarded your February 29, 2012 letter to me.

PIPG does not agree that the artwork on its poster and invitation infringes any of Louis Vuitton's trademarks, nor does it dilute any of those trademarks. In fact, 15 U.S.C. 1125(c)(3) expressly protects a noncommercial use of a mark and a parody from any claim for dilution. There also is no violation of 15 U.S.C. 1125(a) because there is no likelihood of confusion that Louis Vuitton sponsored or is associated with PIPG's annual educational symposium.

You assert that the clever artwork parody that appears on the poster and invitation is a "serious willful infringement." However, to constitute trademark infringement under the Lanham Act, PIPG has to be using a trademark in interstate commerce, which is substantially similar to Louis Vuitton's mark(s), and which is likely to cause confusion between Louis Vuitton's luxury apparel goods and PIPG's educational conference among the relevant audience. First, I don't believe that PIPG's artwork parody was adopted as, or is being used as, a trademark to identify any goods and services. It is artwork on a poster to supplement text, designed to evoke some of the very issues to be discussed at the conference, including the importance of intellectual property rights to fashion companies, the controversy over the proposed Innovative Design Protection and Piracy Prevention Act, and the exceptions in the law to liability for dilution, including parody. Second, although you don't cite the actual federal trademark registrations that you assert protect your marks, I doubt any of them are registered in Class 41 to cover educational symposia in intellectual property law issues. There is no substantial similarity between the goods identified by Louis Vuitton's marks and the PIPG educational symposium. Third, there is no likelihood of confusion possible here. The lawyers, law students, and fashion industry executives who will attend the symposium certainly are unlikely to think that Louis Vuitton is organizing the conference; the poster clearly says that PIPG has organized the event, with support from Penn Law and a number of nationally-known law firms. The artwork on the poster and invitation does not constitute trademark infringement.

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Despite Louis Vuitton's best efforts set forth above (along with the law school's masterful response), I am going to address the Innovative Design Protection and Piracy Prevention Act (IDPPPA).¹ Still, the Penn Intellectual Property Group conference organizers badly blundered when planning their confab—not in regard to drawing the cease-and-desist letter just reproduced, but rather by inviting someone to deliver the keynote address who is almost completely ignorant about *haute couture*.

I therefore have no choice but to fall back on my strong suits—the law of copyright, as well as religion. I therefore choose to organize my

¹ S. 3728, 111th Cong. (2010).

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copyright ruminations around three antinomies drawn from religious thought: (1) body *vs.* spirit; (2) cosmogony *vs.* evolution; and (3) esoteric *vs.* exoteric revelation.



THE FALL

Thus fortified, we can plow into the IDPPPA—the fashion bill that has been introduced into Congresses on several occasions since 2006.² When the Penn conference took place on March 20, 2012, no bill was currently pending before Congress. By contrast, a bill exists today, tracing back to a predecessor introduced by Senator Schumer of New York on August 5, 2010,³ and more recently reintroduced on September 10, 2012.⁴ The IDPPPA, at its outset, proclaims that its purpose is to amend § 1301 of Title 17 of the Copyright Act by adding a section labeled, “Designs Protected” to “extend protection to fashion design, and for other purposes.”⁵ The matter on the table is therefore to explicate how we have come to a juncture in the copyright universe where it makes sense to augment the Copyright Act (as opposed to other bodies of law, such as trademark) for the purpose of increasing fashion protection.

Title 17 of the United States Code codifies the Copyright Act of

² The IDPPPA was originally introduced as an act “to Provide Protection for Fashion Design” H.R. 5055, 109th Cong. (2006). The act was later referred to as the “Design Piracy Prohibition Act,” H.R. 2033, 110th Cong. (2007).

³ S. 3728, 111th Cong. (2010).

⁴ S. 3523, 112th Cong. (2012).

⁵ S. 3728, 111th Cong. (2010).

1976. It is divided into various headings and chapters. Eight chapters are all that existed as of passage of the law.⁶ But it is important to consider the bill that ultimately led to the enactment of the 1976 Act. In the House of Representatives, that bill included something entirely different from those eight chapters, namely, a title called “Protection of Ornamental Designs of Useful Articles.”⁷ This particular provision created what we can call “circle-D” protection.⁸ But the most salient aspect about © is that it did not survive to enactment. Thus, the 1976 Act never embodied protection for ornamental designs.⁹

I. BODY VS. SPIRIT

We are now prepared to confront the first dichotomy, that between body and spirit. To do so, it is best to advert to the previously governing law, namely the Copyright Act of 1909.¹⁰ Title 17 under the 1909 Act listed various classes that obtain copyright protection. Inspection shows it to be entirely different in orientation from the current Copyright Act. The 1909 Act protected something called “books.”¹¹ A book is a physical object—you can hold it in your hand or hoist it aloft. This feature constitutes a continuation, as a lineal descendant, of the Act of May 31, 1790.¹² In fact, our first copyright statute protected only three very particular items: “maps, charts, and books.”¹³ So “books” formed part of the privileged core right from the outset—which is why, of course, the American artist portrays his protagonist crying when he realized that copyright protection does not extend to works of visual arts. That subject matter lay entirely outside of copyright protection, at the time.

⁶ Act of Oct. 19, 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976).

⁷ See S. 22, 94th Cong. tit. II (1975).

⁸ “Whenever any design for which protection is sought under this title is made public as provided in section 209(b), the proprietor shall, subject to the provisions of section 207, mark it or have it marked legibly with a design notice consisting of the following three elements: (1) the words “Protected Design”, the abbreviation “Prot’d Des.” or the letter “D” with a circle thus ©. . . .” *Id.* Sec. 206. (a).

⁹ See H.R. Conf. Rep. No. 1476, at 82.

¹⁰ Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075 (1909).

¹¹ 17 U.S.C. § 5(a) (1909 Act).

¹² “An Act for the Encouragement of Learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned.” Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124. (1790).

¹³ *Id.*



Benjamin West, *The Expulsion of Adam and Eve from Paradise* (1791)

As a physical item, a “book” can assume any one of innumerable forms . . .



But we reach a complete dichotomy when we get to the Copyright Act of 1976.¹⁴ No longer are “books” protected.

Though we do indeed find protection limited to something embodied in “a tangible medium of expression”¹⁵ (meaning that there needs to be a physical substratum for copyright protection), the Copyright Act at present protects the more ethereal category of “literary works.”¹⁶ The



¹⁴ Act of Oct. 19, 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified at 17 U.S.C. §§ 101-1332 (2006)).

¹⁵ 17 U.S.C. § 102(a).

¹⁶ 17 U.S.C. § 102(a)(1).

difference is that the 1909 Act protected *physical items*, whereas the current Act confers protection on *conceptual types*. It includes within its ambit, for example, text that can be observed electronically on a screen.

