

Sans Protection: Typeface Design and Copyright in the Twenty-First Century

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If there is uncertainty or lack of clarity, it is not the fault of the letters, it is how they are put together.

Yet these symbols can be transformed visually without any loss of their essential character. The changes reflect new societies, new technologies, new preferences, new functions; but within these changes the symbols are constant, always themselves.¹

—Alan Bartram

Introduction

IT HAS BEEN THIRTY-TWO YEARS since copyright protection was explicitly withheld from typeface designs.² Personal computers have since created both a new market for typeface designs and an easy way to copy them.³ This article examines whether the genesis of this new market coupled with other effects of the digitization of fonts⁴ sufficiently alters the rationale for denying copyright protection to typeface designs to justify an amendment to the Copyright Act.

Part I of this article provides a brief history of typeface design and a primer on the basic features of typefaces. These features provide for

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1. ALAN BARTRAM, *TYPEFORMS: A HISTORY* 125 (2007).

2. *Eltra Corp. v. Ringer*, 579 F.2d 294 (4th Cir. 1978).

3. Jacqueline D. Lipton, *To © or Not to ©? Copyright and Innovation in the Digital Typeface Industry*, 43 U.C. DAVIS L. REV. 143, 167–68 (2009).

4. Though the terms “font” and “typeface” are often used interchangeably, the important distinction between the two is explained by Professor Lipton:

A typeface is technically “a set of letters, numbers, or other symbolic characters, whose forms are related by repeating design elements consistently applied in a notational system and are intended to be embodied in articles whose intrinsic utilitarian function is for use in composing text or other cognizable combinations of characters.” A font, on the other hand, is “an article in which a typeface resides as the implement of printing technology, regardless of the medium or form.” In other words, a typeface is the artistic creation of a typeface designer, while a font is the result of an industrial process to enable the reproduction of typefaces in the printing process.

Id. at 148.

endless variety. The history in Part I.B provides the foundation for an application of certain rhetorics that are commonly espoused to justify laws that protect intellectual property to typeface design protection in Part II. Part III is a survey of the currently available protections for typeface design under U.S. law. The purpose of this survey is to ascertain whether typeface designs *qua* designs⁵ are already sufficiently protected. The survey scrutinizes the available protection to determine whether the designs themselves are actually protected or only their embodiment in fonts. Part IV combines the reasoning in Parts II and III to determine: (A) whether typeface designs *qua* designs *should* be protected; (B) whether current U.S. law provides sufficient protection; and (C) whether typeface designs *could* feasibly be protected by copyright. The fruit of this analysis comes in Part V, with a suggestion for an amendment to the Copyright Act informed by the conclusions in Parts I–IV.⁶

In her excellent article on copyright protection for typeface designs, Professor Jacqueline Lipton touches on some of the ways that the digitization of fonts has altered the policy considerations regarding copyright protection in typeface design.⁷ Professor Lipton's article focuses primarily, however, on whether typefaces *could* be copyrightable under existing copyright law, while this article focuses on whether typeface designs *should* be copyrightable.⁸ She addresses both the formalistic question of whether the Copyright Act of 1976 would correctly be interpreted to protect typeface designs⁹ and the practical question of whether typefaces could survive the application of copyright doctrines such as merger and conceptual separability.¹⁰ This article seeks to complete the dual inquiry begun by Professor Lipton into

5. For an explanation of the importance of distinguishing between legal protection for typeface designs and alternative legal means to combat copying of digital fonts, see *infra* Part III.

6. Though the current body of scholarship on typeface design protection in the United States is small in quantity, it is vast in quality and substance. This article could not have been written without the benefit of the prior articles on the subject. Professor Jacqueline Lipton's recent article considers the digitization of fonts from a different perspective. See Lipton, *supra* note 3, at 155–63, 178–89. Two articles from the early 1990s were essential to drafting the terms of the amendment to the Copyright Act suggested in Part V.B. See generally Phillip W. Snyder, *Typeface Design After the Desktop Revolution: A New Case for Legal Protection*, 16 COLUM.-VLA J.L. & ARTS 97 (1991); Terrence J. Carroll, *Protection for Typeface Designs: A Copyright Proposal*, 10 SANTA CLARA CLARA COMPUTER & HIGH TECH. L.J. 139 (1994).

7. Lipton, *supra* note 3, at 167–71.

8. *Id.* at 148–67.

9. *Id.* at 148–55.

10. *Id.* at 155–67. The concepts of merger and conceptual separability are discussed *infra* in Parts IV.C.3 and IV.C.1, respectively.

whether copyright protection for typeface designs is both feasible *and* desirable by delving more deeply into the rhetorics that form the foundation of intellectual property law in the United States.¹¹

I. Typeface Design: Elements and History

This part provides background information on the elements and history of typography as a foundation for the remainder of the article.

A. A Primer on the Elements of Typeface Design

To a layperson, most typeface designs probably look relatively similar. This section first describes the elements that distinguish one typeface from another, then offers an in-depth description of the many varieties of serifs.¹² This will provide the reader with a better understanding of the variables available to typeface designers to manipulate in the creation of new typefaces.

1. Elements of a Typeface

a. Stress

Letters based on the circle or part circle, such as “o” or “e,” have either oblique or vertical “stress.”¹³ Vertical stress is when the thickest parts of the letter’s line are directly at east and west of the letter’s center, as in “O.”¹⁴ Oblique stress is when the thickest parts of the letter’s line are at approximately northwest and southeast, as in “O.”¹⁵ Another way to understand the concept is to think of letters with vertical stress as appearing to go directly up and down, whereas letters with oblique stress look like they are slightly tilted to the left.¹⁶ Not all letters in the same typeface will have the same stress, and sometimes even the lowercase will have a different stress than the uppercase.¹⁷

11. See Lipton, *supra* note 3, at 155–67.

12. Serifs are “any of the short lines stemming from and at an angle to the upper and lower ends of the strokes of a letter.” *Serif Definition*, MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/serif> (last visited Mar. 16, 2011).

13. GEOFFREY DOWDING, AN INTRODUCTION TO THE HISTORY OF PRINTING TYPES 264 (The British Library & Oak Knoll Press 1998) (1961).

14. *Id.* at 264–65.

15. *Id.*

16. *Id.*

17. *Id.*

b. Extenders

Extenders are ascenders and descenders.¹⁸ Ascenders extend above the midline in lowercase letters, whereas descenders extend below the baseline.¹⁹ The midline is approximately the height of the unextended lowercase letters, such as “a” and “r.”²⁰ The baseline is the imaginary line most letters appear to rest upon; descenders extend below this imaginary line. Extenders are sometimes composed of a stem, which is the straight part of a letter, such as in “h” or “p”; or “l”, which is all stem.²¹ A stem may tilt to the right from two degrees to twenty degrees.²² This tilt is called slope.²³ Extenders can also be composed of a bowl, which is the round part of a letter; lowercase “g” is an example.²⁴

c. Modulation

Modulation is variation in the thickness and thinness of the stroke.²⁵ An example is the uppercase “M” of Garamond Three; the first and third vertical strokes are quite thin in comparison to the thick second and fourth vertical strokes. Some faces have little or no modulation, whereas others have drastic differences in stroke width throughout the letter.²⁶

d. Cap Height and X-Height

Cap height is the height that capital letters reach, which is sometimes the same as lowercase ascenders but often shorter or taller.²⁷ X-height is the distance from the baseline to the midline of the typeface.²⁸ The ratio of cap height to x-height is an important distinguishing feature between typefaces.²⁹ The difference can be seen by comparing how high the unextended lowercase letters, such as “e” or “o” compare in height to the uppercase letters. In some typefaces they

18. ROBERT BRINGHURST, *THE ELEMENTS OF TYPOGRAPHIC STYLE 325* (version 3.2 ed. 2008).

19. *Id.*

20. *Id.*

21. *Id.* at 331.

