Thin Separability: An Answer to Star Athletica

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ABSTRACT

Courts have consistently struggled to adopt a test that appropriately interprets the Copyright Act’s language protecting works of art incorporated into useful articles. The analysis that allows protections of these works of art is called “separability,” and it has been an ambiguous area of copyright law since its inception. In essence, this analysis gives copyright protection to a work of art incorporated into a useful article as long as the work of art is “separate” from the utilitarian aspects of the useful article. The Supreme Court was positioned to end the uncertainty surrounding the separability analysis in its recent decision, Star Athletica. But a survey of lower court decisions applying Star Athletica’s new test shows that it has significant shortcomings. The new analysis results in overprotection of designs incorporated into useful articles and lacks normative guidance. As a result, this Note first argues that Congress should amend the copyright statute. But, if the test remains unchanged, courts should proceed by analyzing these works of art in the following way: the more difficult it is to separate the work of art from the utilitarian aspects of the useful article, the “thinner” the copyright protection a court should give to that work of art.

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* I would like to first give a special thanks to my faculty advisor, Professor Margaret Chon, for all her guidance on this Note and for sparking my interest in copyright law. I would also like to thank all the Law Review members who gave their time to make this Note ready for publication. Last, I would like to thank my friends and family for their continued support, especially my parents.
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INTRODUCTION

In March 2017, the Supreme Court resolved a split amongst lower courts for the separability analysis. In Star Athletica v. Varsity Brands, the Court announced a new test that departed from the nine previous tests applied by lower courts. The separability analysis is used when copyright protection is sought for works of art incorporated into useful articles. It allows for certain works of art to gain copyright protection, despite the fact that those works are part of useful articles that are not themselves protected through copyright. For example, this test is particularly important because of its implications for the copyrights of designs on clothing. The fashion industry has consistently pushed for an expansion of copyrights in order to preserve and incentivize creativity with the practical goal of gaining greater protection to stop the frequent copying of fashion designs. Thus, the test announced by the Court may have far-reaching consequences for copyrights in certain industries, like the fashion industry, where designs are commonly incorporated into useful articles.

2. Id. at 1005.
4. See id. (discussing the definitions of “useful articles” and “pictorial, graphic, and sculptural works”).
7. Transcript of Oral Argument at 35, Star Athletica, L.L.C. v. Varsity Brands, Inc., 137 S. Ct. 1002 (2017) (No. 15-866) (“Justice Sotomayor: You’re killing . . . knock-offs with . . . copyright. You haven’t been able to do it with trademark law. You haven’t been able to do it with patent designs. We are now going to use copyright law to kill the . . . knockoff industry. I don’t know that that’s bad. I’m just saying.”). Barton Beebe, Intellectual Property Law and the Sumptuary Code, 123 HARV. L. REV. 809, 817 (2010); Landers, supra note 5, at 428.
This Note will consider the successes and struggles of lower courts in applying the new test subsequent to the decision in *Star Athletica*. In light of these cases, this Note argues that the new test announced in *Star Athletica* inadequately resolved the disparate tests by focusing on the abstract text of the Copyright Act. Lower courts’ application of this new, ambiguous standard reveals overprotection of useful articles based on a reliance on originality as a limit to protection. Moreover, courts have struggled with the departure from old tests, especially with the role of functionality in the analysis.

Part I of this Note will conceptualize the various modern tests in the context and history of the Copyright Act. Part II of this Note will frame the abstract separability analysis in the context of the fashion industry, an industry replete with imitation. Part III of this Note will survey lower court applications of the new standard in order to locate the reasons for confusion and overprotection in application. Finally, Part IV argues that a solution to this problem should include one of two things: (1) an amendment to the separability section of the Copyright Act that utilizes all or some of the nine tests the lower courts used, which will aid in creating a clearer statutory standard or (2) a thin copyright protection for useful articles under the *Star Athletica* separability standard.

I. SEPARABILITY IN THE COPYRIGHT ACT: HISTORY AND CONTEXT

Before jumping into the details of the separability analysis, it is important to consider the origins of separability. The separability analysis was prompted by a case decided twenty years prior to the 1976 Copyright Act, which provides the modern framework for copyright law. In *Mazer v. Stein*, the Court interpreted the 1909 Copyright Act to extend copyright protection to a sculpture of a dancer that was a part of a lamp. The Court held that the fact that the dancer was incorporated into the lamp did not change the ability of the sculptural work to obtain copyright protection, even though patent protection is supposed to sufficiently cover useful articles. The Court’s interpretation of the Act was supported by regulations of the Copyright Office. Subsequently, the Copyright Office

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9. Id. at 213–15.
codified the *Mazer* holding into a regulation, which became the basis of the separability analysis in the 1976 Copyright Act.

*Mazer* provides the paradigmatic example of where Congress intended to extend copyrights to works of art incorporated into useful articles. The work of art incorporated into the useful article in that case could be intuitively viewed as separate from the utilitarian aspects of the useful article. Comparing *Mazer* to other cases can be a useful tool to determine whether lower courts using *Star Athletica’s* separability analysis significantly departs from the kind of protection Congress intended to grant works of art incorporated into useful articles.

While *Mazer* was the impetus of separability in the Copyright Act of 1976, it is also essential to dig deeper into the words of the Act itself. Congress enacted this Act pursuant to its Constitutional 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.” While incentivizing creativity by granting copyrights is a priority of the Act, the Act also explicitly excludes useful articles from copyright protection. Useful articles are defined as “article[s] having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information.” The Act goes even further in refusing to protect these articles through a clarification of this definition: “An article that is normally a part of a useful article is considered a ‘useful article.’” The reason that there is a lack of copyright protection of useful articles is that patents, which grant protections to inventions, normally cover such articles. But patent protection is harder to obtain than copyright protection, and it does not last as long as copyright protection.

