No. 15-866

IN THE

# Supreme Court of the United States

STAR ATHLETICA, LLC,

*Petitioner*,

v.

VARSITY BRANDS, INC., VARSITY SPIRIT CORPORATION, AND VARSITY SPIRIT FASHIONS & SUPPLIES, INC.,

*Respondents*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## BRIEF OF PUBLIC KNOWLEDGE, THE INTERNATIONAL COSTUMERS GUILD, SHAPEWAYS, INC., THE OPEN SOURCE HARDWARE ASSOCIATION, FORMLABS INC., PRINTRBOT INC., THE ORGANIZATION FOR TRANSFORMATIVE WORKS, THE AMERICAN LIBRARY ASSOCIATION, THE ASSOCIATION OF RESEARCH LIBRARIES, AND THE ASSOCIATION OF COLLEGE AND RESEARCH LIBRARIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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## INTEREST OF *AMICI CURIAE*

*Amici curiae*[1] include a range of public advocacy organizations, associations, and companies who share a common concern for promoting creators at all levels, from industry down to individual consumers. Balanced copyright law that allows for grassroots creativity without unnecessary barriers is important to a wide range of groups, as seen in the diverse *amici* here.

Public Knowledge is a non-profit organization that is dedicated to preserving the openness of the Internet and the public's access to knowledge, promoting creativity through balanced intellectual property rights, and upholding and protecting the rights of consumers to use innovative technology lawfully. Public Knowledge advocates on behalf of the public interest for a balanced copyright system, particularly with respect to new and emerging technologies.

The International Costumers Guild is a non-profit organization for amateur, hobbyist, and professional costumers, with affiliated chapters and special interest groups in the United States and internationally. Members include historic re-enactors, professional, educational and community theatrical costumers, science fiction fans, renaissance festival participants, and all those who are interested in the making, wearing and display of costumes. The International Costumers Guild is dedicated to the promotion and education of costuming as an

[1]Pursuant to Supreme Court Rule 37.3(a), both parties have provided blanket consent to the filing of *amicus* briefs. Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity, other than *amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

art form in all its aspects. It also advocates on behalf of its members and the costuming community in matters of the public interest related to the art and practice of costuming.

Shapeways, Inc. is a 3D printing marketplace and service company. It has printed and sold millions of 3D-printed objects through its platform. Shapeways supports widespread access to 3D printing, which empowers more and more individuals to creatively interact with objects that combine copyrightable and non-copyrightable elements without unnecessary legal uncertainties or liabilities. As the world's leading 3D printing marketplace, Shapeways and its users will often be called on to navigate the landscape of conceptual separability, giving them a key interest in this case.

The Open Source Hardware Association is a nonprofit organization designed to be the voice of the open source hardware community, ensuring that technological knowledge is accessible to everyone, and encouraging the collaborative development of technology that serves education, environmental sustainability, and human welfare. That community includes large companies as well as individuals working on their own, all of whom create hardware according to agreed-upon open principles. A large percentage of open hardware source hardware combines both creative and functional elements. Understanding the licensing requirements of open source hardware begins with understanding how copyright might apply.

Formlabs Inc. is a provider of advanced desktop 3D printing technology whose customers include engineers, designers, artists and many other professionals authoring 3D content. By providing such technology at an affordable price, Formlabs empowers consumers to be-

come professionals with access to tools of creation and innovation previously available only to larger enterprises. Clear, balanced intellectual property rights are important to such individuals in order to avoid costly legal disputes and make possible efficient incentivizing of authorship and invention.

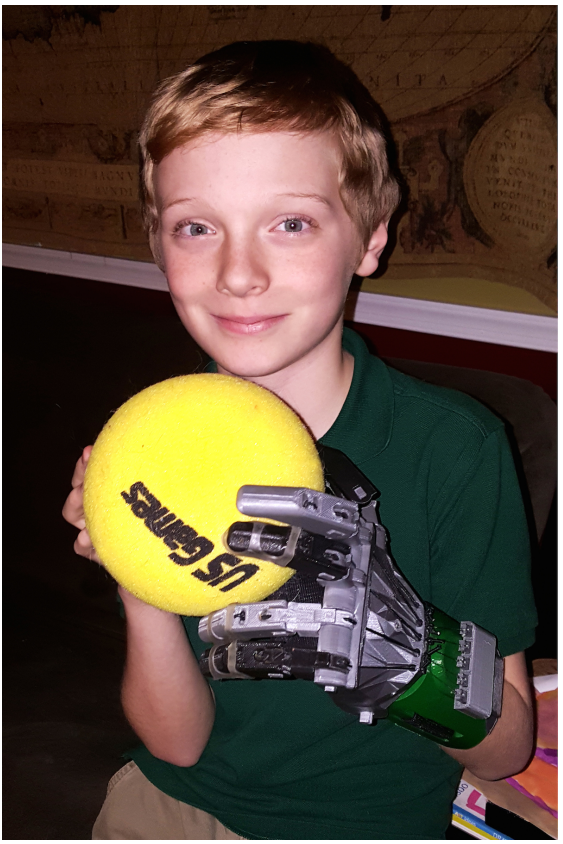
Printrbot Inc. makes affordable desktop 3D printers in Lincoln, CA. Printrbot has shipped 40,000 3D printers all over the world. Printrbot is very active in the community—teaching people how to use 3D printers, how to model in 3D and will soon be distributing files itself. Printrbot's customers make use of a wide variety of 3D design files from a broad array of sources.

The Organization for Transformative Works is a 501(c)(3) nonprofit organization established in 2007 and dedicated to protecting and preserving noncommercial fanworks: works created by fans based on existing works, including popular television shows, books, and movies. The OTW's nonprofit website hosting transformative noncommercial works, the Archive of Our Own, has over 850,000 registered users and receives over 119 million page views per week. The OTW's members include cosplayers: fans who express their fan identity by creating or wearing garments that replicate or are inspired by costumes in literature, film, and other media.

The American Library Association is a nonprofit professional organization of more than 60,000 librarians dedicated to providing and improving library services and promoting the public interest in a free and open information society. The Association of College and Research Libraries, the largest division of the ALA, is a professional association of academic and research librarians. The Association of Research Libraries is a nonprofit or-

ganization of 125 research libraries in North America, including university, public, government and national libraries. Collectively, these three associations represent over 100,000 libraries in the United States employing over 350,000 librarians and other personnel. As representatives of libraries, these organizations have an ongoing interest in the development of balanced copyright laws. Additionally, many libraries today offer 3D printing services to the public, and thus have a further interest in this case.

