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Star Athletica and the Problem of Panaestheticism

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INTRODUCTION

The Intellectual Property Clause of the Constitution states that Congress shall have power “[t]o 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.”¹ In a recent article, I argued that in the subclause known as the Progress Clause (“[t]o promote the Progress of Science and useful Arts”), the Framers appeared deliberately to avoid any reference to the “fine arts.”² State copyright statutes of the time spoke comprehensively of their intent to promote the “various arts and sciences,”³ with one entitled “An act for the encouragement of arts and sciences.”⁴ Yet the Progress Clause conspicuously avoids the phrase “arts and sciences,” which was otherwise widely used in the eighteenth century, and instead limits itself only to “Science and the *useful* Arts.” I asserted in the article that the Framers thus sought to evade engagement with what was then a new category of human theory and practice: the category of the aesthetic. This historical assertion

* John M. Desmarais, Professor of Intellectual Property Law, NYU School of Law. This was prepared as a lunchtime keynote address for the UC Irvine School of Law’s *Intellectual Property Law Annual Conference: The Discursive Turn in Copyright* on October 27, 2017. My thanks to Dan Burk for the invitation to participate in the conference and prepare this address. For comments on a previous draft, thanks to Jeanne Fromer.

1. U.S. CONST. art. I, § 8, cl. 8.
2. See Barton Beebe, *Intellectual Property Law and the Problem of Aesthetic Progress*, 117 COLUM. L. REV. 319, 322–24, 337–42 (2017).
3. See *id.* at 322–23 n.13.
4. See *id.* at 323 n.14.

is admittedly unconventional and naturally invites the question: why would the Framers have bothered to do such a thing? Why would they have taken such pains to try to protect intellectual property law from the aesthetic (and the aesthetic from intellectual property law)?

The recent Supreme Court case of *Star Athletica, LLC v. Varsity Brands, Inc.*⁵ provides the latest in a long line of troubling answers. Itself a frustratingly ill-defined category, the aesthetic seems always to destructure the borders separating the various fields of intellectual property law.⁶ Constantly it collapses the doctrinal edifices that we build—and then repeatedly rebuild—to try to contain it. No less a jurist than Judge Richard Posner has declared that judges (and perhaps keynote speakers?) “can make fools of themselves pronouncing on aesthetic matters.”⁷ The many dilemmas the aesthetic poses are especially pronounced in design patent law and trademark law, where the works at issue so often perform non-aesthetic functions. But they appear in copyright law as well, as they do in *Star Athletica*. From *Star Athletica* and its unremarkable facts has emerged yet another reset of our understanding of the balance between what is aesthetic, and thus should be copyrightable, and what is functional, and thus should not be copyrightable.

Star Athletica thus struck me as a worthwhile focus for a keynote address at a conference such as this that seeks to bring “law and literature” perspectives to copyright law. I left literary studies decades ago, and after twenty years among increasingly economic and now quantitative law talk, when I come back to literary studies, I’m not exactly arriving where I started and knowing the place for the first time, but it’s pretty close. Yet for all of the dismissiveness sometimes directed towards the field of law and literature by the field only of law, I know enough of the law and literature tradition to know that it is full of great art and scope, particularly in works since the 1970s, as Brook Thomas’s recent survey of the field shows us.⁸ And for a number of reasons, it seems to me that *Star Athletica* cannot be properly understood without recourse to the sensibility of this tradition.

First, just look at the opinions in *Star Athletica*. Contemplate them as if from afar. Doing so is like seeing one of Wallace Stevens’s delicious letters on his

5. 137 S. Ct. 1002 (2017).

6. For some recent attempts to try to rebuild these borders, see Christopher Buccafusco & Mark A. Lemley, *Functionality Screens*, 103 VA. L. REV. 1293 (2017); Christopher Buccafusco, Mark A. Lemley & Jonathan S. Masur, *Intelligent Design*, 68 DUKE L.J. 75 (2018); Jeanne C. Fromer & Mark P. McKenna, *Claiming Design*, 167 U. PA. L. REV. 123 (2018); Laura A. Heymann, *Overlapping Intellectual Property Doctrines: Election of Rights Versus Selection of Remedies*, 17 STAN. TECH. L. REV. 239 (2013); Laura A. Heymann, *The Copyright/Trademark Divide*, 60 SMU L. REV. 55, 67–74, 76–683 (2007); Mark P. McKenna & Katherine J. Strandburg, *Progress and Competition in Design*, 17 STAN. TECH. L. REV. 1, 2–3 (2013); Mark P. McKenna, *An Alternate Approach to Channeling?*, 51 WM. & MARY L. REV. 873, 875–76 (2009); Viva R. Moffat, *The Copyright/Patent Boundary*, 48 U. RICH. L. REV. 611, 611–12 (2014); Pamela Samuelson, *Strategies for Discerning the Boundaries of Copyright and Patent Protections*, 92 NOTRE DAME L. REV. 1493 (2017).

7. *Gracen v. Bradford Exch.*, 698 F.2d 300, 304 (7th Cir. 1983).

8. See Brook Thomas, *Minding Previous Steps Taken*, in NEW DIRECTIONS IN LAW & LITERATURE 33 (2017) [hereinafter NEW DIRECTIONS].

Hartford Accident and Indemnity Company home office letterhead. Here is one such letter dated January 13, 1955 to the poet Robert Pack.⁹ It has every appearance of a conventional business correspondence. On closer inspection, however, we become aware of the letter's large-mannered¹⁰ nature. Here is a representative sentence: "Your observation that comedy does not stress time is a most interesting observation, which is certainly true when comedy is being compared with tragedy where time is of the essence."¹¹ Thus Stevens sets out the temporal parameters of comedy and tragedy—all of this appearing above the embossed corporate slogan "Year in and year out you'll do well with the Hartford."¹²