22. *Id.*

23. *Id.*

24. *Id.* at 324.

25. *Id.* at 328.

26. *Id.*

27. *Id.* at 324.

28. *Id.* at 332.

29. *Id.*

are much shorter than the uppercase letters, whereas in others they are noticeably more than half the height of uppercase letters.

e. Aperture

Aperture is the opening on letters such as “C” and “S.”³⁰ The size of an aperture can range from large to small and is also a distinguishing factor between typefaces.³¹

f. Composition

The features of typeface designs described *supra* in Part I.B.1.a–e are less than half of the features typeface designers must consider when designing a new typeface.³² It is not difficult to see that many different designs can be made by both modifying these elements and combining the modifications in various ways. This is without even considering the wide variety of serif styles described in the next section.

2. Serif Styles

This section describes many of the most common types of serifs used in typeface designs. Not all typefaces have serifs; those that don’t are called “sans serif” typefaces.³³ To start with, here is Dowding’s explanation of the basic elements of a serif:

The term *serifs* is used to describe the cross strokes which finish the stems or arms of letters. They are usually drawn at right angles or obliquely to these stems or arms and may extend on both sides or only on one side. The stem of a letter may be the straight or oblique stroke of a capital or lower-case letter and the arms may belong, for example to a capital E or a lower-case k.

These finishing strokes will vary very considerably in shape and size. Some may be bracketed . . . or unbracketed, wedge-shaped or triangular. . . . They may be cupped, hairline, fine slab, or heavy slab with or without bracketing.³⁴

There are many other varieties of serifs not described in the paragraphs above. Serifs can be abrupt or adnate, which means they either “break from the stem suddenly at an angle,” in the case of abrupt, or “flow smoothly into or out of the stem,” in the case of adnate.³⁵ A ball terminal is a type of serif that looks like a ball coming off

30. *Id.* at 321.

31. *Id.*

32. *See id.* at 321–32.

33. Examples include Helvetica and Arial. This is the origin of the title of this article.

34. DOWDING, *supra* note 13, at 267.

35. BRINGHURST, *supra* note 18, at 321.

of the end of the stem.³⁶ A teardrop terminal is a variation of a ball terminal that, not surprisingly, looks more like a teardrop.³⁷ A sculluate serif is diamond shaped.³⁸ Serifs can vary in length and thickness.³⁹ Not all letters in a typeface must have the same type of serifs on each different letter; for example, a “p” can have different looking serifs than an “f.” As with the other elements of typeface glyphs,⁴⁰ it is not hard to see that there is significant potential for variety in typeface design. The serif styles described *supra* only scrape the surface of the currently existing types of serifs, and of course, don’t account for all of the new serif styles that may be designed in the future.

B. A Brief History of Typeface Design

The names of many of the great typeface designers are known to those who have tried to find the perfect style of lettering in a typographical work. The typefounders’ names are known because they are shared with well-loved typefaces such as Goudy, Garamond, and Baskerville.⁴¹ To assess the rationale for protecting typeface designs, some knowledge of the history of the industry is necessary. A survey of the thousands of different typefaces or even the thirty-plus major categorizations would be beyond the scope of this article.⁴² Rather, this article examines several example typefaces to illustrate the variety and evolution of typeface designs. The designs are arranged in chronological order based upon their earliest incarnations in order to give an idea of the evolution of typefaces. The examples are: (1) Venetian, (2) Italic, (3) Garamond, (4) Baskerville, (5) Goudy Old Style, and (6) Helvetica.

1. Venetian⁴³

Nicolas Jenson created one of the earliest modern typefaces in Venice in 1470.⁴⁴ Jenson’s types became known as Venetians, and variations of those types are still used today.⁴⁵ Bruce Rogers created Cen-

36. *Id.* at 322.

37. *Id.* at 331.

38. *Id.* at 330.

39. *Id.*

40. “A glyph is a version—a conceptual, not material, incarnation—of the abstract symbol called a character.” BRINGHURST, *supra* note 18, at 331. “Z” and “Z” are “alternate glyphs for the same character.” *Id.*

41. ALEXANDER LAWSON, ANATOMY OF A TYPEFACE 110, 129, 184–85 (1990).

42. *Id.* at 7; DOWDING, *supra* note 13, at xxi–xxiv.

43. This header uses the Centaur MT typeface.

44. DOWDING, *supra* note 13, at 21.

45. *Id.*

taur in 1929 in an attempt to recreate the Jenson original.⁴⁶ Venetian is not widely used in modern times due in part to the allegedly unappealing upslope of the bar in the lowercase “e.”⁴⁷

2. *Italic*⁴⁸

In 1500, Aldus Manutius—better known simply as Aldus—commissioned a typeface designer named Griffo to create a typeface that drew inspiration from handwritten letter forms.⁴⁹ These “Italic” typefaces were narrower than their predecessors and tended to lean to the right.⁵⁰ Aldus’s Italic typefaces were distinguished from other Italic typefaces by the wide variation in the shape and treatment of the serifs on ascenders and descenders.⁵¹ It was this variability that probably led to Aldus’s Italic typefaces being usurped by the Vicentino Italic typefaces designed by Arrighi, which were much more regular in their serif style.⁵²

3. **Garamond**⁵³

A typeface that has survived relatively intact for centuries is Garamond, named after and inspired by the designs of famous French punchcutter Claude Garamond, who lived from approximately 1500 to 1561.⁵⁴ Garamond drew inspiration from the Aldine typefaces created by Griffo and Arrighi.⁵⁵ The characteristics that distinguish this typeface from its Italian antecedents are: “Balance of capitals, lowercase and italic more fully harmonized. Gradual smooth transition from stem to serif. More rounded triangular serifs, generally shorter and blunter.”⁵⁶

46. BARTRAM, *supra* note 1, at 18.

47. *Id.* at 16. The typeface used for Google’s logo, Catull, also has a lowercase “e” with an upsloping bar. *Catull BQ*, IDENTIFONT, <http://www.identifont.com/find?font=catull> (last visited Mar.16, 2011).

48. This header uses italicized Bembo, a modern typeface modeled after a design commissioned by Aldus and created by Griffo. LAWSON, *supra* note 41, at 78.

49. *Id.* at 20–21.

50. DOWDING, *supra* note 13, at 43.

51. *Id.* at 45.

52. *Id.* at 45–47.

53. This header uses Garamond MT.

54. LAWSON, *supra* note 41, at 129–30, 134.

55. *Id.* at 133; BARTRAM, *supra* note 1, at 25.

56. BARTRAM, *supra* note 1, at 25.

4. Baskerville⁵⁷

John Baskerville created the typeface that would become modern day Baskerville in 1757.⁵⁸ This typeface was unheralded in its day but was revived with great success beginning in 1917 by Bruce Rogers.⁵⁹ Although John Baskerville did not achieve wide acclaim before his death in 1775, his designs were admired and imitated by a number of his contemporaries.⁶⁰ Baskerville's beautiful design, however, eventually became one of the most widely used typefaces in the early twentieth century.⁶¹ Due to this postponed renown, John Baskerville did not achieve commercial success through his typeface design.⁶² Baskerville's original characteristics are: "Generously proportioned. Round letters approaching circular. . . . [M]ore contrast between thicks and thins than in old face designs. Generally vertical stress. Rounded serifs slightly angled, slightly bracketted [sic]. Lower bowl of g not fully enclosed. Caps shorter than ascenders."⁶³

5. Goudy Old Style⁶⁴

Frederic W. Goudy designed over one hundred typefaces in his lifetime.⁶⁵ His most famous typeface is possibly Goudy Old Style, commissioned by American Type Founders Company ("ATF") in 1915.⁶⁶ This typeface's immense popularity was probably due to Goudy's use of short descenders.⁶⁷ This allowed for an economical use of vertical space in advertisements.⁶⁸

57. This header, along with most of this article and the other articles in this journal, uses Baskerville MT, a modern variation on the original typefaces designed by John Baskerville.

