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HOW RINGS FIT INTO THE COPYRIGHT SCHEME: ASSESSING THEIR INTRINSIC UTILITARIAN FUNCTION

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This Note examines how rings fit into the copyright system as sculptural pieces not subject to the separability test under the useful articles doctrine. It focuses exclusive on rings, as they seemingly possess numerous functions; they have been used for mystical purposes, portable bank accounts, and as a signal of socially meaningful codes. Moreover, since jewelry designers consider functional features in the design process, should rings be treated as useful articles? After examining the purposes of the Copyright Act and conversing at length with designers, this Note concludes that rings are more of an art form. Although jewelry designers are limited by a finger's constraints, they employ a great deal of artistic creativity in expressing a message though the details of a ring.

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INTRODUCTION

Jewelry is considered "one of the oldest art forms,"[1] dating further back than the history of painting and more vibrant than the history of sculpture.[2] Due to rampant imitation—or inspiration as some refer to it—in the fashion industry,[3] many jewelry designers seek to use the copyright system to protect their artistic designs.[4] In the past few years, retail stores such as Nasty Gal and Urban Outfitters

[1] NORMAN CHERRY, JEWELRY DESIGN AND DEVELOPMENT: FROM CONCEPT TO OBJECT 6 (Susan James et al. eds., 2013).

[2] Bruce Metcalf, *On the Nature of Jewelry*, JEWELRY AUSTRALIA NOW (1989), http://www.brucemetcalf.com/pages/essays/nature_jewelry.html.

[3] *See generally* Kal Raustiala & Christopher Jon Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1696-99, 1725–32 (2006).

[4] Interview with Courtney Crangi, CEO, Philip Crangi Jewelry and Giles & Brother, in New York City, N.Y. (Mar. 30, 2015) (explaining how she was quite upset when she saw a knockoff of a Giles & Brother signature necklace sold at a certain multinational retail store).

have been "slapped with lawsuits by jewelry designers who are crying foul over their work being mimicked without any credit and sold at fast fashion prices."[5]

Under the Copyright Act of 1976, many courts consider rings ornamental sculptures entitled to copyright protection as a pictorial, graphic or sculptural (PGS) work. With the objective of protecting artistic works and excluding functional designs from protection, the Copyright Act explicitly distinguishes useful articles. Specifically if a PGS qualifies as a useful article—defined as "having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information"[6]—then it is subject to a separability test. While courts have differed in their analysis in applying separability,[7] the test will essentially render the functional aspects of a PGS unprotectable.

Fashion designs are considered useful articles mostly unprotectable by Copyright system; their purpose to clothe people is utilitarian and the designs do not meet the Copyright Act's separability test.[8] Jewelry pieces are often lumped together with fashion articles and accessories, leading some to question their status as purely ornamental sculptures.

This Note focuses exclusively on rings as they seemingly possess numerous functional purposes as compared to other pieces of jewelry. For example, rings have been used for mystical and talismanic reasons. They are still used today as portable bank accounts, as the nature of small-scale jewelry allows wealth to be hidden easily and safely, to display socially meaningful codes, such as class rings and engagements rings, and to adorn one's hand.[9] Moreover, jewelry designers inevitably consider functional concerns when creating a ring; it is supposed to fit comfortably around one's finger. This raises the question that if a design is created with functional concerns, does it possess an intrinsic utilitarian function? Furthermore, there are diverging opinions in the federal district courts as to whether rings are considered sculptural works subject to a separability test.[10] While most courts hold that rings are purely artistic works, this Note seeks to examine

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[5] Kathryn Dachille, *Bling It On: Copyright & The Rise of Jewelry Infringement Lawsuits*, CREATIVE ARTS ADVOCATE (2014), http://creativeartsadvocate.com/bling-it-on-copyright-the-rise-of-jewelry-infringement-lawsuits.

[6] 17 U.S.C. § 101 (2006).

[7] *See infra* Part I.B.2.

[8] Fashion designs do not meet the conceptual separability test because it is hard to distinguish their expressive and functional components. Hemphill & Suk, *The Law, Culture, and Economics of Fashion*, 61 STAN. L. REV. 1147, 1185 (2009).

[9] Cherry, *supra* note 1, at 6. *See also* Metcalf, *supra* note 2.

[10] *See infra* Part I.C.

why there has been confusion as to whether the useful articles doctrine applies specifically to rings.

Part I of this Note examines the history of jewelry in copyright, describing how courts have attempted to define intrinsic utilitarian function in light of the separability analysis. This section also compares case law that has expressly assessed rings in relation to the useful articles doctrine. Part II next considers rings as sculptural works not subject to a useful articles analysis. After briefly describing the evolution of jewelry in the 1960-80s, this section reinforces why rings qualify as ornamental sculpture for purposes of the Copyright Act. Part III considers rings as useful articles subject to a separability test, examining certain uses of rings as well as functional consideration in the design process. Lastly, this section analyzes critical reception in connection with rings, and explains how museum display is not a prerequisite for copyrightability. In the copyright spectrum with useful articles on one end and aesthetic objects on the other, this Note concludes that rings lie more on the artistic side. Rings do not possess an intrinsic utilitarian function for purposes of the Copyright Act, and therefore should not undergo a useful articles analysis.

I
HISTORICAL BACKGROUND OF JEWELRY IN THE COPYRIGHT ACT

Copyright law has included a variety of designs that are seemingly useful while simultaneously purporting to exclude any utilitarian products. Beginning in 1870, through a series of acts, Congress drew from piecemeal administrative and judicial formulations, in an attempt to reconcile the differences between protectable applied arts and unprotectable utilitarian designs. In 1949, Congress explicitly included "artistic jewelry" as within the scope of copyright protection. This section examines the history of jewelry in the copyright scheme, explains judicial attempts at defining intrinsic utilitarian function, and highlights district court cases that have expressly assessed rings in light of the useful articles doctrine.

A. Initial Encounters in Early Legislation and Case Law

Article 1, Section 8 of the Constitution authorizes federal legislation "[t]o promote the Progress of Science and useful Arts,"[11] but gives little guidance in defining the scope of the copyright system. The original Copyright Act of 1790 extended protection only to maps, charts, and books.[12] It was not until 1870 when

[11] U.S. CONST. art. I, § 8, cl. 8.
[12] *See* Act of May 31, 1790, ch. 15, 1 Stat. 124.

Congress explicitly extended copyright protection to three-dimensional objects: "painting, drawing, chromo, statute, statutary, and of models or designs intended to be perfected as works of the fine arts."[13] This statute purposefully used the term "fine art" in order to "maintain a respectable distance between copyright and useful articles."[14] The Copyright Act of 1909 eliminated this distinction, and seemingly allowed copyright coverage to apply to the designs of useful articles.[15] Specifically, the 1909 Act broadened the category of "fine arts" to include "[w]orks of art; models or designs for works of art."[16] One year later, however, the Copyright Office quickly corrected itself, amending the statute to expressly exclude "industrial arts utilitarian in purpose and character … even if artistically made or ornamented."[17]

With the advent of new useful articles in the early 20th century, such as television sets and new cosmetic products, it became harder to define the contours of industrial design. In 1917, the Copyright Act was reworded to cover "artistic drawings notwithstanding they may afterwards be utilized for articles of manufacture."[18] The Copyright Office promulgated a regulation in 1949 to expand its coverage and explicitly included "artistic jewelry."[19] Specifically, the regulation defined works of art as a class which "includes works of artistic craftsmanship, in so far as their form but not their mechanical or utilitarian aspects are concerned, such as *artistic jewelry*, enamels, glassware, and tapestries, as well as all works belonging to the fine arts, such as paintings, drawings and sculpture."[20] Thus, Congress established copyrightable categories with protection only covering the artistic elements of the designs.

In 1954, the Supreme Court decided *Mazer v. Stein*,[21] a seminal case for the useful articles doctrine, holding that copyright protection could be extended to

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[13] Act of July 8, 1870, ch. 230, § 86, 16 Stat. 198, 212 (repealed 1916).

[14] Robert C. Denicola, *Applied Art and Industrial Design: A Suggested Approach to Copyright in Useful Articles*, 67 MINN. L. REV. 707, 711 (1983).