## COPYRIGHT NOTICE




Colin Consavage and his 3D-printed hand. Courtesy of his mother, Clare Consavage. Images throughout this brief will highlight the many examples of individual and consumer creativity.

## SUMMARY OF ARGUMENT

In this case on creativity and useful articles, consider Colin Consavage, the ten-year-old who printed himself a new hand.

Colin was born with his left hand smaller than usual. Commercial prosthetics were financially out of reach, but he and his mother learned of a new possibility: using a 3D printer to make one. They found plans on the Internet, customized them for Colin, and used the 3D printer at the local library to make each part.

After two days of assembly, Colin put on his new hand. He picked up a Pringles can and shouted, "Triumph!" He won an arm wrestling match at school. So empowered did he feel that he went to bed that first night still wearing his plastic hand.[2]

In this case on creativity and useful articles, it is essential to remember the ingenuity of all people, down to the most ordinary consumers, who use and improve upon existing knowledge to solve problems and make new things. "We build and create," said Justice Kennedy, "by bringing to the tangible and palpable reality around us new works based on instinct, simple logic, ordinary inferences, extraordinary ideas, and sometimes even genius."[3] But that innovation depends on consumers' longstanding expectations that useful things are generally not subject to the exclusivity of copyright, exclusivity that could interfere with building and creating.

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[2] *See generally* Saranac Hale Spencer, *Claymont Boy Prints Hand, Wins Arm Wrestling Match*, USA Today (Oct. 28, 2015), URL *supra* p. x; Caroline Lester, *3D Printing, a Public Library, and One Very Determined 11-Year-Old*, WGBH Innovation Hub (Feb. 19, 2016), URL *supra* p. viii.

[3] *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 427 (2007).

Those consumers are correct: useful articles are not copyrightable, and the appearances of such articles rarely so. Nothing should change. Without endorsing a particular test for conceptual separability, *amici* suggest that copyright in a useful article's appearance ought to remain highly limited, wherein such appearance may be copyrighted only upon a clear showing of obvious separability and indisputable independence from the utilitarian aspects of the article.

1. The public interest cautions against undue copyright in the appearance of useful articles. Individuals like Colin rely on an expectation that useful articles like mechanical hands are generally adaptable, reusable, and improvable without incurring commercial-level transaction costs of copyright licensing. A rule that more broadly enables copyright in useful articles could throw these activities into question, stifling creativity and progress.

More specific to this case, clothing design and fashion are closely tied to basic constitutional liberties of speech and association, and these concerns are important to the proper balance of copyright law. Where the appearance of a useful article serves these constitutionally-grounded ends, that fact should weigh in favor of the appearance being utilitarian and thus not subject to copyright.

2. Maintaining limits on copyright will not discourage productivity in the industries producing such articles, and it will likely even increase such productivity. Numerous industries, such as fashion, cuisine, comedy, and typography, lack substantial intellectual property protection and yet continue to thrive and create at impressive rates. Other pressures—including competition from lack of exclusive rights—are what spur creativity in these and many more industries.

Economic research corroborates these industry examples. Studies find that expansion of copyright into new fields can impede technological development, business investment, and education; conversely they find little evidence of benefit. This Court should cast a skeptical eye on claims that increased copyright will encourage creativity, as history repeatedly challenges that claim.

3. Finally, a look to patent law confirms that copyright in useful articles should be limited. Patent law is carefully balanced, in part through rigorous examination and short term length, to ensure that the intellectual property monopoly in useful articles does not unduly impede the public interest. Copyright, with much longer term and no examination, could thus upset that patent balance if the appearances of useful articles become more easily copyrightable. Case law and legislation reflect a desire to keep copyright out of the domain properly allocated to patent; the doctrine of conceptual separability should follow that sensible path.

Some years ago, a now-famous paper on the "uneasy case for copyright" concluded that "a heavy burden of persuasion should be placed upon those who would extend such protection."[4] That heavy burden falls upon Respondents today. An overbroad test for conceptual separability will expand copyright in the appearance of useful articles. Creative individuals, public innovation, rights of expression, and the progress of science and useful arts will bear the costs of that expansion. This Court should adopt a test that accommodates these important interests, and that guarantees limits on copyright that will allow all ordinary creators to flourish.

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[4]Stephen Breyer, *The Uneasy Case for Copyright*, 84 Harv. L. Rev. 281, 322–23 (1970).

## ARGUMENT

### I. A High Bar to Conceptual Separability Serves Fundamental Interests of Individuals and the Public

The rule for copyrightability in utilitarian aspects of articles will potentially have wide-ranging effects for consumers and the public. Two such effects are treated below: the effect on individual creativity, and the effect on basic rights of expression and association.

#### A. Creative Consumers of All Stripes Depend on Limited Copyright in Useful Articles

Individual consumers are fast becoming some of the most productive creators contributing to the public storehouse of innovation. But in making such contributions, those consumers depend on rights to borrow, adapt, and improve existing concepts in areas of useful articles generally viewed as outside the domain of copyright. To extend copyrightability to these areas, as Respondents seek, could stifle rather than advance these important sectors of consumer-driven making.

Many different fields exhibit the creativity of individuals; a few are described below.

1. Home sewing has enjoyed a renaissance in recent years, part of the current interest in Do-It-Yourself (or "DIY") culture. No longer "the domain of apron-clad matrons tasked with domestic busywork . . . [it has] become an accessible outlet for self-expression, creativity, and a way to participate in shared interests." Laura M. Holson, *Dusting Off the Sewing Machine*, N.Y. Times, July 4, 2012, at E6, *available at* URL *supra* p. viii. A 2006 es-

timate found 35 million sewing hobbyists in the United States; other statistics are equally impressive. Anita Hamilton, *Circling Back to Sewing*, Time (Nov. 27, 2006), URL *supra* p. vii.[5]

Borrowing from existing work, especially the styles and ideas of others, is central to this home sewing practice. A New Yorker constructs a pair of custom-sized shoes based on an existing design, because he could not find the original product in the correct size. Holson, *supra*. A Colorado teenager engages in the trend of "refashioning, in which parts of different pieces of clothing are sewn together to make a one-of-a-kind T shirt, skirt, or jacket." Hamilton, *supra*. These creative adaptations are made possible, in no small part, from a starting perspective that the intensely personal practice of making clothing does not entail the heavy commercial transaction costs of copyright licensing.