58. BARTRAM, *supra* note 1, at 43.

59. LAWSON, *supra* note 41, at 184–92.

60. *Id.*

61. *Id.* at 194.

62. BARTRAM, *supra* note 1, at 41.

63. *Id.*

64. This header uses Goudy Old Style.

65. LAWSON, *supra* note 41, at 110.

66. *Id.* at 114.

67. *Id.* at 114–15.

68. *Id.* at 114.

6. Helvetica⁶⁹

Helvetica was created by Max Meidinger in 1953.⁷⁰ Microsoft's popular Arial typeface was inspired by this famous typeface.⁷¹ The Helvetica typeface itself is a very close approximation of Akzidenz Grotesk,⁷² which originated in 1898.⁷³ Helvetica is perhaps the closest designers have ever come to designing a "generic" typeface.⁷⁴ "Helvetica was so overused that it had lost its power: Setting a company name in Helvetica made it look not authoritative but generic."⁷⁵ Although its period of extreme popularity took place in the 1960s and 1970s, Helvetica has drawn renewed interest in the early part of the twenty-first century, over fifty years after Meidinger designed it.⁷⁶

II. Application of the Traditional Rhetorics to Typeface Design: Then and Now

The printing press, upon its invention around 1450 by Johannes Gutenberg, birthed a (relatively) quick and easy way to make copies of written text.⁷⁷ This new threat to the rights held by authors—or more accurately, publishers—eventually led to the passage of the Statute of Anne, the oldest ancestor of United States copyright law.⁷⁸ Similarly, the so-called digital revolution has made the copying and dissemination of typeface designs—fixed in the form of digital fonts—far easier than in the preceding era.⁷⁹ Before computers were used, a typeface was transformed into a font by carving the letters of the typeface into individual wooden blocks, casting the letters in metal, or even reducing the typeface to a celluloid filmstrip or wheel.⁸⁰ Whether the shift

69. As with the other examples *supra*, this header uses the typeface it describes, Helvetica.

70. STEPHEN J. ESKILSON, GRAPHIC DESIGN: A NEW HISTORY 307 (2007). A recent eponymous film offers perspectives on Helvetica's place in history. See HELVETICA (Plexifilm 2007).

71. ESKILSON, *supra* note 70, at 422.

72. BARTRAM, *supra* note 1, at 99.

73. *Id.* at 86.

74. See generally Experimental Jetset et al., *Helvetica Again*, in IF WE'RE STANDING ON THE SHOULDERS OF GIANTS, WHAT ARE WE REACHING FOR? 16 (Rudy VanderLans ed., 2003) (examining the history and resurgence of the Helvetica typeface).

75. BARTRAM, *supra* note 1, at 40.

76. *Id.*

77. ROBERT HOE, A SHORT HISTORY OF THE PRINTING PRESS AND OF THE IMPROVEMENTS IN PRINTING MACHINERY FROM THE TIME OF GUTENBERG UP TO THE PRESENT DAY 5 (1902).

78. Act for the Encouragement of Learning, 1710, 8 Ann., ch. 19, § 1 (Eng.); MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW 3–5 (2010).

79. Lipton, *supra* note 3, at 167.

80. *Id.*

to computers calls for an alteration of copyright law similar to that of the passage of the Statute of Anne depends on an analysis of the theoretical principles of intellectual property law.

In this section the common rationales for protection of intellectual property will be applied to typeface designs in two contexts. First, the rationales will be applied to typeface design as it existed prior to the digital revolution, embodied in physical fonts (“pre-digital”). Second, the rationales—or rhetorics as they are sometimes known—will be applied to typeface designs in the digital era, embodied in digital fonts (“post-digital”). These rationales—(1) Economic Incentive Theory; (2) Personhood Theory; (3) Neoclassical Economic Theory; and (4) Public Domain—are collectively referred to throughout this article as either “the rationales” or “the rhetorics.”

This bifurcated analysis will determine whether the advent of the digital font and the personal computer (“PC”) has altered rationales that may have once justified the denial of protection to typeface designs. Those original rationales must first be understood and delineated before the question of whether they have been altered by the digitization of fonts can be addressed.

The dividing line between pre-digital and post-digital is not bright. Fortunately, it is not necessary to establish a bright line for this article. The tradition of denying copyright protection to typefaces began before computers existed, and even by the time the Fourth Circuit held explicitly that typeface designs could not be copyrighted,⁸¹ PCs were in a nascent state.⁸² This article proposes that the lack of protection for typeface designs is a product of the era before PCs were commonly available. This article agrees with Professor Lipton that the advent of the ubiquitous PC has significantly altered the typeface design industry and that the historic denial of copyright must be reexamined.⁸³ Thus, this article will treat pre-digital (prior to 1978, the year *Eltra*⁸⁴ was decided) and post-digital (2010 and after) as two distinct

81. See *Eltra Corp. v. Ringer*, 579 F.2d 294 (4th Cir. 1978).

82. The original IBM PC was introduced on August 12, 1981. ROY A. ALLAN, A HISTORY OF THE PERSONAL COMPUTER: THE PEOPLE AND THE TECHNOLOGY 97 (2001). The Apple II, Apple’s first personal computer, became available to the public in June of 1977. *Id.* at 45–47. At a price of \$1,298, equivalent to \$4,314.87 in 2010 dollars (as of April 2010), the Apple II was hardly affordable for the average citizen. *Id.* at 46; Alan Eliassen, *Historical Currency Conversions*, THINGS I MADE FROM YARN, <http://futureboy.homeip.net/fsp/dollar.fsp?quantity=1298¤cy=dollars&fromYear=1978> (last visited Apr. 4, 2010).

83. See Lipton, *supra* note 3.

84. 579 F.2d 294.

eras and will not discuss the transitional span in between, which should have no bearing on the analysis of copyright law for the future.

A. Pre-Digital

This section will analyze whether the absence of typeface design protection was justified in the days of wooden and metal fonts—a question not yet analyzed in the current body of scholarship on typeface design protection.⁸⁵ Four major rhetorics will be applied to typeface design protection: (1) Economic Incentive Theory; (2) Personhood Theory; (3) Neoclassical Economic Theory; and (4) Public Domain.

1. Economic Incentive Theory

The Economic Incentive Theory (“Incentivization”) is a common justification for copyright and patent protection. Incentivization generally maintains that copyright protection is desirable because it increases the incentive to create.⁸⁶ By prohibiting copying, copyright protection allows the creator to profit from her works even after they are disseminated to the public.⁸⁷ This potential profit drives the creator to create more works.⁸⁸

In the pre-digital typeface industry, protection of typeface designs after dissemination added little, if any, incentive to design new typefaces. In the earliest days of typeface design, typefounders were usually their own printers.⁸⁹ Their incentive to design a typeface was presumably so that the typeface could be incorporated into a font for use on their printing press. Since there was no market for typeface designs, sale of the design could not have been a motivating factor in the design of the face. Even as late as 1968, the market for typeface designs in the printing industry was relatively small.⁹⁰ Even larger printers only used around twelve different typeface designs, due to the cost of producing a new metal font with all the necessary characters (not to mention different sizes).⁹¹ It is no surprise, then, that many typefounders worked on commission, rather than designing typefaces and

85. See generally Lipton, *supra* note 3; Carroll, *supra* note 6; Snyder, *supra* note 6.

86. ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 128 (3d ed. 2000).