17. Id. (defining a “useful article”).
18. Id.
20. Kieselstein-Cord v. Accessories by Pearl, Inc., 632 F.2d 989, 993 (2d Cir. 1980) (stating that copyright law was “never intended to nor would the Constitution permit them to protect monopolies on useful articles”); Susan Scafidi, *Intellectual Property and Fashion Design*, in 1 INTELLECTUAL PROPERTY AND INFORMATION WEALTH 115, 122 (Peter K. Yu ed., 2006) (explaining that such patents for fashion design are impractical given the short timing of fashion).
21. Darren Hudson Hick, *Conceptual Problems of Conceptual Separability and the Non-Usefulness of the Useful Articles Distinction*, 57 J. COPYRIGHT SOC’Y U.S.A. 37, 37 (2010). For an in-depth discussion of the differences between patent and copyright law, see Steve W. Ackerman,
Perhaps as a result of these differences, and with Mazer in mind, the Act also allows for protection of "[p]ictorial, graphic, and sculptural works' [that] include two-dimensional and three-dimensional" works of art. More particularly and most importantly here, while the Act does not protect parts of useful articles that serve a utilitarian function, it protects "the design of a useful article . . . 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." This is the "separability" analysis—the section of the Act that codified the ability to protect specific parts of useful articles announced in Mazer. Even though the codification of Mazer in the statute seems relatively straightforward, the Act itself is not clear as to what it means to "be identified separately from" or exist "independently of, the utilitarian aspects of the article."

The only clue regarding the application of separability based on the language of the Act is from the House Committee on the Judiciary. The Committee attempted to provide clarity by stating that a work of art could be protected if it could be either physically or conceptually separated from the useful article. Courts have interpreted physical separability to mean that the work of art can be "physically separated from the article by ordinary means while leaving the utilitarian aspects of the article completely intact." If the work of art could not be physically separated, then it could still be protected as long as it could be imagined or visualized as separate from the useful article while leaving the useful article intact. This is called "conceptual" separability. Without more guidance on the

23. See id.
24. Id.
25. See id.
26. H.R. REP. NO. 94-1476, at 55 (1976) ("Unless the shape of an automobile, airplane, ladies’ dress, food processor, television set, or any other industrial product contains some element that, physically or conceptually, can be identified as separable from the utilitarian aspects of that article, the design would not be copyrighted under the bill."). For more on the distinction between physical and conceptual separability, see generally Barton R. Keyes, Alive and Well: The (Still) Ongoing Debate Surrounding Conceptual Separability in American Copyright Law, 69 OHIO ST. L.J. 109, 120 (2008) and Shira Perlmutter, Conceptual Separability and Copyright in the Designs of Useful Articles, 37 J. COPYRIGHT SOC’Y U.S.A. 339 (1990).
29. Id. Justice Breyer gave helpful guidance on the distinction between physical and conceptual separability in his dissent in Star Athletica. 137 S. Ct. at 1031–32 (Breyer, J., dissenting). For an example of physical separability, he used a lamp with a cat fixed on the round base of the lamp. Id. In
separability analysis, courts were tasked with creating meaningful standards that reflected Congress’s intentions in this section of the Act. But the abstract textual requirement and vague guidance for the analysis resulted in a variance of separability standards applied in the lower courts.\textsuperscript{30} Lower courts have used nine different tests in grappling with faithfully applying separability, some of which will be discussed in detail later in the article.\textsuperscript{31}

To summarize, when a party seeks copyright protection of a work of art incorporated into a useful article, the Act requires a court to (1) determine whether there is a valid copyright for the pictorial, graphic, or sculptural work incorporated into the useful article\textsuperscript{32} and (2) utilize the separability analysis to establish whether the work of art can be sufficiently separated from the useful article.\textsuperscript{33}

But if separability is met, it only establishes that the author has ownership of a valid copyright in the work. If an author wants to enforce his or her copyright, there is also a two-part infringement component.\textsuperscript{34} First, the author must show that the alleged infringer copied the author’s work, which requires showing that the infringing work copied the original elements of the work\textsuperscript{35} and evidence that the infringer actually copied the work.\textsuperscript{36} The second element is improper appropriation, and it asks whether the defendant’s copying was sufficient to constitute improper copying.\textsuperscript{37} While different tests for improper appropriation have been articulated, at

\[\text{that case, the cat could be “physically separate from the lamp, as it could be easily removed while leaving both cat and lamp intact.” Id. at 1032. For an example of conceptual separability, Justice Breyer changes his hypothetical lamp to mirror the lamp in \textit{Mazer v. Stein}, 347 U.S. 201 (1954). Id. The cat sculpture is placed in the middle of the base of the lamp with wires running through it. Id. Because the cat sculpture and the lamp were “integrated into a single functional object,” the cat could not be physically removed from the lamp without destroying the lamp and the cat. Id. But because the cat can easily be imagined as separate from the lamp, the cat was conceptually separable from the lamp like the dance sculptures in \textit{Mazer}. Id.}\]


\[\text{33. Id.}\]

\[\text{34. See \textit{Arnstein v. Porter}, 154 F.2d 464, 468 (2d Cir. 1946).}\]


\[\text{36. Id. at 408–11.}\]

\[\text{37. Id. at 412.}\]
the simplest level, the plaintiff “must show that the defendant copied a sufficient amount of the protectible elements of the plaintiff’s copyrighted work as to render the two works substantially similar.”\footnote{Id.} A main question for a court regarding this element of a copyright claim, and a question integral to this Note, is the requisite level of similarity between the copyrighted work and the allegedly infringing work that will be considered improper.\footnote{Shyamkrishna Balganesh, The Normativity of Copying in Copyright Law, 62 DUKE L.J. 203, 207 (2012).} In other words, depending on the kinds of works involved, a court may require more or less similarity between the works before concluding that a work is improperly infringing.