We see the same progression from the physical to the virtual throughout the realm of copyright protection. In terms of movies, we can imagine a whole host of ways in which they can be realized in a non-tangible form. And that is exactly what is protected under the current Act—not the celluloid, but rather the audiovisual work.¹⁷

Now we can observe an interesting phenomenon. Under the 1909 Act, “motion-picture photoplays” were protected.¹⁸ When I recently delivered a talk at the Los Angeles Copyright Society, I asked the audience—which includes a few folks in their seventies and eighties—what is a motion-picture photoplay? Only two audience members had even the slightest idea.



Photoplays were the first type of motion pictures. Imagine a large reel of, say, seventy millimeter celluloid comprising a long series of photographs. We are dealing with a bunch of photographs that can be copyrightable.

The historic protection for audiovisual works began when photographs gained copyright protection, which was later extended to a series of photographs that impart motion. The 1909 Act accorded protection to “motion-picture photoplays”—again, physical items.¹⁹

Moving on, the same phenomenon again applies to graphic works. The 1909 Act protected physical artworks—which, of course, could assume a whole variety of instantiations—anything from gouache on canvas to paint on a sidewalk to who-knows-what on the side of a VW bus.

¹⁷ 17 U.S.C. § 102(a)(6).

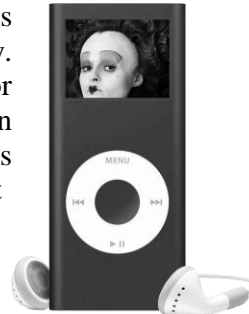
¹⁸ The inclusion of “motion-picture photoplays” in the 1909 Act was the result of “The Townsend Amendment,” Act of Aug. 24, 1912 ch. 356, 37 Stat. 488 (1912).

¹⁹ 17 U.S.C. § 5(l) (1909 Act).



But, as broad as that protection might be, the 1976 Act is that much broader. For it gives protection even to images embodied on your iPad, on a screen, or on a Jumbotron.

It is fascinating to see the progression here. The 1909 Act protected works in various stages: “[1] Works of art; [2] models or designs for works of art”²⁰ [and] [3] Reproductions of a work of art.”²¹ Category [1] refers to an end product, whereas category [2] references something preliminary. Category [3] then brings in protection for something subsequent. Again, the point in common is that protection lies for various physical items. By contrast, the current Act broadens protection to all “pictorial, graphic, and sculptural works.”²² Captured thereby are such evanescent matters as onscreen representations.



Now we can see in full bloom the dichotomy between body and spirit: the 1909 Act protected bodily works, material instantiations; the 1976 Act is much broader, protecting realizations in whatever format. That is the first overarching distinction drawn above.

As soon as one draws any distinction, exceptions arise—the current instance represents no exception to that rule.²³ The pertinent feature here is the Visual Artists’ Rights Act of 1990 (VARA),²⁴ which forms part of our current 1976 Act. The *zeitgeist* of this later amendment participates in the old law, rather than the new one.

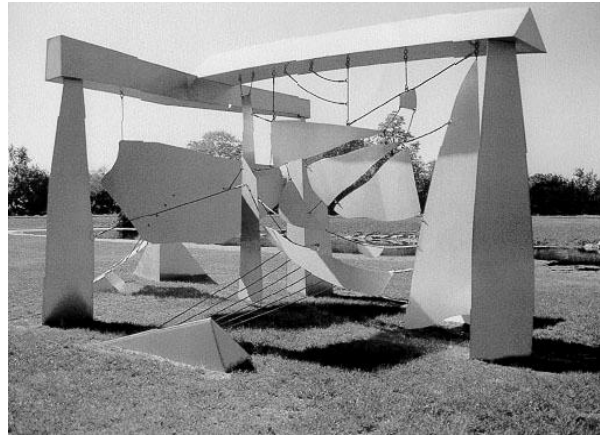
²⁰ 17 U.S.C. § 5(g) (1909 Act).

²¹ 17 U.S.C. § 5(h) (1909 Act).

²² 17 U.S.C. § 102(a)(5).

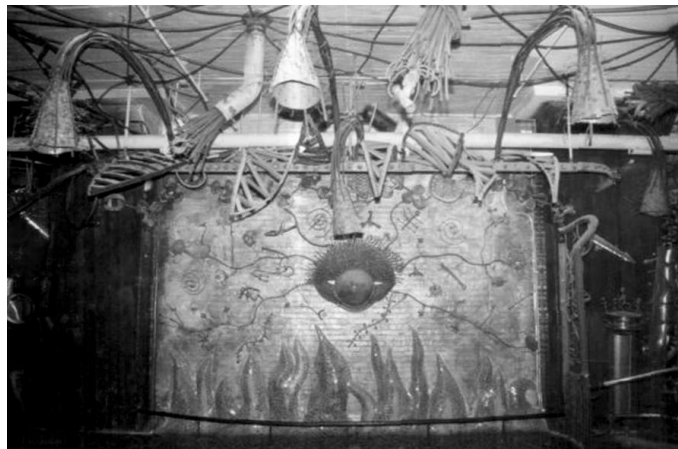
²³ A delightful paradox looms here: One could argue that there must be some rule that has no exception, in order to fulfill the higher order that there be an exception to every rule—including the rule that there is always an exception.

²⁴ 17 U.S.C. § 106A (2006).



Symphony #1 by Jan Randolph Martin

In *Martin v. City of Indianapolis*,²⁵ for instance, a large, outdoor stainless steel sculptural work was demolished in Indiana. The sculptural work was a physical realization. That physical realization was protected under VARA.²⁶ On the other side of the coin comes *Carter v. Helmsley-Spear, Inc.*²⁷



Installation by "Jx3" (John Carter, John Swing and John Veronis)

The Second Circuit there applied VARA to the lobby of the Helmsley Building located at 47-44 31st Street, Queens, New York, something that was so hideous that the court had to come up with some way *not* to protect it in order to allow the buyers of the building to demolish all trace of it. What they decided in that case was that it

²⁵ 192 F.3d 608, 611 (7th Cir. 1999).

²⁶ *Id.* at 611–614.

²⁷ *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77 (2d Cir. 1995).

would not qualify as a work of visual art because it was composed as a work for hire, which by definition fails to qualify as a work of visual art.²⁸

The structure of VARA suggests something unique.²⁹ Moral rights generally find little instantiation under U.S. copyright law, but there is one prominent exception³⁰—narrow protection for works of visual art.³¹ Drawn from Article 6*bis* of the Berne Convention, that provision comes into play when there is activity that is prejudicial to an author's honor³²—a consideration that is otherwise almost wholly alien to U.S. copyright law.³³ And consider this: the anti-destruction clause in VARA applies only to works of “recognized stature.”³⁴ That feature denotes artistic quality, a concept that is foreign to the rest of the Copyright Act. We will return to those features presently.