With that framework in mind, consider now the slip opinion in *Star Athletica*.¹³ There is the conventional apparatus at the beginning: the syllabus summarizing the case.¹⁴ Then there is Justice Thomas's majority opinion, also altogether conventional until its conclusion, where there appears an appendix consisting of stylized images of cheerleading uniforms.¹⁵ Justice Ginsburg's three-page concurrence follows, to which is attached an eleven-page appendix consisting of images of administrative forms with small arrows pointing to details.¹⁶ Finally, there is Justice Breyer's dissent, joined by Justice Kennedy.¹⁷ This too appears as a conventional dissent until we arrive to its appendix, consisting of four figures.¹⁸ Figures 1 and 2 are photos of lamps incorporating sculptures of cats.¹⁹ Figure 3 is a photograph of Vincent Van Gogh's painting *Shoes*.²⁰ Figure 4 is a photograph of Marcel Duchamp's *In Advance of the Broken Arm*, which is a sculpture consisting of a standard snow shovel.²¹ All of these photographs lack attribution. As my NYU colleague Amanda Levendowski discovered, the photograph reproduced as Figure

9. See Letter from Wallace Stevens to Robert Pack (Jan. 13, 1955), https://archive.org/stream/abermis.stevensw.1955.01.13/abermis.stevensw.1955.01.13_djvu.txt [<https://perma.cc/SHB2-ZMKT>] [hereinafter Stevens Letter].

10. Wallace Stevens, *Sunday Morning*, POETRY FOUND., <https://www.poetryfoundation.org/poetrymagazine/poems/13261/sunday-morning> [<https://perma.cc/94M5-696G>] (last visited Jan. 16, 2019) (observing in reference to Jove that "no sweet land gave // Large-mannered motions to his mythy mind").

11. Stevens Letter, *supra* note 9.

12. *Id.*

13. *Star Athletica, LLC v. Varsity Brands, Inc.*, No. 15-866, slip op. (U.S. Mar. 22, 2017), https://www.supremecourt.gov/opinions/16pdf/15-866_0971.pdf [<https://perma.cc/7XEK-MFDQ>]. I refer here to the slip opinion because it has full-sized color images.

14. *Id.* at 1–4.

15. *Id.* at 18.

16. *Star Athletica, LLC v. Varsity Brands, Inc.*, No. 15-866, slip op. at 4–414 (U.S. Mar. 22, 2017) (Ginsburg, J., concurring).

17. *Star Athletica, LLC v. Varsity Brands, Inc.*, No. 15-866, slip op. (U.S. Mar. 22, 2017) (Breyer, J., dissenting).

18. *Id.* at 13–15.

19. *Id.* at 13.

20. *Id.* at 14.

21. *Id.* at 15.

2 was apparently taken from eBay.²² At this point, I think we are entitled to adopt that most important, most basic hermeneutic stance: What the hell is going on? At the very least, we can expect that what we have on our hands is a very rich text.

Second, the three opinions in *Star Athletica* each engage especially explicitly perennial themes in law and literature, or as I would like to think it here, law and the aesthetic. As you are all well aware, “law and literature” is a problematic name. Various rebranding proposals have been considered: “law, literature, and the humanities”;²³ “law and the humanities”;²⁴ “law, culture, and the humanities”;²⁵ and even perhaps law and “mixed media.”²⁶ In this tradition, I wonder what might be gained and lost, at least for the moment, by a different name? By “law and literature,” we mean to refer more generally to the relations between law and aesthetic expression and aesthetic thinking, or even more generally, to the relations between law and all that can carry the adjective “aesthetic.” The label “law and the aesthetic” is no doubt overbroad, potentially limitless. But it expresses well enough the true breadth of the field—and hints at the fundamental problem of *Star Athletica*.

This problem is the problem of panaestheticism, which I’ll define here for our purposes as the problem that anything can pass for art. Anything can serve as an object of aesthetic experience. If we go searching for the aesthetic, we will most certainly find it. One conventional solution to the problem of panaestheticism is to establish a limitation on the category of the aesthetic: only *purely* aesthetic phenomena qualify as aesthetic. An alternative, more elaborate solution might hold that only *primarily* aesthetic phenomena qualify. The point is that we need some kind of workable limitation.

Star Athletica confronts the problem of panaestheticism but fails to develop this limitation. It sets forth a new “separability test”²⁷ for determining when particular features of an otherwise functional and thus uncopyrightable work can qualify for copyright protection. In essence, this test asks: even if the design feature

22. See E-mail from Amanda Levendowski, Clinical Teaching Fellow, N.Y. Univ. Sch. of Law, to author (Sept. 28, 2017, 01:22 PM EST) (on file with author) (referencing a Twitter post, now deleted, that refers to an eBay listing available at *Siamese Cat Vintage Ceramic TV / Table Lamp*, EBAY, https://www.ebay.com/itm/Siamese-Cat-Vintage-Ceramic-TV-Table-Lamp-from-approx-the-50-039-s-or-60-039-s-RARE-/221426115777?token=cUgayN&nma=true&si=AcFqoU8s0S3vEKII%252FjiI%252BWld0U%253D&orig_cvip=true&rt=nc&_trksid=p2047675.l2557t [<https://perma.cc/2WA5-YD2W>] (last visited Jan. 5, 2019)).

23. See THE LAW, LITERATURE & THE HUMANITIES ASSOCIATION OF AUSTRALASIA, <http://lawlithum.org/> [<https://perma.cc/3D2B-CGTL>] (last visited Jan. 5, 2019).

24. See, e.g., Bernadette Meyler, *Law, Literature, History: The Love Triangle*, in NEW DIRECTIONS 160–0–61 (2017) (discussing the term “law and the humanities”).

25. See THE ASSOCIATION FOR THE STUDY OF LAW, CULTURE, AND THE HUMANITIES, <http://lawculturehumanities.com/> [<https://perma.cc/SL4J-62H4>] (last visited Jan. 5, 2019); see also Julie Stone Peters, *Law, Literature, and the Vanishing Real: On the Future of an Interdisciplinary Illusion*, in 120 THE MODERN LANGUAGE ASSOCIATION OF AMERICA, THE CHANGING PROFESSION 442, 451 (2005) (discussing a shift in terminology toward “law, culture, and the humanities”).

26. See Peter Goodrich, *Screening Law*, 21 LAW & LITERATURE 1, 3 (2009).

27. *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1011 (2017).

makes the work more useful, could the design feature be imagined on its own as a “work of art?”²⁸ This new separability test has rendered the statutory language on which it is based a nullity. The result, as I hope to explain, is that we are left to look elsewhere in the Copyright Act—namely, in the definition of “useful article”²⁹—for some limitation on the reach of copyright law.

