

An Approach to Why Typography Should be Copyrightable*

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Thank you. I'm not going to talk about anything that's nearly as sexy as tattoos. I want to thank all the organizers and staff for their hard work and for including me in what has turned out to be an extremely interesting day. June earlier said that this panel is concerned with the scope of protection, and I am here to talk about typefaces, which, in the United States, unlike most of the rest of the world, have no copyright protection at all. With the exception, in a way, of the fact that the computer programs that produce digitized typefaces are protected by copyright, although the typefaces that they produce are not.

My contention is that under the 1976 Act, typefaces should be protected. To start, I just want to—since pictures say a thousand words and I have so little time—I want you to look at these fonts and think about the extent to which you can perceive ornamentation and artistic effort apart from the basic letter form.

There are many different kinds of typefaces. On your left, there are these various sans serifs, then moving into serif typefaces. This is the very famous Helvetica typeface, which is used throughout the New York subway system; that is its standard type.¹ And then we move on to typefaces which are named for their style of art, like the Bauhaus 93, or that come from artistic movements in historical contexts. And then, because the Copyright Office treats calligraphy in the same way that it treats typeface, that is to say, it is not protected, this is a page from *Carmina Burana* by Klaus-Peter Dienst, which is entirely in calligraphy.² It portrays the first verses of *Carmina Burana*, in varying ways, black on white and white on black.

I think that it is almost impossible not to have an aesthetic reaction to typefaces. They are usually selected and designed in aesthetic ways that are best suited to express the works that are being printed, whether it's a comic book, or a Bible, or the signs in the subway. The treatment of typeface as art is not new. In 2007–08, MoMA had an exhibition on the 50th anniversary of the creation of the Helvetica typeface.³ This was not an accident.

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1. Jennifer Lee, *How Helvetica Took Over the Subway*, N.Y. TIMES (Dec. 4, 2008), <http://cityroom.blogs.nytimes.com/2008/12/04/how-helvetica-took-over-the-subway/>.

2. See Klaus-Peter Dienst, *Carmina Burana*, RUINS OR BOOKS (last visited Mar. 8, 2016), <http://ruinsorbooks.com/2013/02/carmina-burana-klaus-peter-dienst/> [https://perma.cc/RD65-YW3G].

3. *50 Years of Helvetica*, MUSEUM OF MODERN ART (2007–08), <http://www.moma.org/calendar/exhibitions/38?locale> [https://perma.cc/ZN4R-UHJX].

There is no mention of typeface in the 1909 or the 1976 Acts. The Copyright Office practice (because sometimes it has 'had regulations, sometimes it has not, although it has always treated typefaces the same way) under both Acts states that there is no protection of typefaces. They are assumed to be functional only, and they certainly are functional to the extent that they express a letter that make up words that make up sentences. Specifically, the language of the current regulation is that "typeface as typeface" (whatever that means) is not protected.⁴ The Copyright Office's recently updated *Compendium of U.S. Copyright Office Practices* says little more. "Typeface is not protected: "mere variations of typographic ornamentation" and typeface as typeface "are not protected," and the same applies to calligraphy.⁵

There is really only one case which focuses directly on typefaces. It's *Eltra v. Ringer*, a 1976 case decided under the 1909 Act.⁶ It involved a typeface that had been commissioned by Eltra from Hermann Zapf, a famous Swiss typographer, who died earlier this year at age 95. The District Court—this is after *Mazer v. Stein*—goes through a kind of *Mazer v. Stein* analysis, and decides that it's absolutely protected.⁷ And then the case went to the Fourth Circuit—this is when the Copyright Office was in Virginia—which decides in favor of the Copyright Office, based entirely on the deference shown to regulations of the Copyright Office.⁸

Now, I just want to say right at the beginning that I think that the principal hostility against the protection of typefaces comes from the fear of the injunction. And especially in the publishing world, aside from the fact that of course people don't like to pay license fees, there is a real fear that if an infringing typeface were used, a work would be enjoined. That is something that does not happen, typically, under the First Amendment in the United States. Although, I was thinking about this the other day, there certainly was opposition to typeface protection before the decision in *Masses*.⁹ But certainly, as you go through the century, I think that that is what principally explains the hostility. But this is no longer an issue after *eBay v. MercExchange*.¹⁰ Where a typeface is held to be infringing, a court could easily

4. 35 C.F.R. § 202.1(e).

5. U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES (THIRD), § 313.3(D) (3d ed. 2014).

6. *Eltra Corp. v. Ringer*, Civ. No. 76-264-A, 1976 WL 21070 (E.D. Va. Oct. 26, 1976).

7. *Id.* at *4 ("Insofar as the main issue is concerned, the case of *Mazer v. Stein*, is dispositive of the issue whether typeface designs *can* be considered works of art. Typeface should no more be denied registration on the theory that the letters themselves have an underlying function separate from its artistic design than could registration be denied the statuettes in *Mazer* because the statuettes were intended for an underlying utilitarian use as bases for table lamps.") (internal citations omitted).

8. *Eltra Corp. v. Ringer*, 579 F.2d 294, 301 (4th Cir. 1978).

9. *Masses Pub. Co. v. Patten*, 246 F. 24 (2d Cir. 1917) (reversing Judge L. Hand's injunction commanding the Postmaster General to withdraw his order excluding *The Masses* magazine from the mails and rejecting Judge Hand's "incitement" or "direct advocacy" theory of the First Amendment).

