tionary test to determine the personal immunity of officials, the courts seem to have preferred to call the act ministerial (thereby permitting the injured party recovery) when the harm was an invasion of more tangible interests.[41]

Continued judicial application of the discretionary function exception without reference to the fundamental bases of government immunity may invoke Congressional amendment of the exception so as to permit remedies where sovereign protection is unnecessary. It would seem that the whole exception might well be removed without jeopardizing government efficiency and economy. As previously noted, the great majority of claims which would validly be denied by this exception in reality are not torts and would not create government liability even without the exception. Either a judicial or a legislative move in this direction would more completely assimilate the position of the citizen as against the government to his position when suing another citizen.

## COPYRIGHTING WORKS OF ARTISTIC CRAFTSMANSHIP EMBODIED IN ARTICLES OF PRACTICAL USE

The Copyright Act of 1909[1] continues to pose the question of whether Congress intended to protect, by copyright, artistic designs embodied in utilitarian articles of manufacture, commonly designated as "applied art." The Copyright Office, in administering the statute, originally established a distinction[2] between applied art and the so-called fine arts,[3] accepting for registration only matter considered to be fine art.[4] The protection of aesthetic designs on articles of manufacture was conceived to be the function of design patent.[5] However, in 1948 the

41. McCord v. High, 24 Iowa 336 (1868); Miller v. Horton, 152 Mass. 540, 26 N.E. 100 (1891); MECHEM, A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS § 642 (1890); Borchard, *Government Liability in Tort*, 34 YALE L.J. 129, 138 (1925); Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263 (1937); Patterson, *Ministerial and Discretionary Official Acts*, 20 MICH. L. REV. 848, 860 (1921).

1. Originally enacted as 35 STAT. 1075 (1909) and codified with amendments in 1947. 17 U.S.C. (Supp. 1950).

2. 17 CODE FED. REGS. § 201.4 (1938).

3. Courts have not measured the artistic merit of a work beyond the most obvious limits. See Bleistein v. Donaldson, 188 U.S. 239 (1903). Works that are the result of only intellectual labor generally have been held copyrightable. Jewelers Circular Publishing Co. v. Keystone Publishing Co., 274 Fed. 932 (2d Cir. 1922); See Howell, *The Scope of Copyright Law*, 4 VA. L. REV. 385 (1917).

4. 17 CODE FED. REGS. § 201.4 (1938).

5. 32 STAT. 193 (1902), as amended, 35 U.S.C. § 73 (1946); 24 STAT. 387 (1887), as amended, 35 U.S.C. § 74 (1946). "The protection of productions of the industrial arts utilitarian in purpose and character even if artistically made or ornamented depends upon action under the patent law. . . ." 17 CODE FED. REGS. § 201.4 (1938).

present Register of Copyrights issued substantially new regulations defining what is now to be acceptable for registration as works of art:[6]

> *Works of Art.* This class 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 works belonging to the so-called fine arts, such as paintings, drawings, and sculpture.[7]

This language indicates the purpose of the regulations to be an extension of copyright registration to all works of artistic craftsmanship even though the work may be embodied in an article that is essentially utilitarian, rather than aesthetic, in purpose.[8] But it is equally clear that the intention is to afford copyright protection for only the artistic features of the creation and not for its practical uses.

The new regulations were quoted without comment by the court in *Stein v. Expert Lamp Co.*,[9] a recent decision by the Court of Appeals for the Seventh Circuit. In that case plaintiff, a manufacturer of lamps, had designed and registered with the Copyright Office a pair of statuettes, which he used as the bases for table lamps. Defendant produced exact replicas of the lamps and plaintiff brought an action against infringement. Although it was disclosed by the evidence that the defendant had copied the statuettes, the court of appeals affirmed the decision of the district court which dismissed the action. The district court considered that there was no valid copyright since at the time of registration, plaintiff intended to put the statuettes to a practical use.[10] It is not clear whether the court did not consider that the new regulations introduced a change from the previous interpretation of the copyright law, or whether it construed them in such a manner that the intended purpose to which a work is to be applied is a limiting factor on what may be copyrighted. In either event, the decision would imply that a literal interpretation of the new regulations is not within the scope of the Copyright Act.

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6. The Register of Copyrights, with the approval of the Librarian of Congress, is authorized to promulgate regulations for the registration of claims to copyright. 17 U.S.C. § 207 (Supp. 1950).