[15] *See* Act of March 4, 1909, 60th Cong., 2d Sess., 35 Stat. 1075. *See also*, Shira Perlmutter, *Conceptual Separability and Copyright in the Designs of Useful Articles*, 37 J. COPYRIGHT SOC'Y U.S.A. 339, 365 (1990).

[16] Act of March 4, 1909, 60th Cong., 2d Sess., 35 Stat. 1075.

[17] COPYRIGHT OFF., RULES AND REGULATIONS FOR THE REGISTRATION OF CLAIMS TO COPYRIGHT, Bulletin No. 15, at 8 (1910).

[18] Mazer v. Stein, 347 U.S. 201, 212 n.24 (1954) (quoting 37 C.F.R. § 201.4(7) (1917)).

[19] *Id*. at 212-213 (quoting 37 C.F.R. § 202.10(a) (1949)).

[20] *Id.* (emphasis added).

[21] *Id*. at 201.

sculptural figures that were used as bases for lamps.[22] *Mazer* attempted to distinguish artistic design, which qualifies for copyright protection, from ornamental features of useful articles, which belong to the design patent regime: "[t]he dichotomy of protection for the aesthetic is not beauty and utility but art for the copyright and the invention of original and ornamental design for design patents."[23] Based on the 1949 Regulation promulgated by the Copyright Office, *Mazer* supported the idea that artistic elements in useful articles would be entitled to Copyright protection as long as they remain physically separable from the utilitarian components.

Robert Denicola suggests that *Rosenthal v. Stein*[24] articulated a better approach to determine the Copyright Act's scope at the time.[25] Specifically, the Ninth Circuit in *Rosenthal* stated, "[a] thing is a work of art if it appears to be within the historical and ordinary conception of the term art."[26] Based on this definition, numerous cases upheld copyrights in jewelry, drawing on the historical conception of jewelry as a work of art.[27] Overall, before the Copyright Act of 1976, many courts considered artistic jewelry as a copyrightable category not subject to a separability test.

B. Further Defining Useful Articles

1. The Copyright Act of 1976

In § 102 of the Copyright Act of 1976, Congress approved these earlier precedents—specifically attempting to codify *Mazer*[28]—and enumerated eight categories of copyrightable subject matter. Section 102(a)(5) specifically included "pictorial, graphic and sculptural works" (PGS), thereby abandoning 1909's Act "works of art" categorization. While the new Act did not include specific

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[22] *Id.* at 214.

[23] *Id.* at 218.

[24] 205 F.2d 633 (9th Cir. 1953).

[25] Denicola, *supra* note 14, at 17.

[26] 205 F.2d at 635.

[27] *See generally* Boucher v. Du Boyes, Inc., 253 F.2d 948 (2d Cir.), cert. denied, 357 U.S. 936 (1958); Dan Kasoff, Inc. v. Palmer Jewelry Mfg. Co., 171 F. Supp. 603, 606 (S.D.N.Y. 1959); Trifari, Krussman & Fishel, Inc. v. B. Steinberg-Kaslo Co., 144 F. Supp. 577 (S.D.N.Y. 1956); Trifari, Krussman & Fishel, Inc. v. Charel Co., 134 F. Supp. 551, 553 (S.D.N.Y. 1955).

[28] *See* H.R. REP. NO. 94-1476, at 54 [hereinafter HOUSE REPORT] ("In accordance with [*Mazer*] works of 'applied art' encompass all original pictorial, graphic, and sculptural works that are intended to be or have been embodied in useful articles, regardless of factors such as mass production, commercial exploitation, and the potential availability of design patent protection.").

examples, such as "artistic jewelry" from the 1949 regulation, many courts have held that jewelry is still a copyrightable sculptural work.[29] Furthermore, one court explained, "the explicit congressional adoption of the Copyright Office's definition indicates that jewelry remains within the scope of copyright protection."[30]

The 1976 Act also formulated the scope of useful articles: if a PGS meets the useful articles definition in § 101, "an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information,"[31] that article qualifies as useful. The design is not copyrightable unless its particular aesthetic elements satisfy the separability test. Section 101 defines the separability test as whether "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."[32] According to the legislative history, copyright protection for features of useful articles depended on whether the elements of the design are physically or conceptually separable from the utilitarian elements, such as the carving on the back of a chair or a floral relief design on silver flatware.[33] If the object is not separable, it does receive copyright protection. The following section identifies judicial attempts at defining intrinsic utilitarian function and determining a separability test. The last section examines how case law has treated rings in light of the useful articles doctrine.

2. Judicial Attempts at Defining "Intrinsic Utilitarian Function" and Separability

Many critics claim that the 1976 Act and its legislative history do not provide sufficient instructions to determine what the term "intrinsic utilitarian function" means.[34] While the House Report accompanying the 1976 Act identifies examples of "utilitarian articles such as textile fabrics, wallpaper, containers, and the like," it fails to define what constitutes an "intrinsic utilitarian function."[35] Courts have struggled to articulate an exact definition for intrinsic utilitarian function. *Gay Toys, Inc. v. Buddy L Corp.* attempted to distinguish the term from

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[29] "It is undisputed that jewelry is included within the sculptural works classification of Section 102(a)(5)." Donald Bruce & Co. v. B. H. Multi Com Corp., 964 F. Supp. 265, 266 (N.D. Ill. 1997).

[30] Kieselstein-Cord v. Accessories by Pearl, Inc., 632 F.2d 989, 993 n.5 (2d Cir. 1980).

[31] 17 U.S.C. § 101 (2006).

[32] *Id.* (emphasis added).

[33] HOUSE REPORT, *supra* note 28, at 55 (1976).

[34] *See, e.g.*, Stephen Langs, *The Definitional Scope of an Intrinsic Utilitarian Function Under the 1976 Copyright Act: One Man's Use Is Another Man's Art*, 20 W. NEW ENG. L. REV. 143, 171-72 (1998).

[35] HOUSE REPORT, *supra* note 28, at 55 (1976).

other useful purposes, which may not rise to an intrinsic utilitarian function.[36] Other courts, such as *Brandir Int'l v. Cascade Pac. Lumber Co.* and *Poe v. Missing Persons*,[37] identified factors to determine usefulness. Moreover, courts have conveyed different approaches for establishing separability in a useful articles analysis. The Second Circuit in *Kieselstein-Cord v. Accessories by Pearl, Inc.* employed a consumer-based approach, focusing how the consumer uses the object to determine conceptual separability.[38] Five years later, the Second Circuit in *Carol Barnhart v. Economy Cover Corp.* established an object-based approach, assessing whether the function of the object drives the form to determine separability.[39] And in *Brandir*, the Second Circuit laid out a process-based approach, examining whether the form and function merge during the creation process to determine separability.[40] Below is a detailed analysis of how each case defines intrinsic utilitarian function in light of a separability analysis, and a brief overview of academic definitions.

In trying to determine whether belt buckles are copyrightable, Judge Oakes in *Kieselstein-Cord* did not delve into what, if any, intrinsic utilitarian function subsisted in the designs. Rather, he noted, "[t]he primary ornamental aspect of the [belt] buckles is conceptually separable from their subsidiary utilitarian function."[41] Throughout the opinion though, Judge Oakes failed to elaborate on what "subsidiary utilitarian function" means.[42] Ultimately, he upheld copyright protection for the etched metal belt buckles because some people wore them as jewelry, which the court determined was copyrightable subject matter.[43]

In *Carol Barnhart*, the Second Circuit looked at the function of the object to determine if four life-size polystyrene mannequins of human torsos were

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[36] 703 F.2d 970, 973 (6th Cir. 1983) (noting that while a toy airplane may have other uses, its intrinsic purpose is to portray a real airplane).

[37] 834 F.2d 1142 (2d Cir. 1987) (examining the differences in design between the wire sculptural work and the ultimate bike rack, the utilitarian reasons in implementing the design changes, manufacturing concerns, advertising costs, and promotional or marketing objectives to determine whether the bike rack was a useful article); 745 F.2d 1238 (9th Cir. 1984) (looking at expert evidence, the designer's intent, testimony regarding industry practice in the art world and clothing trade, and marketing data to assess whether the bathing suit was a useful article).