2. A particularly colorful offshoot of home sewing is the practice of "fan costuming" (sometimes called "cosplay") in which enthusiasts of various artistic or historical genres construct elaborate costumes, props, and other accessories in the relevant style. Most notable is comic book–based costuming, a practice that thousands of fans enjoy at numerous major conventions across the country, the largest with over 167,000 attendees.[6] Period costuming based on real or imagined history is no less popular, with subjects ranging among American Civil War reenactments, renaissance faires, and literary festivals.

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[5]*See also* Kim Leonard, *$30 Billion Crafts Industry Enjoys Resurgence*, TribLive, Nov. 17, 2012, *available at* URL *supra* p. viii; Holson, *supra* (3 million sewing machines sold in 2012).

[6]Rob Salkowitz, *How Many Fans??!! New York Comic Con Sets Attendance Record*, Forbes (Oct. 15, 2015), URL *supra* p. x.

Finely dressed participants in the Jane Austen Festival in Bath, England, 2008. Photograph by Owen Benson, https://www.flickr.com/photos/obenson/2875090895/, under a Creative Commons license, https://creativecommons.org/licenses/by-nc/2.0/.

The Jane Austen Festival in Bath, England, for example, hosts an annual promenade of over 500 picnickers attired in their finest late Georgian or Regency dress.[7]

The costumes that result from these practices are strikingly complex and ingenious in both artistry and engineering. The Janeites engage in painstaking historical research in constructing their dresses to conform to the period.[8] More futuristic costumes involve sophistication such as custom fabric prints and computer-controlled lighting effects.[9] Fans have actually invented real technologies based on fictional concepts, such as a working Captain America electromagnetic shield and a functioning Star Trek phaser.[10] This research and creative problem-solving undoubtedly add to the storehouse of knowledge and creative works.

Home-grown fan creations are so celebrated and adored that they sometimes are adopted by the originators of the work. In one example, a father with his friends created a custom pink droid in the style of R2-D2 from *Star Wars*, as a comfort companion for his terminally ill

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[7]Kelly Faircloth, *How Much Jane Austen Is Too Much Jane Austen?*, Jezebel (Sept. 4, 2015), URL *supra* p. vi.

[8]*See* Faircloth, *supra*; Deborah Yaffe, *Among the Janeites: A Journey Through the World of Jane Austen Fandom* 6–9 (2013).

[9]*See, e.g.*, Stephen Fraser et al., *The Spoonflower Handbook: A DIY Guide to Designing Fabric, Wallpaper & Gift Wrap* (2015) (describing service where users can design and order custom fabric by the yard); Hhhhammy & Gothichamlet, *Ragyo Kiryuin Wig Tutorial*, Cowbutt Crunchies Cosplay (last visited Jan. 25, 2016), URL *supra* p. vii (describing stylized, lighted rainbow wig).

[10]*See, e.g.*, Catrina Dennis, *YouTuber Builds Real-Life Working Captain America Shield*, Screen Rant (May 16, 2016), URL *supra* p. vi; Sam Grossman, *Live Long and Prosper: This Guy Built a Real-Life Star Trek Phaser*, Time (Apr. 26, 2012), URL *supra* p. vii.

A fan painting of Katie Johnson and R2-KT.
By Tsuneo Sanda, from the R2-KT press kit,
http://www.r2kt.com/press-kit/pics/_page-kt-presskit.html.

daughter, Katie Johnson.[11] The story of Katie's love and enthusiasm for the droid, and the outpouring of community support for her, reached the ears of the movie production staff. R2-KT, as the droid was named, now appears in the most recent *Star Wars* sequel, a reminder of the value that a small individual creation can bring not just to a young girl but also to an entire creative franchise.

3. Another consumer industry of importance is 3D printing, sometimes called additive manufacturing, in which a computer system creates a physical product out of a computer model.[12] This rapidly growing technology helps all sorts of companies shorten their research and development cycles. *See* Tim Catts, *GE Turns to 3D Printers for Plane Parts*, Bloomberg (Nov. 27, 2013), URL *supra* p. vi.

More importantly, 3D printing allows individual consumers to participate in manufacturing and product development practices formerly open only to large companies. Software for customizing and creating new designs is accessible to anyone with a computer, and any person can purchase a low-cost 3D printer or engage a 3D printing service to turn their ideas into physical objects. Millions of designs can be found on Shapeways, one such service, ready to be improved, modified, and manufactured. *See* Adrianne Jeffries, *Shapeways, the Startup that Lets You Print 3D Designs, Gets a $30 Million Cash Infusion*, The Verge (Apr. 23, 2013), URL *supra* p. viii.

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[11] *See, e.g.*, Ethan Anderton, *The Touching Story of R2-KT: The "Star Wars" Droid Created as Tribute to a Young Girl*, Slash Film (Nov. 30, 2015), URL *supra* p. v.

[12] This is generally achieved by the system precisely depositing and fusing layers of material upon each other until the desired product is made.

The depth of creativity of consumers is revealed in the range of 3D printed products: jewelry, shower heads, and lawnmowers, to name a few.[13] Colin Consavage, the boy who 3D-printed a plastic hand, exemplifies this creativity. *See supra* p. 7. Seeking "payback time" for his naturally smaller left hand, he designed his mechanical prosthetic extra large.[14] He now hopes to add features like a screwdriver finger, a laser pointer, and plastic that changes color with temperature.[15]

Consumer-driven 3D printing is creative, innovative, and greatly dependent on copying and derivation to which copyright may be the gatekeeper. Many 3D-printed products, like Colin's plastic hand, are primarily utilitarian but involve aesthetic elements. Sharing of useful 3D designs, and the productive consumer output that results from that sharing and innovation, could be thwarted by an overbroad rule of copyright.

4. Consumers who engage in creative activities matter to the economy and to the public weal. One study estimated that there are 11.7 million "consumer-innovators" in the United States alone, expending $20.2 billion a year on their creative activities. Eric von Hippel et al., *The Age of the Consumer-Innovator*, MIT Sloan Mgmt. Rev., Fall 2011, at 30 tbl., *available at* URL *supra* p. viii. Succinctly summarized: "It is by no means only companies that, as a well-known General Electric slogan put it, 'bring good things to life.'" *Id.* at 31.

