Subject Matter and Special Cases

Copyright Law – Professor Grimmelmann
Class 5 – September 9, 2008

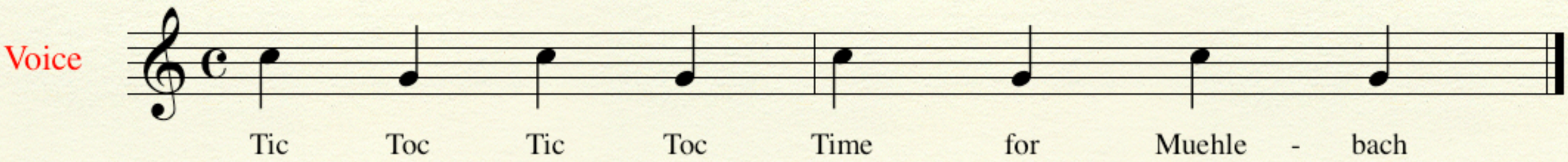
Subject Matter

Statutory categories

- literary works
- musical works
- dramatic works
- choreographic
- audiovisual
  - motion pictures
- sound recordings
- architectural works

Tic Toc Time for Muehlebach

Leonard Smith



“musical work” vs. “sound recording”

copy-based

architectural

PGS

literary

musical

sound recording

audiovisual

dramatic

choreographic

performative

Subject matter reminders

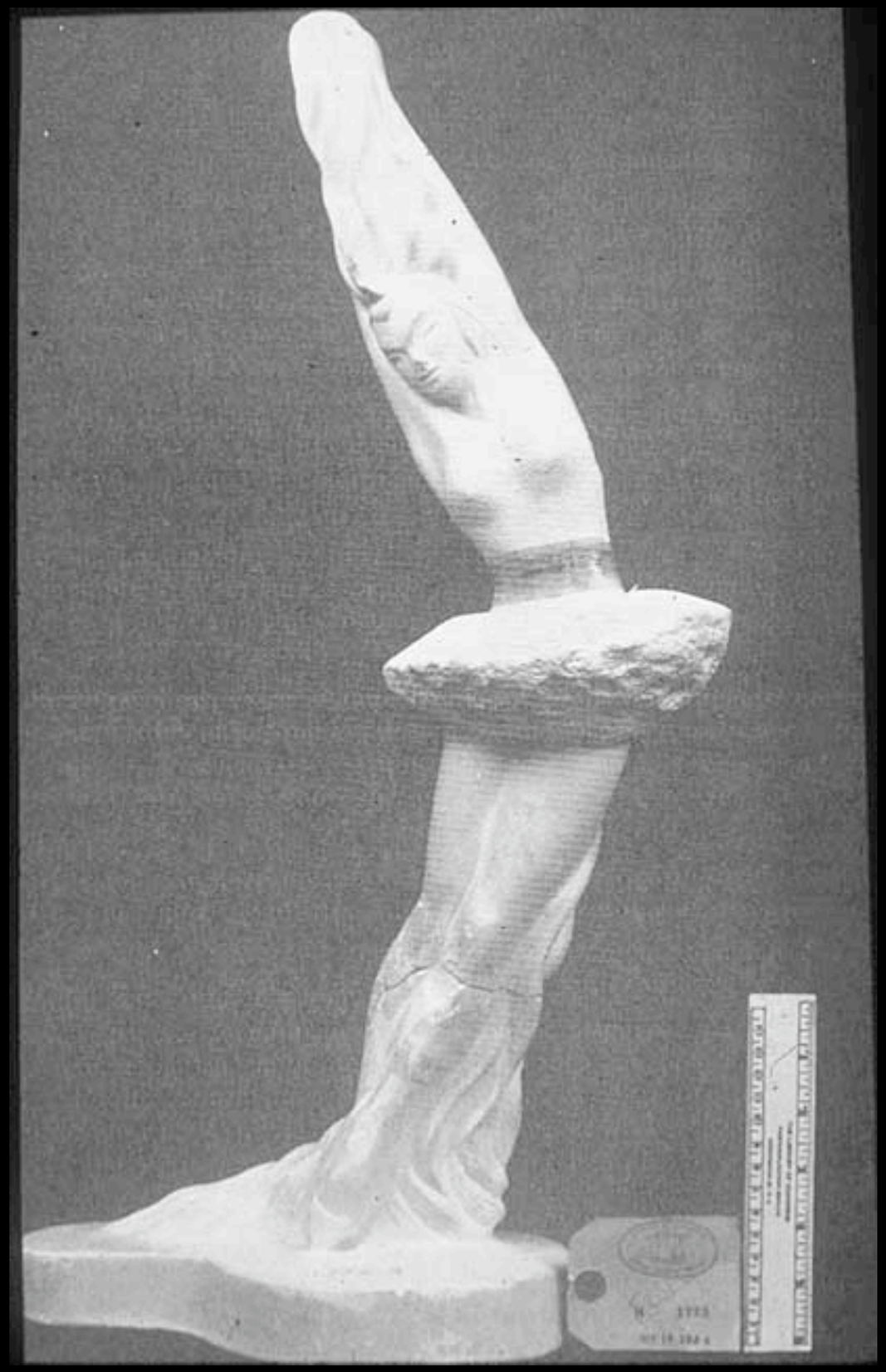
- Read the definitions closely!
- The list is non-exclusive
- Categories affect certain exclusive rights
- Categories matter on registration forms