[38] 632 F.2d 989, 993–94 (2d Cir. 1980).

[39] 773 F.2d 411, 419 (2d Cir. 1985).

[40] 834 F.2d at 1148.

[41] 632 F.2d at 994.

[42] Stephen Langs, *The Definitional Scope of an Intrinsic Utilitarian Function Under the 1976 Copyright Act: One Man's Use Is Another Man's Art*, 20 W. NEW ENG. L. REV. 143, 155-56 (1998)

[43] Kieselstein-Cord, 632 F.2d at 993–94.

protectable sculptural works under the Copyright Act.[44] In fact, Judge Newman's dissent expressly noted the "intrinsic" functional purpose of the mannequins: to "serv[e] as a means of displaying clothing and accessories to customers of retail stores."[45] After evaluating the legislative history and prior case law, the court held that the mannequins were not copyrightable because their function drove their form; mannequin surfaces are inextricably intertwined with the utilitarian purpose of displaying clothes.[46] Therefore, the court ruled that the mannequins were unprotectable as useful articles.[47]

Two years later, in *Brandir*, the Second Circuit looked at a number of different factors to determine whether the plaintiff's bike rack was useful: the differences in design between the wire sculptural work and the ultimate bike rack, the utilitarian reasons in implementing the design changes, manufacturing concerns, advertising costs, and promotional or marketing objectives.[48] To determine separability, the court mainly looked at the design process.[49] It held that even though the bike rack is worthy of admiration for its aesthetic qualities alone, utilitarian concerns during the creation process significantly influenced the design.[50] Specifically, the plaintiff expanded the undulating "sine-curve" of an artistic sculpture in order to accommodate it for bikes; accordingly, the court could not establish separability for purposes of the Copyright Act.[51]

In *Gay Toys*, the Sixth Circuit attempted to carve out a definitional difference between utilitarian function and intrinsic utilitarian function to determine whether toys, specifically model airplanes, are copyrightable.[52] Judge Brown stated that designs might have uses that go beyond portraying the appearance of the object or conveying information, but those uses do not necessarily constitute the intrinsic utilitarian function of the object.[53] He acknowledged that toys are designed for children to play with.[54] Yet in terms of the

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[44] 773 F.2d at 412.

[45] *Id.* at 420. Ultimately, Judge Newman found the design features of the mannequins could constitute "conceptual separability." *Id.* at 426.

[46] *See id.* at 419. *See also* Shira Perlmutter, *Conceptual Separability and Copyright in the Designs of Useful Articles*, 37 J. COPYRIGHT SOC'Y U.S.A. 339, 365 (1990).

[47] 773 F.2d at 419.

[48] 834 F.2d 1142, 1146–48 (2d Cir. 1987).

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] 703 F.2d 970 (6th Cir. 1983).

[53] *Id.* at 973.

[54] *Id.*

Copyright Act, between unprotectable useful articles and protectable paintings, "[t]he function of toys is much more similar to that of works of art than it is to the 'intrinsic utilitarian function' of industrial products."[55] The court held that toys are copyrightable subject matter as a PGS, and are not subject to a useful articles analysis.[56]

A year later, in *Poe*, the Ninth Circuit reinforced *Gay Toys* definitional difference between usefulness and intrinsic utilitarian function.[57] Specifically, Judge Alarcon acknowledged that the swimsuit in question might have uses that go beyond portraying its own appearance, and remanded the case to the district court to determine whether such uses constitute an intrinsic utilitarian function.[58] The Ninth Circuit identified four factors that are relevant to the usefulness inquiry:

> (1) expert evidence may be offered concerning the usefulness of the article and whether any apparent functional aspects can be separated from the artistic aspects…(2) evidence of Poe's intent in designing the article may be relevant in determining whether it has a utilitarian function…(3) testimony concerning the custom and usage within the art world and the clothing trade concerning such objects also may be relevant;…and (4) the district court may also consider the admissibility of evidence as to Aquatint No. 5's marketability as a work of art.[59]

Similar to *Brandir*, these factors highlight the object's functionality in light of its aesthetic elements.

After analyzing relevant case law to determine the meaning of intrinsic utilitarian function, Professor Hick defines the term as objects that are designed with a specific function in mind (a factor mentioned in *Brandir* and *Poe*), such as a hammer that is designed to drive nails into a surface.[60] The extrinsic function, however, is derived from how consumers interact with the product—if one uses a hammer as a paperweight, that would constitute an extrinsic function of the hammer.[61] Furthermore, Thomas Byron explains how one might affix a coiled

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[55] *Id.*
[56] *Id.* at 974.
[57] 745 F.2d 1238 (9th Cir. 1984).
[58] *Id.* at 1243.
[59] *Id.*
[60] Darren Hudson Hick, *Conceptual Problems of Conceptual Separability and the Non-Usefulness of the Useful Articles Distinction*, 57 J. COPYRIGHT SOC'Y U.S.A. 37, 53 (2010).
[61] *Id.*

extension cord to a wall or use a Van Gogh painting to swat flies.[62] Yet, displaying the extension cord as art, does not eradicate the primary purpose of the object; nor does using a famous artwork for a mundane task implicate that the art piece is less intrinsically artistic.[63] Therefore, he concludes, while many objects "may serve both aesthetic and utilitarian ends, different objects intrinsically serve these ends in varying degrees."[64]

In sum, courts and academics have treated utility and aesthetics as operating on a spectrum. At one end, there are objects that are purely functional, such as certain types of hardware. At the other end, there are inherently aesthetic works, such as a painting. In between, there are more questionable works, namely belt buckles and toys, which incorporate both aesthetic and utilitarian features in the design. In determining whether the design is subject to a separability test, the Copyright Act stipulates that it must possess an intrinsic utilitarian function, which courts have failed to adequately define. While *Kisselstein Cord* explicitly identifies jewelry as a protectable aesthetic category of the Copyright Act (not subject to useful articles analysis), the latter four cases seem to question the categorization of jewelry as a purely sculptural work.

C. Cases Assessing Ring Design Against the Useful Articles Doctrine

Based on courts' interpretations of the Copyright Act, it seems that rings are copyrightable subject matter as long as they meet requirements of authorship and originality, with the latter being the more difficult to prove.[65] While one district court held that rings are useful articles, two district courts explicitly rejected this argument and instead categorized rings as protectable ornamental sculptural pieces.

In *DBC of New York, Inc. v. Merit Diamond Corp.*,[66] the Southern District of New York took the position that rings are useful articles and proceeded with a

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[62] Thomas M. Byron, *As Long as There's Another Way:* Pivot Point v. Charlene Products *as an Accidental Template for a Creativity-Driven Useful Articles Analysis*, 49 IDEA: THE INTELL. PROP. L. REV. 147, 181 (2008).

[63] *Id.*

[64] *Id.*

[65] *Compare* Weindling International, Corp. v. Kobi Katz, Inc., No. 00 Civ 2022, 2000 WL 1458788, *2 (S.D.N.Y. Sep. 29, 2000) (determining that combination of unoriginal elements in design of diamond "bridge" rings were original), *and* Diamond Direct, LLC v. Star Diamond Group, 116 F. Supp. 2d 525, 529 (S.D.N.Y. 2000) (considering the originality of diamond ring designs), *with* Vogue Ring Creations, Inc. v. Hardman, 410 F. Supp. 609, 611 (D.R.I. 1976) (holding that the ring design was "utterly devoid of any 'original creativity'" and therefore not protectable).