7. 37 C.F.R. § 202.8 (1949).

8. Derenberg, *Copyright Law*, 1948 ANNUAL SURVEY OF AMERICAN LAW 777 (1949).

9. 188 F.2d 611 (7th Cir. 1951).

10. The District Court, 96 F.Supp. 97 (N.D. Ill. 1951), held that the intention to use the statuettes in a utilitarian device was evidenced by the existence of mounting stubs for electrical connections. The court interpreted the regulations to mean that when this intent is present at the time of registration, the copyright is invalid. Plaintiff, in appellant's brief, points out that the District Court had a misconception as to the mounting stubs and all the evidence was *contra* to the finding. Defendant did not deny this in his brief but the matter apparently was not considered by the court on the appeal or in considering the petition for rehearing.

Patent and copyright laws are based upon a power granted to Congress by the Constitution "To promote the progress of science and useful arts, by securing for limited times to Authors and Inventors the exclusive right to their respective writings and discoveries."[11] The subject matter of copyright was slowly expanded by legislation[12] from books, maps, and charts covered by the original act to include, in 1870, music, dramatic compositions, drawings, paintings, and the fine arts. In 1884, when the Court in *Burrow Giles Litho. Co. v. Sarony*[13] held the copyrighting of photographs to be constitutional, the theory was expressed that the word "writings" in the Constitution comprehends all literary and artistic works by which the mind of an author is given visible expression.[14] This broad construction was confirmed in 1903 by Justice Holmes in *Bleistein v. Donaldson*[15] where he said, in holding a lithographed circus advertisement copyrightable, that a work is nonetheless a work of "fine art" because it has a practical use.

The House report on the Act of 1909[16] indicated that Congress did not wish to restrict this broad construction of the prerogative granted by the Constitution. In section four of the act itself,[17] Congress rendered the purview of copyright coextensive with the limit of its constitutional authority by stating, "That all the works for which copyright may be secured under this act shall include all the writings of an author."

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11. U.S. CONST. Art. I, § 8.

12. The first federal copyright act was passed in 1790, 1 STAT. 124, and gave protection to only books, maps, and charts. The subsequent act, 2 STAT. 171 (1802), required notice of entry and date thereof to be added to every copy. Also in 1802, prints were added. In 1831 musical compositions were included, 4 STAT. 436; dramatic compositions with right to public performance in 1856, 11 STAT. 138; photographs in 1865, 13 STAT. 540; and in 1870 an act was passed to cover paintings, photographs, drawings, chromos, statues and statuary, and designs for fine arts, REV. STAT. § 4948-71. The right to public performance of musical compositions was granted in 1897, REV. STAT. § 4960.

13. 111 U.S. 53 (1884). "The reading of almost any judicial opinion of the years immediately succeeding the *Sarony* case . . . will indicate both the surprise with which the doctrine was received and the general feeling that its true interpretation was that the Supreme Court intended to enlarge the field of copyright. Umbreit, *A Consideration of Copyright*, 87 U. OF PA. L. REV. 932, 936 (1939).

14. 111 U.S. 61 (1884).

15. "Certainly works are not the less connected with the fine arts because their pictorial quality attracts the crowd, and therefore gives them a use. . . .

"Yet if they command the interest of any public, they have commercial value,—it would be bold to say that they have not an aesthetic value,—and the taste of any public is not to be treated with contempt." 188 U.S. 239, 251-252 (1903).

16. H.R. REP. No. 2222, 60th Cong., 2d Sess. 10 (1909). "It was suggested that the word 'works' should be substituted for the word 'writings' in view of the broad construction given by the courts to the word 'writings,' but it was thought better to use the word 'writings,' which is the word found in the Constitution. It is not intended by the use of this word to change in any way the construction which the courts have given to it."

17. Originally 35 STAT. 1075 (1909) and now 17 U.S.C. § 4 (Supp. 1950).

Section five[18] listed classifications of writings, including "works of art," and expressly stated that these classifications were not to limit the subject matter as defined in section four. It is evident, therefore, that all forms of artistic expression were meant to be included within the compass of the Act.

