Design patent law has come of age on the heels of an era in which copyright and trademark law took steps back from hard separationist doctrines so that those forms of protection would be available to a much wider range of design. They did so in no small part because of their sense that those designs might otherwise not have any effective protection. As it has turned out, design patent law awakened just as copyright and trademark confirmed their respective expansions (copyright more thoroughly than trademark). That timing raises all the more squarely the question we take up here, namely whether there is any first-principles justification for awarding design patents today. While copyright doctrine has evolved to cover the type of superficial ornamentation for which design patents were originally intended, the theory and practice of design has also evolved far beyond the conception of design as mere ornamentation.

Today, design is valued most highly when it integrates aesthetic form and utilitarian function. Intellectual property law and theory has yet to catch up to this conception, however. Instead, copyright, trade dress, and patent law all attempt to separate form and function. This is ultimately an impossible task because all designs are, to varying degrees, both useful and aesthetic. Design is inherently dual, but all of the legal rules depend on a binary distinction. The result is a design patent system without substantial theoretical grounding and a substantial problem of cumulative protection.

In this article, we explore the possibility that design patents should be reconceived specifically with a view toward the integration of form and function, a goal that seems inherently more amenable to scrutiny under a patent-like approach. Currently, with the focus entirely on the ornamental or aesthetic aspects of a given design, the question of whether a particular design is nonobvious in light of prior designs has little conceptual basis and, hence, very little bite. There is no coherent conception of incremental improvement in aesthetic impact. If, however, it is possible to

* Professor of Law and Notre Dame Presidential Fellow, Notre Dame Law School.
** Professor of Law, New York University School of Law
speak sensibly about whether a given design integrates form and function in a way that is nonobvious in light of prior attempts, then it is at least conceivable that a patent-like system makes sense, and that the nonobviousness doctrine can have teeth for design patents.

Moreover, a new conceptualization of the purpose of design patents may permit a sensible sorting of subject matter across intellectual property systems and a better understanding of the role of functionality doctrines in those various systems. Copyright law allows protection for useful articles to the extent expressive elements are separable from the utilitarian aspects of the articles. By contrast, design patent law’s functionality doctrine excludes designs that are *dictated* by function, a formulation that tends to exclude relatively few designs from protection, particularly by comparison to copyright. If design patents and copyrights are aimed at protecting essentially the same ornamental expression, this doctrinal difference makes no sense. On the other hand, if design patents should be concerned instead with the integration of form and function, then it would not be surprising for design patents to cover designs that would be excluded from copyright protection because of inseparable useful features. Put differently, if design patents focus on the integration of form and function, then design patent law, and not copyright law, should be the home for designs that integrate. Copyright, and not design patent, should be the home for more easily separable features.

Reconceptualizing the purpose of design patents in this manner would also help to ground a more consistent approach to the relationship of patents to trade dress protection and give meaning to the distinction between product design and product packaging that the Supreme Court recognized in its opinion in *Wal-Mart Stores, Inc. v. Samara Brothers, Inc.* 529 U.S. 205 (2000).