[66] 768 F. Supp. 414 (S.D.N.Y. 1991).

useful articles analysis.[67] The court explained how the rings' configuration—marquis stones flanked in a trillion ring setting—did not exist independently of its utilitarian counterparts.[68] The court did not include a reason why it categorized the diamond rings as useful articles; rather, the court, citing *Carol Barnhart*, reasoned, "the design of a useful article ... shall be considered a pictorial, graphic or sculptural work only if, and only to the extent that such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article."[69] After briefly conducting a separability analysis, the court held that the plaintiff's rings did not warrant copyright protection.[70]

Two district courts explicitly disagreed with the court's treatment of rings as a useful article in *DBC of New York*. Nearly a decade after, the Southern District in *Weindling Int'l, Corp. v. Kobi Katz, Inc.* stated that rings are "chiefly works of art, or more precisely ornamental sculptures, even if mass-produced."[71] After examining the combination of the rings' unoriginal elements—flaring supports, channel setting, triangle cut-outs, and sharp-edged apexes—it concluded that, in combination, the bridge ring merited copyright protection (specifically known as compilation protection).[72] Additionally, the Northern District Court of Illinois in *Donald Bruce & Co. v. B. H. Multi Com Corp.* stated that it did not agree with the defendant's reliance on the incorrect ruling in *DBC of New York*.[73] In determining whether plaintiff's Skalet Ring Line was copyrightable, the court flatly rejected the defendant's argument that rings can serve as useful articles saying, "[t]he [r]ing is purely ornamental, its sole purpose is to portray its appearance."[74] Accordingly, the court concluded that since the ring is not a useful article under § 101 of the Copyright Act, it therefore did not need to "determine whether the utilitarian aspects of the mount are separable from the sculptural elements."[75] After looking at the Skalet Ring Line's originality and assessing the validity of the copyright, the court dismissed defendant's motion for summary judgment.

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[67] *See id.* at 416-417.
[68] *Id.* at 416.
[69] *Id.*
[70] *See id.* at 417.
[71] Weindling Int'l, Corp. v. Kobi Katz, Inc., No. 00 Civ. 2022, 2000 WL 1458788, at *4 (S.D.N.Y. Sep. 29, 2000).
[72] *Id.*
[73] 964 F. Supp. 265, 267 (N.D. Ill. 1997).
[74] *Id.*
[75] *Id.*

While the Copyright Act of 1976 did not expressly include the term "artistic jewelry," for the most part, rings are considered sculptural works. The absence of any reasoning behind the useful articles analysis for the diamond rings in *DBC of New York* further demonstrates that rings should be treated on the aesthetic end of the copyright spectrum.

II
CONSIDERING RINGS AS SCULPTURAL WORKS NOT SUBJECT TO A USEFUL ARTICLES ANALYSIS

This section examines how rings are considered works of art from jewelry designers' perspective and subsequently not subject to a useful articles analysis. After delineating a brief history on jewelry, this section will bolster what it means to be an "ornamental sculpture" for purposes of the Copyright Act, looking at three relevant factors in ring designs: artistic creativity, how jewelry designers view themselves and their creations, and how rings differ from clothing, a useful article.

A. A Brief History on Jewelry: The Rise of Artistic Expression

Jewelry is an old tradition steeped in the artistic world,[76] predating the history of sculpture and even painting.[77] Yet, rings can be considered useful in many senses. Rings have taken the forms of seals for legal documents, contracts, and international treaties, have been used for talismanic reasons and amuletic properties,[78] and are still used today as portable bank accounts and to display socially meaningful codes.[79]

Paul Greenhalgh delineates how the "design" category emerged from the "decorative arts." Specifically, in the 19th century, "[t]he decorative arts steadily congealed into a salon de refuse of genres that cohered only by virtue of their exclusion [from the category of fine arts]. Outside the fine arts, there was no fixed nomenclature or hierarchy. Variously—and interchangeably—known as the decorative, useful, industrial, applied or ornamental arts, they struggled to maintain a place in intellectual life …."[80] At the end of the nineteenth century, artists engaged in craft ethic differentiated themselves from those who produced large-scale manufacturing creations, which became known as design.[81] One of the

[76] Cherry, *supra* note 1, at 6.
[77] Metcalf, *supra* note 2.
[78] Cherry, *supra* note 1, at 6.
[79] Metcalf, *supra* note 2.
[80] Paul Greenhalgh, *The History of Craft, in* THE DESIGN HISTORY READER 329 (Grace Lees, Maffei & Rebecca Houze, eds., 2010).
[81] *Id.* at 333.

purposes of rings is to adorn,[82] and therefore rings can remain as a decorative art, distinguished from a fine art. Yet, because many jewelry designers mass-produce their creations, rings can also be considered designs.

Interestingly, though, in the height of the Arts and Crafts revolution from 1970-1980 in the United States, "jewelry had begun to take a new meaning in the art world."[83] This period has been compared to the "new painting" age that developed throughout Europe between 1880-1910 and subsequently in the United States from 1940-1960.[84] The late 1960s generated revolutionary jewelry students, especially potent in the art world, who challenged longstanding conventions and questioned the very notion of jewelry.[85] With the advent of new materials and metals, jewelry designers were tooled with new ways to create "individualistic art."[86] Specifically, jewelry designers employed non-precious metals and other soft metals as well as recycled materials, new plastics, and other refractory metals that could be colored in novel ways.[87] For instance, Crangi explained how she was one of the first designers to employ rugged brass in her creations when the company launched in 2001.[88] These innovative changes in jewelry design resulted in an invigorating and challenging debate whether jewelry was still "Art with a capital A"[89,90] Overall, jewelry has evolved to a forum for "conceptual exploration and personal expression."[91]

B. Considering Rings as Works of Art

In terms of the 1976 Copyright Act, many courts have articulated that rings are not useful articles because they are ornamental sculptures with a sole purpose

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[82] HELEN W. DRUTT ENGLISH & PETER DORMER, JEWELRY OF OUR TIME: ART, ORNAMENT AND OBSESSION 12 (1995).

[83] Cherry, *supra* note 1, at 9.

[84] ENGLISH & DORMER, *supra* note 82, at 12.

[85] Cherry, *supra* note 1, at 9.

[86] ENGLISH & DORMER, *supra* note 82, at 12.

[87] Cherry, *supra* note 1, at 9.

[88] Interview with Courtney Crangi, *supra* note 4.

[89] Andy Warhol and others challenged the notion of what is art, namely "Art with a capital A." Many artists, philosophers, and writers began to take the view that art is how the viewer experienced the work, rather than the conventional rules prescribed to the creative piece: "if the artist offered a work of art and a viewer saw and understood it as art, then it must be art." Cherry, *supra* note 1, at 10.

[90] *Id.*

[91] Metcalf, *supra* note 2.

to convey appearance.[92] Moreover, artistic expression lies in how designers choose materials, how they work the materials to transform an object, and ultimately breathe new life into it.[93] Jewelry design is said to be the "highest level of craftsmanship and creativity—not blindly making [jewelry pieces] to preordained templates, but thinking through making, applying individual philosophies, personal intellect, active intuition, sensitivity, continuously inquiring and experimenting, and immense passion ...."[94] By including perspectives from jewelry designers, this section will further explain how a ring is an ornamental sculpture for purposes of the Copyright Act. Specifically, it will examine three relevant factors in ring design: artistic creativity and how the Copyright Act has aimed to protect that process; jewelry designers' perspectives and infusion of artistic concepts; and how rings differ from clothing, a useful article.

1. Artistic Creativity: Discovery in the Process

The history of the Copyright Act illustrates Congress's purpose in protecting artistic works. The Act has a rich history of explicitly including "fine art"[95] and "work[s] of art."[96] While the Act currently stipulates that PGSs qualify as a category of copyrightable subject matter, it further explains the phrase with references to art in the definitions section, saying PGS include: "works of fine, graphic, and applied *art*, photographs, prints and *art* reproductions …. Such works shall include works of *artistic* craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned ...."[97] There are also policy concerns behind the Copyright Act that seek to incentivize "authors" to create artistic works. Many academics have supported the utilitarian justification for copyright protection: the Constitution authorized copyright legislation "to promote the Progress of Science and useful Arts,"[98] thereby suggesting an incentive rationale to encourage innovative activity through a system that promotes exclusive rights for the tangible results of creative efforts.[99] Accordingly, Professor

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[92] 17 U.S.C. § 101. *See also* Weindling Int'l v. Kobi Katz Inc., No. 00 Civ. 2022, 2000 WL 1458788 at *4 (S.D.N.Y. Sep. 29, 2000); Donald Bruce & Co. v. B. H. Multi Com Corp., 964 F. Supp. 265, 267 (N.D. Ill. 1997).

[93] Cherry, *supra* note 1, at 121.

