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Fonts, Typefaces, and IP Protection: Getting to Just Right

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NOTES

FONTS, TYPEFACES, AND IP PROTECTION: GETTING TO JUST RIGHT

Emily N. Evans

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I. INTRODUCTION

"The work of a type designer is just like that of a dressmaker... Clothing the constant, human form."

—Adrian Fruitger, renowned typographer

"You should definitely recognize the alphabet as a miraculous thing, and not take it for granted."

—Chip Kidd, noted designer

Typeface, the way that our language is expressed in letters, has been an art form since the introduction of the printed word. The design of a letter can change what it is saying, or how it is read; "ENTER IF YOU DARE" can send an entirely different message from "FRNTFL IT YOU DARE." Today, with myriad typefaces available at the click of a button on any computer, or with the stroke of a key through a quick search online, more people can access the tools necessary to design typefaces than ever before. This proliferation of typefaces gives rise to several important questions: What kind of legal protection should these designs receive, and how can these protections be enforced? Given the immense changes in the typeface industry since its inception, and the increasing rate at which new technology necessitates further changes, how can we be sure we are creating the right incentives? While arguments about the proper scope of intellectual property protection for typefaces have focused on extremes, arguing either that existing levels of protections must be reduced or even eliminated, or that the industry can only function if existing levels of protection are overhauled, none have analyzed the current levels of protection. This Note proposes that the protections currently available are ideal for the

1 SIMON GARFIELD, JUST MY TYPE: A BOOK ABOUT FONTS 50 (2011) (internal quotation marks omitted).
2 CHIP KIDD, GO: A KIDD’S GUIDE TO GRAPHIC DESIGN 87 (2013).
3 See Frederic W. Goudy, Typologia: Studies in Type Design and Type Making (1940), available at http://www.typeart.com/reference-books/typologia/typo-contents.html (discussing the historical bases of printing types and referencing the “hand-drawn letters” from both Germany and Italy).
5 A recent Google search, performed on March 24, 2014, for typefaces for download, yielded about 873,000 results.
6 See generally infra Part II.B.1 (discussing the history and development of the typeface industry).
7 See infra Part II.D.2.
8 See infra Part II.D.1.
industry and the way it actually operates. These protections properly balance the incentives and provide a level of exclusivity that is not too big, not too little, but just right.

II. BACKGROUND

A. TYPEFACE TERMINOLOGY

"A 'typeface' [is] 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."9 To put it more simply, "typeface" refers to the way a set of letters and/or numbers appears, whether on a page or a computer monitor.10 An example of a commonly used typeface is Times New Roman.11

A "font," on the other hand, is most commonly described as "an article in which a typeface resides as the implement of printing technology, regardless of the medium or form."12 To put it more simply, "font" refers to the code or program that tells a computer or printer how to render or print a certain typeface on a computer monitor or piece of paper.13

Many people assume that the terms "font," "typeface," and "type" are interchangeable.14 Within the context of everyday, general language, they are mostly correct.15 The popular word processing program Microsoft Word furthers some of this confusion by referring to what are technically typefaces as "fonts" in its drop-down menus.16 The distinction between these two terms, however, is quite important for legal purposes.17

10 Id.
11 Blake Fry, Copyright: Why Typefaces Proliferate Without Copyright Protection, 8 J. ON TELECOMM. & HIGH TECH. L. 425, 431 (2010).
13 Id.
14 Id. at 148.
15 GARFIELD, supra note 1, at 32.
16 It is likely that computers can be blamed for some of the confusion in common speech as well, as they have made fonts and typefaces more accessible to consumers. See Lipton, supra note 12, at 148 (arguing that the digital age has minimized the distinction between the terms).
17 See infra Part II.C. There is some disagreement over the meaning of "typeface" and "font," but this Note will refer to the designs of letters and symbols as typeface, and the programmed rendering of those letters as font.
B. HISTORY OF TYPEFACE

1. Development of the First Typefaces and Fonts. Though today most people think of "fonts" as a function of computers, typefaces and fonts have been in existence since the invention of the printing press. Before the printing press, scribes (generally monks or other clerics) painstakingly copied every manuscript or book by hand. Thus, books were usually expensive and rare, as they took time and skilled labor to complete. As knowledge spread during the Revival of Learning in the fourteenth century, however, demand for faster and cheaper ways to produce printed material increased. The first development toward faster production involved engravings on wooden blocks that could be stamped on paper repeatedly to create a consistent rendering of the same design. The biggest and most important development for type as we know it today occurred in 1440, when Johannes Gutenberg invented the printing press. The first sets of letters used by the printing press were modeled after the original script handwriting of scribes. In fact, the first typeface, "Donatus-Kalender," designed by Peter Schoeffer, was based on German handwriting from the thirteenth century. These sets of new, reusable letters, carved into wood or metal blocks and stamped on paper, formed the first typefaces, and with them, the first "visual expression[s] of language." Initially, letters were "punchcut," meaning that a letter would be carved in reverse in hard metal at the end of a rod. That carving would be impressed, often by hammering into a softer metal, like copper, which created an indented mold. This mold would be filled with hot metal that, when cooled and placed into a wooden handle, could be used as a stamp. Usually, the entire alphabet (including duplicates of commonly used letters to facilitate printing of words that contained multiples of those letters) would be rendered as stamps in this manner.

18 Goudy, supra note 3.
19 Id.
20 Raustiala & Sprigman, supra note 4, at 145.
21 Goudy, supra note 3.
22 Id.
23 Raustiala & Sprigman, supra note 4, at 145. But see Garfield, supra note 1, at 29–30; Goudy, supra note 3. There is some historical disagreement as to who was actually responsible for the development of moveable type. Three men were involved, but it is difficult to identify their precise individual contributions.
24 Goudy, supra note 3.
25 Raustiala & Sprigman, supra note 4, at 146.
26 Id.
27 Garfield, supra note 1, at 28.
28 Id.
29 Id.
way. This set of metal letters comprised what then became known as a font.30 Those fonts were the earliest predecessors of computer-based fonts.31 To print words onto a page, the letter stamps would be arranged in a frame as a mirror-reverse image of the page to be printed.32 Copies would then be inked and stamped, the frame disassembled, and the stamps returned to make room for the next page.33

Later typeface and printing technology led to a process wherein letters would be imprinted on a celluloid strip, placed onto a wheel, and rolled onto a page.34 Before computer programming, type designers (particularly those creating such high-value typeface items as company or brand logos) would also draw individual letter designs by hand on paper.35 Today, this practice is less common.36 Designers do sometimes still “draw” letters by hand, but a mouse or computerized pen and a software program have largely replaced their artist's brushes and paper.37 Most typefaces are no longer embodied in any sort of physical mold, but exist only as the computer programs that create them.38

2. Talking About Type. Graphic designer Chip Kidd once wrote, “Typography itself is its own language about language.”39 As in medicine or law, there is an entire language experts in the field use to talk about typefaces.40 Though the details of this language go beyond the scope of this Note, a brief primer on some of the basics will help elucidate the discussion throughout the remainder of the Note. The distinctions are important, because different design choices can make a big difference in a typeface's final look and feel. “[W]ith letters . . . we can conjure, out of nothing, pictures, sounds, tastes, smells, feelings, worlds, entire universes, and place them directly into the reader's head.”41

The two main types of typefaces are serif and sans serif.42 A “serif” refers to the extra strokes on the top and bottom of a letter, often described as “appearing to ground the letter on the page.”43 Typefaces without these extra

30 Id.
31 Id. at 31.
32 Id. at 29.
33 Id.
34 Lipton, supra note 12, at 167.
36 Id. at 91.
37 Id.
38 RAUSTALA & SPRIGMAN, supra note 4, at 146.
39 KIDD, supra note 2, at 87.
41 KIDD, supra note 2, at 76.
42 GARFIELD, supra note 1, at 34–36.
43 Id. at 35.
strokes are called “sans serifs.” For example, Courier New is a serif typeface whereas Gill Sans is sans serif.

There are also typeface terms describing the varying shapes of letters, including “counter,” which is the center or enclosed part of any letter with a full or partial loop (like in the letters “o,” “b,” or “n”). A “bowl” is a fully enclosed loop in a letter (as is found in the letters “b,” “p,” or “g”). The straight parts of letters are called “stems.” To measure and compare sizes of typefaces, designers refer to “x-height,” or the distance between the base line (where the letters rest on the page) and the mean line (the top of a lower-case letter). “Ascenders” are any parts of letters that extend beyond the mean line, and “descenders” are any parts of letters that extend below the base line (for example, lower-case “p” and “y” have descendents, while lower-case “h” and “d” have ascenders).

