

# Alive and Well: The (Still) Ongoing Debate Surrounding Conceptual Separability in American Copyright Law

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## I. INTRODUCTION

“Of the many fine lines that run through the Copyright Act, none is more troublesome than the line between protectible pictorial, graphic and sculptural works and unprotectible utilitarian elements of industrial design.”<sup>1</sup>

As this statement suggests, the copyrightability of products of industrial design is one of the most confusing aspects of American copyright law. For these works, availability of protection turns on a doctrine known as “separability.” Countless everyday objects have been analyzed under the separability doctrine, including belt buckles, casino uniforms, and mannequin heads, just to name a few.<sup>2</sup> The United States Copyright Act (hereinafter “Copyright Act”) classifies such objects as pictorial, graphic, or sculptural (“PGS”) works.<sup>3</sup> PGS works constitute a very significant category of copyrightable material; 90,749 of the 509,746 basic copyright registrations in the fiscal year ending September 30, 2006, were for PGS works.<sup>4</sup> This Note

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<sup>1</sup> 1 PAUL GOLDSTEIN, COPYRIGHT: PRINCIPLES, LAW AND PRACTICE § 2.5.3, at 99 (1989).

<sup>2</sup> *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989 (2d Cir. 1980) (belt buckle); *Galiano v. Harrah's Operating Co., Inc.*, 416 F.3d 411 (5th Cir. 2005) (casino uniform); *Pivot Point Int'l, Inc. v. Charlene Products, Inc.*, 372 F.3d 913 (7th Cir. 2004) (mannequin head).

<sup>3</sup> PGS 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.” 17 U.S.C. § 101 (2000).

<sup>4</sup> U.S. COPYRIGHT OFFICE, ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS 63 (2006), available at <http://www.copyright.gov/reports/annual/2006/index.html>. In its breakdown of types of registered works, the Report does not use the label “PGS works,” but instead uses the label “[w]orks of the visual arts, including two-dimensional works of fine and graphic art, sculptural works, technical drawings and models, photographs,