

Error Costs & Functionality Exclusions

Joseph Scott Miller
UGA Law School

Every branch of ip law focuses on whether a candidate for protection is functional. In utility patents, functionality is prized, required. In the other domains—design patent, copyright, trademark—functionality is perilous, excluded. Courts and commentators continue to struggle with the rationale and reach of these varied functionality exclusions in ip’s different branches. One route to a more orderly understanding of functionality exclusions, both within and across ip domains, is to conceive of them as contextualized efforts to avoid the same basic error—namely, giving utility-patent-style exclusion rights without imposing the rigors of utility-patent-style scrutiny and limitation. Of course, the more costly an error would be, should it happen, the more precaution against it is warranted; so design patents, which most closely resemble utility patents, merit substantially less precaution against errant utility protection than do trademarks, which least closely resemble utility patents. Copyrights pertaining to useful articles present a middle case, and trigger mid-range precaution. By organizing and assessing these different functionality exclusions according to a common measure, exposing each exclusion more clearly by juxtaposing it against the other two, the error-cost perspective can help both stabilize and harmonize functionality doctrines.