3. Monetization and Significance of Typeface. The typeface industry is surprisingly large, and has a corresponding amount of economic power. As printing has become more digitized and computers become increasingly prevalent in society, more people have access to different typefaces; anyone can be a type designer with the right computer programs. The number of typefaces in existence has exploded in recent years, from an estimated 44,000 typefaces in 1990 to 100,000 in 2002; recent (Fall 2013) estimates suggest that there are as many as a quarter of a million.

Today, the average consumer encounters typefaces as part of word processing or design software packages such as Microsoft Word or Adobe Acrobat Reader. These packages generally include as many as several hundred typefaces, due to a practice known as “bundling.” Bundling leads many consumers to think (incorrectly) that typefaces are free, since they only encounter them within software programs where there is no fee per typeface used, beyond the original cost of the software. But for those who use typefaces professionally, the biggest source of typefaces are “type foundries.”

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44 Id. at 35–36.
45 Id. at 38.
46 Id.
47 Id.
48 Id.
49 Id.
50 CABARGA, supra note 35, at 11–12. Some of the most popular programs are Adobe Illustrator, Macromedia Fontographer and Pyrus FontLab.
51 RAUSTIALA & SPRIGMAN, supra note 4, at 150.
52 CABARGA, supra note 35, at 11.
53 RAUSTIALA & SPRIGMAN, supra note 4, at 153.
54 Fry, supra note 11, at 490 (naming bundling as the primary cause of the reduction in the price of computer fonts).
55 CABARGA, supra note 35, at 236.
Type foundries are online warehouses containing many digital typefaces available for downloading, usually for a premium. Some type foundries employ type designers to create new typefaces and provide royalties when a typeface gets used. Others simply license the right to use existing typefaces, while still others use a combination of both approaches. Thus, a type foundry’s business model usually works by selling licensing rights to download and use particular font programs (and to display the typefaces produced), though some foundries offer typefaces for free download. Licenses are generally granted per computer or per user, and will explicitly state what the licensee can and cannot do with the typeface—for instance, whether the typeface can be used in advertising, on TV, in print, on merchandise, or online. However, more often than not, copying and forging typefaces or simply downloading fonts for free without a license replaces these agreements.

Though freelance typeface designers may struggle to make more than a few hundred dollars per design as beginners, as they gain exposure the fees can quickly skyrocket. The value of a particular typeface can be tricky to calculate. April 2012 estimates of the world’s most expensive publicly available typefaces range from around $100 to around $5,000, but the values can quickly soar much higher, particularly when a typeface is used in advertising, or on a consumer product. Typeface is surprisingly big business for corporations; often, a typeface is part of a company’s image and branding. For example, the famous Coca-Cola logo, modeled after eighteenth century Spencerian script (the common handwriting of the day) is recognized across the world. Other brands have attempted, with varying results, to replicate this success, and have paid type designers a lot of money to do so. One successful attempt involved

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56 Id. at 236–37 (offering a list of contributing designers and sources of fonts, the majority of which are foundries).
57 Id. Companies that use this arrangement will pay designers a percentage of any licensing fee that a customer of the foundry pays for the right to use a typeface that designer created.
58 Id.
59 Id.
61 Fry, supra note 11, at 442–43.
62 CABARGA, supra note 35, at 228–29 (advising would-be designers to accept no job for less than $100).
major telecommunications company AT&T.\textsuperscript{65} To improve its “stodgy” image, the company commissioned a slightly modified version of a typeface originally designed to reduce glare on highway signs,\textsuperscript{66} and within a year the number of consumers who thought they were a technologically savvy company doubled.\textsuperscript{67} Less successfully, PepsiCo spent $1 million to re-design a logo that tanked with consumers, and the company quickly reverted to its old logo after consumer complaints.\textsuperscript{68} Yahoo recently seemed to repeat Pepsi’s mistake, unveiling a logo after thirty days of buildup that attracted much ire and eye-rolling from consumers and design experts.\textsuperscript{69}

The reason companies expend so many resources on typeface designs is that they resonate with consumers, affecting a company’s bottom line. Many companies have found that a great typeface can evoke feelings of goodwill toward their brand, just as it can on a printed page.\textsuperscript{70} One such example is Swedish furniture retailer IKEA, which recently changed its company-wide typeface.\textsuperscript{71} This is a relatively common practice for any big corporation, one that often goes unnoticed.\textsuperscript{72} IKEA was surprised by the backlash caused by the switch from using the typeface \textit{Futura} to the similar but more prevalent \textit{Verdana}.\textsuperscript{73} Many of the chain’s customers expressed disappointment and anger about the change, dubbing it “Verdanagate” on discussion boards and creating online petitions,\textsuperscript{74} one of which garnered over 7,000 signatures.\textsuperscript{75} Though nothing but the company’s typeface changed—including the company’s name, prices, or merchandise—many lamented the company’s...
choice to replace what was considered the more unique Futura with the ubiquitous and more corporate-feeling Verdana.76

Given their constantly increasing popularity, typefaces and fonts have also gained prevalence (and value) through an increasing role in pop culture.77 One recent example involves the typeface Comic Sans MS, a friendly looking set of letters designed by Vincent Connare.78 Comic Sans was originally meant to make the Microsoft Windows 95 interface appear less intimidating.79 After being included in the Microsoft Windows general palette of typefaces,80 it took off in popularity and soon spawned a legion of detractors,81 sparking an international petition to ban Comic Sans. The Wall Street Journal even covered the movement.82

Today, the dispute over Comic Sans is so well-known that those who choose to use the typeface risk ridicule.83 Perhaps most notoriously, media and fans alike mocked Cleveland Cavaliers owner Dan Gilbert after he posted a scathing letter, entirely in Comic Sans, on the NBA website, rebuking star basketball player LeBron James for choosing to leave the Cavaliers to play for the Miami Heat.84 In covering the story, the media focused not only on the contents of the letter, but also on Gilbert’s choice of the inapposite typeface for such a contentious topic.85

4. The Typeface Industry’s Legal Disputes. The size of the typeface industry and high fees involved in owning, commissioning, and using typefaces can lead to expensive disputes. The television network NBC, for example, recently found itself in a legal battle over its license to use the typefaces Bureau Grotesque, Interstate, and Antenna.86 This license allowed the network to use the typefaces

76 GARFIELD, supra note 1, at 73.
77 RAUSTIALA & SPRIGMAN, supra note 4, at 150 (estimating that the number of fonts likely grew by 2,700% over the last thirty-five years).
78 GARFIELD, supra note 1, at 10, 14.
79 Id. at 11.
80 Id. at 15.
81 See id. at 16; see also Holly and David Combs, BAN COMIC SANS, http://bancomicsans.com (last visited Apr. 17, 2014).
82 GARFIELD, supra note 1, at 18.
83 Id. at 16.
85 See Sutter, supra note 84.
on only one computer.\textsuperscript{87} When NBC used the typefaces in marketing the television programs \textit{Saturday Night Live} and \textit{The Tonight Show with Jay Leno}, it exceeded its one-computer license.\textsuperscript{88} The suit, which sought damages of $2 million, eventually settled for an undisclosed amount.\textsuperscript{89} A similar suit sought $1.5 million from NBC Universal, Universal Studios, merchandise-makers Nanco-Nancy Sales Co., and Screenworks USA on behalf of type foundry P22, alleging that the companies used the Cezanne typeface on \textit{Harry Potter}-related merchandise without a license to the underlying font program; this suit also settled for an undisclosed amount.\textsuperscript{90} Additionally, Microsoft recently only narrowly escaped liability for its use of a Chinese character typeface in its operating systems in a suit that alleged it went beyond its license; the court eventually found that the license did extend to cover the use at issue.\textsuperscript{91}

Another lawsuit, against Rick Santorum’s campaign on behalf of foundry Typotheque, demonstrates that these problems can become worse without license agreements.\textsuperscript{92} Among other causes of action, Typotheque alleged the campaign used and distributed unauthorized copies of the copyrighted font software Fedra on its campaign website, and sought over $2 million in damages.\textsuperscript{93} Though the number of suits raising these kinds of issues is increasing, few lawyers focus on the industry.\textsuperscript{94}