I. THE STATUTORY BACKGROUND OF *STAR ATHLETICA*

Star Athletica asked the Court to determine if two-dimensional graphic designs appearing on cheerleading uniforms could qualify for copyright protection. The problem was that a cheerleading uniform is what copyright law calls a “useful article”³⁰ because, among other things, the uniform covers the body, and a useful article cannot itself qualify for copyright protection.³¹ The Copyright Act defines 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.”³² Note the strangeness of this definition. It establishes that among the various “intrinsic utilitarian function[s]” that an article might serve are “merely portraying the appearance of the article” and “conveying information.”³³ The definition simply states that if one of these is the article’s *only* “intrinsic utilitarian function,” then the article is not a “useful” article. Thus, the aesthetic is defined as a category *within* the utilitarian and the functional. According to the Copyright Act, or at least this part of it, everything that is aesthetic is also utilitarian and functional.

The Act’s definition of “useful article” thus collapses much of the terminology we conventionally use to distinguish between, on the one hand, the utilitarian and the functional, and on the other, the aesthetic. Strictly speaking, it is incoherent under the scheme established by the definition of “useful article” to distinguish between the utilitarian and the aesthetic, because both are utilitarian. And yet the definition of “useful article” ends up privileging the aesthetic. It urges us to start with the aesthetic and then ask if there is anything else that is not aesthetic. If there is, then the article is a “useful article.” (And in this sense, the scheme established by the definition is an appealing one. It urges us to conceive not of law and literature, but of literature and law).

The Act’s definition of “useful article” might have formed a good basis for a test as to whether the various graphic features at issue in *Star Athletica* could qualify for copyright protection. After all, as Justice Thomas helpfully notes, “to qualify as a pictorial, graphic, or sculptural work on its own, the feature cannot itself be a useful article or ‘[a]n article that is normally a part of a useful article’ (which is itself

28. *Id.* at 1007.

29. 17 U.S.C. § 101 (2012).

30. *Id.*

31. *See id.*; *see also Star Athletica*, 137 S. Ct. at 1010.

32. 17 U.S.C. § 101.

33. *Id.*

considered a useful article). § 101.”³⁴ Accordingly, we would ask: do the graphic features have *any* intrinsic utilitarian function other than to portray their own appearance or convey information? If so, they are useful features and uncopyrightable.³⁵ If, by contrast, their *only* intrinsic utilitarian function is to portray their own appearance or convey information, then they are not useful features and are potentially copyrightable—provided that they meet all other requirements for copyrightability. Such a test would appear to place us more or less in Oscar Wilde’s world, where “all art is quite useless.”³⁶ This would depend on how we chose to define “intrinsic.” More on this below.

The question of what utilitarian functions are “intrinsic” should not detain us here, however, because the Copyright Act ultimately sought to establish a different test to determine the copyrightability of a useful article’s design (or design features—part and whole are used interchangeably in this world).³⁷ The Act specifies that the design of a useful article (for example, a cheerleading uniform) is eligible for copyright protection only if it qualifies as a “pictorial, graphic, or sculptural work.”³⁸ How do we know when a design does so qualify? The Act’s definition of “pictorial, graphic, and sculptural works” tells us:

the design of a useful article, as defined in this section, 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.³⁹

In some tension with the Act’s definition of “useful article” discussed above, this statutory language removes the aesthetic from the category of the utilitarian. Now the whole point of our exercise is to determine whether any particular aesthetic “feature” can be “identified separately from” and is “capable of existing

34. *Star Athletica*, 137 S. Ct. at 1010.

35. *See Ets-Hokin v. Sky Spirits, Inc.*, 225 F.3d 1068, 1080 (9th Cir. 2000); *see also Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989, 993 (2d Cir. 1980) (“Congress in the 1976 Act may have somewhat narrowed the sweep of the former regulations by defining a ‘useful article’ as one with ‘an intrinsic utilitarian function,’ 17 U.S.C. § 101 (emphasis added), instead of one, in the words of the old regulations, with utility as its ‘sole intrinsic function,’ 37 C.F.R. § 202.10(c) (1977) (revoked Jan. 5, 1978, 43 Fed.Reg. 965, 966 (1978)) (emphasis added).”).

36. *See OSCAR WILDE, THE PICTURE OF DORIAN GRAY* 4 (Joseph Bristow ed., Oxford Univ. Press new ed. 2006) (1890); *see also* Christopher Buccafusco & Jeanne C. Fromer, *Forgetting Functionality*, 166 U. PA. L. REV. 119, 121 (2017) (interpreting the definition of “useful article” to mean that “[o]nly when components of an article are purely expressive should they be treated as pictorial, graphic, or sculptural features rather than utilitarian aspects.”).

37. A source of significant difficulty in the separability analysis is the tendency of the analysis to range among different levels of specificity, so that with respect to a useful article, a court may at once apply the analysis to particular features of the article, particular combinations of features, and the overall design of the article. As in *Star Athletica*, the copyright claimant is likely to be able to identify at some level of specificity some feature or combination of features that qualifies as separable and thus copyrightable.

38. 17 U.S.C. § 101.

39. *Id.*

independently of” any “utilitarian aspects” of the underlying useful article. In the decades leading up to *Star Athletica*, this statutory language propagated, by the Sixth Circuit’s count, no less than nine different legal tests devised to separate the aesthetic from the utilitarian.⁴⁰ With *Star Athletica*, the Supreme Court has now added a tenth test, which it has called the “separability test.”⁴¹ To understand what this statutory language now means and how this test now operates, we must turn to Justice Thomas’s majority opinion.