The key point is that this aspect of the Copyright Act limits protection to physical items.³⁵ Importantly, it only encompasses works that are in a “single copy” or in a “limited edition” of no more than two

²⁸ *Id.* at 88.

²⁹ “(a) Rights of attribution and integrity . . . the author of a work of visual art—(1) shall have the right—(A) to claim authorship of that work, and (B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create; (2) shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation; and (3) . . . shall have the right (A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and (B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.” 17 U.S.C. § 106A (2006).

³⁰ Another exception comes in the mechanical license to make cover recordings. See 17 U.S.C. § 115(a)(2).

³¹ See 17 U.S.C. § 106A.

³² “[T]he author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.” Berne Convention (Paris text), art 6*bis*(1). *Berne Convention for the Protection of Literary and Artistic Works*, WORLD INTELL. PROP. ORG., http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P123_20726 (last visited Apr. 19, 2013).

³³ Prior to the adoption of VARA, the provision cited above regarding the mechanical license represented “the sole explicit recognition of moral rights in the entire Copyright Act” 2 NIMMER ON COPYRIGHT § 8.04[F].

³⁴ “[T]o prevent any destruction of a work of *recognized stature*, and any intentional or grossly negligent destruction of that work is a violation of that right.” 17 U.S.C. §106A (2006) (emphasis added).

³⁵ “At the abstract (or perhaps fustian) level, traditional copyright law protects art; by contrast, the Visual Artists Rights Act protects artifacts.” 3 NIMMER ON COPYRIGHT § 8D.06[A][2] (footnotes omitted).

hundred copies³⁶—limitations completely at odds with the rest of U.S. copyright law.³⁷ In other words, VARA partakes in the spirit of copyright's earlier framework under the 1790 and 1909 Acts, which protected bodily works instead of abstract forms. It therefore looks to physical instantiation rather than conceptual type.

II. COSMOGONY VS. EVOLUTION

The second dichotomy separates cosmogony from evolution. We have already noted that the Copyright Act was eight chapters long at enactment, compared to the thirteen chapters that it occupies today. The fashion bill designed to be § 1301 would fit into Chapter 13. It therefore becomes pertinent to investigate what happened in each of five prior instances when chapters were added to the Copyright Act.

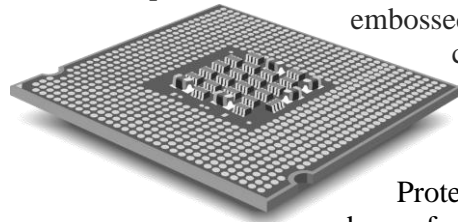
A. *The Semiconductor Chip Protection Act*

The first addition, Chapter 9 of Title 17, accords protection to semiconductor chips.³⁸ This chapter added fourteen sections to the Copyright Act, to confer protection on “mask works,” the integrated circuits responsible for the whole computing revolution.³⁹

Here, we reach another innovation, namely the addition pursuant to this 1984 amendment of “circle M” protection.⁴⁰

Long ago, I had occasion to open up my computer and examine its internal chip, in order to advise a client. I thereupon witnessed the © embossed on a chip, allowing me to conclude that the item in question secured protection under Title 17 of the United States Code.

The Semiconductor Chip Protection Act of 1984 seems to be drawn from a universe wholly separate from the rest of the Copyright Act. These provisions did not grow up organically, as the rest of the Copyright Act did, to protect works of



³⁶ “A ‘work of visual art’ is—(1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer . . . or (2) a still photograph image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer” 17 U.S.C. § 101 (2006).

³⁷ There might be many millions of copies extant of a bestseller, which forfeits no copyright protection under the Act on account of any such surfeit. The same applies to a platinum record or DVD.

³⁸ 17 U.S.C. §§ 901–914 (2006).

³⁹ 17 U.S.C. § 902 (2006).

⁴⁰ Ownership notice of a mask work “shall consist of—(1) the words “mask work”, the symbol *M*, or the symbol ©” 17 U.S.C. § 909 (2006).

authorship. Instead, the fourteen implicated sections sprung full-grown from the brow of Zeus—or from the pen of Congress—to impart a wholly new flavor. In particular, as compared to all that came before, they embody a different term of protection;⁴¹ different formality (the aforementioned ©);⁴² different standard of reverse engineering.⁴³ Just about every aspect differs from the rest of the Copyright Act.

Why would Congress pursue such an unusual tack? To answer that inquiry, we have to go back to the great international conventions. First of all, there is the Paris Convention for the Protection of Industrial Property⁴⁴, the oldest international IP treaty. Today the Paris Convention boasts 174 signatories.⁴⁵ Then, within the copyright realm, of course, we have the Berne Convention for the Protection of Literary and Artistic works.⁴⁶ That Convention has 166 adherents today.⁴⁷ The dream in Washington D.C., as of 1984, was that there be would a parallel development; in consonance with that goal came the Washington Treaty on Intellectual Property in Respect of Integrated Circuits, promulgated in 1989, which was to provide the groundwork for our new electronic revolution.⁴⁸ Nonetheless, experience has been less than kind as to that particular treaty. The totality of nations that have ratified the treaty to date consists of the following enumeration: Bosnia and Herzegovina; Egypt; and the Caribbean island of St. Lucia.⁴⁹ That recitation hardly encompasses the chip-producing powerhouses of the planet. Not even Washington, has joined its own eponymous treaty. So the entire enterprise has been less than salutary.

How many reported decision cases have arisen under U.S. law pursuant to the Semiconductor Chip Protection Act of 1984? The

⁴¹ 17 U.S.C. § 904(b)

⁴² 17 U.S.C. § 909(b).

⁴³ 17 U.S.C. § 906(a).

⁴⁴ *Paris Convention for the Protection of Industrial Property*, WORLD INTELL. PROP. ORG., http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html (last visited Mar. 16, 2013).

⁴⁵ *Treaties Statistics*, WORLD INTELL. PROP. ORG., http://www.wipo.int/treaties/en/statistics/StatsResults.jsp?treaty_id=2 (last visited Mar. 16, 2013).

⁴⁶ *Berne Convention for the Protection of Literary and Artistic Works*, WORLD INTELL. PROP. ORG., http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html (last visited Feb. 10, 2013).

⁴⁷ *Treaties Statistics*, WORLD INTELL. PROP. ORG., http://www.wipo.int/treaties/en/statistics/StatsResults.jsp?treaty_id=15 (last visited Mar. 16, 2013).

⁴⁸ *Treaty on Intellectual Property in Respect of Integrated Circuits*, WORLD INTELL. PROP. ORG., http://www.wipo.int/treaties/en/ip/washington/trtdocs_wo011.html (last visited Mar. 16, 2013).