Even when no lawsuit has been filed, disputes can still arise. For example, many typefaces are stolen, or used without attribution. Though some designers create beautiful typefaces, a significant amount of those in existence today are the work of amateurs,\textsuperscript{95} lacking artistic finesse.\textsuperscript{96} Others are merely loosely copied versions of currently existing fonts.\textsuperscript{97} Probably the most famous

\begin{flushright}
\textsuperscript{87} Id. \\
\textsuperscript{88} Id. \\
\textsuperscript{89} Stipulation of Dismissal, The Font Bureau Inc. v. NBC Universal, Inc., No. 1:09-cv-04286-SLT (E.D.N.Y. 2010). \\
\textsuperscript{92} Complaint, Typotheque VOF v. RaiseDigital LLC, No. 11-3943 (E.D.N.Y 2011). \\
\textsuperscript{93} Id. at 18. \\
\textsuperscript{95} CABARGA, supra note 35, at 6. \\
\textsuperscript{96} See GARFIELD, supra note 1, at 258 (criticizing amateur type in the age of computers: “There’s no legitimate typographic reason to create an alphabet which looks like it leaked out of a diaper.”). \\
\end{flushright}
example of this kind of “typeface piracy” involves Helvetica. Helvetica is an extremely popular sans serif typeface (it is used on Apple’s iPod and is even the star of its own documentary film). Microsoft famously copied the typeface because the company wanted to avoid paying licensing fees to use Helvetica in its word processing software. Microsoft’s Arial looks remarkably similar to Helvetica; the two typefaces likely appear identical to the majority of users and readers, particularly at a quick glance. Robin Nicholas and Patricia Saunders of the Monotype Corporation are also said to have forged the typeface by copying a few of its letters, only slightly changing the ends and edges, and then removing trademark notices.

Technology has certainly increased the ease with which a typeface or font can be shared, copied, and altered, but the digital revolution is not all bad. As Mr. Frederic Goudy, himself a prolific type designer, remarks, “The machine has not killed good craftsmanship; the machine in the hand of the craftsman is merely a more intricate tool than any that was available to the earlier worker, and enables him to carry out his own creative idea more exactly...”

The typeface industry will continue to grow, and the large amounts of money at stake in the industry and business evidence the need for clarity in this area of the law.

C. INTELLECTUAL PROPERTY LAW, AS APPLIED TO TYPEFACE AND FONT

Various intellectual property laws have very specific applications to this industry, and differ with regards to typeface and font.

1. Copyrights. The current Copyright Act, governed by federal statute in chapter 17 of the U.S. Code, was passed in 1976. Copyright protects

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98 Id.
99 RAUSTIALA & SPRIGMAN, supra note 4, at 147.
100 GARFIELD, supra note 1, at 126–29.
101 RAUSTIALA & SPRIGMAN, supra note 4, at 147.
102 The differences between the typefaces, however, may not seem as subtle to an experienced designer. See GARFIELD, supra note 1, at 221 (“A remarkable thing about Arial is that it has many deliberate differences that... are as different from Helvetica as pineapple is from mango.”).
103 RAUSTIALA & SPRIGMAN, supra note 4, at 147.
104 Stiehl, supra note 97.
105 GARFIELD, supra note 1, at 201 (“Frederic Goudy [was] the American type designer who had the greatest impact on the textual tone of America in the first half of the twentieth century.”).
106 GOUDY, supra note 3.
107 LYDIA PALLAS LOREN & JOSEPH SCOTT MILLER, INTELLECTUAL PROPERTY LAW: CASES & MATERIALS 343 (Version 3.1 2013) (noting that copyright gains its authority from the United States Constitution). See U.S. Const. art. I, § 8, cl. 8 (granting Congress the power “to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”).
“original works of authorship fixed in any tangible medium of expression.” Copyright protection for works created after January 1, 1978, lasts the life of the author plus seventy years. It is generally limited to protecting expressive works, meaning it protects the expression of an idea, rather than raw facts or data (or, often, the idea itself). Copyright laws protect a variety of categories of expressive works; typeface would likely fall under the protected category of pictorial, graphic and sculptural works. There are limitations to what copyright on such works will protect. For instance, a design that is also a useful article is considered a pictorial, graphic, or sculptural work “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.” Copyright protection can thus extend only to the expression in a work, not to its useful aspects. An article is considered useful if it has an intrinsic utilitarian function beyond its appearance, or if the design elements show a merger of aesthetic and functional considerations.

Relatedly, the merger doctrine prevents copyrightability for the expression of an idea if there are only a few ways of expressing it, and the scenes a faire doctrine denies copyright protection to stock elements in a certain type of work or genre (such as types of characters or stories that often appear in plays or novels). Also relevant to typeface is the requirement that a work be registered in order to obtain damages for infringement. Typeface designs are considered un-copyrightable. And despite argument to the contrary, this has long been the case. Congress has confirmed by

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108 17 U.S.C. § 102(a) (2011). This is generally read to require that a work be original and fixed in a tangible form. LOREN & MILLER, supra note 107, at 34–35.


111 See 17 U.S.C. § 101 (2011) (“Pictorial, graphic, and sculptural works” are defined as “two-dimensional and three-dimensional works of fine, graphic, and applied art . . . Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned.”).

112 Id.

113 Id.

114 See id. § 102(b).

115 Id. § 101.


117 See v. Durang, 711 F.2d 141, 143 (9th Cir. 1983) (describing the scenes a faire doctrine as “forms of expression that were either stock scenes or scenes that flowed necessarily from common un-protectable ideas”).


statute that "typeface as typeface" is not subject to copyright.\textsuperscript{122} In the biggest case on the topic to date, \textit{Eltra Corp. v. Ringer}, the Fourth Circuit held that "typeface is an industrial design in which the design cannot exist independently and separately as a work of art."\textsuperscript{123}

Additionally, even if typeface were not explicitly denied copyright protection by statute, it would likely still not fit within the scope of copyright protection. It is unclear whether a letter's useful function as communication can be separated from its design.\textsuperscript{124} If it could be, it is equally unclear that any one typeface could receive individual protection for the design of its letters, given that every typeface must necessarily contain the same letters. Some argue that the letters of the English language are \textit{scènes a faire} and thus un-protectable, or that even if the letters escape this classification, common elements of typeface design (serifs, for example) might not.\textsuperscript{125}

While the design of a typeface itself is not eligible for copyright protection, the Copyright Office suggested in a 1992 statement that the underlying computer program used to render a typeface on screen, the font, is: "[c]omputer programs designed for generating typeface . . . may involve original computer instructions entitled to protection under the Copyright Act."\textsuperscript{126} This position was confirmed in 1998 in \textit{Adobe v. Southern Software}.\textsuperscript{127} Computer programs are protectable as literary works,\textsuperscript{128} and a computer program does not lose copyrightability just because its output (including a typeface) is not copyrightable.\textsuperscript{129}

2. Utility Patents. Patents are governed by federal law under Title 35 of the U.S. Code; utility patents are available for "any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof."\textsuperscript{130} An application to obtain a patent on an invention


\textsuperscript{121} H.R. REP. NO. 94-1476 (1976) ("The Committee does not regard the design of typeface, as thus defined, to be a copyrightable 'pictorial, graphic or sculptural work' within the meaning of this bill and the application of the dividing line in section 101.").


\textsuperscript{123} Eltra Corp. v. Ringer, 579 F.2d 294, 298 (4th Cir. 1978).

\textsuperscript{124} Lipton, \textit{supra} note 12, at 150, 157.

\textsuperscript{125} \textit{Id.} at 164.

\textsuperscript{126} Registrability of Computer Programs that Generate Typefaces, 57 Fed. Reg. 6201, 6201–02 (Feb. 21, 1992).

\textsuperscript{127} Adobe Sys. v. Southern Software, Inc., 1998 U.S. Dist. LEXIS 1941, at *16–17 (holding font programs eligible for copyright protection because their design requires creativity, and selection of code is not solely dictated by function).


must contain a detailed description of that invention and numbered paragraphs, called claims, stating the legal boundaries of the rights the inventor wishes to seek. Patent protection lasts for twenty years after the date on which the patent is filed. Patent protection for a font program as a process may be available if the program meets the patent requirements, most importantly, novelty and non-obviousness. Novelty requires that a claimed invention be new to the world, not just new to a particular inventor, and must be shown by proving that nothing within the same field preceded that particular invention. The field of related prior inventions is referred to as the prior art. If an invention in the prior art is too similar to a new invention that someone seeks to patent, the original invention is said to anticipate the newer invention, which prevents an inventor from obtaining a patent on it. To meet the non-obviousness requirement, an invention must not have been apparent, based on discoveries and inventions made by others, or based on the prior art, at the time it was made.