87. *Id.*

88. *Id.*

89. As used in this article, “typefounder” is essentially a synonym of typeface designer. DOWDING, *supra* note 13, at 3.

90. BARTRAM, *supra* note 1, at 6–7.

91. *Id.* “[O]nce a printing office had accumulated a reasonable supply of type, there was little work for the resident founders.” LAWSON, *supra* note 41, at 386.

then shopping them to printers.⁹² Many of the most prolific typefounders in this era worked directly for printers.⁹³ These founders included Benton, Hess, Middleton, and Goudy⁹⁴—“[t]he types designed by these four men far outnumber those produced by all the freelance type designers of their era.”⁹⁵ Freelance designers were encouraged to produce new type designs by the manufacturers as well but only for one-time sale to the manufacturer of a font.⁹⁶ Since it was highly unlikely that a typeface designer could profit from the sale of a particular design more than once, if at all, protection against copying of the design would have provided little incentive to create.

Many typefounders in the 1940s and 1950s were motivated by a noneconomic incentive.⁹⁷ “The belief that good design made for a better society motivated many designers”⁹⁸ However, the glow of this higher purpose began to fade in the 1960s.⁹⁹

Thus, in the pre-digital era, typefounders were generally motivated either by the promised commission, the necessity to have a typeface to create a font for their printing press, or the belief that their designs were somehow benefiting and shaping society. The potential for profit through future sales of the design didn’t enter into the equation, so increasing that phantasmal potential would not have fostered any more creation than was already taking place.

2. Personhood Theory

Personhood, also known as the moral right, is a doctrine most commonly found in European intellectual property law.¹⁰⁰ The three components of the moral right are: (a) the right of disclosure; (b) the right of paternity; and (c) the right of integrity.¹⁰¹ As applied to typeface design, the right of paternity—or more progressively, the attribution right—is the most relevant of these rights.¹⁰² The attribution

92. See *infra* Part II.A.2.

93. LAWSON, *supra* note 41, at 381.

94. *Id.*

95. *Id.*

96. *Id.*

97. BARTRAM, *supra* note 1, at 7.

98. *Id.*

99. *Id.*

100. Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 3 (1985).

101. *Id.* at 5.

102. LEAFFER, *supra* note 78, at 389.

right “safeguards a creator’s right to compel recognition for his work and prevents others from naming anyone else as the creator.”¹⁰³

In the pre-digital typeface industry, many typeface designers subsisted on their reputation. This is evidenced by the frequency of the commission of a new typeface design for a particular purpose from an established designer. Due to the success of Goudy’s Kennerly and Forum typefaces, ATF commissioned him to produce the type that would later become known as Goudy Old Style.¹⁰⁴ Similarly, Bruce Rogers was commissioned by George H. Mifflin to design the Montaigne type for Mifflin’s Riverside Press, because he was so impressed with the success of Rogers’s Brimmer type.¹⁰⁵ Rogers and Goudy both benefited from the association between themselves personally and their creations. If good designers can be identified by their good designs, as would seem logical, then protecting the right of those designers to be identified by their creations is worthwhile. Not only is the designer benefited by this protection, but society also benefits by virtue of the increased ease in identifying quality designers, much in the same way trademark law allows the consumer to identify quality goods.

Personhood Theory provided a rational justification for protections of the rights of typeface designers in the pre-digital era. The justification for protection of the designs themselves is more tenuous, however. If a third party can copy a designer’s typeface and pass it off as their own, this diminishes the typeface designer’s ability to identify themselves with the design, as it takes the distribution of the design out of their sphere of control. Without some form of protection against copying, the designer has no recourse. Current United States copyright protection would be particularly useful to protect this interest, because the designer obtains the right upon fixation and can then make sure that their name is at least initially associated with the design.¹⁰⁶

Despite the justification for typeface design protection provided by the Personhood Theory, such protection was not afforded by U.S. copyright law. The reason for this is surprisingly clear: moral rights are generally not protected by U.S. law, particularly U.S. copyright law.¹⁰⁷

103. Kwall, *supra* note 100, at 7.

104. LAWSON, *supra* note 41, at 113–14.

105. Herbert H. Johnson, *On the Montaigne and Centaur Types of Bruce Rogers*, in *AMERICAN PROPRIETARY TYPEFACES* 42, 45–46 (David Pankow ed., 1998).

106. 17 U.S.C. § 302(a) (2006).

107. Kwall, *supra* note 100, at 17.

3. Neoclassical Economic Efficiency Theory

The Neoclassical Economic Efficiency Theory is best stated by Professor Landes and Judge Posner:

Copyright protection—the right of the copyright’s owner to prevent others from making copies—trades off the costs of limiting access to a work against the benefits of providing incentives to create the work in the first place. Striking the correct balance between access and incentives is the central problem in copyright law.¹⁰⁸

Under this theory, the purpose of copyright protection is to promote economic efficiency by balancing two competing interests: (1) the benefit of decreased cost of creation derived from creators borrowing from prior works; against (2) the benefit of increased incentive to create new works caused by protection against copying.¹⁰⁹ Thus, strong copyright protection is most efficient in instances where the costs of production of copies and the benefits of borrowing from prior works are minimal. Conversely, weak copyright protection is most efficient when borrowing from prior works is particularly necessary, and the cost of production of copies is relatively high.¹¹⁰

Application of this theory to the question of pre-digital typeface design offers a possible explanation for the historic lack of copyright protection in this field. Typeface designers borrowed heavily from prior works in the early days of typeface design.¹¹¹ Many classic typefaces, such as Garamond and Bodoni, were copied and marketed successfully by multiple foundries in the early nineteenth century.¹¹² The incentive to create new typefaces could not have been driven by the hope that many copies could one day be sold, because the market for typefaces was small.¹¹³ The only purchasers of typefaces in the pre-digital era were printers, who for the most part desired original, novel typefaces, rather than copies of existing typefaces.¹¹⁴ The incentive to create new typeface designs was driven by the hope that *one* copy of the typeface design could be sold to a foundry that would then create a font based upon the design.¹¹⁵ Thus, the benefit of drawing upon

108. William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326 (1989).

109. *Id.* at 333.

110. *See id.*

111. *See* DOWDING, *supra* note 13, at xxi (describing the history of typeforms: “There has never been anything sudden or spectacular in this long process of evolution.”).

112. *Id.* at xxii.

113. *See supra* Part II.A.1.

114. *Id.*

115. *Id.*

prior typeface designs vastly outweighed the negligible impact on any incentive to create that would be bolstered by copyright protection.

Far from providing a justification for copyright in typeface design protection, the Economic Efficiency Theory provides an affirmative reason why copyright protection should *not* have been given to typeface designs in the pre-digital era.

4. Public Domain

A large and vibrant public domain greatly benefits the public good and increases the potential for new creations.¹¹⁶ Lawrence Lessig describes it as follows: “The public domain is a lawyer-free zone. It is a place where culture lives permission-free. One needs no authority from anybody to take and build upon culture that lives in the public domain. It is guaranteed by the freedom of the public domain forever.”¹¹⁷ Whatever one’s view on how large the public domain should be, it seems to be generally agreed that *some* amount of works should be in the public domain.¹¹⁸ When typeface design was a relatively new art, the public domain was necessarily small. The only sources a typefounder had to draw from were the few designs already in existence—if he could even locate samples of those designs—and handwritten manuscripts. Not only were there fewer typeface designs in the public domain in the pre-digital era, the potential variety in typeface designs was also not as great.¹¹⁹ In the early days the process of printing made the use of many of the delicate distinctive features of typefaces described in Part I.A impossible.¹²⁰ During this era, protection for typeface designs would have been quite detrimental to the development of the art, since it would have further limited the minimal variety in the public domain.