⁴⁹ *Washington Treaty on Intellectual Property in Respect of Integrated Circuits*, WORLD INTELL. PROP. ORG., <http://www.wipo.int/treaties/en/ip/washington/> (last visited Mar. 16, 2013).

answer is four:

Brooktree Corp. v. Advanced Micro Devices, Inc.;⁵⁰

Brooktree Corp. v. Advanced Micro Devices, Inc.;⁵¹

Brooktree Corp. v. Advanced Micro Devices, Inc.;⁵² and

*Altera Corp. v. Clear Logic, Inc.*⁵³

Actually, higher textual criticism illuminates that the first three of those citations simply represent different proceedings in one and the same case. The bottom line, therefore, is that, over the course of almost thirty years, we have witnessed a total of two distinct reported cases arising under the Semiconductor Chip Protection Act of 1984. So, when we talk about “The Fall” of copyright—how the statute decayed from a pristine focus, until today it is being repurposed for every goal under the sun—the Semiconductor Chip Protection Act of 1984 represents the beginning.⁵⁴

B. *The Audio Home Recording Act*

Onward to the next installment, Chapter 10: Digital Audio-Recording Devices and Media.⁵⁵ In particular, the Audio Home-Recording Act added ten sections to the U.S. Copyright Act. Why? Because Congress just *knew*, as of 1992, that every man, woman, and child throughout the United States would soon be equipped with that ubiquitous device, without which life itself was destined to become well-nigh inconceivable: DAT—a Digital Audio Tape-recorder.



Dat's DAT.

The future promised to equip every living room with a DAT recorder, with the concomitant necessity to maintain an additional DAT

⁵⁰ 705 F. Supp. 491, 496 (S.D. Cal. 1990).

⁵¹ 757 F. Supp. 1088, 1099 (S.D. Cal. 1990).

⁵² 977 F.2d 1555 (Fed. Cir. 1992).

⁵³ 424 F.3d 1079 (9th Cir. 2005).

⁵⁴ See Comments of Jean-Francois Verstrynge, 4 Fordham Intell. Prop., Media & Ent. L.J. 165, 166-67 (1993) (blaming United States for introducing notion of reciprocity in protecting intellectual property under Semiconductor Chip Protection Act).

⁵⁵ 17 U.S.C. §§ 1001-1010.

in the dining room. Plus, the future would undoubtedly bring pressure to place yet another DAT in each bathroom (not to mention in cars as well, no doubt). Because Congress *knew* that this future was ineluctably coming—its crystal ball left no doubt to the effect that “Everyone inevitably is going to own multiple digital audio tape-recorders in the years to come”—it needed to add ten sections to the Copyright Act.⁵⁶

An extraordinarily elaborate set of specifications, the Serial Copy Management System minutely regulates exactly what can happen in the context of exploiting music through the medium that everyone was going to use.⁵⁷ Now, of course, Congress included exceptions here; after all, this new scheme should not govern professionals who are in recording studios.⁵⁸ Besides that exception, Congress included others. Consider that only the geekiest propeller-heads, as of 1992, would do something like listen to music through a computer! Therefore, this 1992 enactment was drafted with another exception—it does not regulate music that is listened to through the computer.⁵⁹ The bottom line is that Congress managed to pass a law at the beginning of the 1990s crafted perfectly to miss the very innovation that would mark the end of that decade, namely Napster.⁶⁰ As a result, we reach the grand total of reported matters litigated pursuant to this enactment—one case.⁶¹

C. Sound Recordings and Music Videos

Moving on, we are forced into Chapter Eleven. The subject matter now under review is captioned “Sound Recordings and Music Videos.” Here is where things really get weird. I have never been as shocked as I was in 1994, when Congress passed the Uruguay Round Agreements Act.⁶² The sole section comprising Chapter 11 includes protection for “unauthorized fixation.”⁶³

To what does that language refer? Picture a jazz band at Independence Hall coming up with some extemporaneous music (not

⁵⁶ We will return to this sentiment below.

⁵⁷ The details are set forth in the “Technical Reference Document,” which is reproduced in 9 NIMMER ON COPYRIGHT at pages App. 36-33 to 36-59.

⁵⁸ 17 U.S.C. § 1008 (2006).

⁵⁹ See 17 U.S.C. § 1001(5)(B)(ii).

⁶⁰ “We agree with the district court that the Audio v. Napster, 239 F.3d 1004, 1024 (9th Cir. 2001).

⁶¹ Again, the case is doubled, as it was decided by the appeals. See RIAA v. Diamond Multimedia, 29 F. S. *aff’d*, 180 F.3d 1072 (9th Cir. 1999).

⁶² Act of Dec. 8, 1994, Pub. L. 103-465, 108 Stat. 48

⁶³ 17 U.S.C. § 1101 (2006).



simply playing a cover of a pre-existing song) or Dame Kiri Te Kanawa appearing live at Carnegie Hall to sing an aria by Mozart. (Wolfgang, by the way—spoiler alert—is not a proprietor whose works are durationally eligible for U.S. copyright today). In both those instances, the live performance is protected under U.S. copyright law by virtue of § 1101.

We now need to bother our heads with a pesky thing called the U.S. Constitution. Congress's practice, whenever passing copyright legislation, historically has been to specify its constitutional foundation.⁶⁴ As a result, I am very used to reading the House and Senate Report for copyright bills that explicitly reference the Copyright Clause⁶⁵ of the U.S. Constitution.⁶⁶ Occasionally, those reports⁶⁷ ground their rationale in the Commerce Clause⁶⁸ or on something else.⁶⁹ What do you think they talked about in the context of the Uruguay Round Agreements Act? The Copyright Clause would be a good guess. But they did not reference the Copyright Clause. The Commerce Clause is also a good guess—but again wrong, as it happens. What other clause could Congress have referenced? The Treaty Clause comes to mind; but there was no reference to it, either. So what *did* Congress consider when rooting the Uruguay Round Agreements Act in the United States Constitution?

⁶⁴ In fact, the matter was subsequently embodied into a formal rule. *See* H.Res. 5 § 2(a), 112th Cong. (2011); Constitutional Authority Statements, House Rule XII, clause 7(c). The rule requires that all bills and joint resolutions provide a statement that states “as specifically as practicable the power or powers granted to Congress in the Constitution to enact the bill or joint resolution” to be accepted for introduction by the House Clerk.

⁶⁵ U.S. CONST. art. I, § 8, cl. 8.

⁶⁶ Consider the following, from the Sonny Bono amendment: “Pursuant to Article I, Section 8 of the United States Constitution, Title 17 of the United States Code gives the owners and authors of creative works an exclusive right to keep others from using their work for a limited period of time through copyright protection.” H.R. Rep. No. 105-452 (1998) at 3-4.