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[13] *See, e.g.*, Gareth Branwyn, *Can Your Really 3D Print a Working Robotic Lawnmower?*, Make: Mag. (Apr. 19, 2016), URL *supra* p. v.

[14] *See* Saranac Hale Spencer, *Claymont Boy Prints Hand, Wins Arm Wrestling Match*, USA Today (Oct. 28, 2015), URL *supra* p. x.

[15] *See* Caroline Lester, *3D Printing, a Public Library, and One Very Determined 11-Year-Old*, WGBH Innovation Hub (Feb. 19, 2016), URL *supra* p. viii.

Overbroad copyright in the appearance of useful articles will likely impede these important activities. Though consumer-innovators will probably rarely appear in civil lawsuits,[16] the important effect of the conceptual separability rule will be to enunciate a cultural and social norm as to what borrowing is acceptable and what is not. "Copyright law purports to set the rules of the game for human creativity," one scholar explains.[17]

Should articles such as clothing, costumes, and 3D-printed prosthetics become more subject to copyright in their appearances, that would not only increase the risk of liability for home-grown creators; it would send a message to those creators that they are less welcome at the table of creativity than those who can ante up the price and transaction costs of copyright licenses. That message contravenes the purpose of copyright law, namely "to promote the progress of science and useful arts." U.S. Const. art. I, § 8, cl. 8. To better serve that constitutional purpose, the role of copyright in useful articles ought to remain limited.

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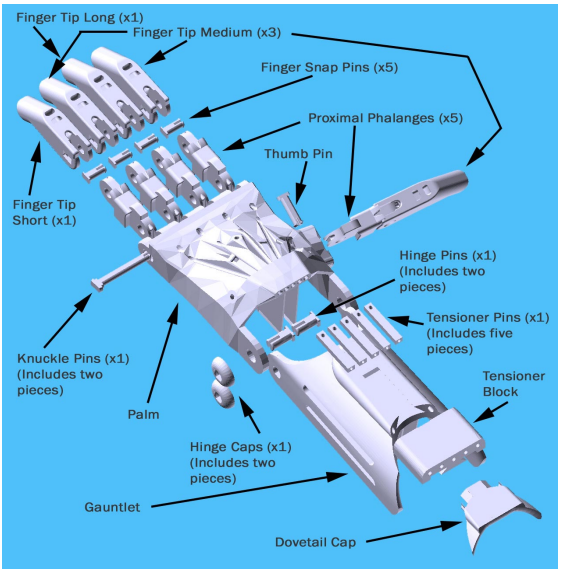
[16] *Cf.* Tim Wu, *Tolerated Use*, 31 Colum. J.L. & Arts 617, 619 (2008) (describing "tolerated use" in which a copyright owner takes no action against certain infringers due to enforcement costs and other factors). Furthermore, many of the activities thus described are likely permitted as fair use. Nevertheless, the existence of fair use does not justify a general expansion of the scope of copyright in the area of useful articles. And furthermore, insofar as costs of litigating complex questions of fair use are no more within reach of ordinary consumers than are the transaction costs of copyright licensing, fair use may fail in practice to redress consumer-creator concerns.

[17] Michael Birnhack, *Copyright Law and Creative Social Norms*, Oxford U. Press Blog (Nov. 21, 2012), URL *supra* p. v; *see also* Casey Fiesler, *Everything I Need to Know I Learned from Fandom: How Existing Social Norms Can Help Shape the Next Generation of User-Generated Content*, 10 Vand. J. Ent. & Tech. L. 729 (2008).




Parts diagram of the Raptor Hand 3D-printed prosthetic. Designed by e-NABLE, http://enablingthefuture.org/upper-limb-prosthetics/the-raptor-hand/, under a Creative Commons license, https://creativecommons.org/licenses/by-sa/3.0/.

### B. Styles of Clothing, at Issue in this Case, Implicate Basic Rights of Speech and Association

Copyrightability of clothing further affects public and consumer interests because choice of clothing often implicates individual rights of free speech and association. The degree of copyrightability of clothing should be interpreted to accommodate these important interests.

This Court has long recognized the basic rights of speech and association. The First Amendment guarantees "freedom to engage in association for the advancement of beliefs and ideas." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958); *accord Knox v. Serv. Employees Int'l Union, Local 1000*, 132 S. Ct. 2277, 2288 (2012) ("[T]he ability of like-minded individuals to associate for the purpose of expressing commonly held views may not be curtailed."). This freedom "includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means." *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965).

That clothing allows an individual to engage in speech and associative activities is self-evident. *Tinker v. Des Moines Independent Community School District* described the wearing of black armbands to be "akin to 'pure speech.'" 393 U.S. 503, 508 (1969).[18] *Kent v. Dulles*,

[18] *See also Guiles ex rel. Guiles v. Marineau*, 461 F.3d 320, 322 (2d Cir. 2006) (op. joined by Sotomayor, J.) (holding to be protected speech a T-shirt depicting President George W. Bush as "Chicken-Hawk-in-Chief" accompanied by drugs and alcohol); *Kelley v. Johnson*, 425 U.S. 238, 244 (1976) (assuming without deciding that "the citizenry at large has a 'liberty' interest . . . in matters of personal appearance").

Students wearing black armbands in a protest. From http://www.uscourts.gov/about-federal-courts/educational-resources/supreme-court-landmarks/tinker-v-des-moines-podcast.

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in finding a due process right to travel, found that activity to be "as close to the heart of the individual as the choice of what he . . . wears." 357 U.S. 116, 126 (1958). The protected speech in *Cohen v. California* was written on a jacket. 403 U.S. 15, 16 (1971). As Justice Scalia quipped: "Wearing whatever hat you want is part of the freedom of justice."[19]

Attitudes of sewing hobbyists exemplify the speech dimension of attire. "Fashion . . . can of course be a political issue, particularly if discussing the political or economic forces behind its production, sales and marketing."[20] Those who engage in making their own clothes

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[19]Nikki Schwab, *Part of Freedom Is Wearing Interesting Hats, Says Scalia*, Wash. Examiner (Feb. 13, 2013), URL *supra* p. x; *see also* 1 Annals of Cong. 760 (Joseph Gales ed., 1834) (statement of Rep. Sedgwick, Aug. 15, 1789) (finding it obvious beyond mention that "a man should have a right to wear his hat if he pleased").