10. *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 392–93 (2006) (applying a four-factor test for permanent injunctive relief to disputes under the Patent Act, but commenting that the test also applies to copyright infringement under 17 U.S.C. § 502(a)).

fashion a remedy which requires the payment of a license fee and avoids the worry about the injunction of a work protected under the First Amendment.

Let's turn to the statutory definition—I was unaware of the “PGS” acronym for “pictorial, graphical, and sculptural,” but it saves me a lot of time, so I'm all for it. As I read the definition—and this is under the 1976 Act—I think that a typeface is “a work of fine graphic, and applied art. A work of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned.”¹¹ And by the way, that language is a direct quote from *Mazer v. Stein*.¹² The latter part of this definition presents some problems, and we'll come back to that.

Just before the Act was passed, there had been a big push by Barbara Ringer for Congress to consider the protection of designs and typefaces in 1974–75, unfortunately too close to the end of Congress's finishing the '76 Act. What the House Report finally says, though, is that, “[t]he Committee has considered, but chosen to defer”—I take that to mean not decide—“the possibility of protecting . . . typefaces.”¹³ But then, maybe trying to dictate the future, the Report proceeded to say that, “[a] ‘typeface’ can be defined as 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.”¹⁴ Now comes the kicker: “The Committee does not consider the design of typeface, *as thus defined*, to be a copyrightable [PGS] work within the meaning of this bill. . . .”¹⁵

Now, my position is that a Congress that was not deferring the decision, if so inclined, might decide that a different definition might qualify for protection. For example, it might decide that a typeface described as “a set of letters, numbers, or other symbolic characters whose design features are sufficiently dominant or distinctive in appearance that they are unnecessary to the expression of the basic letter form,” is a copyrightable PGS work.¹⁶ I recognize that there would be—and this is what I was talking about before—some difficulties with the latter part of the current statutory definition, which is also a problem in the area of the modern design of other kinds of things, like furniture. It requires them, according to the definition, to be “capable of existing independently of the utilitarian aspects of the

11. 17 U.S.C. § 101 (“‘Pictorial, graphic, and sculptural works’ include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.”).

12. *Mazer v. Stein*, 347 U.S. 201, 212 (1954).

13. H.R. REP. NO. 94-1476, at 55 (1976), http://www.copyright.gov/history/law/clrev_94-1476.pdf [<https://perma.cc/HC7S-GCEK>].

14. *Id.*

15. *Id.* (emphasis added).

16. *Id.*

article.”¹⁷ If that future Congress is going to change the definition of a typeface, it could consider removing that phrase from this definition as well.

The other challenges that have been associated with typefaces are related to the fact that it is difficult to determine what aspects are design, what elements are public domain, etc. These are objections that were raised about sixty years ago. It seems to me that a world that can deal with examining computer code can probably deal with similar complexities in the context of typefaces. Interestingly, at the same time that Congress was considering the PGS issues’ in the middle 1970s, Barbara Ringer was making efforts to amend the regulations in the Copyright Office to expand them to include typefaces. They did not come to anything, but, in materials that you can find online, Barbara Ringer eventually wrote to Representative Kastenmeier, partly to press him to hold hearings in which she admitted doubt about the Copyright Office’s authority to regulate typefaces in the absence of legislation.¹⁸ In her letter, she quotes testimony language of Irwin Karp in a Copyright Office rulemaking. I don’t know if you know who he was, but he was formerly counsel for the Author’s Guild and the Authors League. He was a very strong defender of the First Amendment, and in the testimony she quotes, he is challenging the Copyright Office’s authority to make changes in the protection of typeface—a decision that he viewed as legislative only. He said to the Register: “You are not a legislator. You can only say yes or no. Register or not register. And you can’t mediate or modify the impact of that absolute judgment on many industries and the whole process of disseminating information and culture in this country.”¹⁹ Irwin Karp was not a shrinking violet, I assure you. And I suspect that at least part of what he was concerned about specifically were these First Amendment concerns regarding injunctions.

Three months ago, in the Sixth Circuit in the *Varsity Brands* decision, there is a long discussion about the standards of deference due to the Copyright Office, or to any regulatory office, but in this case, the Copyright Office.²⁰ So, we are confronted with the “interesting” position of having no legislation that says anything about the protection of typefaces, and a regulation that forbids the protection of typefaces with no explanation, but to which one federal appellate court believes deference is due. So we’re in a great loop that provides no explanation whatsoever about the rationale for the refusal to protect typefaces.

It seems to me that where we have the courts deferring to the Copyright Office’s 100 years of regulatory history, which in this case flatly denies protection; where Congress has not spoken directly on the issue at all; and where at least one Register has questioned whether the Copyright Office has the power to regulate on the topic, maybe it’s time for someone to challenge that regulation.

17. 17 U.S.C. § 101.

18. U.S. Copyright Office, “Registration of Original Typeface Designs, Legislative Consideration,” M-119 at 3–4 (June 1975), <http://www.copyright.gov/history/mls/ML-119.pdf> [<https://perma.cc/LV5Q-GTDB>].

19. *Id.*

20. *Varsity Brands, Inc. v. Star Athletica, L.L.C.*, 799 F.3d 468, 477–80 (6th Cir. 2015).