[94] *Id.*

[95] Act of July 8, 1870, ch. 230, § 86, 16 Stat. 198, 212 (repealed 1916).

[96] Act of March 4, 1909, 60th Cong., 2d Sess., 35 Stat. 1075 (repealed 1976).

[97] 17 U.S.C. § 101 (emphasis added).

[98] U.S. CONST. art. I, § 8, cl. 8.

[99] Denicola, *supra* note 14, at 722. *See* Mazer v. Stein, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to

Fromer argues that while the drafters of copyright legislation may not have had "artistic creativity" in mind, "[copyright]'s standard of originality for protectability, principally aligns with our understanding of how creativity proceeds and is valued in the artistic realm."[100] Specifically, the low bar for originality incentivizes authors to create works that are not "highly original," rather drawing on previous artistic works, which are typically in line with consumers' tastes.[101] Many ring designers employ artistic creativity, which further supports the notion that rings are sculptural works not subject to a useful articles analysis.

While scientific creativity seeks to find practical solutions for problems, artistic creativity focuses on the problem, posing questions to an audience to provoke debate and discussion.[102] The spirit of open-ended inquiry coincides with the Copyright Act's requirement of originality, as the author identifies a problem and fixes it in a work of art.[103] While jewelry is not considered a fine art in the strict sense, many jewelry designers see themselves as using artistic creativity in the process.[104] Norman Cherry interviewed seventeen jewelry designers, many who describe their creative process in artistic terms. For example, Simon Cottrell creates his designs in a structured form of improvisation, similar to how a jazz musician develops an initial theme and, through a complex combination of prior knowledge, experience, and intuition, eventually reaches a final destination.[105] Additionally, Ruudt Peters conveys that alchemy is a process in jewelry design that transmutes "prosaic materials into a visual poetry."[106]

Moreover, jewelry designers are actively engaged in a method referred to as "discovery of the problem," which involves both "deciding which artistic medium, materials, and represented objects will be used" and "harnessing experiences and themes for artistic expression."[107] Most jewelry artists do not rigidly follow a blueprint in the design process; they employ a number of different methodologies

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advance public welfare through the talents of authors and inventors in 'Science and useful Arts."). *See also* Jeanne C. Fromer, *A Psychology of Intellectual Property*, 104 NW. U. L. REV. 1441, 1457-58 (2010).

[100] Fromer, *supra* note 99, at 1492.

[101] *Id.* at 1492, 1497.

[102] *Id.* at 1444. *See also* discussion *infra* Part II.B.2 (explaining how jewelry designers infuse of artistic concepts into their designs).

[103] Fromer, *supra* note 99, at 1444.

[104] *See generally* Cherry, *supra* note 1.

[105] *Id.* at 42.

[106] *Id.* at 92.

[107] Fromer, *supra* note 99, at 1467.

for their creations.[108] Gruenberg states that "[m]uch of what I do is instinctive … I don't consciously follow a step-by-step process to construct a ring."[109] When creating the ring template for 3D printing, she says that she designs, experiments with components, reacts, and then redesigns—like drawing through materials.[110] During the process new problems may arise and the artist is tempted to reframe that problem.[111] For instance, Peter Skubik designed a mercury ring by creating a mold, pouring liquid mercury into the mold and cooling the mercury in carbon dioxide snow to solidify it.[112] Once he removed the solidified ring from the mold, the ring melted a little and lost its form.[113] It created a dripping effect, calling attention to the malleable metal in relation to the sturdy mold.[114] Lastly, Courtney Crangi commented on her brother Phillip Crangi's designs saying that during college he noticed how "steel and gold love to live together;" he has since created a fine jewelry line that includes rings that combine the two materials.[115]

Figure 1: Phillip Crangi's Fine Jewelry Line[116]

Accordingly, copyright law rewards many artists and writers for articulating a particular emotion or subjective concept into a tangible work, rather than "only one problem solution receives the prize of copyright," as in the patent regime.[117]

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[108] Cherry, *supra* note 1, at 121.

[109] Interview with Tanya Gruenberg, Creative Director/Jewelry Designer, Studio Grun, in New York City, N.Y. (Mar. 3, 2015).

[110] *Id.*

[111] Cherry, *supra* note 1, at 16.

[112] *Id.* at 106.

[113] *Id.*

[114] *Id.*

[115] Interview with Courtney Crangi, *supra* note 4; *see also* PHILLIP CRANGI DESIGNS, http://www.philipcrangi.com/collections/womens-rings (last visited May 19, 2015).

[116] PHILLIP CRANGI DESIGNS, *supra* note 115.

Overall, the Copyright Act's low originality threshold is designed to award the use of artistic creativity. Many jewelry designers describe their creation process in poetic terms and focus on the discovery of a problem, which mirrors the creative process of other artists, musicians, and writers. Thus, jewelry should be considered on the aesthetic side of the copyright spectrum not subject to a useful articles analysis as it incentivizes jewelry designers to engage in artistic creativity.

2. Designers' Perspectives

As the *Brandir* and *Poe* courts noted, one factor in determining usefulness is the designer's intent in creating the object. Specifically, Professor Hick explains that the intrinsic utilitarian function is mainly derived from how the designer purposed the object.[118] Accordingly, it is important to see how jewelry designers view their pieces to determine whether rings qualify as useful articles. To many designers and academics, jewelry is considered "one of the most vibrant, exciting and challenging contemporary art forms."[119] Many jewelry designers see themselves as artists.[120] In line with the 1976 Copyright Act's objectives, jewelry designers have compared their work to that of a sculptor.[121] Similar to sculptural objects, rings "consist of a physical object that has its own discrete existence."[122] In fact, Skubik views his rings in isolation from the body and sees them as art even when it is not worn.[123]

While there is a commercial component to jewelry design, Tanya Gruenberg, the creator of Studio Grun jewelry designs, states that she manages the production as a businesswoman, yet creates as an artist.[124] For sales, she has to think formulaically, keeping track of her cash flow and inventory.[125] As an artist, she sees her rings as a platform for investigating the interplay of a diverse range of mixed media—3D printing, plastic molds, and gemstones—to highlight a "unique degradation aesthetic while maintaining elegant accents."[126] Other jewelry designers infuse different art world concepts into their designs, such as abstraction,

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[117] Fromer, *supra* note 99, at 1493.
[118] Hick, *supra* note 60, at 53.
[119] Cherry, *supra* note 1, at 10.
[120] Metcalf, *supra* note 2. *See* Cherry, *supra* note 1, at 13-17.
[121] *See e.g.*, *Designer Profile: Philip Crangi*, STYLE CASTER (2009) http://stylecaster.com/designer-profile-philip-crangi/ ("I see jewelry as small sculptural piece, so really for me, this is a sculptural pursuit.").
[122] Metcalf, *supra* note 2.
[123] Cherry, *supra* note 1, at 105.
[124] Interview with Tanya Gruenberg, *supra* note 109.
[125] *Id.*
[126] *Id.*

minimalism, and color schemes. Along with her husband, Emmy van Leersum creates pieces in an abstract manner that "rejected the craft tradition of the silversmith and strove instead to eradicate any trace of personal expression from their creations."[127] Additionally, Otto Künzli highlights social critique, frequently disparaging the pretentions of jewelry in his pieces.[128]

Figure 2: Emmy van Leersum – Broken Lines Ring[129]

Figure 3: Otto Künzli – Seal Ring[130]

[127] CURRENT OBSESSION, *The Gijs + Emmy Show*, http://current-obsession.com/THE-GIJS-EMMY-SHOW (last visited March 19, 2016).

[128] DOMUS, *Otto Künzli Jewellery*, http://www.domusweb.it/en/news/2014/08/18/otto_kunzli_jewellery.html (last visited March 19, 2016).

[129] CHP JEWELRY, http://shop.chpjewelry.com/design-jewelry-chp22-broken-lines-ring-emmy-van-leersum-gold (last visited May 19, 2015).

[130] PINTEREST, https://www.pinterest.com/pin/468655904947185241/ (last visited May 19, 2015).