II. STAR ATHLETICA: FASHION AND REASONING

An example is helpful to conceptualize separability and its possible implications. Aside from announcing the new separability test, the Star Athletica case offers fashion as an example of why separability can be significant.\footnote{Julie Zerbo, Protecting Fashion Designs: Not Only “What?” but “Who?,” 6 AM. U. BUS. L. REV. 595, 597–98 (2017).} Historically, because clothing is considered a useful article, Congress has refused to extend copyright protection to fashion designs on clothing.\footnote{See Registrability of Costume Designs, 56 Fed. Reg. 56,530 (U.S. Copyright Office Nov. 5, 1991); Jonathan M. Barnett et al., The Fashion Lottery: Cooperative Innovation in Stochastic Markets, 39 J. LEGAL STUD. 159, 163–64 (2010).} But Star Athletica put this question squarely before the Supreme Court and, through a test allowing designers to more easily obtain copyrights for fashion designs, gave the fashion industry some hope in realizing its goal of stopping the copying of designs.\footnote{See Helene M. Freeman, A Big Cheer for Cheerleader Uniforms, FASHION INDUSTRY L. BLOG (Mar. 22, 2017), https://fashionindustrylaw.com/2017/03/22/a-big-cheer-for-cheerleader-uniforms/ [https://perma.cc/TFY9-73CG]; Michael Madison, Two Cheers for Copyright, MADISONIAN (Mar. 27, 2017), http://madisonian.net/2017/03/27/two-cheers-for-copyright/ [https://perma.cc/BA7U-8L7S]; Steff Yotka, What the Supreme Court’s First Ruling on Fashion Copyrights Means for the Runway, VOGUE (Mar. 23, 2017), https://www.vogue.com/article/supreme-court-star-athletica-varsity-brands-ruling-fashion-industry [https://perma.cc/B328-EMP5].} The case was about the copyrightability of chevron designs printed onto cheerleading uniforms.\footnote{Star Athletica, L.L.C. v. Varsity Brands, Inc., 137 S. Ct. 1002, 1004 (2017).} Because the designs were on useful articles, the Court was tasked with a separability analysis to determine the copyrightability of the designs.\footnote{Id. at 1004–05.}

As a result of the split in the lower courts, the Court took up Star Athletica to resolve the separability issue, and it announced a new test that
ended the debate as to which of the nine separability tests the lower courts should use.\textsuperscript{45} The Court created its own test:

We hold that a feature incorporated into the design of a useful article is eligible for copyright protection only if the feature (1) can be perceived as a two- or three-dimensional work of art separate from the useful article and (2) would qualify as a protectable pictorial, graphic, or sculptural work—either on its own or fixed in some other tangible medium of expression—if it were imagined separately from the useful article into which it is incorporated.\textsuperscript{46}

The Court, applying its new test for separability—which closely followed the text of the Copyright Act—held that the chevron designs (1) could be imagined separately from the cheerleading uniforms and (2) could have qualified as a protectable work when imagined separately from the design.\textsuperscript{47}

In describing its analysis, the Court noted that “[t]he first requirement—separate identification—is not onerous” because one “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.”\textsuperscript{48} By choosing to focus on imagining the work of art separated from the useful article, the Court chose “conceptual” separability as the standard and explicitly eliminated the previous distinction between “physical” and “conceptual” separability announced by the House Committee on the Judiciary.\textsuperscript{49}

The Court went on to comment that “[t]he independent-existence requirement is ordinarily more difficult to satisfy,”\textsuperscript{50} reasoning that this second requirement means that “the feature must be able to exist as its own pictorial, graphic, or sculptural work . . . once it is imagined apart from the useful article.”\textsuperscript{51} The Court highlighted that this requirement in itself provided a sufficient analytical tool for determining whether the work of art served a functional purpose in the useful article: “If the feature is not capable of existing as a pictorial, graphic, or sculptural work once separated from the useful article, then it was . . . one of its utilitarian aspects” that was not protectable under the Act.\textsuperscript{52}

\begin{itemize}
  \item \textsuperscript{45} Id. at 1007.
  \item \textsuperscript{46} Id.
  \item \textsuperscript{47} Id.
  \item \textsuperscript{48} Id. at 1010.
  \item \textsuperscript{49} Id. at 1014 (“[W]e necessarily abandon the distinction between ‘physical’ and ‘conceptual’ separability, which some courts and commentators have adopted based on the Copyright Act’s legislative history.”).
  \item \textsuperscript{50} Id. at 1010.
  \item \textsuperscript{51} Id. at 1005.
  \item \textsuperscript{52} Id. at 1010.
\end{itemize}
This reasoning appears to disregard prior separability tests that more carefully analyzed whether the work of art performed a utilitarian function. More specifically, the Court explicitly clarified that it did not consider “any aspects of the useful article that remain after the imaginary extraction[.]” and it instead focused on the work of art separated from the article.53 This reasoning eliminated the need to analyze the functionality of the useful article after the design was removed, which was one notable test that some circuits previously adopted.54 The Court also unequivocally rejected two other tests previously used by lower courts: “(1) ‘[W]hether the design elements can be identified as reflecting the designer’s artistic judgment exercised independently of functional influence[,]’ and (2) whether ‘there is [a] substantial likelihood that the pictorial, graphic, or sculptural feature would still be marketable to some significant segment of the community without its utilitarian function[,]’”55 The Court rejected these tests because neither of them were rooted in the statute.56