II. JUSTICE THOMAS’S MAJORITY OPINION

To make a long story very short, and to skip many important issues, let me go to what appears to be the heart of Justice Thomas’s opinion. Justice Thomas explains that a design can qualify as a copyrightable pictorial, graphic, or sculptural work if it meets two requirements: the “separate-identification” requirement and the “independent-existence” requirement.⁴²

The separate-identification requirement, we are told, is not “onerous.”⁴³ “The decisionmaker need only be able to look at the useful article and spot some two- or three-dimensional element that appears to have pictorial, graphic, or sculptural qualities.”⁴⁴ Simple, but would it be ungenerous to rephrase this as “The decisionmaker need only be able to look at the useful article and spot some two- or three-dimensional element that appears to have . . . two- or three-dimensional qualities”? How close are we already to Antony’s description of the crocodile, that the crocodile “is shaped . . . like itself, and it is as broad as it has breadth . . . Of its own color too . . . and the tears of it are wet”?⁴⁵ The first requirement is meaningless.⁴⁶

Justice Thomas then turns to the independent-existence requirement:

The independent-existence requirement is ordinarily more difficult to satisfy. The decisionmaker must determine that the separately identified feature has the capacity to exist apart from the utilitarian aspects of the article. See 2 OED 88 (def. 5) (defining “[c]apable” of as “[h]aving the needful capacity, power, or fitness for”). In other words, the feature must be able to exist as its own pictorial, graphic, or sculptural work as defined in § 101 once it is imagined apart from the useful article. If the feature is

40. See *Varsity Brands, Inc. v. Star Athletica, LLC*, 799 F.3d 468, 484–485 (6th Cir. 2015), *aff’d sub nom.*, *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002 (2017); see also Robert Kirk Walker & Ben Depoorter, *Unavoidable Aesthetic Judgment in Copyright Law: A Community of Practice Standard*, 109 NW. U. L. REV. 343, 363–67 (2015) (reviewing courts’ various approaches to aesthetic evaluation in conceptual separability case law).

41. *Star Athletica*, 137 S. Ct. at 1011.

42. *Id.* at 1010.

43. *Id.*

44. *Id.*

45. WILLIAM SHAKESPEARE, *ANTHONY AND CLEOPATRA* act 2, sc. 7., 1332–47 (Barbara A. Mowat & Paul Werstine ed., Wash. Square Press) (1999).

46. See Buccafusco & Fromer, *supra* note 36, at 121 (“According to the majority, an element of a design counts as a pictorial, graphic, or sculptural feature if it looks like something.”).

not capable of existing as a pictorial, graphic, or sculptural work once separated from the useful article, then it was not a pictorial, graphic, or sculptural feature of that article, but rather one of its utilitarian aspects.⁴⁷

This is a remarkable paragraph. Perhaps to give it ballast, Justice Thomas cites an *Oxford English Dictionary* (*OED*) definition of “capable,” when of course what we’re really asking for is a definition of “existing” and, much more importantly, of “independently of.” But the definition that the same dictionary provides of “independently of” could be understood to capsize much of Justice Thomas’s opinion. The *OED* defines the adverb “independently” when used with “of” as “[I]n a way independent of; without regard to; apart from.”⁴⁸ This definition itself depends on the definition of the adjective “independent”: “Not depending on something else for its existence, validity, efficiency, operation, or some other attribute; not contingent on or conditioned by anything else.”⁴⁹ What I want to focus on are the phrases “without regard to,” “[n]ot depending on something else for . . . some other attribute,” and, most importantly, “not . . . conditioned by anything else.” These definitions support a well-established line of separability cases, beginning with *Brandir International, Inc. v. Cascade Pacific Lumber Co.*, that analyzed whether the design at issue was in any way motivated, limited, or influenced by utilitarian or functional concerns, and thus uncopyrightable.⁵⁰ These cases bordered on a pure, disinterested definition of art. In essence, they asked: Is the design capable of existing, of portraying its own appearance, without bearing any influence of utilitarian or functional concerns? And these cases were relatively parsimonious in allowing copyright rights.

Star Athletica explicitly rejects the *Brandir* line of cases. Later in the opinion, Justice Thomas asserts that “the statute’s text makes clear . . . that our inquiry is limited to how the article and feature are perceived, not how or why they were designed.”⁵¹ Justice Thomas provides no analysis to support this claim, but he does cite to Judge Winter’s dissent in *Brandir*, which makes the same claim.⁵² But to support this claim, Judge Winter simply quotes the statute’s text, so we’re back

47. *Star Athletica*, 137 S. Ct. at 1010.

48. *Independently*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/94327?redirectedFrom=independently#eid> (last visited Jan. 5, 2019).

49. *Independent*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/94325?rskey=vWccBl&result=1&isAdvanced=false#eid> (last visited Jan. 5, 2019).

50. *Brandir Int’l, Inc. v. Cascade Pac. Lumber Co.*, 834 F.2d 1142, 1145 (2d Cir. 1987) (analyzing whether the claimed “design elements can be identified as reflecting the designer’s artistic judgment exercised independently of functional influences”); *see also* *Pivot Point Int’l, Inc. v. Charlene Products, Inc.*, 372 F.3d 913, 931–32 (7th Cir. 2004) (analyzing whether the design process was “unfettered by functional concerns”). *Brandir* relied heavily on the approach to conceptual separability proposed in Robert C. Denicola, *Applied Art and Industrial Design: A Suggested Approach to Copyright in Useful Articles*, 67 MINN. L. REV. 707 (1983). *See id.* at 741 (“Because the dominant characteristic of industrial design is the influence of nonaesthetic, utilitarian concerns, copyrightability ultimately should depend on the extent to which the work reflects artistic expression uninhibited by functional considerations.”).

51. *Star Athletica*, 137 S. Ct. at 1015.

52. *Brandir Int’l*, 834 F.2d at 1152 (Winter, J., dissenting).

where we started.⁵³ In any case, this conclusion backs Justice Thomas into a question altogether different from the one asked in *Brandir*. Now, to determine if a design meets the independent-existence requirement, we apparently ask: Is the design capable of being perceived on its own as a work of art?