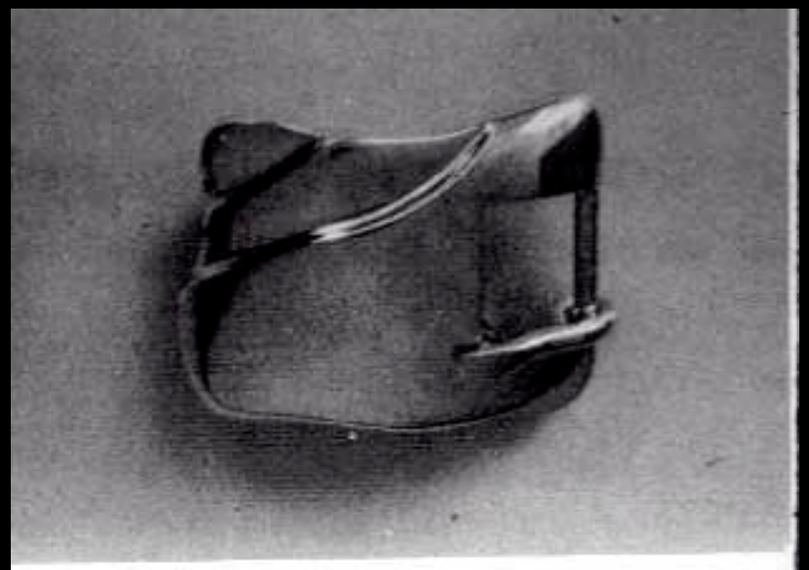
Useful Articles, Fashion, and Design

The useful article rule

- Pictorial, graphical, and sculptural works are copyrightable
- BUT "the design of a useful article" is *not* considered a copyrightable PGS work
- UNLESS its PGS features are *separable* from its utilitarian aspects
  - physically or conceptually

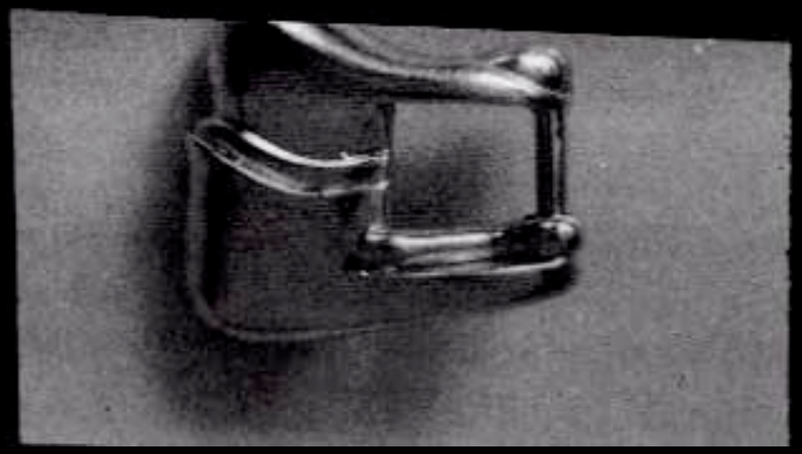
Copyrightable?





The Vaquero buckle.

Copyrightable?



Possible factors/tests

- Do art experts think that it's "art?"
- Did the artist intend to create "art?"
- Does the ordinary observer see it as "art?"
- Was the design dictated by utilitarian considerations? Influenced by them? Something in between?

copyrightable?

18k gold iPod shuffle

New frontiers in design copyrights

- ch. 9: semiconductor mask works
- ch. 13: vessel hulls
- DPPA (proposed): fashion?

