

Conceptual Separability and the Copyright/Patent Boundary

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“Conceptual separability” in copyright law is the doctrine that seeks to draw a distinction between uncopyrightable works of industrial design and copyrightable works of applied art. Congress has made clear that the former should not receive copyright protection but that the latter should. Unfortunately, the courts have been unable to come up with a workable or satisfying test for drawing this distinction. As a result, the tests vary between (and even within) the circuits, and the outcomes are unpredictable. Academics and practitioners have long complained about the doctrine – without arriving at a satisfactory solution. In my view, Congressional intent in this regard is not being carried out: many works of industrial design do, in fact, receive copyright protection. And this is significant because industrial design falls squarely within the patent realm, if it is to be protected at all. Congress and the courts have made clear that inventive works, or useful articles, might receive patent protection, but that they should not be subject to copyright. If copyright protection is available, or even merely possible, any rational inventor would choose copyright over patent: it is easier to obtain and lasts much, much longer. Thus the line between copyright law and patent law should be quite clear. But in the case of some industrial design, it is most certainly not. In the article I will propose a simple rule: in the close cases – that is, when it is difficult to determine whether the protectable aesthetic elements are conceptually separable from the unprotectable functional elements – the courts should employ a default rule of no protection. This would be consistent with Congressional policy and with the notion that useful articles do not properly belong in the copyright scheme.