

# *Typeface Protection:*

An Overview of Contemporary Laws Protecting the  
Works of Typeface and Font Designers.

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## **I. INTRODUCTION**

Copyright protection of type faces and fonts is a topic that has been enjoying considerable debate for decades. Type designers claim that protection is necessary to compensate for the labor and creative expression they invest into producing type styles. Opponents of protection argue that protecting type face designs violates the First Amendment right to free speech and is contrary to considerations of public policy because it prevents the unhindered communication of the printed language. These opposing views are represented throughout the world and have resulted in substantial variations in the way type faces and fonts are protected.

This essay discusses how type face designs can be protected in the United States, and outlines several copyright laws available throughout the world. The essay concludes with a brief summary of how conceptual separability might pave the way to copyrightability of fonts in the United States.

## **II. DEFINITIONS**

The law throughout the world does not appear to treat fonts differently from type faces. Yet, the two terms are not synonymous. While the common user may equate fonts

with type faces, each term represents a distinct aspect of written communication.

A *type face* refers to “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.”<sup>1</sup>

*Fonts* are the vehicles that hold type face character collections. In the context of computers, fonts are commonly known as the files which users require to insert type face characters into documents. A font can also be photographic film, which contains the image of a type face, or lead alloy type face casts.

### III. TYPE FACE PROTECTION IN THE UNITED STATES

#### A. Copyright Protection for Analog Type Face Designs

Typographers claim that type face designs meet the subject matter requirements for copyright protection set forth in § 102 of the Copyright Act of 1976.<sup>2</sup> They argue that type face designs are original because the designs embody creativity and owe their origin to the authors claiming copyright. The fixation requirement is met because type face designs are usually cast in fonts or are fixed in similar tangible mediums for more than a transitory period. Finally, typographers argue that a type face design involves sufficient expression to be considered a work of authorship. For instance, Frederick W. Goudy, one of the most famous type face designers of the 20<sup>th</sup> century, described the design of a type face as an extraordinary expression of the craftsman's skill, life, and power.<sup>3</sup>

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1 H.R. Rep. No. 94-1476, at 55 (1976), *reprinted in* 1978 U.S.C.C.A.N. 5659, 5668.

2 Terrence J. Carroll, *Protection for Typeface Designs: A Copyright Proposal*, 10 Santa Clara Computer & High Tech. L.J. 139, 143 (1994).

3 Frederic W. Goudy, *Typologia*, University of California Press (2002), <http://www.typeart.com/reference-books/typologia/typo-chapter5.html>.

The Fourth Circuit Court of Appeals in *Eltra Corp. v. Ringer*<sup>4</sup> reiterated Congress' intention that analog type face designs may not be granted copyright protection in the United States. The court referred to legislative reports of 1976 where Congress determined that it did not regard the design or type face of a notational system to be copyrightable “pictorial, graphic, or sculptural work” within the meaning of the Copyright Act.<sup>5</sup> Moreover, the court found that type face design is barred from protection because the design is physically inseparable from the useful elements of the type face. It concluded that a type face design cannot exist “independently and separately as a work of art.”<sup>6</sup> The Code of Federal Regulations accordingly states that “[t]he following are examples of works not subject to copyright and applications for registration of such works cannot be entertained: . . . typeface as typeface.”<sup>7</sup>

#### *B. Copyright Protection for Digitized Type Faces*

With the aid of technology, individuals and corporations are increasingly transferring analog type faces into digital font formats. Inconsistent interpretation of the law concerning the protection of these digitized type faces prompted the Copyright Office in 1988 to establish that such fonts do not result in copyright protectable works.<sup>8</sup> In its policy decision, the Copyright Office found that digitized type faces could not be considered original works of authorship, original computer programs (as defined in 17 USC 101), or computer databases. “Like analog type faces, digitally created type faces exhibit no creative authorship apart from the utilitarian shapes that are formed to

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4 579 F.2d 294, 301 (4th Cir. 1978)

5 H.R. Rep. No. 94-1476, *supra* note 1, reprinted in 1976 U.S.C.C.A.N. at 5659.

6 *Eltra*, 579 F.2d at 298.

7 37 C.F.R. § 202 (1992).

8 Copyrightability of Digitized Typefaces, 53 Fed. Reg. 38,110 (Sept. 29, 1988).

compose letters or other font characters.”<sup>9</sup> Similarly, software that presents type faces in bitmapped fonts is not protectable because it is nothing more than a computerized representation of type faces.<sup>10</sup> However, the decision by the Copyright Office does allow copyright protection for computer programs that facilitate the scaling of type faces, in contrast to the mere representation of type face outlines.<sup>11</sup> Such copyright is considered appropriate because scaling involves “many decisions in drafting the instructions that drive” the software or printer.<sup>12</sup>

### *C. Design Patent Protection for Type Face Names*

Designers will not receive protection under domestic copyright laws. However, under limited circumstances, a type face can be protected for up to fourteen years using design patent law.<sup>13</sup> To acquire design patent protection, the designer must prove that the design is novel and not a variation of existing type faces.<sup>14</sup> This is a difficult test to prove for many ordinary type face designs, but not an impossible one where the type face is not obviously a derivative of another design. The fact that a type face is digitized as opposed to cast in metal is irrelevant because the determinative test is whether the design itself is novel.<sup>15</sup>