However, the regulations of the Copyright Office, announced soon after the passage of the Act, expressly excluded from registration artistic designs on articles essentially utilitarian in purpose.[19] These regulations provoked severe criticism by writers who considered them too narrow in the light of previous judicial interpretation of Congress' Constitutional authority and the clear congressional intent to exercise fully its prerogative. However, the Copyright Office was influenced by the fact that aesthetic designs on articles of manufacture were granted protection by the previously enacted Design Patent Act, which imposes rather strict eligibility standards. It was reasoned that the less stringent requirements requisite for copyright were not intended to be substituted. Consequently, the Copyright Office promulgated its regulations on the theory that design patent was meant to be the sole instrument for protection of applied art.

An examination of the relative eligibility requirements of design patent and copyright and the disparity in the extent of protection accorded by each reveals that two essentially different functions were contemplated. To be patentable a design must have been previously unknown in this country,[20] and it is required that it be based upon a completely new idea in the field. Moreover, it must reflect a degree of inventive skill beyond that exercised by the ordinary designer.[21] While to be eligible for copyright, a work need not embody a new idea. It is sufficient, though it be based upon a previously exposited conception, that

18. *Id.* Section 5.

19. *"Works of art.* This term includes all the works belonging fairly to the so-called fine arts. (Paintings, drawings, and sculpture.) Productions of the industrial arts utilitarian in purpose and character are not the subject of copyright registration even if artistically made or ornamented. No copyright exists in toys, games, dolls, advertising novelties, instruments or tools of any kind, glassware, embroideries, garments, laces, woven fabrics or similar articles." WEIL, COPYRIGHT LAW 625 (1917).

20. ". . . not known or used by others in this country before his invention thereof, and not patented or described in any printed publication in this or any foreign country before his invention thereof. . . ." 32 STAT. 193 (1902), as amended, 35 U.S.C. § 73 (1936).

21. It has been said that the application of the eligibility standards of mechanical patents to design patents was an accident of administration due to their name and administration by the Patent Office rather than the intent of Congress. However, it had become well settled that the same standard was applicable to each, when Congress considered the Act of 1909. Smith v. Whiteman, 148 U.S. 674 (1892); Myers v. Sternheim, 97 Fed. 625 (9th Cir. 1899); Western E. M. v. Odell, 18 Fed. 31 (C.C.N.D. Ill. 1883).

it is a work of intellectual labor which substantially evinces in its makeup the mind of the creator.[22] Second, a patent grants the exclusive right to make, use, and vend the protected work. The idea or conception itself and the method in which it is expressed is the subject of the patent. Copyright, on the other hand, comprehends a monopoly only to make and vend the particular expression of an idea.[23] As a result of the copyright proprietor's lack of the right to "use" the particular idea, he is protected only against a copy of his own peculiar mode of expression of that conception. The idea or conception itself is not the subject of copyright.

It is thus demonstrated that the purpose of design patent and copyright materially differ. Design patent encourages the development of original impressions which will be visibly expressed in the form of designs. Copyright, however, encourages only uniqueness in the manner of expressing an impression; it is not concerned with the originality of the idea which comprises the subject of a design. The Design Patent Act, therefore, did not enter the area of protection to which Congress so clearly intended copyright to extend.

This conclusion is not weakened by the argument that Congress could not have intended to grant monopoly protection for possibly fifty-six years,[24] the maximum period of copyright, to artistic designs embodied in articles of practical use, important to the development of industry. For it must be emphasized that it is not a particular device or process which is copyrighted; protection is extended only to the manner of expositing the conception or idea embodied by the device. Indeed, it may fairly be assumed that copyrighting of applied art in fact aids industrial progress. For logically the result should be a constant endeavor by entrepreneurs to develop variety in designs.

Similarly, the very purpose of copyright illustrates the invalidity of the "purpose for which the work is intended" test as adopted by the

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22. See note 2, *supra.*

23. Bobbs-Merrill v. Straus, 147 Fed. 15 (2d Cir. 1906); BALL, THE LAW OF COPYRIGHT AND LITERARY PROPERTY 6 (1944); AMDUR, COPYRIGHT LAW 5 (1936).

"Copyright law is usually treated as an off-shoot of patent law—as one of the two queer branches of our jurisprudence in which by an exception depending on statute, intangible ideas are protected. The dissimilarities are more pronounced than similarities. One gives a monopoly; the other a mere prohibition aganst copying a very different thing. About the only similarity is that both deal with intangible rights against all the world but that is an element which they share with several other branches of the law." Umbriet, *A Consideration of Copyright,* 87 U. OF PA. L. REV. 932 (1939).