Since Star Athletica was decided, lower courts have focused on the Court’s example of a tangible medium in which the chevron designs could exist when imagined separately from the useful article: “a painter’s canvas.”57 While Justice Thomas worked hard to explain that this is an acceptable way to think about separability, the dissent was skeptical that this would merely create “pictures of cheerleader uniforms.”58 Nonetheless, Justice Thomas’s interpretation won out; the test for separability is now rooted in the abstract language of the Copyright Act.

III. LOWER COURT APPLICATIONS

After Star Athletica, only a handful of cases have applied the new test in depth. Three general categories of cases emerge from a survey of these lower court decisions: (1) cases with facts that lend themselves to intuitive separability; (2) cases that result in overprotection of useful articles due to a reliance on originality as a limiting factor; and (3) cases struggling with the role of functionality in the new separability test.

A. Intuitive Separability

Some cases have provided notably easy separability analyses after Star Athletica because of their facts. In these cases, courts can intuitively

53. Id. at 1013.
54. Id. at 1014 (“But the statute does not require the imagined remainder to be a fully functioning useful article at all, much less an equally useful one.”).
55. Id. at 1015 (citation omitted) (quoting Brief for Petitioner at 34–35).
56. Id.
57. Id. at 1012. For an example of this approach, see Pivot Point Int’l, Inc. v. Charlene Prods., Inc., 372 F.3d 913, 934 (7th Cir. 2004) (Kanne, J., dissenting).
58. Star Athletica, 137 S. Ct. at 1030–31 (Breyer, J., dissenting).
separate certain pictorial, graphic, or sculptural elements from useful articles that are worthy of copyright protection. These cases had little difficulty in applying the separability analysis, so it is helpful to see where Star Athletica has been applied to contextualize the analytical problems in other cases.

For example, in Design Ideas, Ltd. v. Meijer, Inc., the plaintiff brought a copyright infringement suit for the copying of its “Sparrow Clips,” comprised of a sparrow figure placed on a clothespin.\(^5\) In determining whether the sparrow figure was copyrightable, the court initially and very easily held that, regarding the first separability requirement, the bird could be imagined as a three-dimensional work of art separate from the clothespin.\(^6\) The court proceeded to hold that the bird would be a copyrightable sculptural work of art when separated from the clothespin and placed into another tangible medium.\(^7\) In its reasoning for this second requirement, the court noted that the sparrow figure was not “useful” merely because it could be used in insignificant or trivial useful ways once removed from the useful article (like hanging the bird from its beak or using the bird as a door stop).\(^8\) Instead, the sparrow on the clothespin had to have “an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information” to be useful and thus not protectable.\(^9\)

In another case, Triangl Group Ltd. v. Jiangmen City Xinhui District Lingzhi Garment Co., the plaintiff asserted copyrights in their distinctive swimsuit line with a black trim in a “T” shape.\(^10\) The court directly analogized these facts to Star Athletica and stated that the “black trim and T-shape” of the swimsuit could be imagined separately from clothing and could exist as their own works of art in another tangible medium.\(^11\) Both of these cases give good examples of the straightforward application of Star Athletica when there is an identifiable work of art that is intuitively separable from a useful article. In Design Ideas, a three-dimensional sparrow on a clothespin is relatively easy to imagine as separate from the clothespin and existing as its own sculptural work in another medium.\(^12\) These facts are very similar to Mazer in that the bird,

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6. Id. at *2.
7. Id. at *3.
8. Id.
9. Id. at *1 (quoting 17 U.S.C. § 101 (2010)).
11. Id. at *8
like the sculpture of a dancer on the lamp, was separable from the clothespin and naturally viewed as an artistic statue in its own right, rather than being a utilitarian part of the clothespin.\textsuperscript{67} The \textit{Triangl Group} case offered a similarly easy separability analysis because it concerned shapes and designs on a commonly used fashion item, which were plainly separable under \textit{Star Athletica’s} holding.\textsuperscript{68}

\textbf{B. Overprotection and Originality}

Other cases have useful articles and designs that stray further from cases like \textit{Mazer} and \textit{Star Athletica}, which make the separability analysis much more demanding. These cases start to expose some of the complications and the lack of guidance from \textit{Star Athletica’s} analysis. In one category of challenges, courts only rely on originality to limit broad applications of the new separability analysis. A work must be original in order to be eligible for copyright protection.\textsuperscript{69} Originality requires that both authorship and creativity be manifested in the work in question,\textsuperscript{70} but the amount of creativity necessary is considered “extremely low.”\textsuperscript{71} While courts are not overtly struggling with overprotection, using originality as a limiting factor once separability is met leads to overprotection of useful articles. The following cases provide some examples.