⁶⁷ One example here is the previously encountered Semiconductor Chip Protection Act of 1984: “As originally introduced, H.R. 1028 had a further provision limiting the definition of the semiconductor chip products protected under the Act to those in or affecting commerce. H.R. 5525 is premised on a finding that original mask works are ‘writings’ within the meaning of Article I, section 8, clause 8 of the Constitution. In the unlikely event that a court should find mask works not to be writings, authority for the legislation is found in the commerce clause, to the extent that the chip products and piratical conduct occur in or affect interstate commerce.” H.R. Rep. No. 98-781 (1984) at 16 n.36.

⁶⁸ U.S. CONST. art. I, § 8, cl. 3.

⁶⁹ On the ability to ground amendments to Title 17 of the United States Code on the Constitution’s Treaty Clause (U.S. CONST. art. II, § 2, cl. 2), see 3 NIMMER ON COPYRIGHT § 9A.07.

The answer is—nothing. The pertinent reports simply omitted any reference. In other words, Congress decided not to follow its own practice of identifying the constitutional underpinning for this law because it had *no constitutional underpinning*. Which is why we witness a case that recently traveled to the U.S. Supreme Court, challenging the constitutionality of a portion of the Uruguay Round Agreements Act.⁷⁰ At issue in that case was restoration of qualifying works of foreign origin, conferring on public domain works a new term of copyright protection, notwithstanding the Copyright Clause's language that protection may be conferred only "for limited Times."⁷¹ In that particular instance, the Court majority rebuffed the challenge—but by a 6/2 vote, so the challenge cannot be dismissed as makeweight.⁷² Nonetheless, although that particular facet of the Uruguay Round Agreements Act survived constitutional scrutiny, it must be recognized as the easy, straightforward part of the enactment.

The *weird* part of the Uruguay Round Agreements Act, the aspect that is truly mystifying, is that the Constitution limits Congress to protecting "Writings" of "Authors."⁷³ I understand "Writings" can be viewed as an expansive term. It may extend to protect not only a poem and novel, but even a sculpture (in some sense, a "writing"). I even understand how the stencils of mask works were embraced within Title 17 as of passage of the Semiconductor Chip Protection Act in 1984—in some tenuous, removed sense, those also might be viewed "writings." But what is the implicated "writing" underlying, for example, a live jam session (producing new music) at Independence Hall?

Bootlegging a live performance constitutes a violation of Title 17 of the U.S. Code, by virtue of the Uruguay Round Agreements Act. I was mystified when I encountered that provision for the first time, as to its constitutional basis. I remain mystified twenty years later.

D. *The Digital Millennium Copyright Act*

This brings us to Chapter Twelve: the Digital Millennium Copyright Act. Far from postulating that there are no cases that have been brought, here the exact opposite pertains: a plethora of cases have been brought under the DMCA. This amendment is fascinating because we already saw the circle-c and the circle-m. Moreover, the circle-C

⁷⁰ *Golan v. Holder*, 132 S.Ct. 873 (2012).

⁷¹ U.S. CONST. art. I, § 8, cl. 8.

⁷² Justices Breyer and Alito dissented. Justice Kagan did not participate in the case, given her defense of the law in her previous role as Solicitor General. *Golan*, 132 S.Ct. at 894.

⁷³ U.S. CONST. art. I, § 8, cl. 8.

has been a part of copyright law since time immemorial.⁷⁴ But the DMCA has conferred unprecedented force and scope on the ©, by virtue of codifying it as an element of “copyright management information.”⁷⁵ Numerous cases have been filed on that basis.⁷⁶ Plus, the matter even bears criminal overtones.⁷⁷

In evaluating the DMCA, sixty-two copyright professors submitted written testimony opposing the bill before Congress.⁷⁸ They condemned it as an “unprecedented departure into the zone of what might be called paracopyright—an uncharted new domain of legislative provisions designed to strengthen copyright protection by regulating conduct which traditionally has fallen outside the regulatory sphere of intellectual property law.”⁷⁹ My reaction to that statement is that it is completely mistaken—one need simply revert to the Semiconductor Chip Protection Act and the Audio Home Recording Act. Viewed against that backdrop, the Digital Millennium Copyright Act does not represent “an *unprecedented* departure”; to the contrary, it constitutes an *all-too-precedented* departure into “paracopyright” —indeed, it simply crochets more fabric onto the same quilt that Congress has been weaving for decades.

Let us recall the circle-D that underlay the House bill for the 1976 Act, plus the circle-M added to mark semiconductor chips, against the ubiquitous background of circle-C. Simply adding to that formulation the letter ‘A’ for the Audio Home-Recording Act yields a quasi-mathematical proof that the 1998 addition of Chapter 12 to the Copyright Act stands for no new innovation.

$$\textcircled{d} + \textcircled{m} + \textcircled{C} + A = \text{DMCA}$$

In 2004, I represented a company called Skylink that manufactured a universal garage door opener, in a suit alleging alleging that it had violated the DMCA’s prohibition on circumvention of technical

⁷⁴ Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075 (1909), amended July 30, 1947, ch. 391, 61 Stat. 657 § 19 (1947), “In the case . . . of copies of works specified in subsections (f) to (k), inclusive, of section 5 of this title, the notice may consist of the letter C enclosed with a circle, thus ©”

⁷⁵ See 17 U.S.C. § 1202.

⁷⁶ See 3 NIMMER ON COPYRIGHT § 12A.08.

⁷⁷ Section 1204 provides for criminal penalties for violations of sections 1201 and 1201. See 3 NIMMER ON COPYRIGHT § 12A.14.

⁷⁸ See 144 Cong. Rec. E2136–02 (daily ed. Oct. 13, 1998).

⁷⁹ *Id.*

protection measures surrounding copyright.⁸⁰ The plaintiff Chamberlain, a manufacturer of a proprietary garage door opener, claimed that my client had violated its rights under copyright law. The gravamen of the claim was that the plaintiff's garage



door opener contained some computer code; by virtue of manufacturing a universal garage door opener, Skylink was alleged to circumvent the technical protection measure supposedly enveloping that code.

Our defense was common-sensical, or so it seemed to me, and later, apparently, to Judge Pallmayer as well. My statement to the court was basically to the following effect:

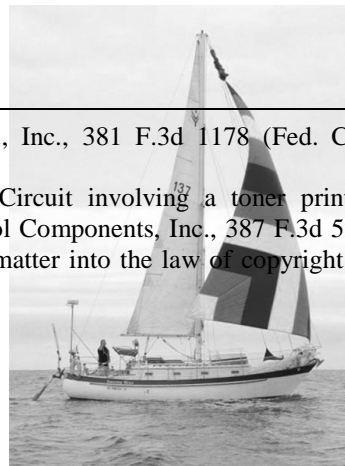
I understand the learned opposing counsel to be claiming that a family living in the Chicago suburbs who outfitted their home with a Chamberlain garage door opener, if they happen to return home one day during a rainstorm to discover their door jammed such that they could not gain entry into their own house and they sent their teenage son to jimmy the lock—what he's saying is that the son has violated the Digital Millennium Copyright Act. Could that actually be the law?