[20]Kaitlynn Mendes, *"Feminism Rules! Now, Where's My Swimsuit?" Re-evaluating Feminist Discourse in Print Media 1968-2008*,

feel empowerment over conventional notions of attractiveness: "the only person you need to please is yourself. . . . My body no longer needs to tick a retailer's box."[21] One well-known amateur sewist[22] sums up this attitude of makers:

> For men and women, there are so few areas in our lives where we get to create something ourselves, that challenge us to focus and express our creativity. Sewing allows a person to do that. Self-expression is a basic human need. It's a way we self-actualise, at least, that's what it's like for me.

Sarah Adie, *Meet Your Maker: Peter Lappin of Male Pattern Boldness*, Black Cat Originals (May 4, 2012), URL *supra* p. v.

These basic concerns of individual liberty deserve a place in the calculus of copyrightability, and the conceptual separability doctrine is the appropriate place to account for them. The conceptual separability doctrine and the general disapproval of copyright in utilitarian works derive from the general idea-expression dichotomy in copyright law, *see* Section III(2)(a) *infra* p. 36, and that dichotomy is one of the two " 'speech-protective purposes and safeguards' embraced by copyright law," without which copyright might overrun the First Amend-

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34 Media Culture & Soc'y 554, 564 (July 2012); *see also* Jessica Bain, "*Darn Right I'm a Feminist . . . Sew What?" The Politics of Contemporary Home Dressmaking: Sewing, Slow Fashion and Feminism*, 54 Women's Stud. Int'l F. 57, 61 (Feb. 2016).

[21]Karen Ball, *Can Sewing Change Your Body Image?*, The Guardian (July 30, 2013), URL *supra* p. v.

[22]There appears to be no conventional male equivalent to "seamstress."

ment. *Golan v. Holder*, 132 S. Ct. 873, 890 (2012) (quoting *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003)).

The viability of that speech-protective safeguard is at the heart of this case. Designs on cheerleading uniforms serve to "identify the wearer as a cheerleader and a member of a cheerleading team," but the Court of Appeals refused to accept that as a "utilitarian function" within the meaning of the Copyright Act. *Varsity Brands, Inc. v. Star Athletica, LLC*, 799 F.3d 468, 490 (6th Cir. 2015) (Pet. Cert. 43a). *Contra id.* at 495 (Pet. Cert. 54a) (McKeague, J., dissenting) (design of uniform is "integral to its identifying function"). This summary rejection of the uniforms' function of identifying the wearer as a member of a group gives short shrift to those individual interests in speech and association that have long been a foundational part of the law.

By failing to acknowledge those important interests, the Sixth Circuit erred. A proper standard for conceptual separability must account for those interests and ensure that statutory law does not unduly burden them.

## II. Limits on Copyright in Useful Articles Will Advance Creativity and Beneficial Competition

Copyright law "must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts."[23] Respondents and supporting *amici* will likely argue that copyright in useful articles, or clothing specifically, is needed to spur creativity in their industries. But on the contrary, the evidence shows that permitting the reproduction and improvement of useful

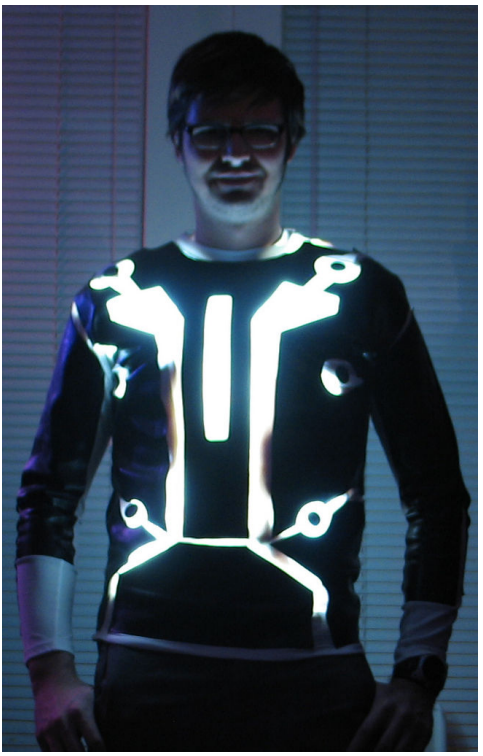
[23] *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975), *quoted in Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526 (1994).

articles through limits on copyright protection would advance these public interests. Two pieces of that evidence are presented below: examples of industries that succeed absent strong copyright protection, and research challenging the premise that copyright expansion is economically beneficial.

### A. Numerous Industries Thrive Despite Lack of Substantial Copyright Protection—And Likely Because of It

There is now evidence of numerous creative industries that produce new output at a fantastic rate despite lack of any extensive intellectual property protection. These industries, in the so-called "negative spaces" of intellectual property, demonstrate that copyright in useful articles such as cheerleading uniforms is not necessarily as important to industry creativity as Respondents and supporting *amici* might make it out to be.

*Fashion.* Most notable among those industries is the industry at the heart of this case: the fashion industry. Clothing designs are not heavily protected by copyright or other means, and copying of clothing designs is ubiquitous. *See* Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 Va. L. Rev. 1687, 1699, 1705 (2006). Yet at the same time it is impossible to argue that the clothing industry has stagnated; quite to the contrary, new styles are created within a matter of months. In view of the conventional utilitarian premise that creative industries depend on intellectual property law to protect their investments in new creations, the fashion industry presents a "piracy paradox": rampant copying does not



A homemade lighted Tron suit, part of an instructional tutorial on making the suit. By Sheet Metal Alchemy, http://www.instructables.com/id/LED-lit-Tron-v20-suit/, under a Creative Commons license, https://creativecommons.org/licenses/by-nc-sa/2.5/.

seem to hinder creativity in clothing, and indeed appears to facilitate that creativity. *Id.* at 1691.

The paradox is easily explained by simply looking at the practices of the industry. Where clothing designs are easily copied, designers must always come up with new and more creative designs to stay ahead of the pack and on top of new trends. *See id.* at 1718–28. And borrowing ideas from existing clothing allows designers to rapidly improve. As the creative director for Adidas explained, designers "tend to be copycats," but:

> If there are things that look and feel similar, I don't see that as any kind of threat. That's the creative culture, driving the aesthetic of the industry forward.[24]

*Cuisine.* The food industry similarly displays great creativity with little protection. Chefs invent new recipes notwithstanding that those recipes generally fall outside copyright protection. *See* 37 C.F.R. § 202.1(a) ("mere listing of ingredients or contents" not subject to copyright registration); *Publ'ns Int'l, Ltd. v. Meredith Corp.*, 88 F.3d 473, 480–81 (7th Cir. 1996).