Lastly, Irene Neuwirth, a native from South California, explains that her inspiration is the ocean: "[i]ts purity, power and colors are all key elements at the origin of her designs."[131]

Figure 4: Irene Neuwirth – Gemstone Hexagonal Ring[132]

Overall, many jewelry designers see themselves as artists and incorporate many artistic themes into their pieces, thereby highlighting how jewelry is more of an art form for purposes of the Copyright Act.

3. Adornment Purposes of Rings: Distinct from Clothing

While other useful articles certainly incorporate artistic styles in their designs,[133] rings are inherently different from other industrial designs. As mentioned, the copyright system treats fashion pieces as useful articles,[134] and most jewelry designs as sculptural ornamental pieces.[135] However, many designers would submit that the nature of rings is innately tied to the human finger as rings

[131] IRENE NEUWIRTH JEWELRY, http://ireneneuwirth.com/ (last visited May 19, 2015).

[132] BARNEYS NEW YORK, http://www.barneys.com/irene-neuwirth-gemstone-hexagonal-ring-503107450.html (last visited May 19, 2015).

[133] *See e.g.*, MINIMALISSIMO MAGAZINE, http://minimalissimo.com/2009/08/humidifier/ (last visited May 19, 2015) (a minimalist humidifier); ARCHITECTURE, ART & DESIGN, http://www.architectureartdesigns.com/27-cool-furniture-ideas-inspired-by-pop-art/ (last visited May 19, 2015) (pop art chairs).

[134] *See* United States Copyright Office, Rules and Regulations for the Registration of Claims to Copyright 12(g) (1917) (listing "garments" among works that should not be registered).

[135] *See* Weindling Int'l v. Kobi Katz Inc., No. 00 Civ. 2022, 2000 WL 1458788, at *4 (S.D.N.Y. Sep. 29, 2000); Donald Bruce & Co. v. B. H. Multi Com Corp., 964 F. Supp. 265, 267 (N.D. Ill. 1997).

are made—and imagined—to be worn.[136] In this regard, rings are similar to garments in that the body is the site of the creative work. However, rings are remarkably different in the sense that they do not protect people from cold temperatures, which could be considered an intrinsic utilitarian function of clothing.[137] Additionally, clothing is used for modesty purposes in many cultures,[138] whereas rings could be said to have a complete opposite function—they mainly serve an adornment purpose: "it beautifies, within the value system of the local culture, and sometimes renders the wearer socially or sexually desirable."[139] Of course, fashion designs can accomplish the same objective, but the copyright system does not treat that as a primary objective of clothing.[140] Unlike clothing, which in most parts of the world you are legally required to wear, donning rings is a choice.[141] Many jewelry designers would submit that the primary purpose of rings is to decorate fingers and convey a specific style.[142]

Similar to clothing, though, jewelry designers must cater to trends, and in order "to be complete," their designs should be purchased and worn by others.[143] Many traditional artists are generally free from those "constraints of commerce,"[144] whereas many jewelry designers have to develop a business sense. Furthermore, English and Dormer argue that art "confers a status upon an object that is currently higher than and different from the status of craft or design" seen in jewelry.[145] However, the Copyright Act still considers many sculptural works as works of art, even if they are mass-produced or marketed for commercial purposes.[146] Judge

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[136] Metcalf, *supra* note 2.

[137] *Id.*

[138] ART, DESIGN & VISUAL THINKING: AN INTERACTIVE TEXTBOOK, http://char.txa.cornell.edu/art/dress/dress.htm (last visited May 19, 2015).

[139] Metcalf, *supra* note 2.

[140] *See* Raustiala & Sprigman, *supra* note 3, at 1745–55.

[141] *Id.*

[142] ENGLISH & DORMER, *supra* note 82, at 20 ("Ornament and decoration are still important objectives in jewelry design.").

[143] *Id.* at 13.

[144] *Id.*

[145] *Id.* at 13-14.

[146] *See* HOUSE REPORT, *supra* note 28, at 54 ("In accordance with [*Mazer*] works of "applied art' encompass all original pictorial, graphic, and sculptural works that are intended to be or have been embodied in useful articles, regardless of factors such as mass production, commercial exploitation, and the potential availability of design patent protection."); *see also* Mazer v. Stein, 347 U.S. 201, 217-18 (1954) (We find nothing in the copyright statute to support the argument that the intended use or use in industry of an article eligible for copyright bars or invalidates its registration.").

Rakoff in *Weindling International*, points out "[a]rtistic design, after all, is at the very heart of the jewelry business, even in its crasser commercial forms."[147]

Furthermore, some designers see their rings as a more "intimate" art form between the creator and audience.[148] The weight of a ring combined with its "texture and size" on one's finger and size serves as a tactile "constant reminder of its presence."[149] Moreover, a ring, after being worn for years, "acquires a patina of age and even conforms itself to the shape of the finger."[150] While clothing and jewelry share similar elements, a ring's primary purpose is to adorn, which makes it more of an ornamental sculptural work for purposes of the Copyright Act. Additionally, the copyright system and its low threshold for originality is designed to afford tangible rights to the artistic creative efforts of designers. Since, many jewelry designers engage in artistic creativity (focusing on the problem) and infuse their designs with artistic concepts (expressing a particular problem), their designs should be protected as aesthetic works.

III
CONSIDERING RINGS AS USEFUL ARTICLES SUBJECT TO A SEPARABILITY TEST

As mentioned, jewelry is considered a sculptural work under the Copyright Act. The Copyright Act of 1976 further distinguishes between sculptural works and sculptural works that are useful articles with an "intrinsic utilitarian function," and affords protection to the latter as long as their artistic features "can be identified separately from, and are capable of existing independently of, the useful design."[151] Given that rings do possess some functional uses, this section assesses whether those uses constitute an "intrinsic utilitarian function" in terms of the Copyright Act. Both *Gay Toys* and *Poe* have explained that not all uses rise to the level of intrinsic utilitarian function.[152] Continuing, this section examines functional aspects underlying ring designs, such as those considered in *Brandir*, and assess whether that is an important factor in determining intrinsic utilitarian function. Lastly, the section analyzes critical reception of rings, and how the copyright system considers museum display.

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[147] Weindling Int'l v. Kobi Katz Inc., No. 00 Civ. 2022, 2000 WL 1458788 at *4 (S.D.N.Y. Sep. 29, 2000).

[148] Metcalf, *supra* note 2.

[149] *Id.*

[150] *Id.*

[151] 17 U.S.C. § 101 (defining a "useful article" as "an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information").

[152] *See supra* Part I.B.2.

A. The Purposes of Rings: Examining their Intrinsic Functionality

A ring can possess a number of functional purposes; it can be used as an amuletic power, a portable bank account, a signifier of status, and an allurement to one's hands. After examining each of these uses, this section will conclude that some of these uses are more extrinsic functions, not rising to the level of intrinsic utilitarian function for purposes of the Copyright Act.

Some people buy rings for the talismanic power of the gemstones. In line with popular culture, the American Gem Society designates a different gemstone that contains a unique mystic meaning to each calendar month. For instance, Garnet, the birthstone of January, is "known to promote romantic love, passion, sensuality, and intimacy."[153] Accordingly, Jewelry by December 1967, a designer on Etsy, lists a Mozambique Garnet Ring and explains "[g]arnet is said to be the stone of romantic love and passion, enhancing sensuality, sexuality, and intimacy."[154]

Figure 5: Jewelry by December 1967 – Mozambique Garnet Ring[155]

Additionally, the Mystical Maven, another seller on Etsy, presents a Golden Garnet Ring, which she describes as a ring that will allure the opposite sex if the other person touches the ring while the owner is wearing it.[156]

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[153] AMERICAN GEM SOCIETY, *The Healing Power of Gemstones*, http://www.americangemsociety.org/healing-gemstones (last visited May 19, 2015).

[154] ETSY, https://www.etsy.com/listing/233352938/mozambique-garnet-ring-sterling-silver?ga_order=most_relevant&ga_search_type=handmade&ga_view_type=gallery&ga_search_query=garnet%20ring%20love&ref=sr_gallery_42 (last visited May 19, 2015).