I was amazed by the response that my question elicited. When the judge asked plaintiff's counsel point blank to address that matter, he replied with words to the effect, "Yes, Your Honor: that would be a violation of the DMCA. But it would be a *technical* violation, and we would not sue."

The judge decided that Skylink had *not* violated the DMCA. The precise reasons are beyond today's scope; suffice it to say, though, that in a million years I never would have imagined, when I started writing my copyright career, that one day I would litigate a case about universal garage door openers as something arising under the Copyright Act.⁸¹

E. The Vessel Hull Design Protection Act

We have finally arrived at the Act's



⁸⁰ Chamberlain Group, Inc. v. Skylink Techs., Inc., 381 F.3d 1178 (Fed. Cir. 2004).

⁸¹ There was a parallel case in the Fourth Circuit involving a toner printer cartridge, Lexmark Intern., Inc. v. Static Control Components, Inc., 387 F.3d 522 (6th Cir. 2004). The intrusion of that subject matter into the law of copyright is equally surprising.

last chapter. Chapter Thirteen has added a legendary thirty-two sections into the Copyright Act.⁸² What was the need for this major addition to Title 17? This subject matter here encompasses protection for boat hulls, a proposition supposedly necessitated by the Supreme Court's *Bonito Boats* decision in 1989 regarding "plug molding."⁸³

My vast erudition on the subject allows me to formulate a highly technical and scrupulously accurate description of plug molding: Take a boat, turn it upside-down, and spread Silly Putty all over it; after you remove the goop, then turn it right-side-up, and pour silicone in the resulting space. Now, you have a new boat that is identical to the old boat. That is "plug molding," also known as "hull splashing."

This practice used to be illegal under Florida law,⁸⁴ until the case reached the U.S. Supreme Court. *Bonito Boats* ruled that the state law in question was regulating affairs that belong in the domain of copyrights and patents. Legislating anti-plug-molding statutes might be a good idea, or it might be a bad idea—but it is a *national* idea, meaning that *Congress* has to be the body to take action.⁸⁵ After that 1989 ruling, Congress reacted expeditiously—a mere nine years later. In particular, as a portion of the previously encountered Digital Millennium Copyright Act, Congress acted to rectify the evidently devastating effects that *Bonito Boats* must have been exerting on the boat hull industry. The resulting Vessel Hull Design Protection Act sets forth the thirty-two sections needed to fill the gap.

It stands to reason that, over the course of those nine long years, society must have witnessed proof of the terrible economic effects that boat manufacturers were suffering. Here is what the Congress had to say on the subject:

"Hull splashing" is a problem for consumers, as well as manufacturers and boat design firms. Consumers who purchase copied boats are defrauded in the sense that they are not benefitting from the many attributes of hull design, other than shape, that are structurally relevant, including those related to quality and safety.⁸⁶

"Quality and safety" is thus the first rationale for this enactment. How do those concerns play out? Let us imagine that someone who knows nothing about hull design starts to manufacture boats. If that ingenu were to design a boat from scratch, the result is likely to be a poor-quality and unsafe vessel. To redress such issues, Congress should pass standards that require minimum competency in nautical technology. In

⁸² 17 U.S.C. § 1301-1332.

⁸³ *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.* 489 U.S. 141 (1989).

⁸⁴ FLA.STAT. § 559.94 (1987).

⁸⁵ *Bonito Boats*, 489 U.S. at 157–168.

⁸⁶ H.R. Rep. No. 105-436, at 13 (1998).

addition, it could establish a board to determine what makes boats safe and avoids accidental drowning.

But all those quality and safety strictures are resolutely missing from the Vessel Hull Design Protection Act itself, which limits its focus to regulating the design. Very well—if design regulation is the only tool available, then how do we improve the unsophisticated manufacturer’s performance? The only step that comes to mind would be to *require* plug molding of an existing design that itself has stood the test of time. In other words, if our naïf were to exactly copy a design from a rival who had produced a safe and high-quality boat, at least there can be some hope that the knock-off will share those characteristics.⁸⁷ Therefore, taking seriously Congress’ stated concerns quality and safety, it has managed to pass a law that is exactly



C.K. Dexter-Haven (Bing Crosby) and Tracy Lord (Grace Kelly) aboard the sailboat *True Love*

backwards.⁸⁸

Let us continue with our quotation from the pertinent legislative history, to see if other concerns actually underlie the enactment:

It is also highly unlikely that consumer [sic] know that a boat has been copied from an existing design. Most importantly for the purposes of promoting intellectual property rights, if manufacturers are not permitted to recoup at least some of their research and

⁸⁷ Conversely forcing the newcomer to design a model wholly from scratch seems more likely to produce a design that is less safe than a tried-and-true form.

⁸⁸ The very proposition that design is a surrogate for quality and safety seems highly questionable. But, if that first proposition holds, then the point is that it follows that *copying* seems superior to *independent design*. It is for this reason that the Vessel Hull Design Protection Act gets matters backwards.

development costs, they may no longer invest in new, innovative boat designs that boaters eagerly await.⁸⁹

Here, a new rationale is asserted—consumers are defrauded when unaware that a given design has been copied. At this point, let us imagine your typical boat purchaser: A billionaire who walks into a showroom and sees a thirty-two-foot yacht. “My, that’s beautiful,” he intones. “I love her. She’s yar. I’ll buy one.” Congress is positing that, if only the billionaire had been told that particular hull design was copied



from a previous exemplar, he instead would have exclaimed, “Take that ugly thing away. I hate it!” Though theoretically possible, the claim seems wholly implausible on its face; it follows that putative concern about fraud is just a smokescreen.

Even more strikingly, the legislative history contains no attempt to adduce economic proof about how many billionaires actually *are* dissatisfied with what they bought between 1989 and 1998, or any empirical investigation at all into boat customers. And what was the economic impact? Given the reference to “research and development costs” that are not going to be recouped, the question immediately arises what the experience has been during the previous nine years during which all legal protection has been lacking. If a regression study showed that ninety percent of the boat hull manufacturers had gone bankrupt in that interim, we could conclude that Congress was acting sensibly—your tax dollars at work for a good purpose. Instead, though, the stated rationales seem to be all pretense and no substance.

So now we have our final addition, Chapter 13. How many cases have been brought under it? By now, we can discern a pattern—there has been one reported decision brought under the additional thirty-two sections added to the Copyright Act in 1998.⁹⁰

III. ESOTERIC VS. EXOTERIC REVELATION

We have now progressed to our third and final theme, the distinction between esoteric *vs.* exoteric revelation. To explicate it

⁸⁹ H.R. Rep. No. 105-436, at 13 (1998).