The disturbing implications of this question begin to emerge when Justice Thomas engages in the “straightforward”⁵⁴ application of his two requirements to the graphical features at issue in the case. “First, one can identify the decorations as having pictorial, graphic, or sculptural features.”⁵⁵ Indeed, a visible decoration has two- or three-dimensional qualities; “‘Tis a strange serpent.”⁵⁶ Justice Thomas continues: “Second, if the arrangement of colors, shapes, stripes, and chevrons on the surface of the cheerleading uniforms were separated from the uniform and applied in another medium—for example, on a painter’s canvas—they would qualify as ‘two-dimensional . . . works of . . . art.’ §101.”⁵⁷ While *Brandir* and its progeny are reasonably criticized as relying too much on the subjective mindset of the particular creator of the design,⁵⁸ *Star Athletica*’s independent-existence inquiry appears to depend entirely on the subjective mindset of any viewer of the design. Could anyone imagine it as art?

But before we drop off a cliff into panaestheticism, there may be a limit to this inquiry. Recall the final sentence of the paragraph quoted above: “If the feature is not capable of existing as a pictorial, graphic, or sculptural work once separated from the useful article, then it was not a pictorial, graphic, or sculptural feature of that article, but rather one of its utilitarian aspects.”⁵⁹ This would seem to imply that a design feature is either an aesthetic feature or a utilitarian feature (“but rather”). And from this distinction we might assume that to qualify as a pictorial, graphic, or sculptural work, the design feature cannot bear functional influences. It must be “quite useless.”

But elsewhere in his opinion, Justice Thomas comes to a different conclusion. The company *Star Athletica* (the alleged infringer) argued that the Copyright Act “protects only ‘solely artistic’ features that have no effect whatsoever on a useful article’s utilitarian function.”⁶⁰ Justice Thomas rejects this argument on the basis that the Act explicitly protects “applied art.”⁶¹ Thus, “[a]n artistic feature that would be eligible for copyright protection on its own cannot lose that protection simply because it was first created as a feature of the design of a useful article, even if it

53. *See id.*

54. *Star Athletica*, 137 S. Ct. at 1012.

55. *Id.* at 1012.

56. SHAKESPEARE, *supra* note 45, act 2, sc. 7.

57. *Star Athletica*, 137 S. Ct. at 1012.

58. *See id.* at 1015 (asserting that the *Brandir* test “would require the decisionmaker to consider evidence of the creator’s design methods, purposes, and reasons”).

59. *Star Athletica*, 137 S. Ct. at 1015.

60. *Id.* at 1014.

61. *Id.*

makes that article more useful.”⁶² So much for “but rather.” And so we arrive to the full formulation of the independent-existence question: Is the design capable of being perceived on its own as a work of art, even if it continues to bear utilitarian or functional influences?

There’s much else going on here, but in the interest of time, let me summarize *Star Athletica*’s overall separability test in the manner that Justice Thomas does. In explaining that both “freestanding art”⁶³ and “features of useful articles”⁶⁴ may qualify for protection, he invokes the imagined *origins* of the features at issue in any copyright case involving the separability analysis:

The ultimate separability question, then, is whether the feature for which copyright protection is claimed would have been eligible for copyright protection as a pictorial, graphic, or sculptural work had it originally been fixed in some tangible medium other than a useful article before being applied to a useful article.⁶⁵

In other words, can we tell ourselves a story in which the design was originally created as “free-standing art” and only then applied to a useful article? I suppose it’s pleasant to note that this formulation of the “ultimate separability question” runs parallel with the origins of the root word “separate,” from the Latin “se” for apart and “parare,” to prepare.⁶⁶ More on this also in a moment.

III. THE ROLE OF BLEISTEIN

There are undoubtedly many reasonable objections to Justice Thomas’s approach in *Star Athletica*, as there are to any resolution of a close question in the kind of close case that reaches the Supreme Court. But for all of my poking at it, I have to admit some degree of sympathy with Justice Thomas’s reasoning. I’m certain that some will disagree with me, but I don’t think we can say that his reading of the actual statutory text (including important parts of which I’m not covering) is just wrong as a matter of statutory interpretation. One can almost hear his sigh when

62. *Id.* On the possible meanings of this sentence, see Robert C. Denicola, *Imagining Things: Copyright for Useful Articles After Star Athletica v. Varsity Brands*, 79 U. PITT. L. REV. 635, 648–49 (2018) (proposing that this sentence be “interpreted to refer only to the fact that the useful article need not be functional once the separated feature is removed,” but noting other aspects of Justice Thomas’s opinion that “might indicate that the Court did indeed intend to include [as copyrightable] even designs that are specifically necessary to the optimal functioning of the useful article”); see also Mark P. McKenna, *Knowing Separability When We See It*, 166 U. PA. L. REV. 127, 128 (2017) (asserting that the *Star Athletica* majority misunderstood the “applied art/industrial design distinction” in copyright law).

63. *Star Athletica*, 137 S. Ct. at 1011.

64. *Id.*

65. *Id.* On the significance of origin stories in innovation and intellectual property law more generally, see JESSICA SILBEY, *THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY* 25–54 (2015) (discussing innovators’ accounts of the origins of their work).

66. *Separate*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/176100?rskey=PbW30k&result=2&isAdvanced=false#eid> (last visited Jan. 5, 2019); *Se-*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/174070#eid23881980> (last visited Jan. 5, 2019).

he reminds his readers at one point that “[T]his is not a free-ranging search for the best copyright policy, but rather depends solely on statutory interpretation.”⁶⁷ I’m tempted to say that we’ve all known that, putting aside the legislative history, Justice Thomas’s reading may very well be the most loyal to the actual words of the Copyright Act—perhaps primarily because he just rephrases them. But we’ve also known for decades that if we adopt this reading, only madness can follow, because it will require judges to identify what is art rather than to identify what is utilitarian or functional.

It is as if nearly all the doctrine that we’ve built up around what we used to call the test for “conceptual separability”⁶⁸ (a term that *Star Athletica* explicitly declares obsolete)⁶⁹ was designed precisely to insulate judges from having to decide what is art, with more or less success. Admittedly, some lesser veins of the doctrine seemed to propose that the judge just ask himself: well, could I imagine this appearing in a museum?⁷⁰ But we used to make fun of that—the joke’s on us.