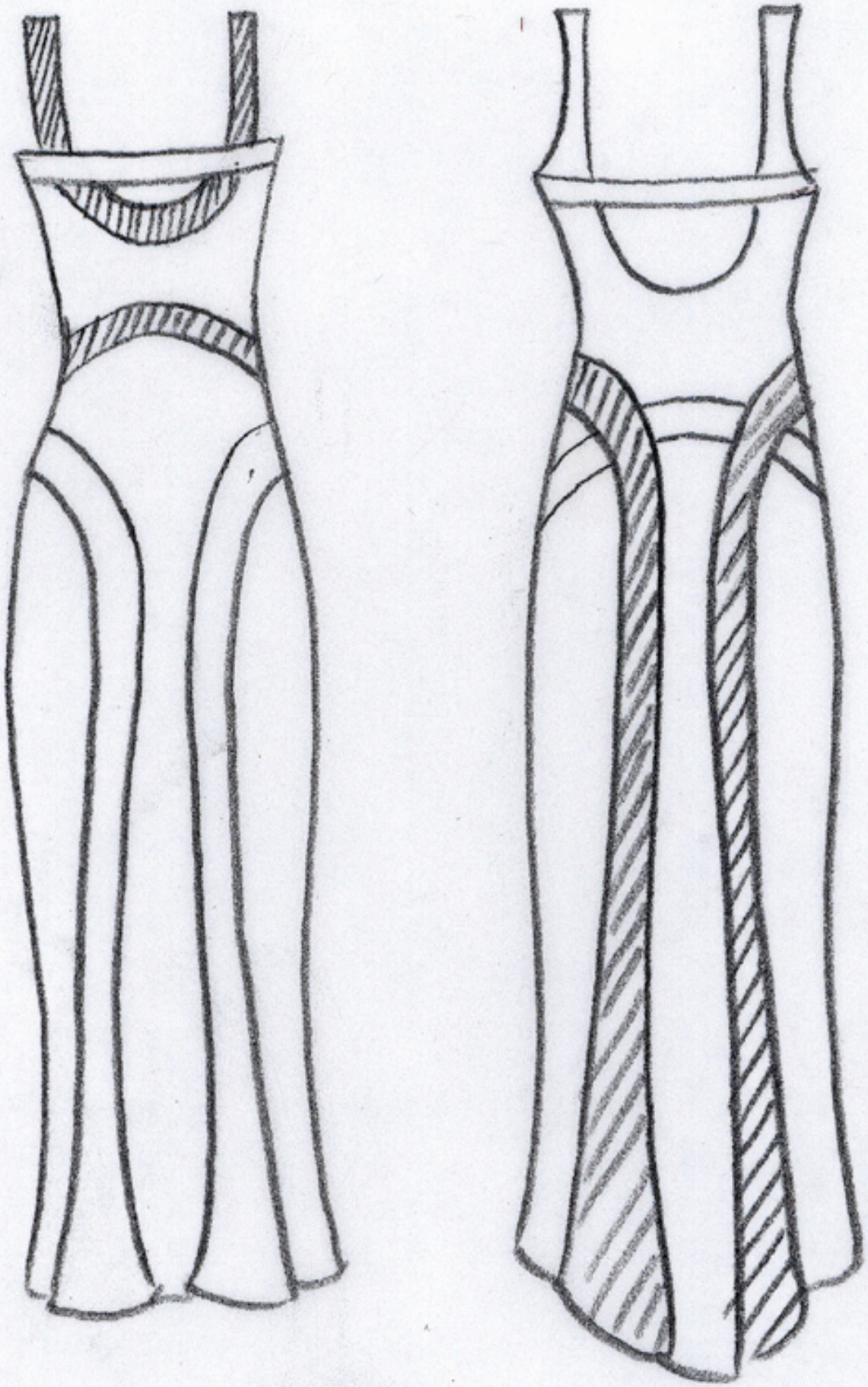
Infringement?

SPLURGE:
Pima cotton top, $350, linen skirt, $650, Michael Kors; ballet flats, $135, London Sole; turquoise-pendant necklace, $1355, Stephen Dweck; large bangle, $80, small bangles, $55 each, Dinosaur Designs; sunglasses, $200, Ralph Lauren.

STEAL:
Top, $59, Club Monaco; skirt, $54, The Limited; ballet flats, $12.99, Xhilaration at Target; turquoise-pendant necklace, $135, R.J. Graziano; large bangle, $40, small bangles, $15, Isaac Manevitz for Ben-Amun; sunglasses, $28, XOXO Eyewear by Fantas-Eyes.

Fashion ~~copyright~~

- Clothing designs are uncopyrightable
  - But fabric designs may be. (Why?)
- Is this good or bad for designers?
  - For the public?
- What kind of IP right, if any, is appropriate for the fashion industry?