In one case, \textit{Silvertop Associates, Inc. v. Kangaroo Manufacturing, Inc.}, the plaintiff asserted copyrights to the combination of designs incorporated into a banana suit.\textsuperscript{72} In granting a preliminary injunction, the district court held that almost every feature of the banana suit was probably protected except for the arm holes.\textsuperscript{73} According to the court, the cutout holes of the suit were merely an unprotectable utilitarian part of the suit because “[t]hey do not contribute to the Banana Costume’s aesthetic except to produce it in a wearable form.”\textsuperscript{74} However, almost the rest of the entire suit was protected under the separability analysis.\textsuperscript{75} The court’s framing of this analysis is significant to its outcome: “The Court must view the Banana Costume as a whole, as opposed to inspecting the individual

\begin{footnotesize}
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\item \textsuperscript{67} Id. at *2–3. See generally \textit{Mazer} v. Stein, 347 U.S. 201 (1954).
\item \textsuperscript{68} \textit{Triangl Grp. Ltd.}, 2017 WL 2829752, at *8.
\item \textsuperscript{69} Katherine L. McDaniel & James Joo, \textit{A Quantum of Originality in Copyright}, 8 CHI-KENT J. INTELL. PROP 169, 169 (2009).
\item \textsuperscript{70} David E. Shipley, \textit{Thin but Not Anorexic: Copyright Protection for Compilations and Other Fact Works}, 15 J. INTELL. PROP. L. 91, 92 (2007).
\item \textsuperscript{72} Silvertop Assocs., Inc. v. Kangaroo Mfg., Inc., 319 F. Supp. 3d 754, 760 (D.N.J. 2018), aff’d, 931 F.3d 215 (3d Cir. 2019).
\item \textsuperscript{73} Id. at 764.
\item \textsuperscript{74} Id.
\item \textsuperscript{75} Id. at 764–65.
\end{itemize}
\end{footnotesize}
components that come together to create the Banana Costume.”\textsuperscript{76} The court went on to state that the banana suit’s features comprised as a whole, many of which are suspect as utilitarian parts of any costume,\textsuperscript{77} could be “identified separately from and can exist independently from the utilitarian aspect of the article.”\textsuperscript{78} Perhaps most interestingly, the court stated that “if these features were separated from the costume itself and applied on a painter’s canvas, it would qualify as a two-dimensional work of art.”\textsuperscript{79} Relying heavily on a “painter’s canvas” as a primary means of legal analysis, the court held that the compilation of the banana suit’s colors, shapes, and textures could together be protected because the “imaginative spark” of the unique combination of its parts provided the requisite level of creativity for originality.\textsuperscript{80} The court came to this conclusion despite the fact that the banana suit depicted a natural object and was “unlikely to end up in the Philadelphia Museum of Art.”\textsuperscript{81} This decision was recently affirmed by the Third Circuit.\textsuperscript{82} The Third Circuit agreed that the Banana Costume contained artistic features (“colors, lines, shape, and length”) that were separable and capable of existing independently of the useful article.\textsuperscript{83} The court also agreed that the costume’s holes were not protectable because they were a utilitarian part of the costume.\textsuperscript{84} The Third Circuit explained that it could “imagine the banana apart from the costume as an original sculpture” and that the “sculpted banana, once split from the costume, is not intrinsically utilitarian and does not merely replicate the costume.”\textsuperscript{85} Moreover, the court confirmed that \textit{Star Athletica} allowed the artistic features of the

\textsuperscript{76} Id. at 764.
\textsuperscript{77} The court identified the following as protectable:
\begin{itemize}
  \item a) the overall length of the costume,
  \item b) the overall shape of the design in terms of curvature,
  \item c) the length of the shape both above and below the torso of the wearer,
  \item d) the shape, size, and jet black color of both ends,
  \item e) the location of the head and arm cutouts which dictate how the costume drapes on and protrudes from a wearer (as opposed to the mere existence of the cutout holes),
  \item f) the soft, smooth, almost shiny look and feel of the chosen synthetic fabric,
  \item g) the parallel lines which mimic the ridges on a banana in three-dimensional form, and
  \item h) the bright shade of a golden yellow and uniform color that appears distinct from the more muted and inconsistent tones of a natural banana.
\end{itemize}

\textsuperscript{78} Id. at 764–65.
\textsuperscript{79} Id. at 764.
\textsuperscript{80} Id. at 765.
\textsuperscript{81} It is also worth noting that the court contrasted the banana costume with the iconic cheerleading outfit in \textit{Star Athletica}. While the chevron designs on the outfit were protectable, the court noted that the cheerleading uniform itself would not be protectable because it was an iconic and common outfit that necessitated no level of originality on its own. \textit{Id.}
\textsuperscript{82} Silvertop Assocs., Inc. v. Kangaroo Mfg., Inc., 931 F.3d 215, 218 (3d Cir. 2019).
\textsuperscript{83} Id. at 221.
\textsuperscript{84} Id.
\textsuperscript{85} Id.
costume to be analyzed in combination. 86 The court again rejected the argument that the banana costume was unoriginal because the banana suit depicted a natural object. 87 It emphasized that the argument “seeks to raise the originality requirement’s very low bar” 88 and held that “the depiction of the natural object has a minimal level of creativity” to be copyrightable. 89 Last, the court rejected the infringer’s analogy to another case in which the court held that a costume was not original because the costume was merely a pile of fabric when imagined separately from the wearer. 90 The court underscored that Star Athletica no longer permitted such an approach because it required the expressive features to be imagined and fixed in a “tangible medium.” 91 Thus, while the court did not specifically use the “painter’s canvas” in its analysis, it confirmed that the district court’s use of that mode of analysis was proper after Star Athletica.