All of this doctrine was built up in light of Justice Holmes’s admonition in the 1903 case *Bleistein v. Donaldson Lithographic Co.* that judges should not judge the aesthetic worth of works of art.⁷¹ Justice Thomas was clearly aware of *Bleistein* because he cites to it and quotes from it. A citation somewhere in *Star Athletica* to *Bleistein* was inevitable, but what is strange is how *Bleistein* appears in the majority opinion, or *where*, which is near the end. The company Star Athletica had argued that judges should consider the marketability of pictorial, graphic, or sculptural features in determining if such features are capable of existing independently.⁷² Justice Thomas rejects this approach:

Nothing in the statute suggests that copyrightability depends on market surveys. Moreover, asking whether some segment of the market would be interested in a given work threatens to prize popular art over other forms, or to substitute judicial aesthetic preferences for the policy choices embodied in the Copyright Act. *See Bleistein v. Donaldson Lithographic Co.*, 188 U.S. 239, 351 (1903) (“It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits”).⁷³

Needless to say, this is a strange treatment of *Bleistein*. As a small matter, Justice Thomas volunteers the view that the prizing of popular art over other forms

67. *Star Athletica*, 137 S. Ct. at 1010.

68. *See, e.g., Varsity Brands, Inc. v. Star Athletica, LLC*, 799 F.3d 468, 481–89 (6th Cir. 2015) (discussing the “conceptual separability” test), *aff’d sub nom., Star Athletica*, 137 S. Ct. 1002.

69. *Star Athletica*, 137 S. Ct. at 1014 (“Because separability does not require the underlying useful article to remain, the physical-conceptual distinction is unnecessary.”).

70. *See Carol Barnhart Inc. v. Econ. Cover Corp.*, 773 F.2d 411, 422 (2d. Cir. 1985) (discussing but ostensibly rejecting this approach).

71. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251–52 (1903).

72. *Star Athletica*, 137 S. Ct. at 1015.

73. *Id.*

is improper, which would seem to be an expression of a “judicial aesthetic preference.” But what is stranger is that the whole point of Justice Holmes’s famous long paragraph in *Bleistein* was to explain why he was relying on the market as an index of aesthetic value.⁷⁴ The issue was whether *Bleistein*’s circus posters satisfied what was then understood to be a constitutional requirement that, to qualify for copyright protection, they must “promote the Progress of Science and useful Arts.”⁷⁵ Holmes refused to judge their merit himself (“It would be a dangerous undertaking . . .”). Instead, he let the market decide: if the posters sell, then they must have “worth” and this must mean that they promote progress.⁷⁶ It could be argued that *Bleistein* proposed a market definition of what kind of expression can be identified separately and exist independently as an aesthetic commodity—and yet Justice Thomas cites *Bleistein* here to reject a market definition. But what is strangest, of course, is the whole idea that near the end of an opinion that asks judges to determine what qualifies as art, Justice Thomas then cites *Bleistein*’s oft-cited dictum that judges should not engage in aesthetic judgment.

The irony is that *Bleistein* engaged in a different kind of separability analysis. Like the Framers, Justice Holmes sought to separate the law from the aesthetic—just as, if you’ll permit the analogy or homology, *Star Athletica* seeks to separate the utilitarian from the aesthetic. But *Star Athletica*, in seeking this separation of the utilitarian from the aesthetic, apparently necessarily joins the law and the aesthetic. The hydraulics of this are unclear and worth further thought, but it appears that we are left in a condition in which one separation cannot coexist with the other. You can have *Bleistein* or *Star Athletica* but you cannot have both. Stated a little more pointedly: The moment the law begins to pursue a separation between the utilitarian and the aesthetic and decide what is aesthetic, the law finds itself on what it would consider to be the wrong, less privileged (less objective, less logical, less rational) side of that divide, where it is no longer engaging in legal reasoning about the utilitarian and the just. Instead, it is engaging in aesthetic thinking about the meaningful and the beautiful.

IV. JUSTICE BREYER’S DISSENT

This brings us finally to Justice Breyer’s dissent, which is wide-ranging and, I think, relatively mild—everyone recognizes that, at its core, *Star Athletica* asks unanswerable questions. In the interests of time, I will not address Justice Breyer’s alternative test. Instead, I want only to focus on one of Justice Breyer’s defenses of his test, when he says: at least my test is better than Justice Thomas’s. Justice Breyer explains:

74. See Beebe, *supra* note 2, at 371–76.

75. See *id.* at 352–57.

76. See *Bleistein*, 188 U.S. at 351 (“That these pictures had their worth and their success is sufficiently shown by the desire to reproduce them without regard to the plaintiff’s rights.”).

[It is better] because virtually any industrial design can be thought of separately as a “work of art”: Just imagine a frame surrounding the design, or its being placed in a gallery. Consider Marcel Duchamp’s “readymades” series, the functional mass-produced objects he designated as art. What is there in the world that, viewed through an esthetic lens, cannot be seen as a good, bad, or indifferent work of art? What design features could not be imaginatively reproduced on a painter’s canvas?⁷⁷

I think we have here the obvious objection to the test that Justice Thomas establishes, spoken on behalf of a half-century of copyright law and scholarship. When law engages in aesthetic thinking, it must confront the probability that there is nothing outside of the aesthetic. There are no longer any of *Bleistein*’s “narrowest or most obvious limits.”⁷⁸ Any two- or three-dimensional element can appear to have two- or three-dimensional qualities and these qualities can exist independently as objects of aesthetic experience—and as invested with the aura of art, even if mass-produced, as in *Mazer v. Stein*.⁷⁹ This might not have been true long ago, back when everyone knew everything’s place. But it is true now.⁸⁰ And arguably this is a significant accomplishment.