⁹⁰ *Maverick Boat Co. v. American Marine Holdings, Inc.*, 18 F.3d 1186 (11th Cir. 2005).



requires recourse to academic assistance. In that spirit, I turn to the wisdom of “Professor” Stephen Colbert, who annotated the case of *Citizens United v. FEC*⁹¹ by trenchantly noting that it has *not* led to billionaires covertly buying elections.⁹² No sirree; there has been nothing covert about it! That same sensibility is at work in the Copyright Act. To illustrate these themes, I revert to the exposition of a previous article.⁹³

Let us focus on one aspect of the Copyright Act that almost never forms the curriculum of any law school copyright class in this country: the Satellite Home Viewer Improvement Act of 1999,⁹⁴ and in particular its “Technical amendments.”⁹⁵ What are technical amendments? They consist of refinements along the lines of correcting grammar. For instance, if a previous copyright enactment referred to “programing,” then the amendment steps in to add the missing “M” and thereby spell the word correctly as “programming.”⁹⁶ Likewise, technical amendments fix internal cross-references to various sections within bills as they gain or lose subparagraphs.⁹⁷

In midst of these “technical” amendments, what else did Congress decide to do? It worked a fundamental amendment to Copyright law’s work-for-hire doctrine by adding a definition that sound recordings qualify as works made for hire.⁹⁸ Assuming that Bruce Springsteen had previously entered the recording studio; after the passage of thirty-five years, he would be able to reclaim rights to his individual recordings.⁹⁹ The effect of this law is to deprive him of that ability.¹⁰⁰

This matter qualifies as a “midnight amendment,” inasmuch as practically no one could have known what was going on, except for a staffer on the House Judiciary Committee.¹⁰¹ In fact, it was so

⁹¹ 558 U.S. 310 (2010).

⁹² “To all the worrywarts out there who said that super PACs were going to lead to a cabal of billionaires secretly buying democracy: Wrong. They are *publicly* buying democracy.” <http://latimesblogs.latimes.com/showtracker/2012/02/stephen-colbert-says-super-pacs-buying-democracy.html> (visited April 15, 2013).

⁹³ David Nimmer, *Codifying Copyright Comprehensibly*, 51 UCLA L. REV. 1233 (2004).

⁹⁴ Act of Nov. 29, 1999, Pub. L. No. 106-113, app. I, 113 Stat. 1501.

⁹⁵ *Id.* at § 1011.

⁹⁶ *Id.* at § 1011(a)(1).

⁹⁷ *See id.* at § 201(j).

⁹⁸ *Id.* at § 1011(d).

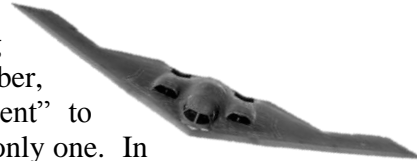
⁹⁹ *See* 17 U.S.C. § 203.

¹⁰⁰ *See generally* David Nimmer and Peter S. Menell, *Sound Recordings, Works for Hire, and the Termination-of-Transfers Time Bomb*, 49 J. Copr. Soc’y 387 (2001).

¹⁰¹ *See* Lital Helman, *When Your Recording Agency Turns Into An Agency Problem: The True Nature Of The Peer-To-Peer Debate*, 50 IDEA 49, 62 n. 56 (2009).

controversial¹⁰² that it later had to be eliminated. Sheryl Crow, for example, later testified to Congress about the deficiencies in these “technical amendments” made by the Satellite Home Viewer Improvement Act of 1999.¹⁰³ The whole process took an additional year, at which point Congress repealed its 1999 handiwork via the Work Made for Hire and Copyright Corrections Act of 2000.¹⁰⁴

We have now reached the all-time worst example of something that, by analogy to the stealth bomber, may be termed a “stealth amendment” to U.S. copyright law. But it is not the only one. In fact, it is not even the only example of a stealth amendment afflicting the Copyright Act to appear in the Satellite Home Viewer Improvement Act of 1999.¹⁰⁵ The other example affected the sunset date that was originally included as part of the Vessel Hull Design Protection Act. At enactment, Chapter 13 of the Copyright Act provided that no cause of action could be filed at the end of a two-year period.¹⁰⁶ In other words, when passed as part of the Digital Millennium Copyright Act in October 1998, the new thirty-two sections were destined to expire in October 2000.



An essential feature of the enactment itself was that Congress ordered two reports to be prepared within that two-year experimental window “evaluating the effect” of these new provisions.¹⁰⁷ The implicit arrangement was that Congress could study those reports in order to determine whether to sunset the new approach as of 2000, or by contrast to continue it for another two years on an experimental basis, or—if it proved to be a smashing success—could even institute it permanently. Senator Orrin Hatch explicitly conditioned his approval for the bill on

¹⁰² See Eric Boehlert, *Four Little Words: How the Record Industry Used a Tiny Legislative Amendment to Try to Steal Recording Copyrights from Artists—Forever*, SALON.COM, Aug. 28, 2000. http://www.salon.com/2000/08/28/work_for_hire/.

¹⁰³ 2000 Hearings, p. 217, at 79.

¹⁰⁴ Pub. L. No. 106–379, sec. 1, 114 Stat. 1444 (Oct. 27, 2000).

¹⁰⁵ Strictly speaking, the matter now under investigation formed part of the Intellectual Property and Communications Omnibus Act of 1999, Pub. L. No. 106–113, 113 Stat. 1536 § 5005 (Nov. 29, 1999), the omnibus bill with which the Satellite Home Viewer Improvement Act of 1999 was consolidated for enactment.

¹⁰⁶ See Digital Millennium Copyright Act, Pub. L. No., 105–304, 505, 112 Stat. 2860, 2918 (1998) (“No cause of action based on Chapter 13 of Title 17, United States Code as added by this title, may be filed after the end of that 2-year period.”).

¹⁰⁷ See Digital Millennium Copyright Act, Pub. L. No., 105–304, 504, 112 Stat. 2860, 2918 (1998).

that “sunset” provision.¹⁰⁸ Senator Strom Thurmond elaborated that, in his estimation, those features rendered the whole amendment “truly experimental.”¹⁰⁹

What happened next? The answer is another stealth amendment—the same 1999 law that covertly added sound recordings as works for hire also unceremoniously *eliminated* the two-year sunset of the Vessel Hull Design Protection Act!¹¹⁰ The salient difference is that no Sheryl Crow or other celebrity went to Congress to complain about the latter instance.