In another case, Inhale, Inc. v. Starbuzz Tobacco, Inc., the plaintiff sued for the copyrights to the designs of hookah water containers. 92 The court concluded that plaintiffs failed to identify the separate parts of the hookah containers that could be the predicate for the Star Athletica analysis. 93 The issue was that the plaintiff sought protection of the way the shapes were combined to form the entire container. 94 The court explained that “[w]hen an entity seeks protection for the arrangement of all the parts of an article, combined in the manner necessary to create the article, it is effectively seeking protection for the article as a whole.” 95 Because such comprehensive protection of useful articles is not permissible, the court held that the plaintiff did not point to artistic features of the containers that were separable from the usefulness of the article itself. 96 The court attempted to identify individual or subsets of shapes that could be works of art separated from the container. 97 However, the court highlighted that the container was a combination of common geometric shapes that were

86. The court noted that Star Athletica took into account “the arrangement of colors, shapes, stripes, and chevrons on the surface of the cheerleading uniforms.” Id. (quoting Star Athletica, L.L.C. v. Varsity Brands, Inc., 137 S. Ct. 1002, 1012 (2017)).
87. Id.
88. Id.
89. Id. at 222.
90. Id.
91. Id. (citing Star Athletica, 137 S. Ct. at 1012).
93. Id. at *2.
94. See id. at *3.
95. Id.
96. Id.
97. Id.
not sufficiently unique to be passable as original sculptural works. 98 Nevertheless, the court qualified that some unique combinations of geometric shapes could be sufficiently original after Star Athletica. 99 The court, however, concluded that “the water container at issue here is no Noguchi Table.” 100

In Glass Egg Digital Media v. Gameloft, Inc., the plaintiff asserted copyrights to certain arrangements of polygons in 3D digital car models used in the defendant’s video games. 101 The plaintiff claimed that its arrangements of the polygons were copyrightable because they were sufficiently original and because they could be separated from the cars as they appeared on the screen. 102 The court assumed that the polygon arrangements were separable from the cars because the defendant did not contest that fact. 103 Because separability was met, the court was left only to consider whether these arrangements possessed the required level of originality. 104 Unlike Inhale, where the polygons did not meet the required

98. Id.
99. Id.
100. Id. A Noguchi table is a modern table that creatively utilizes shapes in its design. The court used the table’s creative design as an example of how a configuration of shapes can possess the requisite level of originality and how the shapes of the water container did not remotely represent such creativity. The court included a picture of a Noguchi table at this part of the opinion, and below appears another example:


102. Id.
103. See id. at *5.
104. See id.
level of originality, the court held that the decisions made by artists working for the plaintiff on where to put the large amount of polygons based on millions of combinations possessed the minimal, requisite degree of creativity.\textsuperscript{105}

All three of these examples, in one way or another, show the extension of the copyrightability of useful articles after \textit{Star Athletica} because originality appears as the only limiting factor to a broad separability analysis. In \textit{Silvertop}, the court decided that almost an entire banana suit was probably protected because the suit was comprised of a unique combination of various parts.\textsuperscript{106} The court was allowed the freedom to deem those combinations as original after it applied the new and less stringent separability analysis.\textsuperscript{107} Both the district court and the Third Circuit were able to conclude that the banana suit was separable because it could exist in another tangible medium.\textsuperscript{108} This arguably confirms the dissent’s worry in \textit{Star Athletica} that the new separability analysis would allow for copyrightability by creating “pictures” of the work of art in question.\textsuperscript{109}

Moreover, the overprotection resulting from this new analysis is apparent when looking at how far \textit{Silvertop} takes us from \textit{Mazer}. As previously discussed, the dancer incorporated into the lamp in \textit{Mazer} is relatively easy to see as a piece of art separable from a lamp as a useful article.\textsuperscript{110} However, in \textit{Silvertop}, it is more difficult to see how a banana suit’s “artistic” shape and length are separable from the whole suit as a useful article.\textsuperscript{111} Thus, because of its focus on the originality of the combination of artistic parts in the suit, \textit{Silvertop} shows that the new analysis may provide copyright protection in cases where it is not clear whether the artistic parts of the useful article are separable from the article’s usefulness.

The issue of originality as a limiting factor is also more clearly shown in a comparison between \textit{Inhale} and \textit{Glass Egg}. The court in \textit{Inhale}, while noting that it was an easy case, drew the line between what was not a protectable arrangement of geometrical figures—the hookah containers—

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{105} Id.
\item \textsuperscript{107} For cases before \textit{Star Athletica} that protected costumes, see Masquerade Novelty, Inc. v. Unique Indus., Inc., 912 F.2d 663, 671 (3d Cir. 1990) and Nat’l Theme Prods., Inc. v. Jerry B. Beck, Inc., 696 F. Supp. 1348, 1356 (S.D. Cal. 1988).
\item \textsuperscript{108} Silvertop Assocs., Inc., 319 F. Supp. 3d at 765; Silvertop Assocs., Inc. v. Kangaroo Mfg., Inc., 931 F.3d 215, 222 (3d Cir. 2019).
\item \textsuperscript{110} See \textit{Mazer} v. Stein, 347 U.S. 201, 202, 212–14 (1954).
\item \textsuperscript{111} See \textit{Silvertop Assocs., Inc.}, 319 F. Supp. 3d at 764–65.
\end{enumerate}
\end{footnotesize}
and a protectable arrangement that was—a Noguchi table—based on the originality of the composition rather than on the separability of such arrangements.\footnote{112. Inhale, Inc. v. Starbuzz Tobacco, Inc., No. 2:11-cv-03838-ODW (FFM), 2017 WL 4163990, at *3 (C.D. Cal. May 8, 2017).} Although originality limited the copyrights of the common polygon hookah containers in \textit{Inhale},\footnote{113. \textit{Id.}} there was no such limit to the more complex car models in \textit{Glass Egg}.\footnote{114. See Glass Egg Dig. Media v. Gameloft, Inc., No. 17-cv-04165-MMC, 2018 WL 3659259, at *4 (N.D. Cal. Aug. 2, 2018).} Originality appears to be the only difference in the result between the two cases. If originality is the only limit to the new separability analysis, then it is likely correct that the new analysis will extend protection to artistic parts of useful articles beyond what Congress intended.\footnote{115. Lili Levi, \textit{The New Separability}, 20 VAND. J. ENT. & TECH. L. 709, 712–14 (2018).} Originality is a low bar in copyrights, and it is not an effective limiting factor to a broadened separability analysis.\footnote{116. See generally McDaniel & Juo, supra note 69; Joseph Scott Miller, \textit{Hoisting Originality}, 31 CARDOZO L. REV. 451 (2009).} It seems that the copyright community has already noted the possibility of overprotection of designs on useful articles as there has been a notable increase in copyright litigation after \textit{Star Athletica}.\footnote{117. Star Athletica, L.L.C. v. Varsity Brands, Inc., 137 S. Ct. 1002, 1013, 1015 (2017).}