### *D. Trademark Protection for Type Face Names*

Current U.S. law and court precedent also makes available trademark protection

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<sup>9</sup> *Id.*

<sup>10</sup> Registrability of Computer Programs That Generate Typefaces, 57 Fed. Reg. 6201 (Feb. 21, 1992) (to be codified at C.F.R. pt. 202).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> The first design patent, granted in 1842, was for a type face design. *Secretary Gutierrez to Award 500,00<sup>th</sup> Design Patent*, (Feb. 11, 2005), at United States Patent and Trademark Office, <http://www.uspto.gov/web/offices/com/speeches/05-10.htm>.

<sup>14</sup> *A Guide to Filing a Design Patent Application*, (Jan. 18, 2005), at United States Patent and Trademark Office, <http://www.uspto.gov/web/offices/pac/design/index.html>.

<sup>15</sup> Frank J. Martinez, *U.S. Design Patent for Typeface Design*, (1997), at <http://www.martinezgroup.com/articles/1997typedesign.html>.

of type face names. Several type face names have acquired trademark protection in the U.S. including: Times Roman (1945, U.S. reg. 417,439); Helvetica (1967, U.S. reg. 825,989); Lucida (1985, U.S. reg. 1,314,574); Arial (1999, U.S. reg. 2,270,853). This level of protection may be sufficient for some designers, but it will not prevent unauthorized reproductions that do not use the same name as the original. For instance, most of the above mentioned type faces have been reproduced under similar names. The popular Times Roman type face has been plagiarized as “English Times” and “London.” Helvetica pseudonyms include “Helios”, “Geneva”, “Triumvirate.”

#### **IV. VIENNA AGREEMENT FOR THE PROTECTION OF TYPE FACES**

The aggressive approach taken by the United States to avoid copyright protection of type face designs is not shared internationally. Numerous countries currently provide remedies for unauthorized copying. However, in these countries, legal standards and efforts to encourage further creation of type faces vary. In 1973, eleven countries, including France, Germany, Hungary, Italy, Liechtenstein, Luxembourg, the Netherlands, San Marino, Switzerland, the United Kingdom, and Yugoslavia established the Vienna Agreement for the Protection of Type Faces and their International Deposit to standardize type face protection laws world-wide and to develop effective means to promote the creation of type faces.<sup>16</sup> This agreement defines what type faces are and sets forth basic terms and requirements for acquiring copyright protection in member countries.

The Vienna Agreement will enter into force once five countries ratify its terms.<sup>17</sup>

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<sup>16</sup> Vienna Agreement for the Protection of Type Faces and Their International Deposit, reprinted in World Intellectual Property Organization (WIPO), Records of the Vienna Diplomatic Conference On The Protection Of Type Faces 1973 (1980) (hereinafter Vienna Agreement), <http://www.austlii.edu.au/au/other/dfat/seldoc/1973/2203.html>.

<sup>17</sup> The treaty was signed by eleven states. But at least five of these signatories must ratify it before the

So far, only Germany (1981)<sup>18</sup> and France (1974)<sup>19</sup> have done so while it is not clear whether the United Kingdom ratified the Vienna Agreement in its 1988 law.<sup>20</sup>

## V. TYPE FACE PROTECTION IN OTHER COUNTRIES

### A. Copyright Protection in Germany

In an effort to ratify the Vienna Agreement, Germany passed a 1981 copyright law (the “Schriftzeichengesetz”)<sup>21</sup> which grants copyright protection to type face designs.<sup>22</sup> To become eligible for protection, the type face must be an original work of authorship. Unlike the U.S. “originality requirement,” designers claiming protection under the German law must prove that the design elements of the type face (1) are new, (2) were previously unknown to experts, and (3) are the result of expressive passion beyond mere capability.<sup>23</sup> While the law does not apply retroactively to works created prior to 1981, German courts have nonetheless granted protection to various earlier type face designs. For instance, the heirs of Paul Bauer, one of the designers of Futura, successfully pursued infringement claims against the Bauer foundry for unauthorized use of the 1927 Futura type face.<sup>24</sup>

In a 2000 landmark legal case concerning claims by FSI FontShop International, a

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Vienna Agreement will go into effect. Vienna Agreement, *supra* note 16.

18 SCHRIFTZEICHENGESETZ [SZG] art. 1 (F.R.G.), <http://www.online-recht.de/vorges.html?SZG>.

19 CODE DE LA PROPRIÉTÉ INTELLECTUELLE [C. PR. INTELL.] art. L511-1 (Fr.), <http://www.legifrance.gouv.fr/WAspad/RechercheSimplePartieCode?commun=&code=CPROINTL.rcv&art=l511-1&exp=>.

20 Copyright, Designs and Patents Act, 1988, c. 48 (Eng.), [http://www.opsi.gov.uk/acts/acts1988/Ukpga\\_19880048\\_en\\_1.htm](http://www.opsi.gov.uk/acts/acts1988/Ukpga_19880048_en_1.htm).