3. Design Patents. Design patents share some features with utility patents but have some important contrasts. They protect any “new, original and ornamental design for an article of manufacture.” Unlike utility patents, design patents are not meant to protect useful or functional items. They protect ornamental design, or the aesthetic features and design of a product. An important way to determine if a design is functional, as opposed to ornamental, is to ask whether the appearance is “dictated by” the use or purpose of the article; if so, it is likely functional, and would not meet the ornamental requirement. For example, if the design of a certain invention, like a drinking glass, does not help it do a better job as a drinking glass, and is merely included to increase the aesthetic appeal of that glass, it will likely be ornamental. On the other hand, if a certain design does help improve its effectiveness (for instance, if the design helped it contain liquid more

131 LOREN & MILLER, supra note 107, at 119.
133 Id. § 154(a)(2).
134 Id. § 101.
135 Id. §§ 102–103. Other requirements include that the invention must be supported by an adequate written disclosure, constitute patentable subject matter, and be useful.
136 See id. § 102.
137 See id. §§ 102–103.
138 Id. § 103.
139 Id. § 171.
140 LOREN & MILLER, supra note 107, at 302.
141 Id.
effectively), then it may be considered functional and ineligible for design patent protection.

Design patents also differ from utility patents in that they only apply to articles of manufacture, meaning articles that could be physically produced and created. Though this might seem an impossible hurdle for typeface, as typefaces are not manufactured in the traditional, physical sense, a set of 1996 PTO guidelines reflects a specific intent by the PTO to avoid this issue:

Traditionally, type fonts have been generated by solid blocks from which each letter or symbol was produced. Consequently, the PTO has historically granted design patents drawn to type fonts. PTO personnel should not reject claims for type fonts...for failure to comply with the ‘article of manufacture’ requirement on the basis that more modern methods of typesetting, including computer-generation, do not require solid printing blocks.

This interpretation was confirmed in Adobe v. Southern Systems: “[T]he program which creates the type fonts is the article of manufacture.” It is also clear that fonts are able to be protected by design patents: “Type fonts are [design] patentable subject matter.” In fact, the first-ever design patent was granted for a “printing type” to George Bruce in 1842. Since then, the PTO has granted over 1,500 design patents for typeface design.

Other than the above differences, (and the fact that design patent protection lasts fourteen years from the date the design patent is granted), the provisions of the Patent Act apply equally to design patents, including damages provisions directing courts to award damages “adequate to compensate for the infringement,” setting only a lower limit of reasonable royalty for the use of the invention, and establishing no upper limit.

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146 Id.
147 Id.
149 Id. § 171.
150 Id. § 284.
4. Trademarks. Trademarks protect any word, name, symbol or device that acts as an identifier of the source of a brand or product in commerce. The federal Lanham Act serves as the main source of trademark law. Trademark protection differs from patent and copyright in that it derives its legal force from the Commerce Clause of the Constitution, instead of the Copyright Clause. Trademarks are meant to protect against consumer confusion about the source of goods and products. They are also meant to prevent infringers from either wrongfully benefitting from the good reputation established by an original mark owner's product, or from harming an original mark owner by creating a lesser product that then becomes associated with the original mark owner. Trademark protection can theoretically last forever, as a trademark can be renewed every ten years.

One can obtain a trademark on the name of a typeface. Probably the most famous example of a trademarked typeface name (that is still in use) is Hermann Zapf's typeface Palatino. However, as trademarks only protect the use of a name or mark in commerce, trademark cannot protect the design of the typeface itself. Returning to the Palatino example, many companies, including Microsoft, were able to copy its original exactly and avoid licensing fees simply by using a different name: Microsoft called its version Book Antiqua. One caveat to this loophole is that if a particularly distinctive typeface becomes part of a logo (for example, the typefaces of brands like Coca-Cola or sports teams), then the typeface might get protection as part of that logo, but the protection would not apply to the person who created the

151 15 U.S.C. § 1127 (2006) ("The term 'trademark' includes any word, name, symbol, or device, or any combination thereof—(1) used by a person, or (2) which a person has a bona fide intention to use in commerce and applies to register on the principal register established by this Act, to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.").

152 LOREN & MILLER, supra note 107, at 5.

153 The Commerce Clause grants Congress the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

154 LOREN & MILLER, supra note 107, at 5.

155 Id. at 546–47.


157 See id. § 1127 (defining a trademark as "any word, name, symbol, or device . . . used by a person . . . in commerce . . . to identify and distinguish his or her goods." A typeface’s name, as a word, could be a trademark if it meets these requirements.).


160 Lipton, supra note 12, at 184.

161 Gaultney, supra note 158.
typeface, it would instead protect the company that holds the trademark to that logo or brand. Additionally, the protection would be for just those letters used in the order they appear in the brand name.\(^\text{162}\)

D. CURRENT PROPOSALS FOR PROTECTING COPYRIGHT AND TYPEFACE

As typeface and font become more prevalent and their production and economic impact change with the digital age, there have been several proposals to change the way typeface and font are protected by intellectual property laws. These proposals tend to either suggest new or different ways of protecting typeface and font,\(^\text{163}\) or argue that typeface and font are an area of law that does not need intellectual property protection at all.\(^\text{164}\)

1. Arguments Favoring Increased Protection. Probably the most common argument for changing the intellectual property protection available for typefaces is that in favor of extending copyright protections to cover them.\(^\text{165}\) Proponents of this position argue that since copying fonts and typefaces has become very easy, type designers lose profits and therefore have a decreased incentive to create more and better typeface designs.\(^\text{166}\) They argue that typefaces do not fail the useful article limitation\(^\text{167}\) for pictorial, graphic, or sculptural works. According to this view, typefaces are sufficiently artistic\(^\text{168}\) and separable from their utilitarian function\(^\text{169}\) to merit copyright protection. Those championing an extension of copyright to typeface design also attempt

\(^{162}\) Lipton, \textit{supra} note 12, at 183.

\(^{163}\) See, e.g., \textit{id.} (examining copyright’s applicability to typeface); Carroll, \textit{supra} note 120 (proposing a new copyright amendment to protect typeface); Lillian Abbott Pfohl, \textit{Serif Wars: An Argument for the Protection of Typeface Design}, 2001 SYRACUSE L. & TECH. J. 1 (arguing that typeface should be protectable under copyright law); Manfredi, \textit{supra} note 40, at 841 (proposing a copyright amendment to protect typeface based on the Architectural Works Copyright Protection Act).

\(^{164}\) See, e.g., RAUSTIALA & SPRIGMAN, \textit{supra} note 4, at 145–55 (arguing that typeface is one of several categories, including fashion design, culinary arts, and magic tricks, that does not need IP protection to thrive); Fry, \textit{supra} note 11, at 471 n.317 (arguing that typeface is part of IP’s “negative space,” which explains why there are still incentives to produce more typefaces even without IP protection).

\(^{165}\) RAUSTIALA & SPRIGMAN, \textit{supra} note 4; Fry, \textit{supra} note 11, at 471 n.317.

\(^{166}\) See, e.g., Manfredi, \textit{supra} note 40, at 864 (arguing that it is easy to pirate fonts and typefaces and current methods of protection only focus on the font program itself); Pfohl, \textit{supra} note 163, at *3: “No doubt, it is appealing to call font copiers thieves who steal food from the mouths of font designers’ children.”

\(^{167}\) See 17 U.S.C. § 101 (2013) (forbidding the copyrightability of pictorial, graphic, or sculptural works that are “useful articles” whose design cannot be identified separately from the useful article itself).

\(^{168}\) “Typeface designers argue their work conveys more than letterforms.” Pfohl, \textit{supra} note 163, at *21.