\textbf{C. Functionality}

In another category of challenges, courts struggle with the role of functionality in determining whether the work of art can exist separately from the useful article.\footnote{118. For an in-depth discussion of the confusion of the role of functionality in the separability analysis in \textit{Star Athletica}, see generally Christopher Buccafusco & Jeanne C. Fromer, \textit{Forgetting Functionality}, 166 U. PA. L. REV. 119 (2017); see also Rebecca Tushnet, \textit{Shoveling a Path After Star Athletica}, 66 UCLA L. REV. 1216, 1224–31 (2019).} Notably, the Court in \textit{Star Athletica} rejected both a meaningful analysis of the functionality of the useful article after the expressive feature is separated, as well as whether the design of the work of art reflected any functional influence.\footnote{119. Star Athletica, L.L.C. v. Varsity Brands, Inc., 137 S. Ct. 1002, 1013, 1015 (2017).} Both of these tests were previously used by courts for the separability analysis.\footnote{120. Larry C. Russ & Nathan D. Meyer, \textit{Fashion Forward: The Star Athletica v. Varsity Brands Decision Overturned Copyright Office Practices Going Back Half a Century}, L.A. LAW., Sept. 2017, at 20, 23–24.} The role of functionality in the separability analysis has caused some tension in the following cases.
In *Jetmax Ltd. v. Big Lots, Inc.*, the plaintiff sued to enforce its copyrights to a teardrop light set that had ornamental features, including “molded, decorative tear shaped covered lights with a wire frame over the covers.”121 With regard to the first requirement of separability, the court held that the decorative molding of the lights could be identified separately from the utilitarian use of the light set.122 The court reasoned that the second requirement for separability was also met because the decorative covers were artistic, sculptural works that could be removed from the light set and stand apart from the functionality of the light set.123 This analysis seems straightforward. But the court also clarified that, even though the light covers served a useful purpose by creating less glare, it was irrelevant whether the useful article was equally functional once the separated part was removed after *Star Athletica.*124

In *Ross v. Apple, Inc.*, the plaintiff asserted copyrights of his drawing that he claimed Apple had stolen from him through the “non-functional aesthetic look and feel” of the drawings.125 The court, however, disagreed and stated that the parts of the drawing were not separable from “the idea of a handheld electronic reading device.”126 Thus, the court held that none of the elements of the drawing could be perceived as a work of art that was separate from the usefulness of the device itself.127 Instead, the court stated that these were “necessary parts of [the device,]”128 which is a nod toward a previous separability test that emphasized the functionality of the work of art for the useful article.129 It is unclear whether *Star Athletica* abandoned that test specifically, but this court does appear to rely on it in part when applying the new test.

After *Star Athletica*, the Court instructed that functionality (i.e., the utilitarian aspects of the useful article) was considered only when deciding whether the work of art could “exist apart from the utilitarian aspects of the article.”130 Thus, the focus of this analysis is simply on the ability of the work of art to exist in another tangible medium. The Court circularly concluded that, as long as the work of art could exist separately, then it

122. Id. at *6.
123. Id.
124. Id. at n.2.
126. Id. at 737.
127. Id.
128. Id.
129. This separability test was called “the objectively necessary approach, which provides that ‘if the artistic features of the design are not necessary to the performance of the utilitarian function of the article,’ then the article is conceptually separable.” Spina, supra note 31, at 244 n.41.
was not a utilitarian part of the useful article. But this analysis arguably confuses courts because it is unclear what analytical tools are to be used in deciding whether the work of art can exist apart from the useful article’s utilitarian aspects. In other words, by rejecting previous tests relating to functionality, Star Athletica left courts to grapple with how to make principled distinctions between the work of art and the useful article’s functionality.

These cases together shed light on how courts are responding to the role of functionality in the separability analysis after Star Athletica. In Jetmax, the court went out of its way to highlight the irrelevancy of the fact that the function of the light changed when the decorative piece was removed. That case is a signal that courts are struggling with the tests specifically rejected by Star Athletica that emphasize the functionality of the useful article. Ross further highlights this problem with Star Athletica’s reasoning. The court in that case was not willing to recognize copyright protection of the look and feel of a drawing of a handheld device because all parts of the drawing were necessary to the functionality of a handheld device. While that case concluded that the artistic part of the drawing could not be imagined separately from the useful article itself, it reveals that courts may still grapple with the functionality as a part of the separability analysis and even rely on previous tests in the analysis. This is not surprising given that separability is an exception to the general rule that useful articles, as functional objects, are not intended to be protected through copyright. Therefore, these two cases show that Star Athletica’s reasoning lacks guidance regarding the role that functionality plays in whether the expressive element is a utilitarian part of the useful article.