Section 113 and the 2D-3D problem

- § 113(a): "includes the right to reproduce the work in or on any kind of article"
- § 113(b): "that portrays a useful article"
  - At common law . . . ?
- § 113(c): "in connection with … advertisements or … news reports"

typefaces aren't copyrightable

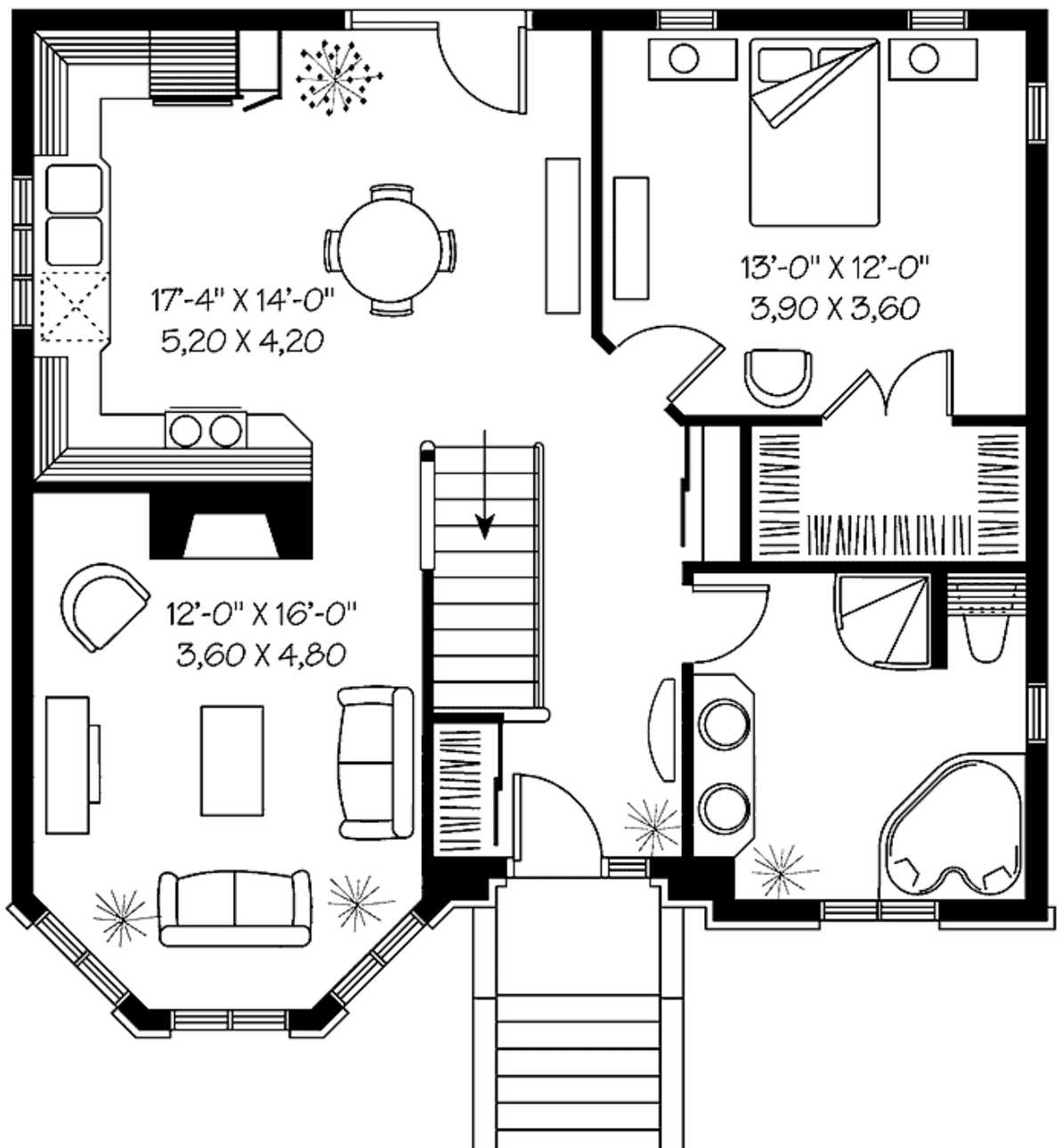
- the quick brown fox jumped over the lazy dog
- the quick brown fox jumped over the lazy dog
- ♦♒♏ ❑◆♓♍& ♌❒❑◆■ ♐❑☒ ♑◆♁◘♏♎ ❑❖♏❑ ♦♒♏ ●♋⌘♤ ♎❑♑

Useful article wrap-up

- Only an issue for PGS works!
- Creates higher threshold than § 102(b)
- Physical or conceptual separability
- No one understands what “separability” is
- I don’t understand why we have this rule

Architecture

plans vs. buildings



pre-1990

- building = useful article
- consequences:
  - plans copyrightable as drawings
  - construction doesn’t infringe
  - buildings not copyrightable as such
  - but separable elements were

AWCPA

- pre-1990 PGS copyright in plans *plus*
  - architectural work copyright
- building copyrightable notwithstanding the fact that it's a useful article
- copyright does *not* include "individual standard features"

Is this a “building?”

"buildings"?

ISUZU
545512M
DARAVAN
HVJ 409

ISUZU
ISUZU
545512M
HVJ 409

ISUZU
ISUZU

ISUZU
ISUZU

Section 120

- § 120(a): pictures okay if building visible from a public place
- § 120(b): owner of building may alter or destroy it