\(^{169}\) Lipton, \textit{supra} note 12, at 155–62.
to skirt the merger doctrine\textsuperscript{170} by arguing that typefaces are unique.\textsuperscript{171} If there are literally millions of ways to express the same letter using different combinations of traditional typeface design elements,\textsuperscript{172} the argument goes, theoretically the use of those elements in a new combination for each new typeface is unique—or cannot be merged into one “stock” typeface design.\textsuperscript{173}

Others, accepting that there is no way to squeeze typefaces into the currently existing scheme of copyright protection, argue that the definition of pictorial, graphic, and sculptural works should be amended to include typeface designs,\textsuperscript{174} or that the Copyright Act itself must be amended to expressly include protection for typeface.\textsuperscript{175} Still others posit that American typeface designers will lose ground against their foreign counterparts, who generally have more protection for their typeface designs, unless copyright protections are explicit.\textsuperscript{176} These scholars also argue that without copyright, there will be insufficient encouragement to create more works, particularly in the digital market, where the cost of entry, production, and copying (or pirating) is lowered.\textsuperscript{177}

2. Arguments Favoring Decreased Protection. There are also those who suggest that the current level of protection for typefaces is sufficient—or perhaps even too broad. These arguments focus mostly on the idea that typeface occupies part of IP's negative space.\textsuperscript{178} “Negative space” refers to the idea that, though intellectual property laws are meant to foster creation by granting creators limited monopolies, in some areas, granting this kind of protection would actually backfire, resulting in decreased incentives to create and thus lowered creative output.\textsuperscript{179} The term is generally understood to include any area of creation where new ideas are not protected by IP law, sometimes described as being in “doctrinal no man’s land,”\textsuperscript{180} though an industry can have a low level of IP protection and still be considered IP-negative.\textsuperscript{181} Whether it has some or no protection, in order to qualify as IP-negative, “an industry must not only exist in a low-IP environment, but must also thrive there,”\textsuperscript{182} meaning that the

\begin{itemize}
\item \textsuperscript{170} ManFredi, supra note 40, at 867.
\item \textsuperscript{171} Pfohl, supra note 163, at *4.
\item \textsuperscript{172} ManFredi, supra note 40, at 867.
\item \textsuperscript{173} Id.
\item \textsuperscript{174} Carroll, supra note 120, at 171.
\item \textsuperscript{175} ManFredi, supra note 40, at 865–66.
\item \textsuperscript{176} See Pfohl, supra note 163, at *30; Carroll, supra note 120, at 169–71.
\item \textsuperscript{177} ManFredi, supra note 40, at 851, 854, 857.
\item \textsuperscript{178} RAUSTIUKA \\& SPRIGMAN, supra note 4, at 145–55.
\item \textsuperscript{179} Id. at 6–7 (expounding this argument without using the label).
\item \textsuperscript{181} Id.
\item \textsuperscript{182} Id. at 325. Interestingly, Professor Rosenblatt also argues that most areas that fit the IP-negative standard are really “hybrid” industries that do have some protection, but clarifies that the
lack of IP protection actually helps the industry or area to flourish, and is not accidental or incidental.

As pertains to typeface, those who argue that typeface fits the definition of an IP-negative industry suggest that there are several factors inherent to the typeface industry that allow typefaces to proliferate without IP protection, including the proliferation of typefaces due to technology, typeface use in the real world, trends and changes inherent in the typeface industry, and unique aspects of typeface itself.183

First, those in favor of categorizing typeface as IP-negative argue that easier access to design tools (through the internet, computers, and lower-cost access to both) has given more people the ability to enter the typeface market.184 They argue that it is so easy to copy and create typefaces that the sheer number of typefaces in existence discourages copying by lowering the appeal of piracy.185 There is a continuing push for more typefaces even without IP protection, they argue, because new technologies require different features of letters (newspapers and books require different characteristics for legibility than do computers or even iPhones, for example).186

Additionally, some argue that because typefaces are not always designed for an entirely aesthetic purpose, but for use in a product, advertisement, or printed source, there will always be an impetus for more typefaces to be created to respond to the constant flow of products, ads, and printed sources that use them.187 Others posit that increased protection for typeface design might make typefaces more novel (and thus less useful) by encouraging designers to create ever-more fanciful incarnations of letters,188 and that market competition in the software world encourages software companies to invest in the creation of typefaces to include in their software bundles.189 Finally, some go so far as to argue that because fonts are subject to trends and thus rise and fall in popularity in cycles, a drive to get ahead of the next trend encourages new designs.190

Building on this argument, others suggest since typeface plays a major role in advertising, where the main goal is to stand out in a sea of words, a push for

industries she believes fit the IP-negative model are those that "seem to prefer or benefit from a lack of intellectual property protection under the current IP system," seemingly confirming her earlier statement that an industry must thrive without protection to fit the definition. See id. at n.21.

183 RAUSTIALA & SPRIGMAN, supra note 4, at 145–55.
184 Id. at 151.
185 Id. ("Availability of cheaper... fonts does not eliminate piracy, but it helps to blunt its appeal...").
186 Id. at 152.
187 Id. at 152–53.
188 Fry, supra note 11, at 445–46.
189 RAUSTIALA & SPRIGMAN, supra note 4, at 153.
190 Id. at 155 (comparing fonts specifically to fashion in this regard).
newer and different typefaces will continue in order to grab the public's attention.\textsuperscript{191} Other arguments emphasize the unique qualities of typeface to demonstrate why the industry should be IP-negative, for example, citing industry standards that discourage unfair copying.\textsuperscript{192} Additionally, some argue that negative space in the typeface industry arises because its creators invest resources in creation rather than protection or enforcement, largely because they believe it is expensive or ineffective to seek that protection.\textsuperscript{193}

\section*{III. Analysis}

Current scholarly opinion about typefaces and IP protection tend to take either one of the two fairly polarized positions described above: either the "IP negative" view that typefaces have proliferated despite a lack of IP protection, and therefore need no protection at all;\textsuperscript{194} or the view favoring an extension of copyright because typefaces are currently woefully under-protected.\textsuperscript{195} But both positions overlook one basic but important fact about the industry as it exists today: Typefaces already have adequate protection. Rather than analyzing typeface designs and fonts as separate entities by focusing on the lack of copyright protection for typeface designs or glossing over the protection that font programs already enjoy, reality requires that these two parts of letter design be analyzed as one. Thus, through a combination of copyright protection for font programs,\textsuperscript{196} trademark protection for typeface names,\textsuperscript{197} and design patent protection for typeface designs,\textsuperscript{198} typeface designers can (and do) obtain a thorough and complete set of IP protections for their work. This combination strikes a fair balance between encouraging new, high-quality designs (by recognizing typeface as art), and giving designers the same protections as other artists. This is a unique, though admittedly piecemeal, type of protection, but it suits the unique typeface industry perfectly and is consistent with decades of statutory and case law\textsuperscript{199} involving typefaces since the dawn of the printing press.

\begin{footnotesize}
\begin{enumerate}
\item Fry, \textit{supra} note 11, at 479.
\item Id. at 458.
\item Rosenblatt, \textit{supra} note 180, at 351.
\item See \textit{supra} Part II.D.2.
\item See \textit{supra} Part II.D.1.
\item See \textit{supra} Part II.C.1–2.
\end{enumerate}
\end{footnotesize}
A. TYPEFACES NEED PROTECTION

1. Typefaces Do Not, and Should Not, Fit the Profile of an "IP-Negative" Industry. Those who argue that typefaces are an example of an IP-negative industry believe that typefaces do not need protection, since there are currently hundreds of thousands of typefaces in existence despite typeface not currently being protected by copyright. As a result, it is alleged that the industry itself already offers sufficient incentives to create new typefaces without IP protection. This understanding is wrong for several reasons. First, the industry is not truly IP-negative because it has several forms of working IP protection, and the protections it establishes are not minimal. Further, even ignoring existing protections, the standard IP-negative characteristics and incentives would wreak havoc on the typeface industry were they actually applied. Finally, it is the various unique elements of typeface and the industries in which it is prevalent, combined with existing IP protections that encourage a proliferation of designs, not a lack of protection.

First, typefaces already enjoy substantial IP protection, and thus do not fit the profile of an IP-negative industry. Current arguments tend to conclude that because there is no copyright protection available for typeface designs, and since this will not likely change in the future, there is no protection at all for typeface. These accounts quickly dismiss other forms of protection as unviable, but they separate typeface design from font programs by accepting the premise that a lack of copyright protection for a typeface design means the entire design is un-protectable. This is simply not the case. This view ignores the protection that design patents, trademarks, and copyrights can offer when combined.