In addition to the small size of the public domain, access to works therein is also an important concern. Prior to the advent of the PC, some typefounders had collections of books printed in various typefaces,¹²¹ or later, collections of physical fonts.¹²² Although the size of designs in the public domain grew over time, it was still relatively difficult to access much of the variety, due to the difficulty in tracking

116. Laura N. Gasaway, *A Defense of the Public Domain: A Scholarly Essay*, 101 LAW LIBR. J. 451, 456–57 (2009).

117. Lawrence Lessig, *The Creative Commons*, 65 MONT. L. REV. 1, 4 (2004).

118. *See generally id.*

119. DOWDING, *supra* note 13, at 75.

120. *Id.*

121. LAWSON, *supra* note 41, at 47–61.

122. JOHNSON, *supra* 105, at 42–44.

down examples of those works. Thus, even removing newer designs from the public domain would have been detrimental to the creation of new designs, because the older a printed work is, the harder it may be to locate a copy of it to use as inspiration for a new typeface design. A work in the public domain can only benefit creation if it is accessible to the would-be creator. Prior to the PC and the Internet, most faces were unavailable to most designers.

The rhetorics did not clearly justify protection of typeface designs in the pre-digital era, which may explain why these designs have not traditionally been protected by U.S. copyright law.

B. Post-Digital

This section will consider whether the advent of digital fonts and the PC have altered the application of the rhetorics to the question of typeface design protection. The same four major rhetorics will be applied here: (1) Economic Incentive Theory; (2) Personhood Theory; (3) Neoclassical Economic Theory; and (4) Public Domain.

1. Economic Incentive Theory

The post-digital era saw the emergence of a new market for typeface designs. PCs make nearly everyone a “printer,” since all that is needed to create a printed document is word-processing software and a standard computer printer. These PC-printers often have a desire to find the perfect typeface to use for whatever it is they are producing. With this new market comes a new incentive to create typeface designs. The Helvetica family of fonts sells online for \$741.¹²³ The Centaur family seems like a bargain by comparison at only \$99.¹²⁴ The Bembo family goes for \$198.¹²⁵ Garamond can be purchased for \$169 directly from Adobe.¹²⁶ These fonts are sold to regular PC users in addition to professional graphic designers and printers. These prices indicate that there is money to be made from the creation of new typefaces. The primary factor lacking in the pre-digital era for incentivization as a justifiable theory for intellectual property protection was a market for copies of typeface designs. In the post-digital era, the

123. *Helvetica® Complete Family Pack*, FONTS.COM, <http://www.fonts.com/findfonts/detail.htm?pid=4337163> (last visited Mar. 17, 2011).

124. *Centaur Complete Family Pack*, FONTS.COM, <http://www.fonts.com/FindFonts/Detail.htm?pid=242719> (last visited Mar. 17, 2011).

125. *Bembo®*, MYFONTS, <http://new.myfonts.com/fonts/adobe/bembo/> (last visited Mar. 17, 2011).

126. *Adobe Garamond Pro*, ADOBE, <http://store1.adobe.com/cfusion/store/html/index.cfm?store=OLS-US&event=displayFontPackage&code=1703> (last visited Mar. 17, 2011).

ability of anyone with a PC to use a digital font, coupled with the desire for variety and perceived individuality of those PC owners, means that there is a large market for copies of typeface designs. If a typefounder who creates a typeface that becomes popular is able to capitalize on that popularity by selling the design directly, or by licensing it to a font purveyor, then that potential sale becomes a strong incentive to create new typeface designs.

Copyright protection might even provide an incentive for an individual to become a professional type designer, a trade that is generally not economically viable today.¹²⁷ “Even today, despite the respect for the title [type designer], the calling rarely brings affluence to the practitioner. Indeed, most twentieth-century type designers have found it necessary to seek permanent employment in other fields to indulge in the ‘luxury’ of drawing letters for printing types.”¹²⁸

2. Personhood Theory

As in the pre-digital context, this section will consider Personhood Theory primarily by analyzing the attribution right.¹²⁹ Moral rights have made some appearance in U.S. copyright law recently, with the passage of the Visual Artists Rights Act in 1990,¹³⁰ so perhaps it is not so unlikely that moral rights may be used as a justification for protection of typeface designs. The increase in the ease of creation and distribution of typeface designs has increased the importance of the attribution right in the post-digital era.

a. Increased Ease of Creation

With desktop design software such as FontLab Studio, available at a relatively affordable cost,¹³¹ or FontForge, a free open source program,¹³² anyone can become an amateur typeface designer. Whereas previously a professional typeface designer was the only source to go to if one desired a new typeface for a particular purpose, now there are far more options. Even as late as 1968, the only feasible way of presenting a design was to draw each glyph on paper.¹³³ The new ease

127. LAWSON, *supra* note 41, at 381.

128. *Id.*

129. *See supra* Part II.A.2.

130. *See* Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5128.

131. \$550 with an academic discount. *Academic Purchases*, FONTLAB, <http://www.fontlab.com/buy/academic/> (last visited March 17, 2011).

132. Available for free download. FONTFORGE, <http://fontforge.sourceforge.net> (last visited Mar. 17, 2011).

133. BARTRAM, *supra* note 1, at 10.

of creation through use of the PC has not necessarily led to an increase in the number of *quality* typefaces created. Professional graphic designers and publishers know that to obtain a new, quality typeface that serves their purpose, they must engage a skilled typeface designer. But the drastic increase in the number of potential typeface designers makes it much easier for a skilled designer to get lost in the crowd. A designer's right to associate their name with a high-quality design through the attribution right allows the designer to separate themselves from amateurs or mere dabblers. Such separation is beneficial to the public as well, as it allows consumers to identify designers based upon their prior creations and to choose according to that information.

b. Increased Ease of Distribution

The digitization of fonts has resulted in a drastic decrease in the difficulties and costs associated with distribution of typeface designs. In the pre-digital era, the typeface design was usually transmitted directly to the end user, the publisher, or graphic designer.¹³⁴ In many cases publishers even commissioned the designs.¹³⁵ Under those circumstances, it is unlikely that the designer of a typeface would be unknown to the purchaser. In the post-digital era, the situation is much different. Digital fonts are acquired through anonymous sources on the Internet and rarely does the consumer know who designed the typeface. The digital paradigm makes it difficult, or impossible, for the designer to keep their name associated with a particular design. Even if the designer names the typeface after themselves, a copier can change the name of the copy.

The attribution right would make this association much more feasible, as the designer would have the right to force distributors to identify them as the creator of the typeface design.

3. Neoclassical Economic Efficiency Theory

As discussed *supra*,¹³⁶ Economic Efficiency Theory balances two competing interests held by all creators: the benefit of using prior works in creating new works and the desire to protect new works from being copied. The transition to digital fonts alters both considerations and results in a different outcome when this theory is applied to the question of typeface protection. The following changes in the typeface

134. See *supra* Part II.A.2.

135. See *supra* Part II.A.2.

136. See *supra* Part II.A.3.

industry are relevant to analysis of this theory: (a) the constituency of the market for new typefaces has changed; and (b) the cost to copy and profit from the sale of typeface designs has decreased.

a. Market Composition

The post-digital era has birthed an entirely new market for typeface designs composed of nearly everyone that owns a PC. Historically there have been two major consumers of typeface designs: publishers and graphic designers.¹³⁷ Both groups of consumers had significant barriers to entry in the pre-digital era because the equipment required to work in either of these fields was relatively expensive.