Freedom to borrow from existing recipes spurs innovation in cuisine as in clothing. "Chefs work in an open-source model, drawing inspiration from a multitude of places, borrowing and expanding on fellow chefs' ideas and deriving new dishes from them." Emily Cunningham, *Protecting Cuisine Under the Rubric of Intellectual Property Law*, 9 J. High Tech. L. 21, 24 (2009). And chefs

[24] Anna Winston, *"Designers Tend to Be Copycats," Says Adidas Creative Director*, Dezeen (Mar. 31, 2015), URL *supra* p. x.

embrace this idea of unending progress through copying. *See* Christopher J. Buccafusco, *On the Legal Consequences of Sauces: Should Thomas Keller's Recipes Be* Per Se *Copyrightable?*, 24 Cardozo Arts & Ent. L.J. 1121, 1152 n.177 (2007) (quoting acclaimed chef Thomas Keller).

But close copying of recipes is actually rare among chefs, not due to legal rules but rather due to social norms. As restaurants rise and fall on the health of their reputations, they and their chefs have incentives to obey norms against plagiarism and copying lest they be shunned by gourmands, media representatives, customers, and fellow chefs. *See id.* at 1153–55 (citing Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, 19 Org. Sci. 187 (2008)). Self-governing norms and willingness to share drive culinary innovation faster than would a cumbersome intellectual property regime that could cost chef-litigants time, money, and positive relationships. *Id.* at 1151; Cunningham, *supra*, at 21–22 (discussing negative reaction to one chef suing another for copyright infringement).

*Comedy.* Jokes and comedy are plentiful, with new bits of humor being invented every day. But jokes are likely not broadly protectable under copyright due to the idea-expression dichotomy and the doctrines of *scènes à faire* and uncopyrightability of short phrases. *See* Allen D. Madison, *The Uncopyrightability of Jokes*, 35 San Diego L. Rev. 111, 116, 121 (1998).[25]

[25] *Marvin Worth Prods. v. Superior Films Corp.*, 319 F. Supp. 1269, 1272 (S.D.N.Y. 1970) (finding stock jokes to "lack the originality necessary to render them copyrightable"); 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 2.13 (2016).

The comedy industry thrives despite lack of broad copyright for much the same reasons that the fashion and culinary industries thrive. Social norms dissuade direct plagiarism. Interviews with comedians confirm, as one author put it in commandment form: "Thou shalt not covet thy neighbor's jokes, premises, or bits." Dotan Oliar & Christopher Sprigman, *There's No Free Laugh (Anymore)*, 94 Va. L. Rev. 1787, 1812 (2008) (quoting Judy Carter, *The Comedy Bible* 56 (2001)). Furthermore, top comics must constantly update their routines to avoid appearing stale. According to one stand-up star, "The pressure to produce new material never completely goes away." Oliver Double, *Getting the Joke: The Inner Workings of Stand-Up Comedy* 416 (2d ed. 2015).

*Typefaces.* The typeface design industry also exemplifies how creativity does not depend on copyright. Typefaces are unquestionably outside the realm of copyright law, according to case law, legislative history, and Copyright Office regulation. *See Eltra Corp. v. Ringer*, 579 F.2d 294, 298 (4th Cir. 1978); H.R. Rep. No. 94-1476, at 55 (1976); 37 C.F.R. § 202.1(e). Knockoffs are found everywhere, epitomized in the Arial font that was designed to mimic (but not quite match) the famed Helvetica. *See* Mark Simonson, *The Scourge of Arial* (Feb. 21, 2001).[26]

Nevertheless, typefaces continue to be produced; one analysis estimated the increase in typefaces between 1974 and 2002 at 2,672%. *See* Blake Fry, *Why Typefaces Proliferate Without Copyright Protection*, 8 J. on Telecomm. & High Tech. L. 425, 443 (2010); *see also*

[26] Although typefaces may be protected with design patents, there are several practical reasons why they rarely are, discussed in Jacqueline D Lipton, *To (c) or Not to (c)? Copyright and Innovation in the Digital Typeface Industry*, 43 U.C. Davis L. Rev. 143, 181–82 (2009).

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A typeface designed by counsel of record to this brief.
Only the uppercase letters necessary to name this
Court and the courts of appeals have been drawn.

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Caitlin Liu, *Creating a New Generation of Vivid Typefaces*, N.Y. Times, Aug. 5, 1996, at D5.

Creativity in typefaces is driven not by intellectual property, but rather by marketplace dictates. As printing technologies evolved, new typefaces had to be designed to accommodate or showcase those new technologies, so practical demands kept designers in business. *See* Fry, *supra*, at 450–57. Today, digital font formats allow professional designers to include advanced features beyond the uncopyrightable letter shapes, giving them a competitive advantage over amateur copyists.[27] And Internet-age typeface industry business models, like font subscription services, offer new avenues to exploit font creativity. *See* Ivan Beres, *TypeKit Launches, Hopes to Save Typography on the Web*, TechCrunch (Nov. 11, 2009), URL *supra* p. v. New creative typefaces are constantly made simply to meet market demand for continued improvement.

[27] *See id.* at 469–70. Wholesale piracy of digital font files is remediable by copyright, since digital font files are copyrightable as computer programs even if the underlying font designs are not. *See* Registrability of Computer Programs that Generate Typefaces, 57 Fed. Reg. 6201 (Copyright Office Feb. 21, 1992).

Fashion, food, comedy, and typefaces exemplify how industries can be effective even when they fall into negative spaces of intellectual property. These industries, and others, innovate in the absence of copyright protection, and where necessary they develop community norms enforced through mechanisms of self-governance. *See generally* Elizabeth L. Rosenblatt, *A Theory of IP's Negative Space*, 34 Colum. J.L. & Arts 317, 336–57 (2011) (considering factors that allow an industry to succeed in IP-negative spaces).

Obviously cheerleading is not identical to these other industries. But the fact that they all succeed should give this Court pause before thinking that the cheerleading uniform industry cannot succeed absent a greater degree of copyright protection than the clothing industry has heretofore enjoyed.