24. The term of copyright is 28 years plus a 28 year renewal. 17 U.S.C. § 24 (Supp. 1950). The term of the design patent is at the choice of the patentee for three and one-half, seven or fourteen years. 33 STAT. 1293 (1939), 35 U.S.C. § 18 (1946).

court in the *Stein* case.[25] Under that theory a work intended, upon registration with the copyright office, to be used in a practical or utilitarian manner is not protected by a valid copyright.[26] This notion fails to perceive the reason for which protection is sought. Copyright is concerned only with the particular manner in which a conception is expressed. Consequently, the purpose for which a work is intended to be used is irrelevant to the question of its eligibility for copyright.[27] This is confirmed by the decisions holding a copyright infringed when protected works are copied into articles of practical use.[28] This necessarily is an admission that such use is as much a mode of artistic expression as the original work.

While it is clear that the recent regulations promulgated by the Register of Copyrights are consistent with the compass of the 1909 Act, it is arguable that long congressional silence indicates approval of the narrow interpretation traditionally accorded it.[29] However, the nature of the Act itself overcomes this theory.[30] Congress, exerting fully its Constitutional authority, declared broadly that *all* the "writings" of an author are copyrightable. This left to the Copyright Office a certain discretion in determining what type of creations may fairly be said to fall within the scope of the Act. Adoption of new regulations amending a previous determination should not thus be precluded. The change is not of congressional *policy,* but rather of a previous administrative interpretation shown to be inconsistent with that policy.[31]

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25. Stein v. Expert Lamp Co., 188 F.2d 611 (7th Cir. 1951).

26. Horsman v. Kauffman, 286 Fed. 372 (2d Cir. 1922); Schumacher v. Schwencke, 25 Fed. 466 (C.C.S.D.N.Y. 1855).

27. Other than in the classification of "works of art", copyright has been extended to such useful writings as hotel directories, American Travel and Hotel Directory v. Gehring, 4 F.2d 415 (S.D.N.Y. 1925); and interest tables, Edwards and Deutch Litho Co. v. Boorman, 15 F.2d 35 (7th Cir. 1926).

28. Falk v. Howell, 37 Fed. 202 (C.C.S.D.N.Y. 1888); King Features Syndicate v. Fleischer, 299 Fed. 533 (2d Cir. 1924).

29. Congress has considered several bills for the extension of protection to designs, but these have failed for reasons other than the belief that protection should not be given. Weikhart, *Design Piracy,* 19 IND. L.J. 235 (1944); Hugin, *Copyrighting Works of Art,* 31 J.P.O.S. 710 (1949).

30. The enactment of the Copyright Law into title 17 of the United States Code raises the question of whether the interpretation given by the previous regulations was thereby adopted by Congress. This is doubtful, since the re-enactment was only for codification. The inoperative clauses were deleted while section 207 (the rule making section) remained and is still operative. (H.R. REP. No. 1514, 80th Cong., 1st Sess. 1947). It has long been recognized that the Register of Copyrights has the power to change regulations and previous interpretations. Bouve v. Twentieth Century Fox, 122 F.2d 51 (D.C. Cir. 1941). This would indicate that these regulations are not of the type that are adopted by Congress in re-enactment of the statute. Note, 40 COL. L. REV. 252 (1940).

31. Note, 26 IND. L.J. 388 (1951).

The new regulations should be judicially recognized as valid. This leaves to the courts the task of determining, in a given case concerning the validity of a copyright, whether the protection extended is within the congressional policy. In enacting the Copyright Act, the test devised by Congress to determine what "writings" would serve the Constitutional purpose was a balance of the public benefit to be derived from the grant of protection against the evils which may arise from the temporary monopoly.[32] This test should form the guide to be followed in the judicial interpretation of the new regulations.[33]

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32. "In enacting a copyright law Congress must consider, as has already been stated, two questions: First, how much will the legislation stimulate the producer and so benefit the public; and, second, how much will the monopoly granted be detrimental to the public? The granting of such exclusive rights, under the proper terms and conditions, confers a benefit on the public that outweighs the evils of the temporary monopoly." H.R. REP. No. 2222 60th Cong., 2d Sess. 7 (1909).

33. The common practice of copying styles among dress designers presents problems peculiar to that field. It would seem, however, that Congress should make specific provision for this industry, rather than east the burden upon the courts.