Prior to the desktop revolution the equipment necessary to use a typeface in the publishing industry was expensive enough to foreclose the possibility that non-business use of new typeface designs would ever be more than rare or occasional. Even after typesetting moved from wood or metal blocks to magnetic tape, the cost of the equipment necessary to use a typeface design was prohibitive for non-business uses.

b. Decreased Cost of Copying and Profiting from the Sale of Typeface Designs

Copying typeface designs has become much less costly in the post-digital era—even without pirating the font software that generates the glyphs.¹³⁸ One can use a scanner to make digital copies of the glyphs of a typeface and use those scanned versions to turn the typeface into a sellable font using free font generating programs, such as FontForge. This requires a much smaller expenditure of time and resources than punchcutting a new metal font from an existing typeface design, as was the common practice in the pre-digital era.¹³⁹

The decreased cost of copying a typeface design and transforming it into a sellable font means that the only significant expense for one engaged in the business of selling fonts is the time-cost to design a new typeface or purchase a new typeface design. This cost does not exist if typeface designs are not protected by law. With so many typeface designs already available to copy, and no legal impediment to that copying, it would be inefficient for a font seller to spend money

137. See generally BARTRAM, *supra* note 1; DOWDING, *supra* note 13.

138. Copying the font program itself would likely violate the copyright that covers the computer program that is the font. See *infra* Part III.B.

139. The time consuming and expert task of punchcutting a font is described by Lawson in detail. LAWSON, *supra* note 41, at 389–98.

on a new design. Thus, denying copyright protection to typefaces leads to the result that the new market for typeface designs embodied in digital fonts will not result in more typeface designs being created.

In the post-digital era, the best way for font sellers to efficiently exploit the new market created by the PC is to transform popular typeface designs into digital fonts and sell them to the public under new names. Since there is no protection against this behavior, font sellers can wait to see if newly created typefaces become popular, and once they do, copy and sell them. The logical outcome of this situation is that eventually new typefaces will rarely be created, since the designer loses most of the profit from any typeface design that becomes popular to other sellers.

Font creation software such as FontForge and FontLab coupled with the PC-user market make possible an explosion of new typeface designs, but the lack of protection for those designs makes expending time on their creation unprofitable, since it is inefficient for font sellers to purchase them. While amateurs may continue to design typefaces in their spare time, few will take the time to become truly adept at the art if there is no possibility for remuneration.¹⁴⁰ It is the products of these dedicated artists that will most benefit society. Swift action to protect typeface designs is required so that this opportunity is not missed.

4. Public Domain

The number of typeface designs in existence, and thus, in the public domain, has grown drastically since the use of PCs became widespread.¹⁴¹ Many thousands of typeface designs have been created since the fifteenth century.¹⁴² So long as typeface protection is not retroactive, this plethora of typeface designs will remain in the public domain for future designers to draw from. These thousands of typefaces are also readily accessible by anyone with a PC. A copy of Microsoft Word comes with over one hundred typefaces alone.¹⁴³ The

140. The University of Reading in England offers an MA in Typeface Design, but at over \$15,000 per year, it seems unlikely that someone would choose to pursue such a degree if it could not be used professionally. *MA Typeface Design*, U. READING, <http://www.reading.ac.uk/typography/pg-taught/typ-pgtmatypefacedesign.aspx> (last visited Apr. 28, 2010); *Postgraduate Fees*, U. READING, <http://www.reading.ac.uk/Study/fees/pg-feestable.aspx> (last visited Apr. 28, 2010).

141. BARTRAM, *supra* note 1, at 8.

142. LAWSON, *supra* note 41, at 7.

143. *Fonts Supplied With Office 2007*, MICROSOFT, <http://www.microsoft.com/typography/fonts/product.aspx?PID=148> (last visited Apr. 28, 2010).

Internet is chock-full of examples of typeface designs. With such a vast public domain in existence and accessible, it is hard to argue that maintaining public domain works for designers is a valid reason to deny copyright protection to typeface designs.

III. Currently Available Protections

The rhetorics indicate that typeface designs in the post-digital era should be protected. To decry the lack of protection at this stage of the analysis, however, would be premature. This article must examine the protections currently available, and determine whether they are sufficient. Further action is required only if the currently available protections are insufficient. There are two ways that the actual design of a typeface can be protected—at least somewhat—under current U.S. law. Those two ways are: (A) design patents and (B) typeface-related software copyrights. The courts have affirmatively approved design patents and software copyrights as applied to typeface designs and digital fonts respectively.¹⁴⁴

Some forms of intellectual property protection that may be used to protect the interests of typefounders do not actually protect the design of the typeface, the glyphs themselves. These include trade secret, trademark in the name of the typeface, contract law through click-wrap agreements, and technological protection measures.¹⁴⁵ This article only addresses legal protection that will prevent appropriation of the glyph designs. Since the above listed protections do not protect the interests that the rhetorics suggest should be protected, which are the designs themselves, they are not considered potential solutions.

A. Design Patent

Originally, design patents were granted to type fonts because the font, a physical object, met the “article of manufacture” requirement for design patents.¹⁴⁶ Relying on U.S. Patent and Trademark Office (“PTO”) guidelines,¹⁴⁷ one case has held that “type fonts are patentable subject matter and the program which creates the type fonts is the

144. See *Adobe Sys. Inc. v. S. Software Inc.*, 45 U.S.P.Q.2d 1827 (N.D. Cal. 1998).

145. Lipton, *supra* note 3, at 182–89.

146. Guidelines for Examination of Design Patent Applications for Computer-Generated Icons, 61 Fed. Reg. 11,380, 11,382 (Mar. 20, 1996); *Adobe Sys.*, 45 U.S.P.Q.2d at 1832–33.

147. *Adobe Sys.*, 45 U.S.P.Q.2d at 1832–33.

article of manufacture.”¹⁴⁸ Design patents for type fonts are allowed, and granted, by the PTO.¹⁴⁹ Although design patents come closest to the type of protection necessary for typeface designs, they are a poor substitute for copyright protection for three reasons: (1) their term of fourteen years is too limited; (2) the cost to obtain a design patent is too high; and (3) the protection is too broad.

1. Duration Is Too Limited

A design patent lasts for fourteen years.¹⁵⁰ Fourteen years is hardly enough time to establish a typeface design in the marketplace. Due to the explosion of new typeface designs initiated by the availability of desktop design software, it can be difficult to establish a new typeface design in the market. Even before desktop design, when there were far fewer typeface designers, excellent (and highly marketable) typefaces were often not appreciated and exploited until more than fourteen years after their creation.¹⁵¹ Fourteen years is not enough time to provide sufficient incentive to create quality typefaces, nor does it make designing typefaces profitable.

2. Cost Is Too High

The cost to obtain a design patent is high.¹⁵² Typeface design is not a particularly lucrative field.¹⁵³ The cost to enforce patent rights is extremely high.¹⁵⁴ Therefore, even if the prohibitive cost of obtaining a design patent is not enough to dissuade a designer, they will likely not be able to afford the legal fees necessary to protect their rights if their design is copied and they must litigate.

148. *Id.* at 1833.

149. For a more thorough treatment of this topic, see Lipton, *supra* note 3, at 178–82.

150. 35 U.S.C. § 173 (2006).

151. For an example, see John Baskerville’s eponymous typeface discussed *supra* in Part I.B.4.

152. Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1704 (2006).

153. Lipton, *supra* note 3, at 181 (“Most font developers are lucky if the profits they make from their work reach five digits in their lifetime . . .”).

154. Ben Katzenellenbogen, *Trends in Patent Litigation*, in PATENT LAW INSTITUTE 2007, at 275, 282 (PLI Intellectual Prop., Course Handbook Ser. No. G-899, 2007) (“In 2005, it cost a typical patent litigant \$650,000 to litigate a patent case through trial where there was less than \$1 million at stake.”).

3. Protection Is Too Broad

Design patents are enforceable even against those who duplicate the design by independent creation.¹⁵⁵ If the problems of duration and cost were resolved, and design patents became the standard form of protection for typeface designs, the enforceability against innocent infringers would quickly stifle the industry. The time and expense necessary to survey the thousands of typeface designs in existence to be certain that a new design did not too closely resemble an existing type would so outweigh the potential economic rewards that it would become impossible to profit from the creation of new typefaces. Such a result is hardly in keeping with any of the rhetorics but is especially incompatible with incentive theory, in that it actually creates a *disincentive* to create.

