

How well do the statutory definitions and the accompanying legislative history delineate the dividing line between copyrightable “applied art” and uncopyrightable “industrial design”? Think first about how the 1976 Act’s approach implements the *Mazer* holding. The lamps fit the definition of “useful article” because they have an “intrinsic utilitarian function”—providing light. The next question, then, is whether the lamps’ design incorporated pictorial, graphic, or sculptural features that could be separately identified. One could separately identify the Balinese dancer forming the lamps’ bases; indeed, the lamps and bases were physically separated when the bases were submitted for registration. *Mazer*, then, is the paradigmatic case of the *physical separability* to which the House Report refers.

Other cases, however, raise difficult line-drawing questions. Think of the variety of other decorative techniques that you have seen employed in lamps, clocks, or the other items listed in Justice Douglas’ opinion in *Mazer*. Many of these techniques are nonrepresentational, and many incorporate design elements into the overall configuration of the article. In such cases, it can be quite difficult to identify the precise location of the line between form and function, and thus to determine whether separable, copyrightable features exist. These cases require courts to determine what is meant by the other kind of separability mentioned in the House Report: *conceptual separability*. Read the following cases and consider how the courts resolve the separability questions raised.

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

OAKES, J.: . . . Appellant Barry Kieselstein-Cord designs, manufactures exclusively by hand-craftsmanship, and sells fashion accessories. To produce the two [belt] buckles in issue here, the “Winchester” and the “Vaquero,” he worked from original renderings which he had conceived and sketched. He then carved by hand a waxen prototype of each of the works from which molds were made for casting the objects in gold and silver. Difficult to describe, the buckles are solid sculptured designs. . . .

The Vaquero buckle, created in 1978, was part of a series of works that the designer testified was inspired by a book on design of the art nouveau school and the subsequent viewing of related architecture on a trip to Spain. The buckle was registered with the Copyright Office . . . as “jewelry,” although the appellant’s contribution was listed on the certificate as “original sculpture and design.” Explaining why he named the earlier buckle design “Winchester,” the designer said that he saw “in [his] mind’s eye a correlation between the art nouveau period and the butt of an antique Winchester rifle” and then “pulled these elements together graphically.” The registration, which is recorded on a form used for works of art, or models or designs for works of art, specifically describes the nature of the work as “sculpture.”

The Winchester buckle in particular has had great success in the marketplace. . . . A shortened version of the belt with the small Winchester buckle is sometimes worn around the neck or elsewhere on the body rather than around the waist. Sales of both buckles were made primarily in high fashion stores and jewelry stores, bringing recognition to appellant as a “designer.” The recognition included a 1979 Coty American Fashion Critics’ Award for his work in jewelry design as well as election in 1978 to the Council of Fashion Designers of America. Both the Winchester and the Vaquero buckles, donated by appellant after this lawsuit

was commenced, have been accepted by the Metropolitan Museum of Art for its permanent collection. . . .

[The appellee made and sold exact, but far cheaper, copies of the buckles. Appellee admitted to the copying, but argued that the buckles were not copyrightable because they had no separately identifiable pictorial, graphic, or sculptural features. The district court agreed with this argument and granted the appellee summary judgement. Kieselstein-Cord appealed.]

Discussion . . .

We are left nevertheless with the problem of determining when a pictorial, graphic, or sculptural feature “can be identified separately from, and [is] capable of existing independently of, the utilitarian aspects of the article,” 17 U.S.C. §101. This problem is particularly difficult because, according to the legislative history explored by the court below, such separability may occur either “physically or conceptually,” *House Report* at 55. . . . Examples of conceptual separateness as an artistic notion may be found in many museums today and even in the great outdoors. Professor Nimmer cites Christo’s “Running Fence” as an example of today’s “conceptual art.” . . .

We see in appellant’s belt buckles conceptually separable sculptural elements, as apparently have the buckles’ wearers who have used them as ornamentation for parts of the body other than the waist. The primary ornamental aspect of the Vaquero and Winchester buckles is conceptually separable from their subsidiary utilitarian function. . . . Pieces of applied art, these buckles may be considered jewelry, the form of which is subject to copyright protection. . . .

Appellant’s designs are not, as the appellee suggests in an affidavit, mere variations of “the well-known western buckle.” As both the expert witnesses for appellant testified and the Copyright Office’s action implied, the buckles rise to the level of creative art. Indeed, body ornamentation has been an art form since the earliest days, as anyone who has seen the Tutankhamen or Scythian gold exhibits at the Metropolitan Museum will readily attest. The basic requirements of originality and creativity, which the two buckles satisfy and which all works of art must meet to be copyrighted, would take the vast majority of belt buckles wholly out of copyrightability. . . .