As more typeface lawsuits are litigated, it has become clearer that designers are, in fact, relying on IP protection for their work. Some of these suits are contract actions based on licenses for a typeface, but they generally tend to mention some form of IP protection. Most importantly, the fact that

200 RAUSTIALA & SPRIGMAN, supra note 4, at 150.
201 See supra Part II.D.2.
202 Fry, supra note 11, at 432.
203 See id. (arguing that other forms of IP protection outside of copyright are unviable); RAUSTIALA & SPRIGMAN, supra note 4, at 148–49 (dismissing in a few sentences the viability for a trademark or design patent for typeface designs).
204 See infra Part III.B.1 for this argument.
205 See supra Part II.B.4.
206 See supra Part II.B.4; Koppel, supra note 86 (describing a foundry that sued NBC for going beyond its license).
207 See supra Part II.B.4; Typotheque VOF, supra note 92 (suing a foundry for, among other things, using and distributing unauthorized copies of copyrighted font software).
the typeface market uses license agreements\textsuperscript{208} in the first place demonstrates knowledge by both sides that typefaces have inherent value, and rights that inure in their owners and/or creators. If typefaces were truly in the public domain, with no protection whatsoever, licenses would be moot because there would be nothing to license, and thus, no rights to assign.

That all parties recognize that typefaces enjoy some sort of IP protection is evidenced by the normative behavior of big companies like Microsoft, which create their own versions of popular typefaces to avoid licensing fees.\textsuperscript{209} Putting resources into designing and copying typefaces, rather than just using them without a license, demonstrates the understanding that without a license agreement, their use could create infringement liability. Without an inherent right, there would be no incentive to pay a licensing fee to use a typeface, or to develop another version to avoid that fee.

That big foundries can own many typefaces and font programs and license them to others also demonstrates that there is, on some level, an ownership right that is being recognized in the marketplace. It is not a formal copyright, and therefore lacks some of the formal benefits of a copyright, most importantly the exclusive right of protection allowing for an infringement action. Normative behavior in the marketplace, however, demonstrates that private parties have taken advantage of the precise setup of the typeface industry and its IP protection to craft agreements that provide value to typefaces and establish limits on the sharing and use of those typefaces. Designers can use the different IP protections they are granted to further protect their work outside of these contractual agreements.

The fact that those in the typeface design industry frequently rely on licensing agreements might appear, at first glance, to support the IP-negative argument that the typeface industry has its own self-governing norms.\textsuperscript{210} But the norms generally mentioned have more to do with designer behavior during the design process (for example, how much copying from a prior typeface design is considered too much).\textsuperscript{211} These norms help solve copying issues prior to design completion, but alone, they would not be sufficient to establish a system of licensing and would not provide adequate enforcement when violated. That system has to have something to provide incentives to pay for the right to use a design (or discourage workarounds to avoid paying for those rights). Thus, the typeface industry, even through its licensing agreements, has its roots in the IP protection given and enforced in typeface design.

\textsuperscript{208} See supra note 52.
\textsuperscript{209} RAUSTIALA & SPRIGMAN, supra note 4, at 147.
\textsuperscript{210} Fry, supra note 11, at 463.
\textsuperscript{211} Id. at 464–65.
Furthermore, were IP-negative rules adopted, and typefaces had no protection whatsoever, the industry would suffer. IP-negative scholars posit that because there are so many typefaces, with more being created constantly, the industry does not need the help and incentives of IP protection to succeed. At face value, this seems intuitively correct; after all, there is clearly not an underproduction problem in the typeface industry. To the contrary, the multitude of typefaces does not mean the industry is functioning optimally due to a lack of IP protection. In other words, the industry, would not meet the IP-negative “thriving” requirement if all IP protection were removed. There is no guarantee that the same number of typefaces would be created without the current IP laws in place. Were typeface without IP protection, as a truly IP-negative industry would be, the bounty of typefaces we enjoy today could very well disappear.

IP laws exist to provide creative monopolies for the inventors and designers of new and better products; thus IP laws allow designers to make a living off of their work, in order to encourage creation. This benefit is as needed in the typeface industry as in any other creative industry. Without it, there would be little incentive for designers. Typefaces, like other artistic works, have value, though that value might vary or be difficult to calculate. It is already extremely challenging to make a living as a designer, especially a type designer. The law should encourage those who are professionals to make more and better typefaces, and encourage a fair price for that fair work. Not all of these issues can be blamed on the types of IP laws that apply to the industry. But, particularly for designers seeking to make a living off of their typefaces, some form of protection would certainly encourage fair wages more effectively than no protection at all, encouraging would-be designers to enter the industry and create good designs.

As typefaces gain increasing prevalence in society, it seems likely that designers may be able to earn more for their work: the high prices that companies pay designers to create typefaces for new logos, the high damages sought in recent lawsuits, and increased public interest and attention in

212 RAUSTIALA & SPRIGMAN, supra note 4, at 150.
213 Id.
214 Rosenblatt, supra note 180, at 323, 324.
216 See supra Part II.B.3.
217 Lipton, supra note 12, at 181 ("Most font developers are lucky if the profits they make from their work reach five digits in their lifetime.").
218 See supra Part II.B.3.
219 See supra Part II.B.3.
220 See supra Part II.B.3.
typefaces\textsuperscript{221} all demonstrate that this trend may be growing. Perhaps if critics focused on ways to further popularize the use of IP protections currently available rather than on the useless plea to rid the industry of all protection, designers could take better advantage of those that already exist.

Finally, the current proliferation of typefaces is not created through a lack of IP protection, as IP-negative proponents argue, but rather as a consequence of various features of the typeface industry itself. First, although those proponents argue that the proliferation of typeface is a consequence of the democratization of the typeface industry due to the ease of access to the tools necessary to create type,\textsuperscript{222} it is more accurate to say that there are a lot of wasted resources, given the amount of pirating and amateurism in the industry. Removing IP protection would only further incentivize this negative behavior by helping those only seeking to avoid legal consequences.\textsuperscript{223}

Additionally, the IP-negative argument that there will always be a need for new typefaces fueled by technological change (like the invention of new smart phones, digital readers, and other devices)\textsuperscript{224} is misplaced because that need is not what fuels the creation of so many typefaces today. Most typefaces are available for general use online, in foundries, or bundled in software programs, not locked up by a manufacturer of consumer devices. The iPod, for instance, only uses one typeface for its features.\textsuperscript{225} Thus, the device market can hardly be the only driving force behind the production of hundreds of thousands of typefaces. Even if this growth in technology \textit{does} encourage creation of at least some new typefaces, it likely does so only in a small subset of the field.

Though the practice of bundling typefaces with software does encourage typeface development, it gets its strength from the IP protection already afforded to typeface, because otherwise there would be no incentive to create typefaces to bundle. If typefaces were truly not protected by IP, any software company could just pick typefaces from the public domain at will to include in the bundle, and would have no incentive to create anything new. Microsoft’s creation of its Helvetica lookalike Arial demonstrates this concept.\textsuperscript{226}

The IP-negative camp’s argument that typefaces proliferate without IP due to the cyclical rise and fall of typeface trends\textsuperscript{227} is also unconvincing. The desire to keep up with trends alone may not provide sufficient motivation to invent enough new typefaces. Much of typefaces’ trendiness is associated with

\textsuperscript{221} See supra Part II.B.3.
\textsuperscript{222} Fry, supra note 11, at 444.
\textsuperscript{223} See infra Part III.B.2.
\textsuperscript{224} Fry, supra note 11, at 479.
\textsuperscript{225} RAUSTIALA & SPRIGMAN, supra note 4, at 147.
\textsuperscript{226} Id.
\textsuperscript{227} See supra Part II.B.3.
advertising and a brand's desire to choose an unusual-looking typeface to stand out from the crowd and attract consumer attention.\textsuperscript{228} When a brand uses a new typeface in this way, by definition it only commissions redesigns of the letters appearing in the word, brand name, or advertisement itself. Likely much of this innovation will remain out of reach as inspiration for future designers, because the final product in this kind of advertising will generally be protectable on its own.\textsuperscript{229} The argument that typefaces designed specifically for one company are often not useful to others, as inspiration or otherwise, is bolstered by the fact that so many attempts at “re-branding” by using typeface have not succeeded with consumers.\textsuperscript{230} If consumers have an inherently negative reaction to a typeface\textsuperscript{231} (whether because they think it is “ugly,” or they just do not like change), it is likely that designers will choose not to use it as inspiration, as it would have already shown itself to have minimal value in the marketplace.