B. Digital Font Software Copyright

Software copyrights for digital fonts do not adequately protect typeface designs. The protection only extends to the software code of the font, not the actual elements of design.¹⁵⁶ There are many different ways to encode the same typeface design.¹⁵⁷ The *Adobe Systems* court gives a detailed explanation of the technical aspects of software fonts, and the relevant conclusion reached is that there are many different ways to encode a particular glyph in a digital font.¹⁵⁸ All that is required to copy a typeface design without infringing the software copyright is the time it takes to redraw the letters in a different design program. This form of protection does not protect typeface designers against copying of their designs by other designers or by the producers of the very fonts protected by this aspect of copyright law. This leads to the inequitable hypothetical situation in which a large corporation that produces digital fonts could copy an independent designer's typeface without permission, turn the design into a digital font, and then sue the designer for copyright infringement if she downloaded a pirated copy of the font.

155. *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 478 (1974).

156. *Adobe Sys. Inc. v. S. Software Inc.*, 45 U.S.P.Q.2d 1827, 1830 (N.D. Cal. 1998).

157. *Id.*

158. *Id.* at 1828–29.

IV. Should, Would, and Could Typeface Designs Be Protected by Copyright Law?

To move from a copyright law that is sans protection for typeface designs to an amendment to the Copyright Act, three questions must be answered: (A) *Should* typeface designs be protected?; (B) *Would* existing law be sufficient for the protection prescribed by the rhetorics?; and (C) *Could* typeface designs be protected by copyright law? The following subsections use the analysis in Parts II and III *supra* to reach the conclusion that typeface designs should and could be protected, and that current forms of protection are insufficient.

A. Typeface Designs *Should* Be Protected

The digital era has made copying of typefaces so easy that the rhetorics now justify protection for typeface designs. The advents of the PC, the Internet, and desktop design software have brought about many changes in the typeface industry. The most relevant factors affecting the application of the rhetorics to typeface design protection are the increase in the ease of copying a typeface design and turning it into a font; the anonymity in the distribution of typeface design; and most importantly, the expansion of the market for digital fonts to non-professional consumers. While in the pre-digital era there was some rationale for the lack of protection for typeface designs, in the post-digital era protection is not only justified, it is demanded.

The only question that remains is whether society needs more typeface designs. Lawson addresses his book to “the person who believes . . . that the subtleties of refinement as applied to roman letters have yet to be fully investigated and that the production of the perfect printing type remains a goal to be desired as much by contemporary as by future type designers.”¹⁵⁹ Bartram says of new typefaces that “[t]he changes reflect new societies, new technologies, new preferences, new functions.”¹⁶⁰ If the proposition that works of artistic value are beneficial to society is true, then one must accept that more typeface designs are therefore beneficial to society. The written word is a major part of most of our daily lives, and its quality and variety should not be neglected.

159. LAWSON, *supra* note 41, at 7.

160. BARTRAM, *supra* note 1, at 125.

B. Typeface Designs *Qua* Designs Are Not Adequately Protected by Existing Laws

Although in some instances typeface designs may be incidentally protected by design patents or computer software copyrights, neither of these options sufficiently protects the actual designs of typefaces as designs in their own right. Software copyrights only protect the physical or digital means of transmitting and reproducing the designs. Pirate designers are free to copy the glyphs. Design patents offer no *de facto* protection for most designers.¹⁶¹ As established in Part IV.A *supra*, copyright law should protect the designs themselves because that protection is necessary to serve the interests brought to light by application of the rhetorics in Part II. Whether due to legal impediments, in the case of software copyrights, or practical impediments, in the case of design patents, current U.S. law does not allow typeface designers to adequately protect their creations.

C. Typeface Designs *Could* Be Protected by Copyright

The rhetorics suggest that typeface designs should be protected in the post-digital era.¹⁶² The currently available forms of typeface design protection are lacking.¹⁶³ One important question remains: Do the *sui generis* aspects of typeface design render it incompatible with copyright law? This section will examine the three areas of copyright law that are most difficult to square with typeface design protection: (1) conceptual separability of the design elements; (2) difficulty of assessing substantial similarity; and (3) merger doctrine and the alphabet.

1. Conceptual Separability

In the case of a useful article, which a typeface design arguably is, the pictorial, graphic, or sculptural features must be conceptually separable from the utilitarian aspects of the design in order for the design to be registrable.¹⁶⁴ Professor Lipton conducts a thorough analysis of whether there are artistic elements of typefaces that are conceptually separable from the utilitarian function of typefaces as the building blocks of language.¹⁶⁵ For traditional typefaces, as opposed to novelty typefaces, it is unlikely that the artistic elements

161. See *supra* Part III.A.

162. See *supra* Part II.B.

163. See *supra* Part III.

164. See *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989 (2d Cir. 1980).

165. Lipton, *supra* note 3, at 155–62.

would be conceptually separable.¹⁶⁶ This problem can be resolved, however, by amending the Copyright Act to include typeface designs, rather than trying to shoehorn typeface design into existing copyright protection as a pictorial or graphic work, as Professor Lipton valiantly attempts to do.¹⁶⁷ The Architectural Works Copyright Protection Act (“AWCPA”) is an example of how such an amendment can avoid the conceptual separability hurdle.¹⁶⁸ Nimmer explains: “[AWCPA] avoids the pitfall attendant upon the definition of ‘useful articles,’ simply by defining a new category of architectural works, separate and distinct from the category to which the ‘useful article’ limitation applies, *viz.* pictorial, graphic, and sculptural works.”¹⁶⁹ Since the useful article doctrine only applies to pictorial, graphic, or sculptural works, an amendment adding typeface design to the list of copyrightable materials in § 102(a) of the Copyright Act would eliminate the question of conceptual separability.¹⁷⁰

2. Difficult to Draw Substantial Similarity Line

To prove infringement, a plaintiff must show that the allegedly infringing work is substantially similar to the copyrighted work. Since typefaces are all similar in appearance, due to the necessity of being identifiable as the common letters of the alphabet, the question of how substantial similarity will be shown is pertinent. The best option to address this concern is to use typeface experts to examine the designs at issue and assess the similarity of the two designs. These experts already exist, as evidenced by the numerous scholarly books on the topic.¹⁷¹ Expert testimony is commonly used in music composition copyright cases, providing clear precedent for the use of experts in copyright cases.¹⁷²

One tool that experts may use in analyzing typeface designs for substantial similarity is the selection and compilation of the various features described *supra* in Part I.A. Similar analysis is used in the case

166. *Id.*

167. *Id.*

168. Architectural Works Copyright Protection Act, Pub. L. No. 101-650, 104 Stat. 5133 (1990).

169. 1-2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.08[D][2][b] (2009) (citations omitted).

170. 17 U.S.C. § 102(a) (2006).

171. See generally BARTRAM, *supra* note 1; DOWDING, *supra* note 13; LAWSON, *supra* note 41.

172. See NIMMER & NIMMER, *supra* note 169, § 2.05[D] n.62 (mentioning the use of expert testimony in a music composition copyright case).

of architectural works¹⁷³ and music composition,¹⁷⁴ since the protected expression in those two forms of protectable works also is often primarily the arrangement and selection of unprotectable ideas or functional elements.