WEINSTEIN, J., dissenting: . . . The works sued on are, while admirable aesthetically pleasing examples of modern design, indubitably belt buckles and nothing else; their innovations of form are inseparable from the important function they serve—helping to keep the tops of trousers at waist level.

The conclusion that affirmance [of the district court] is required is reached reluctantly. The result does deny protection to designers who use modern three-dimensional abstract works artfully incorporated into a functional object as an inseparable aspect of the article while granting it to those who attach their independent representational art, or even their trite gimmickry, to a useful object for purposes of enhancement. Moreover, this result enables the commercial pirates of the marketplace to appropriate for their own profit, without any cost to themselves, the works of talented designers who enrich our lives with their intuition and skill. The crass are rewarded, the artist who creates beauty is not. All of us are offended by the flagrant copying of another’s work. This is regrettable, but it is not for this court to twist the law in order to achieve a result Congress has denied. . . .



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Vaquero Buckle



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Winchester Buckle

[Judge Weinstein quoted the portion of the legislative history excerpted *supra* pages 196-97, and argued that it clearly required a denial of copyrightability.]

Congress considered and declined to enact legislation that would have extended copyright protection to “[t]he ‘design of a useful article’ . . . including its two-dimensional or three-dimensional features of shape and surface, which make up the appearance of the article.” Passage of this provision was recommended by the Register of Copyrights. It was opposed by the Department of Justice on policy grounds . . . [that] it would charge the public a fee for the use of improved and pleasing new designs and styles in useful articles. . . .

Thus far Congress and the Supreme Court have answered in favor of commerce and the masses, rather than the artists, designers and the well-to-do. Any change must be left to those higher authorities. The choices are legislative not judicial.

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Carol Barnhart Inc. v. Economy Cover Corp.
773 F.2d 411 (2d Cir. 1985)

MANSFIELD, J.: . . . The bones of contention are four human torso forms designed by Barnhart, each of which is life-size, without neck, arms, or a back, and made of expandable white styrene. Plaintiff’s president created the forms in 1982 by using clay, buttons, and fabric to develop an initial mold, which she then used to build an aluminum mold into which the poly-styrene is poured to manufacture the sculptural display form. There are two male and two female upper torsos. One each of the male and female torsos is unclad for the purpose of displaying shirts and sweaters, while the other two are sculpted with shirts for displaying sweaters and jackets. All the forms, which are otherwise life-like and anatomically accurate, have hollow backs designed to hold excess fabric when the garment is fitted onto the form. Barnhart’s advertising stresses the forms’ uses to display items such as sweaters, blouses, and dress shirts, and states that they come “[p]ackaged in UPS-size boxes for easy shipping and [are] sold in multiples of twelve.” . . .

[Economy Cover Corp. copied Barnhart’s forms, and Barnhart sued for copyright infringement. The district court granted Economy’s motion for summary judgment, and Barnhart appealed.]

. . . Appellant emphasizes that clay sculpting, often used in traditional sculpture, was used in making the molds for the forms. It also stresses that the forms have been responded to as sculptural forms, and have been used for purposes other than modeling clothes, e.g., as decorating props and signs without any clothing or accessories. While this may indicate that the forms are “aesthetically satisfying and valuable,” it is insufficient to show that the forms possess aesthetic or artistic features that are physically or conceptually separable from the forms’ use as utilitarian objects to display clothes. . . .

In concluding that the two belt buckles [in *Kieselstein-Cord*] were copyrightable we relied on the fact that “[t]he primary ornamental aspect of the Vaquero and Winchester buckles is conceptually separable from their subsidiary utilitarian function.” *Id.* at 993. A glance at the pictures of the two buckles . . . coupled with the description in the text, confirms their highly ornamental dimensions and separability. What distinguishes those buckles from the Barnhart forms is that the ornamented surfaces of the buckles were not in any respect required by their utilitarian functions; the artistic or aesthetic features could thus be conceived of as having been added to, or superimposed upon, an otherwise utilitarian article. . . . In the case of the Barnhart forms, on the other hand, the features claimed to be aesthetic or artistic, e.g., the life-size configuration of the breasts and the width of the shoulders, are inextricably intertwined with the utilitarian feature, the display of clothes. Whereas a model of a human torso, in order to