Finally, the argument that typeface might fit the IP negative mold because many industry resources go toward reinvestment in creation rather than enforcement of ownership falls flat.\textsuperscript{232} Given recent lawsuits, this assertion does not reflect reality, and as mentioned, there are norms outside of IP law that seem to regulate copying. There are clearly at least some typeface designer resources being put into enforcement.\textsuperscript{233}

B. CURRENT LEVELS OF PROTECTION ARE ADEQUATE

Design patents are an avenue of securing IP protection for typefaces that has gone mostly unexplored by scholars.\textsuperscript{234} As mentioned above, scholarly arguments about this subject tend to focus mostly on copyright. Whether that is because copyright seems the best form of protection for a typeface as an

\textsuperscript{228} RAUSTIALA & SPRIGMAN, supra note 4, at 153.
\textsuperscript{229} Typically this kind of typeface would be designed for a specific purpose that is not translatable to other settings and is protected from public use.
\textsuperscript{230} See supra Part II.B.4.
\textsuperscript{231} As we have seen, this exact scenario played out with the use of Comic Sans in the Cavaliers letter and with the introduction of Verdana by IKEA that struck such an uproar. See supra Part II.B.3.
\textsuperscript{232} Rosenblatt, supra note 180, at 351.
\textsuperscript{233} For example, see Martinez, supra note 94.
\textsuperscript{234} While many who have penned thoughts on typeface and IP protection mention design patents, they do so mostly in passing and are often quick to dismiss them as a viable means of typeface design protection. See, e.g., ManFredi, supra note 40, at 862–64 (arguing that though design patents are an option, they are “a poor substitute for copyright protection”); Carroll, supra note 120, at 181 (mentioning that typeface designs are protected by design patent but still proposing a new copyright amendment to protect typeface design); Lipton, supra note 12, at 178–82 (noting that design patent protection is available for typeface designs, but arguing that only the typeface code itself would be eligible for design patent protection).
artistic work or merely because design patents may be less common is unclear. But design patents, combined with other existing protections through copyright and trademark, offer the best of both worlds for the new generation of digital typefaces, because design patents allow for a balance between allowing artistic creativity and ensuring protection for finished works.

1. Design Patents are Sufficient. A design patent is meant to protect the ornamental parts of an article, altogether separate from the useful parts of that design. This means that a design patent, in practice, would protect any characteristics of a set of letters that are ornamental, above and beyond the parts of those letters that are purely utilitarian in the sense that they convey language. For this reason, a design patent is the most realistic, and most useful, form of protection for typeface design.

One argument against design patents as a viable option for protecting typeface is that, in some ways, typeface is inherently utilitarian. Because letters serve the utilitarian function of expressing language, any letter, no matter how beautiful, is at its core performing a useful function. But ever since the printing press, there have been those who seek to design letters that serve more than just a utilitarian function by adding beauty, enhancing the quality of words, or adding another dimension to the reading experience. With technology giving more people access to the design process, the number of varied and beautiful typefaces has grown.

Given the 1,500 typeface design patents already in existence, it is obviously not an insurmountable challenge for the Patent and Trademark Office and the courts to extract the utilitarian function of a letter from its ornamental parts. Given the huge number of typefaces available, it seems there may be a nearly infinite number of ways to design letters. A slight change in even similar typefaces can yield hugely different results design-wise, some of which might be visible only to other designers. Yet many have important implications to laypersons as well, such as by changing the “mood” or feeling of a typeface, making it more or less legible, making it more or less appropriate for a particular medium, or simply making it more or less visually appealing. Importantly, none of these design changes will generally have an impact on the

235 LOREN & MILLER, supra note 107, at 302.
238 Id.
239 Martinez, supra note 148.
240 RAUSTIALA & SPRIGMAN, supra note 4, at 150.
241 GARFIELD, supra note 1, at 221 (discussing important differences between Arial and Helvetica that are stark once “you get used to them”).
basic effectiveness of a set of letters at conveying words; they will instead affect the artistic nature of a design. This may all seem subjective and prone to personal preference, but that is precisely what makes typefaces akin to art and thus inherently not utilitarian. Small design features, while perhaps negligible to an average consumer, can be quite noticeable to designers and experts. These features can presumably be explained to a court or the PTO in order to determine whether the elements of a given typeface design are separable from its utilitarian functions.

Further, most typefaces will meet the novelty and non-obvious requirements for gaining design patent protection. Though there are many typefaces that can in theory qualify as prior art for any new design, and though it might appear difficult to create something truly new and nonobvious enough to clear those two statutory hurdles, it is important to remember that small changes can add up. Even when a designer is taking inspiration from a typeface that already exists, something as simple as adding or removing serifs, making the stems thinner or thicker, rounding out a bowl, or changing ascender or descender height can completely alter the look of a typeface. And, if several of these small changes were implemented at the same time, the differences would be even clearer. This could be sufficient for both the novelty and nonobviousness requirements. For nonobviousness, though it may conventionally seem “obvious” to remove serifs from a currently existing typeface, for example, that change, combined with other adjustments, can change a lot in the final look and feel of a typeface, and may well be a nonobvious combination. For novelty, the same is true; though two typefaces may appear similar to consumers, designers or other type experts can easily differentiate between typefaces to determine if a new design is a simple adjustment of an old typeface or whether it creates something entirely new.

This approach seems to be reflected in the real-world typeface business. One San Francisco foundry determines whether a typeface is novel enough to sell by running the typeface through not just a visual test, but also by enlarging the letters of any typefaces it already sells that appear similar, comparing them to the prospective new typeface. This suggests that experts can, and do, easily distinguish typefaces that may appear similar. As in many other industries, progress in typeface design might come in tiny steps, and it might borrow a lot from the prior art.

Some typefaces will be too close to the prior art and will not be able to clear the design patent requirements. This merely demonstrates the true benefit of

242 See id. (explaining that small differences may be obvious only to designers in the industry).
244 GARFIELD, supra note 1, at 228–29 (discussing the practice of Font Shop).
design patents: Copycat typefaces simply will not gain protection. If someone
chooses to invest time and resources in making a copycat version of a typeface,
that behavior should not be rewarded, because it does nothing to further the art
of letter design. If the original typeface is patented, its owners can sue an
infringer—basically forcing the copier to license the original typeface from the
owner if the infringer wishes to use it. And if the infringer knows he may be
sued if he copies a typeface design, he has less incentive to copy. He will either
put his resources into making sufficiently new and nonobvious typefaces, or
into paying a license fee to use the existing typeface, thereby enriching the
designer who created it and encouraging production of new typefaces by
supporting the designer. If the copycat version was somehow done by mistake,
the inability to obtain design patent protection for a copied typeface design
might encourage the accidental copier to check the prior art more carefully the
next time.

Those who wish to spend time copying, or making tiny modifications to
existing designs, can, and will probably continue, to do so. Though they may
not earn protection for their designs, copiers will still play a huge part in the
market of typeface design. Unprotected typefaces can be offered for free—
perhaps the appropriate price for a lower quality typeface, or one that does not
take much effort to produce. This also provides access to design on a smaller,
more affordable scale for consumers who do not need a high-quality design,
such as those using typeface primarily for personal use.

Since design patents provide total protection for a design, any copying of the
protected design is prohibited. Because of this, and because protection lasts
fourteen years, it logically follows that such protection should require tougher
forms of proof, and should only be granted to truly new typefaces. If not,
nothing would be left in the public domain. By limiting the protection to truly
new typeface designs, the market will be encouraged to play with small
variations on non-protected designs, until it eventually inspires a design creative
enough to merit protection. A fourteen-year term is appropriate for this goal,
because it is long enough to prevent others from using a pirated typeface while
it is trendy, such as stealing a popular advertising typeface to sell to another
company, or replicating a popular design to include in a competing software
bundle. The time period is also short enough to encourage a fairly rapid
turnover; technology (and society) will change sufficiently over fourteen years
so that the protected design loses relevance. Allowing it back into the public
domain at that point will have adequately compensated the designer, but still
encourage further innovation.

245 See supra Part II.c.3.
Additionally, design patent damages, which provide no upper limit on what may be awarded if infringement is found, further the goal of deterring copying and infringement by allowing the inclusion of an infringer’s profits in the total damage award if a suit is brought and won, and a court decides such profits are warranted.

The typeface industry does have intrinsic characteristics that encourage endless creation. But what makes it unique is that these characteristics work within the bounds set by the IP protections already afforded the industry to help shape that creation in a productive way. Without IP protection, typeface production could spiral out of control. This is not to argue that there is such a thing as too many typefaces, but rather that there is probably such a thing as too many bad typefaces obscuring the good ones, and that there is certainly such a thing as too many people wasting resources designing bad typefaces or typefaces that are copies. Design patents can help stop this result.