Justice Thomas responds to this challenge in a footnote of his opinion. He explains:

The dissent suggests that our test would lead to the copyrighting of shovels. But a shovel, like a cheerleading uniform, even if displayed in an art gallery, is “an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information.” 17 U.S.C. § 101. It therefore cannot be copyrighted. A drawing of a shovel could, of course, be copyrighted. And, if the shovel included any artistic features that could be perceived as art apart from the shovel, and which would qualify as protectable pictorial, graphic, or sculptural works on their own or in another medium, they too could be copyrighted. But a shovel as a shovel cannot.⁸¹

In Justice Thomas’s efforts to constrain and delimit the aesthetic, we arrive finally to what I guess you could call the “This is not a shovel” problem in *Star Athletica*. I am aware that the René Magritte painting *The Treachery of Images* has been

77. *Star Athletica*, 137 S. Ct. at 1033–34 (Breyer, J., dissenting). Some Supreme Court justices spell the word as “esthetic.” Others spell it as “aesthetic.” Compare *Reed v. Town of Gilbert*, Ariz., 135 S. Ct. 2218, 2231 (2015) (Thomas, J.) (“[The Town] has offered only two governmental interests in support of the distinctions the Sign Code draws: preserving the Town’s aesthetic appeal and traffic safety.”), with *id.* at 2233–34 (Alito, J., concurring) (“Properly understood, today’s decision will not prevent cities from regulating signs in a way that fully protects public safety and serves legitimate esthetic objectives.”).

78. *Bleistein*, 188 U.S. at 351 (1903).

79. *Mazer v. Stein*, 347 U.S. 201, 218 (1954).

80. See, e.g., *Silvertop Assocs., Inc. v. Kangaroo Mfg., Inc.*, 319 F. Supp. 3d 754, 765 & n.7 (D.N.J. 2018) (citing the example of Andy Warhol’s “famous image of a ripe banana,” *id.* at 765 n.7, to find that the banana costume at issue in the case could qualify for copyright protection, even though it “is unlikely to end up in the Philadelphia Museum of Art,” *id.* at 765).

81. *Star Athletica*, 137 S. Ct. at 1013 n.2.

the subject of quite a lot of critical thinking from some quite famous critics.⁸² I don't hope to engage any of that here. We still lack the time. And as a legal matter, I can't imagine how this critical tradition could faithfully be operationalized into the kind of doctrine we would want to see in the courts.⁸³

Instead, as I near my conclusion, I just want to wonder about how Justice Thomas can speak so confidently (so dismissively? and why not?) of a “shovel as a shovel[,]” “even if displayed in an art gallery.”⁸⁴ Justice Thomas can do so because he already takes for granted the origins of the shovel—as does the entire doctrinal apparatus he tries to build in *Star Athletica*. Stated differently, the only coherent way that Justice Thomas can distinguish between the “shovel as a shovel” and the “shovel as a sculpture” (the only way he can actually answer the question of copyright protectability as applied to the shovel) is to take into account the origins of the shovel's design.

You will recall Justice Thomas's statement quoted above going to the “ultimate separability question.”⁸⁵ This is the true heart of Justice Thomas's opinion and now of what remains of the test to determine if the design of useful article can qualify for copyright protection. Here he asks: can we tell a story in which the design was originally fixed in a medium other than a useful article, in other words, in a form that has no “intrinsic utilitarian function” other than to portray its own appearance? In *Star Athletica*, the “separability test” has imploded. Everything meets it, even a shovel, because everything may be perceived as aesthetic. The final bar to copyrightability is found instead in the Act's definition of a “useful article” (and the easily-satisfied originality standard). If a work is a useful article, then its features qualify as protectable pictorial, graphic, or sculptural works only if (1) they are separately identifiable, (2) they independently exist, and (3) they are not themselves useful articles. Because the first and second requirements are easily met, the third remains as the backstop. Regardless of what the Copyright Act sought to establish, this is the test that we now have. Does the design feature serve any “intrinsic utilitarian function” other than to portray its own appearance?⁸⁶

82. See, e.g., MICHEL FOUCAULT, *THIS IS NOT A PIPE* (James Harkness ed. & trans., 1983) (1968). Cf. Jane C. Ginsburg, *The Sum is More Public Domain than Its Parts?: US Copyright Protection for Works of Applied Art Under Star Athletica's Imagination Test*, 166 U. PA. L. REV. 83, 85 (2017) (discussing how section 113(a) of the Copyright Act “reifies Magritte's jest” by establishing that “[t]he copyright in a picture of a pipe is not a copyright in an actual pipe”).

83. Cf. FRANÇOIS CUSSET, *FRENCH THEORY 278* (Jeff Fort, Josephine Berganza & Marlon Jones trans., 2008) (discussing the “double bind” that “arises from the fact that the very logic of French theoretical texts prohibits certain uses of them, uses that were often necessary to their American readers in order to *put the texts to work*”) (emphasis in original).

84. *Star Athletica*, 137 S. Ct. at 1013 n.2.

85. *Id.* at 1011.

86. Cf. Buccafusco & Lemley, *supra* note 6, at 1335 (“[T]he most charitable reading of [*Star Athletica*] is that it flips copyright law's treatment of dual-nature features of [pictorial, graphic, and sculptural] works. Where previously only those features that were purely non-functional were protectable . . . , after *Star Athletica*, only those aspects that are purely functional will be filtered out.”).

Needless to say, this “intrinsic utilitarian function” inquiry is in some tension with Justice Thomas’s statement above that a feature may qualify as a protectable pictorial, graphic, or sculptural work “even if it makes that article more useful.”⁸⁷ Let me try to set out this tension clearly. On the one hand, according to the Act’s definition of “useful article,” a design feature is an unprotectable useful article if it has an intrinsic utilitarian function other than to portray its own appearance. On the other hand, according to *Star Athletica*’s “separability test,” a design feature is a protectable pictorial, graphic, or sculptural work even if it adds utilitarian functionality to the article as long as it may be perceived as art. In short, on the one hand, a design feature is unprotectable if it has an intrinsic utilitarian function; on the other hand, it is protectable even if it adds utilitarian functionality as long as it is art.

The only escape from this dilemma is found in the word “intrinsic.” After all, a design could conceivably have utilitarian functions other than portraying its own appearance, and yet the design could still be copyrightable as a non-useful article as long as those functions are not “intrinsic” utilitarian functions of the design. Art trumps functionality but only when that functionality is not “intrinsic.”