[155] *Id.*

[156] ETSY, *Golden Garnet Ring*, https://www.etsy.com/listing/232005178/golden-garnet-ring-love-spellinfused?ga_order=most_relevant&ga_search_type=handmade&ga_view_type=gallery&ga_search_query=garnet%20ring%20love&ref=sr_gallery_2 (last visited May 19, 2015).

Moreover, certain cultures attach mystic powers to certain gemstones, such as the Chinese who consider the rich luster of jade to be very lucky.[157] In illustrating the talismanic forces of the jade stone, Melissa Chang conveys, "[w]hen [my dad] first started wearing [the jade ring], he told me that the deeper the green was, the more good luck it brought. He always wore it to Vegas and as far as I know, he did pretty well on the craps table."[158] While these amuletic powers of rings can qualify as a function, it would be quite difficult to prove actual, intrinsic utilitarian function from anecdotes. The question also remains: to what extent should mystic powers qualify as utilitarian? Indeed, the *Gay Toys* court stated "[t]he intention of Congress was to exclude from copyright protection industrial products such as automobiles, food processors, and television sets."[159] Mystical purposes do not seem to be in line with Copyright Act's intention of excluding useful industrial objects.

Rings are still used today as portable bank accounts because the nature of small-scale jewelry allows wealth to be hidden easily and safely.[160] While this may not be the traditional use, this use constitutes an extrinsic function of a ring, in the same manner as when a person uses a hammer as a paperweight.[161] Jewelry designers generally do not design a ring so that it can be quickly converted into cash. As mentioned in Part II.B.ii, jewelry designers see themselves as artists and incorporate many artistic elements into their designs. Moreover, various paintings could be said to serve as portable bank accounts in the form of investment art, yet, that feature does not prevent courts from categorizing paintings as purely aesthetic and entitled to copyright protection.

Rings can also be used to display socially meaningful codes.[162] For the most part, though, rings have shifted from conveying class identity, to being more

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[157] CULTURAL CHINA, *A Brief Introduction of Chinese Jade-Culture*, http://arts.cultural-china.com/en/32Arts4663.html (last visited May 19, 2015).

[158] JADE GALLERY HAWAII, *The Power of Jade*, http://www.jadegalleryhawaii.com/power-of-jade.htm (last visited Feb. 3, 2016).

[159] Gay Toys, Inc. v. Buddy L Corp., 703 F.2d 970, 973 (6th Cir. 1983). These categories are subject to patent protection, which requires "novelty," a more demanding standard. *See generally* Joseph Scott Miller, *Hoisting Originality*, 31 CARDOZO L. REV. 451, 465-67 (2009).

[160] Metcalf, *supra* note 2.

[161] *See supra* Part I.B.2.

[162] *See* Metcalf, *supra* note 2. *See also* Kristen Booker, *What Happens When the World Doesn't Understand Your Hair*, MARIE CLAIRE (Mar. 4, 2015, 4:23 PM), http://www.marieclaire.com/beauty/news/a13591/what-happens-when-the-world-doesnt-understand-your-hair/ (commenting on the status of a David Yurman ring and how NY subway goers find it unlikely for an African-American woman with curly hair in a full twist out to own a real one).

stylistic choices that can distinguish the wearer or merge the wearer with a particular style.[163] According to the Copyright Act's definition of a useful article, though, social identity markers can be analyzed as merely conveying information, and therefore jewelry should not be considered useful in that sense. Moreover, a number of objects convey social status and identity, such as a handbag or a car, but that does not necessarily speak to their intrinsic utilitarian function; a handbag is known to hold items and a car is known as a method of transportation.

Lastly, donning rings certainly draws attention to one's hands, "appeal[ing] to potential mates."[164] As *Gay Toys* alluded to, many purely aesthetic objects can have some uses.[165] Art pieces do not only serve informational or decorative purposes; they can also arouse passions, offer escape, and serve as a forum of dialogue and contemplation.[166] Drawing attention to one's hands can serve as an aesthetic experience, heightening the artistic essence of the ring. Furthermore, that visual experience bolsters the idea that rings fall more on the aesthetic side of the copyright spectrum. After all, even though an art piece can have functional characteristics derived from emotive power or historical meaning, such characteristics do not make it a useful article under copyright law.[167]

In light of the legislative history behind the Copyright Act and case law, these aforementioned uses do not rise to the level of intrinsic utilitarian function. The legal doctrine of functionality should not be broadened to include extrinsic functions or further aesthetic functions, as that can render even an art piece a useful article.

B. Functional Considerations Behind Ring Design

While jewelry designers take into account a number of considerations in designing a ring, they inevitably take function into account. Alice Sprintzen, a jewelry designer who wrote an instructive book on basic jewelry techniques, emphasized the importance in accounting for functional concerns in the design

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[163] Possibly with the exception of engagement rings, which can still serve as class identifiers. *See The History of Jewelry: Why do we Wear Jewelry?*, SAY WHY DO I (Sept. 3, 2011), http://www.saywhydoi.com/the-history-of-jewelry-why-do-we-wear-jewelry/.

[164] *See id.*

[165] Gay Toys, Inc. v. Buddy L Corp, 703 F.2d 970, 973 (6th Cir. 1983).

[166] Hick, *supra* note 60, at 53. "Alternatively, several theorists have argued that the function of art is to bring about the 'aesthetic experience,' to produce 'aesthetic contemplation,' or to yield 'aesthetic satisfaction." *Id*.

[167] Melissa M. Mathis, *Function, Nonfunction, and Monumental Works of Architecture: An Interpretive Lens in Copyright Law*, 22 CARDOZO L. REV. 595, 621 (2001).

process.[168] Specifically, a designer should consider the weight of the item, flexibility of the material, any protrusions on a piece that might catch clothing, and external circumstances.[169] In the section about wax casting a ring, Sprintzen instructs designers to slightly enlarge wide band rings to allow for finger swelling in hotter seasons.[170] Danielle Frankel Nemiroff, one of the co-designers for Phillips House fine jewelry said, "functionality and comfort are not the leading concerns in the design process, but definitely are important" in the design process.[171] Nemiroff's design philosophy is to create "pretty pieces" that one can wear comfortably; she mentioned that she will not create a ring with a sharp spike that can potentially hurt a young child or damage an evening gown.[172]

Figure 6: Phillips House – No. 3 Hexagon Ring[173]

[168] *See* ALICE SPRINTZEN, JEWELRY, BASIC TECHNIQUES AND DESIGN, 6 (1980).
[169] *Id.*
[170] *Id.* at 74.
[171] Interview with Danielle Frankel Nemiroff, Co-Designer, Phillips House, in N.Y.C., N.Y. (Apr. 2. 2015).
[172] *Id.*
[173] *No. 3 Hexagon Large Ring*, THE SHOP BY PHILLIPS HOUSE, http://shop.phillipshouse.com/collections/rings/products/yg-am-no-3-large-hex-ring (last visited May 19, 2015).

While Gruenberg sees herself as artist, she says she also takes ergonomics and negative space into account when designing a ring, especially for her King Crown Ring that goes above and below the knuckle.[174]

Figure 7: Studio Grun – King Crown Ring[175]

Specifically, she tries to create lighter, more comfortable rings.[176] Additionally, Jennie Kwon, another jewelry designer, stated that she does not want women to be burdened in removing her pieces when washing their hands; rather she creates delicate designs that will not be cumbersome to the wearer.[177]

Figure 8: Jennie Kwon – Black Diamond Mini Deco Point Rings[178]

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[174] Interview with Tanya Gruenberg, *supra* note 109. Studio Grun cuffs, however, are designed heavier to signify luxury. *Id.*

[175] *King Crown Ring*, STUDIO GRUN, http://www.studiogrin.com/shop/companion-ring-turquoise (last visited Feb. 18, 2016).

[176] Interview with Tanya Gruenberg, *supra* note 109.

[177] *See* Maia Adams, *Fine Jeweller Jennie Kwon*, ADORN JEWELLERY BLOG (May 9, 2014), http://www.adorn-london.com/profile/jennie-kwon/.

[178] *Black Diamond Mint Deco Point Ring*, JENNIE KWON DESIGNS, http://jenniekwondesigns.com/products/black-diamond-mini-deco-point-ring (last visited May 19, 2015).