Design patents are not sought as often as other forms of IP protection, like copyrights. This trend may change, however, as the industry does. Protection for typeface designs was unthinkable when they were first invented, simply because it was unnecessary: few had the time or skill to replicate an existing typeface when it involved potentially years of expertly working with hot metals. The transition to computers has made the industry more accessible, and copying type has become a quicker, easier process. As more lawsuits are filed, and more lawyers join the ranks of those already fighting the typeface protection battle, it seems likely that the number of designers who seek protection for their work through design patent will increase as they realize it is a viable option.

2. Copyright-Like Protection is Inappropriate for Typefaces. Copyright protection for typeface designs is an inappropriate solution. Aside from having been emphatically rejected by Congress and the courts, it simply does not fit the typeface industry. Were typefaces to be protected by copyright, typeface might meet the initial copyright requirements of originality and fixation. A particular design would have to be original in order to qualify for protection. A typeface is “fixed” in a tangible medium via the text it is printed in, so that requirement would likely not cause problems. But beyond these initial requirements, typeface does not fit copyright’s scheme.

247 See supra Part II.B.1.
248 GARFIELD, supra note 1, at 28.
249 For example, see Martinez, supra note 94.
250 Copyright and the Public Domain § 2.14 (2009).
251 LOREN & MILLER, supra note 107, at 34–35.
As discussed, if protected by copyright, typeface would most likely fit in the category of pictorial, graphic, and sculptural works. But, in order to obtain protection, those works may not be useful articles. This hurdle can only be overcome if a 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." Although this requirement could perhaps be satisfied through similar arguments as in the design patent context, namely that typefaces are artistic separately from their function as letters, the copyright standard is stricter; it could be difficult to determine if a design element of a typeface could exist independently of its utilitarian letter design. That analysis creates a higher hurdle to jump than the design patent requirement of ornamentality. It seems intuitively easier to demonstrate that a feature is purely ornamental in nature than to separate its ornamental parts from the strictly utilitarian characteristics, and this seems particularly true for typeface designs. What would be separated—just the serifs? How wide or narrow need a stem be before it was considered separable from its essential function of portraying a letter?

Additionally, many of copyright's inherent limitations prevent typeface from fitting into its protections. Copyright requires that only creative elements, not facts or raw data, are protected. This goes beyond the design patent requirement prohibiting protection for utilitarian articles, and could easily apply to typeface to prevent any protection based on the idea that a letter, no matter how beautiful, is inherently a fact or piece of data. At the end of the day, the letter "a" is the letter "a" no matter what flourishes or aesthetic features a designer might add. Put simply, a well-designed letter could probably be enough like art to satisfy the ornamentality requirement of design patent, but it is unclear whether that same well-designed letter could ever be enough like art to overcome its essential fact-based nature to bypass copyright's prohibition on protection of raw data.

Additionally, the merger doctrine further prevents copyrightability of typefaces. If there are only certain ways to legibly express a letter, there may not be a way to protect one expression of that letter. The scenes a faire doctrine, which forbids copyright protection to standard elements, could act as a further deterrent. Elements such as serifs are very much like scenes a faire, so it could be exceedingly difficult to demonstrate the unique parts of a typeface if it

253 See supra Part II.c.1.
255 Id.
256 Id. § 102(b).
258 See v. Durang, 711 F.2d 141, 143 (9th Cir. 1983).
uses these design elements. If these elements are what make a particular design unique and they cannot be protected, all that is left is a generic, useful, set of letters, likely facts or data outside the ambit of copyright protection. The letters upon which a typographer bases his designs in the first place could possibly be considered *scènes a faire* themselves, prohibiting protection entirely regardless of separability of design elements.

These doctrines, working together, would mean that if copyright were the accepted form of protection for typefaces, the protections it could offer would be quite limited. Likely, it would limit protection to only very distinct typefaces, such as ♠♥♣♦ (better known as Wingdings). This would encourage production of those types of designs, which might be interesting, but would not do a whole lot to further the art of letter design, and would certainly not be helpful for any of the usual uses of typeface, particularly expressing language.

One argument in favor of copyright protection is that registration is not required to obtain it. This might counteract the relatively lengthy process of obtaining a design patent, but that process, combined with the unique attributes of the typeface industry, is what properly incentivizes the industry to invest in the type of creation that it needs. Additionally, since registration is required to obtain statutory copyright damages, this argument is weak.

The lengthy protection given to copyrighted works would further discourage useful innovation; the life of the author plus seventy years is a long time, and by the time a typeface has fallen into the public domain, the technology used to create it would likely be obsolete. Keeping designs out of the public's reach for so long might also stunt growth of the industry itself by preventing designers from making small, subtle changes to different designs to suit their needs or to explore a new type of design. Because of this limitation, progress would be less fluid.

3. Design Patents Combined with Copyrights and Trademarks Create Ideal Protection for Typefaces and Fonts. Current levels of IP protection establish the perfect balance needed for the typeface industry, providing a full suite of protection. Designers may seek copyrights for their fonts and design patents for their typeface designs. These protections make any type of copying of their work illegal. The design patent prevents someone from printing out a typeface and tracing it, then either scanning it into a computer or using a different computer program than the one protected to render identical, or almost identical, letter

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259 LOREN & MILLER, supra note 107, at 4.
261 Id. § 302.
263 Id. at *21.
designs (both of which would be legal without design patent protection) as a way to get around the copyrighted font program.

Copyrighting the font program enables designers who are in the process of creating a design-patentable typeface to protect their efforts along the way, and provides further protection for their work. Finally, holding a trademark on the name of a particular typeface will help designers enjoy their success by establishing a brand name for highly successful work, and will allow consumers to be sure they are selecting the typeface that they want. This promotes the three-fold goal of helping consumers learn that typefaces are not free, creating demand for popular typefaces by readily identifying them in the marketplace, and helping consumers differentiate among typefaces that might appear similar to an untrained eye. In short, the combination of existing protection provides a perfect level of limited monopoly, discouraging pirates and encouraging creative investment.

Some argue that there is no such thing as too many typefaces and thus would scorn any method of discouraging production, including that of incentivizing the production of only useful and new typefaces. For example, renowned typographer Gerard Unger\(^{\text{264}}\) once said:

One of my colleagues is convinced that having a wide range of types to choose from is a complete waste of time. He swears by two typefaces: Gill (1928) and Frutiger (1975), which he uses for road signs (among other things). Until 1975, the year in which ... [Frutiger] ... came onto the market, my colleague could only have made half of his selection. It seems to me that this proves the case for continuing to design new typefaces.\(^{\text{265}}\)

This argument misses the mark. It is correct to suggest that encouraging more typefaces, generally, is desirable because it might lead to the creation of more truly great typefaces. It is incorrect when it suggests that new typefaces should be encouraged without limit. The industry is better off when its resources and incentives are designed to encourage faster and more frequent creation of good typefaces rather than hundreds of nearly identical, illegibly fanciful typefaces. The typeface industry is unique in the challenges it faces; funneling resources efficiently using IP protections as they currently exist prevents piracy and encourages good work.


IV. CONCLUSION

The currently existing levels of intellectual property protection work together to create the ideal amount of protection for typefaces and fonts. Rather than focusing argument on how the industry would be better with more, different, or less protection, looking at how typefaces and fonts are used in the real world demonstrates that the current level of protection is already present. The industry is unique in that though it has been around since the 1400s, it has only relatively recently undergone the rapid change to computerization that many thought required an upheaval of the IP protection necessary. Thus, now is the time to focus on and decide the issue once and for all, as the typeface industry is gaining more and more prevalence.

The industry is expanding to more consumers, meaning there is an increase in corporate and business interest in having and using high-quality typefaces. As typeface infringement and misuse lawsuits seek ever-larger damages, all sides need clearly defined legal boundaries to enable and encourage the use and development of this type of design. Thus, designers’ ability to protect their work by combining a copyright on their font programs, a trademark on their typeface names, and a design patent on their typeface designs strikes a balance that is just the right fit, particularly given the fast-changing nature of the industry. And most importantly, it is a suite of protection that is custom-built for the industry, as it has developed naturally along with the industry itself. This means it is proven to work in practice.

Instead of focusing on what could be, following this currently existing level of protection creates a balance that ensures the production of many typefaces and that those typefaces are high quality, while allowing a robust public domain to provide inspiration for the next big innovation. This level of protection avoids any difficulties inherent in changing the law, and fits the way the industry works in real life, giving designers the freedom and encouragement they need to continue designing physical letters for whatever words can be dreamed up.