How then might courts in close cases determine if a design has a non-aesthetic function that is “intrinsic” to the design, and thus that the design is uncopyrightable? The *OED* definition of “intrinsic” is not terribly helpful: “[b]elonging to the thing in itself, or by its very nature; inherent, essential, proper; ‘of its own.’”⁸⁸ But it does suggest— “[b]elonging to the thing in itself . . . inherent”—how courts might determine if a non-aesthetic function inheres in a design. First, courts would not, as some have in the past,⁸⁹ rely on a viewer’s subjective, extrinsic idea about the thing. Rather, they would consider the inherent nature of the thing itself. This of course is easier said than done. But to do so, they might follow the example of Justice Thomas’s separability analysis and, to determine if the design is a useful article, look to the design’s origins. They might inquire into the designer’s purpose and intent and examine the process she followed in developing the design. They might ask if the design incorporates or was in any way influenced or conditioned by concerns other than mere appearance. Did the designer prepare the work apart (se-parare) from the pursuit of any “intrinsic utilitarian function” other than appearance? In other words, they might take up something like the *Brandir* line of analysis.⁹⁰

87. *Star Athletica*, 137 S. Ct. at 1014.

88. *Intrinsic*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/98698?redirectedFrom=intrinsic#eid> (last visited Jan. 5, 2019).

89. *See, e.g.*, *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989, 993–94 (2d Cir. 1980) (discussing expert testimony that belt buckle designs at issue “rise to the level of creative art”); *id.* at 991 (discussing consumer usage of the designs purely as ornamentation). For a discussion of the dangers of relying on audience perception in the context of the infringement analysis, see generally Jeanne Fromer & Mark A. Lemley, *The Audience in Intellectual Property Law*, 112 MICH. L. REV. 1251 (2014).

90. In his 2018 article, Professor Denicola discusses the meaning of “intrinsic.” *See* Denicola, *supra* note 62, at 660–0–64. He declines to advocate an intrinsicness test based on *Brandir* (and his own previous article cited in *Brandir*) on the ground that Justice Thomas explicitly rejected the *Brandir*

One might object that *Star Athletica* explicitly rejected *Brandir*. Indeed, as we saw above, Justice Thomas’s majority opinion states: “the statute’s text makes clear . . . that our inquiry is limited to how the article and feature are perceived, not how or why they were designed.”⁹¹ Fair enough. But the statutory text to which this passage refers is the definition of “pictorial, graphic, and sculptural works,” which is the basis of the separability test. The “intrinsic utilitarian function” test is based on a different statutory text, the definition of “useful article.” *Star Athletica* says nothing about this definition and the meaning of “intrinsic utilitarian function.” As courts may soon discover in close cases, when they discover that *Star Athletica*’s separability test is no test at all, a design feature that satisfies the separability test may nevertheless be disqualified from copyright protection because it has an “intrinsic utilitarian function” other than to portray its own appearance and is thus an uncopyrightable useful article.

CONCLUSION

And so, in the wake of *Star Athletica*, the analysis of whether designs qualify for copyright protection may very well arrive to the place from which it started and know it more or less as it has always known it. To apply the meaning of “intrinsic,” courts may revive the *Brandir* approach, as I have suggested, or indeed they may revive a new chaos of approaches not unlike what preceded *Star Athletica*. The latter outcome is admittedly more likely. Going forward, we should be especially wary of those cases that manage somehow to apply *Star Athletica* to deny copyrightability to the design features before them. The only reported opinion so far to do so does not inspire confidence.⁹²

approach in *Star Athletica*. For an argument that Justice Thomas did not in fact reject a *Brandir* approach with respect to the issue of whether a design feature has an “intrinsic utilitarian function,” see *infra* note 92 and accompanying text.

91. *Star Athletica*, 137 S. Ct. at 1015.

92. In *Inhale, Inc. v. Starbuzg Tobacco, Inc.*, 2:11-cv-03838-ODW (FFM), 2017 WL 4163990 (C.D. Cal. May 8, 2017), the court denied copyright protection to the shape of the plaintiff’s hookah. It found that:

[T]here is nothing distinctive or artistic about the individual features—despite Inhale’s flowery language describing the features, they are essentially geometric shapes of the most common type. . . . Combining two or three of these common geometric shapes together does little to improve the situation—the components of the water container at issue are simply not works of art in even the broadest, most liberal sense. . . .

....

This is not to say that there are not some, if not many, useful articles composed of *unique* geometric shapes variations or *unique* combinations of geometric shapes that might pass muster under the *Star Athletica* test. It is only to say that the water container at issue here is no Noguchi Table.

Inhale, 2017 WL 4163990, at *3. This would appear to be a straightforward example of the kind of judicial aesthetic discrimination that Justice Holmes condemned in *Bleistein*. See *supra* text accompanying note 71; see also Mala Chatterjee, *Conceptual Separability as Conceivability: A Philosophical Analysis of the Useful Articles Doctrine*, 93 N.Y.U. L. REV. 558, 583–84 (2018) (employing the philosophical idea of conceivability as informed by an assessment of the central, “legitimate functions” of the article at issue to criticize the *Inhale* court’s analysis).

What remains clear is that the ultimate separability question goes to the origins of our own analysis. Do we start with the utilitarian and functional and then go searching for the aesthetic, asking: is anything here art and thus copyrightable? Or do we start with the aesthetic and then go searching for the utilitarian, asking: is anything here functional and thus uncopyrightable? In short, is it the aesthetic that ultimately makes the design feature copyrightable, or the utilitarian that ultimately makes the design feature uncopyrightable?

Star Athletica reads the Copyright Act to insist that we do the former: we must start with the utilitarian and search for the comedy of the aesthetic. So long as it is there, copyright adheres, even if functional concerns are brought along. But because judges know what they are not good at, and that they are not good at identifying what is and is not art,⁹³ they have instead traditionally understood that the better course is to start with the aesthetic and search for the tragedy of the utilitarian. If the utilitarian is there, there is no copyright. Judges have properly privileged the aesthetic first, and despite *Star Athletica*, or perhaps in light of it, they will likely continue to do so. To their credit, they recognize the importance of the aesthetic and law, not law and the aesthetic.

93. *But see* Brian Soucek, *Aesthetic Judgment in Law*, 69 ALA. L. REV. 381, 450 (2017) (in challenging the “judicial (in)competency argument for the aesthetic nondiscrimination principle,” observing that “it is hard to understand why aesthetic judgments should be any harder to make than judgments involving, say, complex technology in patent disputes or judgments requiring deep familiarity with the economics of a particular industry in antitrust cases”).