## B. Economic Research Warns Against Expanding Copyright Protection into New Fields

These industry examples are unsurprising given contemporary economic research questioning the value of expanding intellectual property protection.

1. *Sui generis* protection on databases is instructive of the questionable and minimal effect of introducing broader intellectual property protection.[28] In the United States factual compilations are uncopyrightable, *see Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 350–51 (1991), but the nations of the European Community have offered legal protection to databases since a 1996 directive, *see* Parliament & Council Directive 96/9/EC, 1996

[28] For more on database protection, see generally James Boyle, *The Public Domain* 207–20 (2008).

O.J. (L 77) 20. The different regimes in the United States and in Europe thus effectively set up a controlled experiment for the effect of introducing intellectual property protection in a new field.

The experiment showed no evidence of benefit to the database industry. While European database production increased briefly after the directive took effect, that proved to be a temporary blip; by 2004 European database production was *smaller* relative to American production than it was at the time the directive was introduced. *See* DG Internal Mkt. & Servs., *First Evaluation of Directive 96/9/EC on the Legal Protection of Databases* 22 (Dec. 12, 2005) (working paper), *available at* URL *supra* p. vi. And scientists, librarians, and academics raised concerns that database protection, by permitting monopolies in facts, was stifling research and scholarship. *See, e.g.*, Stephen M. Maurer et al., *Europe's Database Experiment*, 294 Science 789, 790 (2001).

So questionable was the effect of database protection that when an agency of the European Union *itself* returned in 2005 to review the directive, the agency found that "the new instrument has had no proven impact on the production of databases," a result that "casts doubts on this necessity" of the directive. DG Internal Mkt. & Servs., *supra*, at 5. That a copyright-like right in the database field did not enhance, and perhaps even weakened, creation and productivity—that should serve as a warning signal for opening up copyright protection in other nontraditional fields such as useful articles.

2. Research failing to find benefit from expanded intellectual property is not limited to the database industry; numerous studies support this conclusion.

One survey of economic research on copyright law identified one study that found that copyright extension had "no effect" on economic output, another study on copyright "finding little evidence of its incentive," and another that copyright was of "little positive effect" for the independent record industry and possibly even a "disincentive." Ruth Towse, *The Quest for Evidence on the Economic Effects of Copyright Law*, 37 Cambridge J. Econ. 1187, 1196 (2013). It thus concluded with remarks on "the difficulty of providing hard economic evidence as a basis for policy on copyright." *Id.* at 1199.

Other research has linked stronger copyright protection to productivity decreases in economically important institutions. Increased copyright liability could discourage venture capital investment in new Internet companies.[29] Costs and complexities of copyright licensing force educators into a "permissions maze," making it difficult for them to use content for classroom instruction, like copyrighted recordings and images.[30] Furthermore, in some situations stronger copyright enforcement practices can intrude on expectations of privacy, adding to the social utility costs of increased copyright.[31]

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[29] *See* Matthew Le Merle et al., Booz & Co., *The Impact of U.S. Internet Copyright Regulations on Early-Stage Investment: A Quantitative Study* 19–22 (2011), *available at* URL *supra* p. ix.

[30] *See* William W. Fisher & William McGeveran, *The Digital Learning Challenge: Obstacles to Educational Uses of Copyrighted Material in the Digital Age* 76–77 (Berkman Ctr. for Internet & Soc'y, Research Pub. No. 2006-09, Aug. 10, 2006), *available at* URL *supra* p. vii.

[31] *See* Stephanie Minnock, *Should Copyright Laws Be Able to Keep Up with Online Piracy?*, 12 Colo. Tech. L.J. 523, 544–45 (2014). Privacy concerns are not out of place in the present case. As explained above, many activities involving useful articles are done by individual consumers in the privacy of their own homes. Should copyright

A family dressed in homemade *Star Wars* costumes at a film screening at San Diego Comic-Con, July 24, 2014. Photograph by Disney/ABC Television Group, https://www.flickr.com/photos/disneyabc/14555577540, under a Creative Commons license, https://creativecommons.org/licenses/by-nd/2.0/. Disney is the current owner of the *Star Wars* franchise.

Given the dearth of general evidence supporting copyright expansion and the economic harms that may come in tow, it is no wonder that numerous learned commentators have warned against expanding copyright without specific evidence of benefit.[32] As explained by Robert Kastenmeier, the House subcommittee chairman largely responsible for the 1976 Copyright Act:

> [T]he proponent of change should present an honest analysis of all the costs and benefits .... The argument that a particular interest group will make more money and therefore be more creative does not satisfy this threshold standard or the constitutional requirements of the intellectual property clause.[33]

No less of an honest analysis should be demanded here. To the extent that some contend that copyright protection over useful articles is needed for their particular industries or for industrial design generally, the record offers no convincing economic data supporting that need compared with costs imposed on the public.

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infringement attach to such activities, there could very well be a push to build enforcement mechanisms to suss them out, possibly intruding on privacy to do so. *See id.* at 526.

[32] *See, e.g.*, Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* 8 (2011), *available at* URL *supra* p. vii ("Government should ensure that development of the IP System is driven as far as possible by objective evidence."); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. Legal Stud. 325, 332 (1989) ("[B]eyond some level copyright protection may actually be counterproductive by raising the cost of expression ...."); Stephen Breyer, *The Uneasy Case for Copyright*, 84 Harv. L. Rev. 281, 322–23 (1970).

[33] Robert W. Kastenmeier & Michael J. Remington, *The Semiconductor Chip Protection Act of 1984: A Swamp or Firm Ground?*, 70 Minn. L. Rev. 417, 441 (1985).

## III. Patent Law Bolsters the View Favoring Limited Availability of Copyright in Useful Articles

Further reason for a high threshold to copyrightability in the appearance of useful articles may be found in patent law, and specifically the patent bargain struck between inventors of useful articles and the public. Examination of that bargain, and the copyright law that has developed to avoid spoiling that bargain, demonstrates why the conceptual separability doctrine should favor keeping copyright largely out of the domain of useful articles.

1. This Court has reiterated that patent law "embodies a carefully crafted bargain for encouraging the creation and disclosure of new, useful, and nonobvious advances in technology and design." *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 150–51 (1989); *see also Pennock v. Dialogue*, 27 U.S. (2 Pet.) 1, 23 (1829) (patent grant is "quid pro quo"). This is because the patent system must ultimately work to the advantage of the public's access to new technologies; "the benefit to the public or community at large was . . . doubtless the primary object in granting and securing that monopoly." *Kendall v. Winsor*, 62 U.S. (21 How.) 322, 328 (1859). Thus, "the public . . . has a paramount interest in seeing that patent monopolies are kept within their legitimate scope." *Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 134 S. Ct. 843, 851 (2014) (internal quotations and alterations omitted) (quoting *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 816 (1945)).