As a result, we currently have thirty-two sections that continue in effect, over a dozen years after they were due to expire.¹¹¹ As currently constituted, they will continue to subsist through 2053 and beyond. But what about the reports that Congress ordered by 2000? They had not even been prepared as of only one year after the Vessel Hull Design Protection Act came into effect; therefore, when the Satellite Home Viewer Improvement Act of 1999 eliminated the sunset, Congress certainly did not rely on any experience of its success. In fact, the sole reported case to arise under this enactment itself was still a half-dozen years away.¹¹²

Now that we have appreciated that the aforementioned thirty-two sections constitute a permanent feature of governing copyright law, let us examine them in more detail. “Protection of Original *Designs*” is the heading of Chapter 13.¹¹³ Its section captions follow suit:

§ 1301. *Designs* protected

§ 1302. *Designs* not subject to protection

§ 1306. *Design* notice¹¹⁴

The same language choice emerges from the statute’s very first provision:

In general. – The *designer* or other owner of an original *design* of a useful article which makes the article attractive [has protection under this enactment].¹¹⁵

¹⁰⁸ 144 CONG. REC. 24,466 (1998).

¹⁰⁹ *Id.* at 24,465. Nonetheless, another legislator (who later served as Attorney General) rose to condemn this approach as a fundamental shift in the tradition and breadth of copyright law. *Id.* (remarks of Sen. Ashcroft).

¹¹⁰ Intellectual Property and Communications Omnibus Act of 1999, Pub. L. No. 106-113, 113 Stat. 1536 § 5005 (Nov. 29, 1999).

¹¹¹ 17 U.S.C. §§ 1301–1332.

¹¹² *See* *Maverick Boat Co. v. Am. Marine Holdings, Inc.*, 418 F.3d 1186 (11th Cir. 2005).

¹¹³ 17 U.S.C. ch. 13 (emphasis added).

¹¹⁴ 17 U.S.C. §§ 1301, 1302, 1306 (emphases added).

What is the “design” underlying all those emphasized words, *i.e.*, all the variants of the word “design”? That language just quoted is as broad as can be. It is only upon deep immersion in the statutory scheme that one discerns the limits of “a useful article”—namely that a “useful article” is a term of art referring exclusively to a “vessel hull or deck.”¹¹⁶ In short, somebody went to the trouble of constructing a statute dripping with references to *designs* of any “useful article,” simultaneously incorporating the only pertinent limitation into the “fine print.” As I have previously observed,

[E]verything about the amendment screams its intent to inject design protection into the Copyright Act. Such a course of action would overrule the drafting decision reached in crafting the 1976 Act to omit a proposed title providing such protection.¹¹⁷ Though the Senate passed that title, the House of Representatives deleted it, meaning that it failed to make its way into the final Act. It is only later upon minutely parsing the details of Title V of the Digital Millennium Copyright Act that one realizes that protection has been limited to “a vessel hull.” Evidently someone went to the trouble to draft the thirty-two sections of the Vessel Hull Design Protection Act as broadly as possible. One need not be a conspiracy theorist to speculate that the reason behind it might have been to set the stage for yet another stealth amendment to the Copyright Act in the future.¹¹⁸

Those previously expressed misgivings, happily, have not come to fruition. Instead, it is gratifying to observe that the IDPPPA currently under examination is *not* the type of stealth bill that I previously feared.

IV. IDPPPA: THE FASHION BILL

Far from unceremoniously altering the definition of “useful article” to drop its limitation to vessel hulls, its elaborate features are explicit in their orientation. In fact, the bill goes to great length to give fashion protection under the law. So that particular danger has passed.

Reverting now to the three opening dichotomies of (1) body *vs.* spirit; (2) cosmogony *vs.* evolution; and (3) esoteric *vs.* exoteric revelation, we can give the IDPPPA a clean bill of health on the third count. Accordingly, only the first two remain.

Does the IDPPPA protect works of the body or conceptual types—is it more like the 1909 Act or the rest of the 1976 Act?

¹¹⁵ 17 U.S.C. § 1301(a)(1) (emphasis added).

¹¹⁶ *Id.* § 1301(b)(2).

¹¹⁷ See S. 22, 94th Cong. tit. II (1975).

¹¹⁸ David Nimmer, *Codifying Copyright Comprehensibly*, 51 UCLA L. REV. 1233, 1318 (2004) (footnotes and bullet points omitted).

Is the IDPPA drawn from the same universe as the rest of the Copyright Act, or is it drawn from something else?

When we look at the details of the fashion bill, we see aspects geared to what is likely to be mistaken for the protected design.¹¹⁹ That sentiment emerges from *trademark* law, not from copyright law, rendering it inconsistent with the rest of the copyright statute. Recall that we had an outlier provision in the Visual Artists' Rights Act that goes back to the old sensibility, rather than the new one, referencing aspects that are prejudicial to an artist's honor and affecting works of recognized stature.¹²⁰ The same type of skewed focus is present here in the fashion bill.

But it goes deeper than that. A "unique, distinguishable . . . variation"¹²¹ is required to obtain protection for fashion works. That feature again rehearses features of VARA, which protects a single copy, a unique artwork, or at least, a limited edition of two hundred copies that are each signed.¹²² The essential matter to recall is that such protection is entirely different from what is protected in the rest of the Copyright Act. In this manner, the new fashion bill, just like VARA, looks to the 1909 Act for its inspiration, rather than fitting harmoniously in with the rest of the 1976 Act.

The upshot is that, even though the stealth problem has been eliminated, the other two issues remain. In particular, the fashion bill protects items that are physical, and is drawn from a different universe than the rest of the Copyright Act.

Just because a bill has those two strikes against it does not mean that it should be rejected out of hand. New problems call for new solutions. If we face a qualitatively different danger today than in years past, we might need a qualitatively new legislative fix. It could be indicated, in that context, to enact a law that draws on different roots than those that traditionally sprouted salutary copyright doctrine.

The question, in short, is whether this country currently faces a pressing *need* for fashion protection. If such a need exists, then we should be prepared to resort to new strategems. On the other hand, history should render us cautious. When Congress just *knew* in 1990 that "Everyone inevitably is going to own multiple digital audio tape-recorders as of 1995,"¹²³ its prediction turned out to be wide of the

¹¹⁹ For this purpose, we revert to H.R. 2511, 112th Cong. (2011). That bill would add the quoted language to 17 U.S.C. § 1301(b)(10).

¹²⁰ See *supra* pp. 14–17.

¹²¹ For this purpose, we revert to S. 3728, 111th Cong. (2010). That bill would add the quoted language to 17 U.S.C. § 1301(b)(7)(B)(ii).

¹²² See *supra* notes 35–37 and accompanying text.

¹²³ See text accompanying fn. 56 *supra*.

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mark. That is why healthy skepticism should attend statements in 2013 along the lines, “Everyone will inevitably need fashion protection as of 2015.”

The only remaining matter is to minutely parse each and every letter, punctuation mark, and space set forth in the IDPPPA. The

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