Yet, does accounting for functional concerns during the design process bestow an intrinsic utilitarian function on the object? While the *Brandir* court analyzed the creation process as a main factor in determining separability,[179] it does not necessarily indicate that the object has an intrinsic utilitarian function. Due to the nature of the ribbon bike rack, which was derived from a wire sculpture, the *Brandir* court collapsed the useful article inquiry with the separability analysis in trying to establish copyrightable subject matter.[180] Thus, whether the design process was heavily influenced by utilitarian concerns should be more of a question for separability, especially when considering the primary purpose of the object. In essence, ring designers are creating for a finger, their canvas, and are naturally limited by that medium's constraints. Rings are worn on the human finger, which imposes functional considerations of weight, height, and scale, but there still remains considerable room for creativity and expression.[181]

C. Critical Reception: Does It Matter?

Art collectors, art museums and critics in the art market do not typically think of jewelry as a fine art, such as a painting or a sculpture.[182] Specifically, English and Dormer maintain that the Museum of Modern Art or the Venice Biennale do not feature jewelry prominently in their collections, and it rarely appears in art periodicals such as *Art Forum*.[183] The Museum of Art and Design, however, recently presented a "stunning array of extravagant fashion jewelry" from June 2013–April 2014.[184] Additionally, from November 2013–March 2014, the Metropolitan Museum of Art had an exhibit titled Jewels by JAR (Joel A. Rosenthal) with bedazzled, vibrant jewelry pieces using the pavé technique.[185] It was the first retrospective at the Museum tailored to a contemporary artist of gems.[186] Yet, these examples perhaps highlight jewelry as more of a craft, rather than an art. Indeed, the Museum of Art and Design, formerly known as the Museum of Contemporary Crafts, has exhibits that feature other useful articles

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[179] *See* Brandir Int'l v. Cascade Pac. Lumber Co., 834 F.2d 1142, 1148 (2d Cir. 1987).

[180] *See id.* at 1143, 1148.

[181] Metcalf, *supra* note 2.

[182] *See* ENGLISH & DORMER, *supra* note 82, at 14

[183] *Id.*

[184] MUSEUM OF ART & DESIGN, *Fashion Jewelry: The Collection of Barbara Berger*, http://madmuseum.org/exhibition/fashion-jewelry (last visited May 19, 2015).

[185] THE METROPOLITAN MUSEUM OF ART, *Jewels by JAR*, http://www.metmuseum.org/about-the-museum/press-room/exhibitions/2013/jewels-by-jar (last visited May 19, 2015).

[186] *Id.*

such as "Ralph Pucci: The Art of the Mannequin."[187] Olaf Skoogfors, one of the main jewelry designers involved in the evolution of the abstractionist, formal approach, said, "I consider myself to be an artists as well as a craftsperson. The same efforts that go into painting or sculpture go into my jewelry. If this medium is a lesser art, than I am a lesser artist."[188] Even though jewelry can be considered a craft, it still falls more on the aesthetic side of the copyright system, which is perhaps bolstered by a recent expanded notion of art in the museum world.

Furthermore, whether jewelry is featured in a museum is not a primary concern for purposes of the Copyright Act. While the *Kieselstein* court noted that two of the belt buckles at issue in the case were placed on display in the Metropolitan Museum of Art in ruling that the buckles were protected by copyright,[189] museum placement merely serves as an additional argument for copyright protection rather than a prerequisite. Judge Rakoff in *Weindling International* commented that it was highly doubtful that the bridge ring in question would appear in the Met, but noted how "the law of copyright protects the modest creations of the humble versifier who churns out greeting cards as much as it does the thrilling inventions of a poet laureate."[190] After all, the Supreme Court in *Feist Publications v. Rural Telephone Co.* defined the originality requirement as merely "some minimal degree of creativity…some creative spark, 'no matter how crude, humble, or obvious' it might be."[191] Because mass-produced jewelry will inevitably be designed in non-original ways, it still may warrant copyright protection "if the creative spark behind a commercial jewelry design is more like a flickering match than a bolt a lightning."[192] Therefore, originality remains a primary prerequisite for aesthetic works.

In sum, rings should not be considered useful articles subject to a separability test. While rings certainly have uses, these uses do not qualify as an

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[187] MUSEUM OF ART & DESIGN, *Ralph Pucci, The Art of the Mannequin* http://madmuseum.org/exhibition/ralph-pucci (last visited May 19, 2015); *cf.* Carol Barnhart v. Economy Cover Corp., 773 F.2d 411 (2d Cir. 1985) (holding a mannequin as a useful article).

[188] ENGLISH & DORMER, *supra* note 82, at 20.

[189] Kieselstein-Cord v. Accessories by Pearl, Inc., 632 F.2d 989, 991 (2d Cir. 1980).

[190] Weindling Int'l v. Kobi Katz Inc., No. 00 Civ. 2022, 2000 WL 1458788 at *4 (S.D.N.Y. Sep. 29, 2000) (probably referring to *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106 (9th Cir. 1970), which granted Copyright protection to greeting card that paired a simple, trite drawing on the outside with the phrase "I love you" on the inside.)

[191] 499 U.S. 340, 345 (1991). Although the Court acknowledged that "the requisite level of creativity is extremely low" and that "even a small amount will suffice," it concluded that white-page telephone directories fail to meet the Copyright Act's originality requirement. *See id.*

[192] Weindling Int'l, Corp., 2000 WL 1458788, at *4.

intrinsic utilitarian function in light of case law and the legislative history behind the Copyright Act. While jewelry designers generally account for functional considerations in the design process, these considerations serve more as a factor for determining separability. While the designer is inevitably going to run into practical issues by designing a ring for a finger, a great deal of artistic expression can exist within those confines. Lastly, museum placement is an added benefit in asserting copyrightability, and rings can still be an aesthetic work despite some historical notions that it served as a craft.

CONCLUSION

Ring design is an art in many senses: many jewelry designers use artistic creativity in making these ornamental sculptural pieces that leave an intimate relationship between the maker and bearer. At the same time, though, rings have been considered useful, especially when they were used as seals or to signify a class. Given the new wave of "individualistic art" during the height of the Arts and Craft Revolution, some of the old purposes of rings were diminished. As inventiveness has become a prominent objective in jewelry design, functionality is often neglected.[193] With the advent of new metals available during the 1960–80s, jewelry designers began to use a number of different materials and tools, employing new methods to create "individualistic art."[194] Considering themselves as artists, jewelry designers seldom create "straight 'social jewelry'" with familiar meanings such as class rings or wedding/engagement rings; "[s]tripped of familiar codes and functions, jewelry has become a vehicle for purely artistic issues"[195] in line with the Copyright Act's objectives.

After examining the purposes behind the Copyright Act and conversing at length with designers, I argue that jewelry rings lie more on the aesthetic side of the copyright spectrum. Since they do not possess an intrinsic utilitarian function, they should not be subject to a useful articles analysis. The process of designing rings certainly takes functional features into account,[196] and could seem confusing against the backdrop of the useful articles doctrine. Yet, courts have pointed out that the primary purpose of rings is to adorn. Designers employ artistic creativity in creating rings, which the Copyright Act is designed to protect. Also, designers see

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[193] *See* Metcalf, *supra* note 2.

[194] ENGLISH & DORMER, *supra* note 82, at 12.

[195] *See* Metcalf, *supra* note 2.

[196] *Cf.* Carol Barnhart v. Economy Cover Corp., 773 F.2d 411 (2d Cir. 1985) (deciding a mannequin was a useful article because the function was driving the form). *See also* Brandir Int'l v. Cascade Pac. Lumber Co., 834 F.2d 1142 (2d Cir. 1987) (holding a bike rack uncopyrightable because form and function merged during the design process).

themselves and their creations as art, which further indicates that rings do not contain an intrinsic utilitarian function. Categorizing the functions of a ring as intrinsically utilitarian would unduly expand the functionality doctrine and could render works of art as useful articles. While jewelry designers consider how a ring fits comfortably around a finger, they incorporate artistic elements to convey a personal story through the details. In articulating a particular expression in a tangible form, jewelry designers should be entitled to robust copyright protection for their rings—specifically, as sculptural works not subject to a useful articles analysis.