21 SZG art. 1, *supra* note 18.

22 Font utilities manual documents, 16.1.1 Legal issues (March 2000), *at* [http://www.delorie.com/gnu/docs/fontutils/fontu\\_129.html](http://www.delorie.com/gnu/docs/fontutils/fontu_129.html).

23 SZG art. 2, *supra* note 18.

24 Font utilities manual documents, *supra* note 22.

German court in Köln upheld copyright protection for digitized type faces.<sup>25</sup> In doing so, the court placed several requirements upon digitized type face copyright claimants. Most notably, claimants must prove that they (1) have specialized computer knowledge, and (2) are educated as typographers or typesetters and are therefore able to develop type faces using artistic and aesthetic parameters.<sup>26</sup>

#### *B. Copyright Protection in France*

Even though the Vienna Agreement has not yet entered into force, type face designers in France can register certain designs under a 19<sup>th</sup> century industrial design protection law.<sup>27</sup> The “Romain du Roi” type face, designed by Philippe Grandjean in 1702, is a protected design under this law, as are possibly other royal type face designs. It appears that type face designers may also rely on a July 2001 addition to the French Intellectual Property Code which grants limited copyright protection to products that qualify as designs or models.<sup>28</sup>

#### *C. Copyright Protection in the United Kingdom*

The United Kingdom passed a copyright law in 1988 which is retroactive and covers type face designs that are first published in the United Kingdom or introduced within thirty days of publication elsewhere.<sup>29</sup> The immensely popular 1932 type face, Times Roman, designed by Stanley Morison, is probably covered by this statute.

#### *D. Copyright Protection in Canada*

Canada also grants copyright protection to type face designs through its Industrial

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25 OLG Köln, *Schutzfähigkeit von Computerschriften*, JurPC Web-Dok. 217/2000 (2000), Abs. 1-37, <http://www.jurpc.de/rechtspr/20000217.htm>.

26 *Id.*

27 Charles Bigelow, *Notes on Typeface Protection*, 7 TUGboat 146, 148 (1986), <http://www.tug.org/TUGboat/Articles/tb07-3/tb16bigelow.pdf>.

28 C. PR. INTELL. L511-1, *supra* note 19.

29 Copyright, Designs and Patents Act, *supra* note 20.

Design Act.<sup>30</sup> Specifically, designers may claim protection for “features of shape, configuration, pattern, or ornament and any combination of those features that, in a finished article, appeal to and are judged solely by the eye.”<sup>31</sup> Carl Dair's 1969 type face “Cartier” is likely protected under this statute.

## VI. CONCLUSION

Those who oppose copyright protection make many strong arguments based on well-established principles of public policy. Primarily, protection of type faces inappropriately restricts the vehicles for reproducing the printed word. It cannot be in the interest of society to prevent the free flow of otherwise publishable information simply because a typographer demands royalty for every one of his character collections used.

However, this argument is not a persuasive one. In countries where copyright is available, there does not appear to be an impairment on the ability to publish written works. Users might be restricted from choosing several specific copyrighted type faces, but there are still an endless number of publicly available fonts which can be used instead.<sup>32</sup>

Protecting new type face designs and fonts from unauthorized copying is a vital measure to ensure that designers and typographers are compensated for their efforts. It is a critical tool to encourage ongoing creativity and establish an impetus for creating new type face designs. Without this incentive, designers will be less willing to create artistic type characters and society will suffer as a consequence because it will have fewer type

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30 Industrial Design Act, R.S.C., ch. I-9, § 2 (1985), amended by ch. 15, 1988 S.C., § 18 (1988) (Can.).

31 *Id.*

32 Font utilities manual documents, 16.1 Additional fonts (March 2000), at [http://www.delorie.com/gnu/docs/fontutils/fontu\\_128.html](http://www.delorie.com/gnu/docs/fontutils/fontu_128.html)

collections to choose from.

Protection will also hem the rampant plagiarism that exists, at least within the United States.<sup>33</sup> These plagiarisms frequently result in type faces which are incomplete and of bad quality. They also inappropriately reflect poorly upon the authors who developed the original type face designs.

Recent court decisions concerning domestic copyright law support a new approach for determining whether protection should be granted. In *Eltra*, the type face design lacked physical separability.<sup>34</sup> However, a few years later, courts began applying the less rigorous conceptual separability test.<sup>35</sup> This is a standard which would allow protection to especially artistic type face designs, while ensuring that type face designs that are inherently part of the utility of the type face remain unprotectable.

For these reasons, the United States should reconsider its attitude towards granting copyright protection for type face designs. Why refrain from granting protection to artistic type face designs where precedent in many countries proves that such protection can be afforded at seemingly little cost? Where is the danger to society in granting protection when the type face design contains truly artistic aspects that are distinct from the utility of the type face?

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<sup>33</sup> Bigelow, *supra* note 24, at 147.

<sup>34</sup> *Eltra*, 579 F.2d at 298.

<sup>35</sup> *Mazer v. Stein*, 347 U.S. 201, 201 (1954).