3. Merger: The Alphabet Is a Necessary Building Block

The merger doctrine is another potential stumbling block in the path of copyright protection for typefaces. When there is only one or a few ways of expressing an idea, the expression of them is not copyrightable.¹⁷⁵ The argument that there are only a few ways of designing a typeface ignores the fact that there are thousands of different typeface designs. It is hard to find a better answer than the one provided by Goudy to the question of whether the design of typefaces is dictated by function: “If there were an individual, readily recognized quality or characteristic which the type designer could incorporate in drawings that would make any one type more beautiful, legible, or distinguished than another, it is obvious that only type of that kind would be designed.”¹⁷⁶

Though merger stands out as a potential stumbling block for typeface design protection, the concern is largely illusory considering the thousands of different typeface designs that have been created since the invention of the printing press.¹⁷⁷

V. What Should Typeface Design Copyright Protection Look Like, Based Upon the Requirements of the Rhetorics and Practical Concerns?

There is precedent for *sui generis* protection of works barred by the useful article doctrine from protection as pictorial, graphic, or sculptural works—architectural structures via the AWCPA.¹⁷⁸ Rather than attempting to reinvent the wheel, this article uses the features of AWCPA as a guide to draft a similar proposed amendment to the Copyright Act for typeface designs.¹⁷⁹ Similar to the fact that the font programs that are employed to use typeface designs in practice are

173. *Id.* § 2.20.

174. *Id.* § 2.05[D].

175. *Baker v. Selden*, 101 U.S. 99 (1879).

176. LAWSON, *supra* note 41, at 110.

177. *Id.* at 7.

178. Architectural Works Copyright Protection Act; NIMMER & NIMMER, *supra* note 169, § 2.20[A].

179. Architectural Works Copyright Protection Act.

copyrightable under § 102(a)(1),¹⁸⁰ architectural plans were copyrightable under § 102(a)(5) even before the AWCPA was enacted.¹⁸¹ Not only will the carefully crafted features of AWCPA help to inform the proposed amendment, the existing case law interpreting AWCPA will be useful in future decisions interpreting the proposed amendment.¹⁸² Part V.A describes the features of AWCPA that are pertinent to typeface design. Part V.B sets out the features of the proposed amendment.

A. Architectural Works: Clear Precedent from a Real World Example

This section described the two features of AWCPA that are most relevant to typeface design protection: (1) amending § 102 to add a new category; and (2) limiting the scope of protection.¹⁸³

1. Amendment of § 102

AWCPA added subsection (8) to the list of protected works in § 102 for “architectural works.”¹⁸⁴ In addition, AWCPA added a definition of “architectural works” to § 101:

An “architectural work” is the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features.¹⁸⁵

The result is that “[t]his new category, architectural works, does not implicate the ‘physical or conceptual separability’ conundrum that bedevils protection for useful pictorial, graphic, and sculptural (PGS) works.”¹⁸⁶ The efficacy of a similar approach for typeface design is explored *infra*.

2. Limitations on Protection

AWCPA contains three relevant limitations: (a) architectural works are only given prospective protection; (b) the owner of a build-

180. 17 U.S.C. § 102(a)(1) (2006); *see* Adobe Sys. Inc. v. S. Software Inc., 45 U.S.P.Q.2d 1827 (N.D. Cal. 1998) (holding that copyright protection for computer programs includes protection of digital font software).

181. 17 U.S.C. § 102(a)(1), (5) (2006).

182. Architectural Works Copyright Protection Act; NIMMER & NIMMER, *supra* note 169, § 2.20[A].

183. Architectural Works Copyright Protection Act.

184. *Id.*

185. *Id.*

186. NIMMER & NIMMER, *supra* note 169, § 2.20[A].

ing is not required to obtain consent from the copyright owner to alter or destroy the building; and (c) the copyright owner's rights as to pictorial representations of the building are limited.¹⁸⁷

a. Prospective-Only Protection

AWCPA applies only to architectural works created on or after its enactment.¹⁸⁸ Buildings constructed before AWCPA are not afforded retroactive protection.¹⁸⁹ A similar limitation for typeface design copyrights would avert the numerous problems that would be created if widely disseminated and copied typeface designs were suddenly afforded retroactive copyright protection. Disallowing retroactive protection is also suggested by the concern that there be a sufficient public domain to draw from, which is discussed *supra* in Part II.B.3–4.

b. Alteration and Destruction

AWCPA added § 120(b) to the Copyright Act, which states that “the owners of a building embodying an architectural work may, without the consent of the author or copyright owner of the architectural work, make or authorize the making of alterations to such building, and destroy or authorize the destruction of such building.”¹⁹⁰ While in the case of architectural works this limitation protects the rights of building owners to use their property,¹⁹¹ in typeface designs a similar provision would protect the right of font owners to use typeface designs embodied in those fonts.

c. Pictorial Representations

AWCPA also added § 120(a) to the Copyright Act, which states that “[t]he copyright in an architectural work that has been constructed does not include the right to prevent the making, distributing, or public display of pictures, paintings, photographs, or other pictorial representations of the work.”¹⁹² In the context of typeface designs, a similar limitation could avert the potential for infringement suits against those that photocopy or otherwise copy the typeface design outside of the design context. A similar limitation could avert the

187. *Id.* § 2.20[C].

188. *Id.* § 2.20[B].

189. *Id.*

190. Architectural Works Copyright Protection Act § 701.

191. NIMMER & NIMMER, *supra* note 169, § 2.20[C].

192. Architectural Works Copyright Protection Act § 701.

concern that injunctions may be sought against people who innocently use a copyrighted typeface in a book or other printed work.¹⁹³

B. Proposed Amendment

Several scholars have argued in favor of copyright protection for typefaces, and each has offered a unique plan to create that protection.¹⁹⁴ Professor Carroll—who presents the most thoroughly delineated plan—suggests amending the definition of “pictorial, graphic, and sculptural works” in § 101 of the Copyright Act to explicitly include typeface designs.¹⁹⁵ Snyder argues for design patent protection but suggests changes that would render the design patent protection for typeface designs much more like copyright protection.¹⁹⁶ Professor Lipton first argues that perhaps the courts should reinterpret the current Copyright Act to include typeface designs and then suggests some limitations on protection if the Copyright Act were amended to include typeface designs.¹⁹⁷ The solution proposed by this article is an amendment to the current Copyright Act to add “typeface designs” to the list of protectable works in § 102(a), much like AWCPA did for architectural works.

Professor Carroll suggests a sensible definition for “typeface design”¹⁹⁸ that he borrows from a failed design protection bill: “A ‘typeface’ consists of a set of letters, numbers, or other symbolic characters, whose forms are related by repeating design elements consistently applied in a notational system.”¹⁹⁹ This article adopts Carroll’s suggested definition.²⁰⁰

The amendment should explicitly limit protection to new works and thus not provide retroactive protection to designs already created, to alleviate gutting the public domain and avoiding the potential for innocent infringement. In addition, a section like § 120 for Architectural Works should be added limiting the protection in two ways: (1) purchasers of legitimate font software should be exempt from a charge of infringement for any use of the typeface in the font other than transforming it into another font software program or a physical font; and (2) copying of other works that embody the typeface design,

193. Carroll, *supra* note 6, at 181.

194. See Lipton, *supra* note 3; Carroll, *supra* note 6; Snyder, *supra* note 6.

195. Carroll, *supra* note 6, at 171.

196. Snyder, *supra* note 6, at 139–42.

197. Lipton, *supra* note 3, at 191.

198. Carroll, *supra* note 6, at 171.

199. H.R. 1790, 102d Cong., 1st Sess. § 1001(b)(4) (1991) (defining “typefont”).

200. Carroll, *supra* note 6, at 171.

such as books or posters, should not be actionable unless the copying is done to facilitate embodying the typeface design in a font.

Conclusion

Copyright law should and could protect typeface designs. An amendment to the Copyright Act to add “typeface designs” to the list of covered works in § 102 is the most appropriate, feasible, and desirable way to provide this protection.