Keeping the patent monopoly within its legitimate scope drives numerous limitations on the patent right. Patent protection requires rigorous examination for subject matter, novelty, and nonobviousness. *See* 35 U.S.C.

§§ 101–103. It requires a detailed written disclosure. *See* 35 U.S.C. § 112(a). And it provides a relatively short term of protection: twenty years from original filing of the application. 35 U.S.C. § 154(a)(2).

These high bars to patent protection reflect a judgment that intellectual property protection for useful articles ought not be granted lightly. "Monopolies in useful articles are jealously guarded: they are hard to get and are short lived." Ralph S. Brown, *Copyright-like Protection for Designs*, 19 U. Balt. L. Rev. 308, 316 (1989).

That carefully established balance, set forth in the limitations on patent protection, suggests that the vastly different protection offered by copyright ought not intrude.[34] Copyright inheres automatically without examination or disclosure, *see* 17 U.S.C. § 102, and lasts much longer, *see* 17 U.S.C. § 302. Inventors of useful articles, then, might turn to copyright as a way of protecting their inventions, such that "the terms of the patent bargain can be avoided by a retreat to copyright law by inventors and designers." Viva R. Moffat, *The Copyright/Patent Boundary*, 48 U. Rich. L. Rev. 611, 622 (2014).

Circumvention of the rigors of the patent bargain through a retreat to copyright law would be especially harmful to the public. Indeed, the D.C. Circuit and the Register of Copyrights have agreed that copyright in "consumer or industrial products" could have "obvious and significant anticompetitive effects." *Esquire, Inc. v. Ringer*, 591 F.2d 796, 800–01 & n.15 (D.C. Cir. 1978).

[34]Copyright law also entails a balancing of interests, *see, e.g.*, *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 428–29 (1984), but "patents and copyrights do not entail the same exchange," *Eldred v. Ashcroft*, 537 U.S. 186, 216 (2003).

This is because useful articles, by virtue of being useful, bear an importance to the public and consumer interests that aesthetic articles do not. Artwork, as unique and valuable as it may be, can never be as essential as an article of utility: one painting can substitute for another in the function of decorating a wall, but not many appliances can substitute for a toaster in the function of toasting bread. While the lesser limits on copyright may be acceptable with respect to the fine arts, copyright in the area of useful articles potentially limits or deprives public access to technologies, access that the patent bargain is supposed to ensure.

2. In view of these concerns, copyright law and jurisprudence have developed to avoid intrusion into the sphere of patents and useful articles.

a. Copyright's exclusion of the utilitarian is an outgrowth of "the long-established idea-expression dichotomy and idea-expression merger doctrines." Jane C. Ginsburg, *Four Reasons and a Paradox*, 94 Colum. L. Rev. 2559, 2568 (1994). The canonical statement of those doctrines came in *Baker v. Selden*, which held that a series of blank accounting forms could not be the subject of copyright. *See* 101 U.S. 99, 107 (1880). The book of forms made up a system or art of bookkeeping, and:

> To give the author of the book an exclusive property in the art described therein, when no examination of its novelty has ever been officially made, would be a surprise and a fraud upon the public. That is the province of letters-patent, not of copyright.

*Id.* at 102. Copyright was refused on the bookkeeping forms because it would allow exclusivity on a useful article without examination.

Notably, there already exists an avenue for protection of the appearance of useful articles: design patents. *See* 35 U.S.C. § 171. Such protection is subject to the same examination requirements as patents, *see id.*, and it is subject to a similarly short term, *see* 35 U.S.C. § 173. That Congress saw fit to allow for protection of designs in useful articles only under terms nearly the same as the overall patent bargain again proves that the patent bargain, not copyright law, is the proper yardstick for protection of useful articles.[35]

b. The legislative history of the Copyright Act further confirms that patent is the preferred realm for protection of useful articles. From early days, copyright law limited itself to "designs intended to be perfected and executed *as works of the fine arts*." Act of July 8, 1870, ch. 230, sec. 86, 16 Stat. 198, 212 (emphasis added). The 1976 Copyright Act in force today introduced the rule that "[p]ictorial, graphic, and sculptural works" are protected only "insofar as their form but not their mechanical or utilitarian aspects are concerned." 17 U.S.C. § 101.

In enacting the 1976 Act, the House Report remarked that this statutory text was intended "to draw as clear a line as possible between coyrightable works of applied art and uncopyrighted works of industrial design." H.R. Rep.

[35] *Mazer v. Stein*, 347 U.S. 201 (1954), is not to the contrary. That case held that a single article may embody both patentable and copyrightable subject matter, *see id.* at 217–18, but notably only after concluding that the copyrightable elements were totally—physically—separable from the utilitarian aspects of the article. *Mazer* is silent as to the issue in this case, namely "the more difficult question of how to determine when elements of a useful article may constitute a copyrightable work of art." Shira Perlmutter, *Conceptual Separability and Copyright in the Designs of Useful Articles*, 37 J. Copyright Soc'y USA 339, 345 (1990).

No. 94-1476, *supra*, at 55. The report further noted a proposal "to create a new limited form of copyright protection" for "designs of useful articles which do not meet the design patent standard." *Id.* at 50. But that proposal was rejected because, among other reasons, it failed a standard akin to the patent bargain: the proposal was not "justified by a showing that its benefits will outweigh the disadvantage of removing such designs from free public use." *Id.* These facts suggest that, in excluding utilitarian aspects from copyrightability, the 1976 Copyright Act reflected concerns for maintaining the balance of intellectual property rights expressed in patent law. *See generally* Moffat, *supra*, at 622–27.

In sum, copyright doctrine and legislative history confirm what the policy principles predict: that patent is the proper avenue of protection for useful articles, and that copyright ought to play a highly limited role in that field. Strictly requiring a clear showing of conceptual separability before permitting copyright in useful articles will ensure that intellectual property protection is channeled in the proper direction. That result both comports with the statutory scheme and protects the basic public interest in avoiding unnecessary barriers to access to useful articles.

## CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be vacated and the case remanded.

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July 2016