IV. RESOLVING CONFUSION AND OVERPROTECTION

A. Amend the Copyright Act

Star Athletica’s new test has fundamental problems. Its ambiguity allows for overprotection of useful articles and, most importantly, it lacks the analytical structure that courts need for the already difficult separability analysis. Star Athletica rejected the tests applied by the lower courts that were not grounded in the text of the statute, especially those tests analyzing the functionality of the useful article after the expressive element was removed. However, a complete banishment of the previous

131. Id.
133. Ross, 741 F. App’x at 734.
134. See generally Star Athletica, 137 S. Ct. 1002.
tests is confusing, especially because it is unclear what role functionality, as an analytical tool, is supposed to play in copyright protection for useful articles. This confusion is reflected in challenges the lower courts have had integrating functionality into a separability analysis after Star Athletica. And Star Athletica’s new test offers no additional or useful guidance because it focused solely on the abstract language of the Copyright Act.

An appropriate way to resolve these issues is to bring the prior tests back into the fold. Because the Court has already spoken through Star Athletica, a petition for Congress to change the analysis might be the next logical step. It is important to consider the incentives for Congress to amend the separability language if petitioned to do so.

First, if Congress still intends to not grant broad copyright protection for fashion designs, it should consider changing this analysis. Clothing designs can be protected through design patents even when the design is not separable from the utility of clothing. However, the fashion industry has pushed for broadened copyright protection in its designs because design patents last only fifteen years and copyrights can last much longer. Congress has been hesitant to give broad copyright protection to fashion designs, and has declined to adopt broader protection on many occasions. But the broader separability analysis would allow for more copyrightable designs for fashion companies. If the Congressional intent of not allowing clothing designs to be copyrightable remains, Star Athletica’s broadened protection for these designs is a persuasive reason for Congress to amend the statute.

Another significant reason for Congress to amend the Act is the possible national—and even international—market effect that a broad separability analysis could create. The separability analysis could have great market impacts for the clothing industry. Fashion companies are likely to bring more suits against alleged copiers after Star Athletica. These suits would attempt to suppress the copying industry in fashion,

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135. Id. at 1034–35 (Breyer, J., dissenting) (first citing 35 U.S.C §§ 71, 173 (2012); and then citing Mark P. McKenna & Katherine J. Strandburg, Progress and Competition in Design, 17 STAN. TECH. L. REV. 1, 48–51 (2013)).
137. See 17 U.S.C. § 302 (2012) (e.g., the copyrights to work after 1978 of known authors last for the life of the authors, plus seventy years after their death).
138. See Star Athletica, 137 S. Ct. at 1034 (Breyer, J., dissenting) (collecting various sources on this point and stating that "[c]ourts must respect those lines and not grant copyright protection where Congress has decided not to do so. And it is clear that Congress has not extended broad copyright protection to the fashion design industry").
139. See id. at 1034–35.
140. Levi, supra note 115, at 709 (noting the possible downhill effects of fashion companies aggregating many copyrights to their designs).
141. See, e.g., Puma Files Patent, Copyright, Trade Dress Suit, supra note 117.
where other companies appropriate distinguishable parts of the fashion designs to use in their clothing.\textsuperscript{142} The active attempt at destruction of the copying industry could produce disruption in this large market, which sells high-end designs at lower prices to more people.\textsuperscript{143} While the extent of these impacts is obviously unclear, the possibility of disruption in an industry that “in the United States alone encompasses nearly $370 billion in annual spending and 1.8 million jobs”\textsuperscript{144} should give an additional, compelling reason for Congress to amend the statute. To be clear, this Note does not support the copying industry; instead, I am merely identifying a real consequence of the separability analysis that provides a convincing reason for Congress to amend the statute.

But the most important reason for Congress to amend the statute is because \textit{Star Athletica}’s test lacks analytical structure. Prior to \textit{Star Athletica}, many tests attempted to provide normative substance to separability to best effectuate Congress’s intent through the abstract separability language in the Copyright Act.\textsuperscript{145} These tests, while paying heed to the statutory language, went beyond the statute and looked to the history of separability as well as the broader policies of copyright for the best possible test.\textsuperscript{146} \textit{Star Athletica} brought separability back to the abstract point from which courts were confused in the first place, resulting in the overprotection of useful articles’ functional elements—likely unintended by the original statute.\textsuperscript{147} Thus, it appears that Congress should intervene because courts are forced to again grapple with abstract statutory language without reliance on any old tests or outside policies for aid.

If Congress were to amend the statute, it would not be working with a blank slate in terms of substance. Instead, Congress should find normative guidance through the lower court tests prior to \textit{Star Athletica}. In particular, in light of the issues functionality has posed to court’s


\textsuperscript{145} Spina, supra note 31, at 244 n.41.

\textsuperscript{146} Id.

\textsuperscript{147} \textit{Star Athletica}, 137 S. Ct. at 1002; Levi, supra note 115, at 709.
analyses, the tests and cases speaking directly to functionality as a meaningful part of separability would be particularly useful. Courts are in need of a principled way to determine whether the work of art is a utilitarian aspect of the useful article. The previous tests provide Congress with a few options that go beyond the text of the statute as it is currently written to provide a workable analysis for such a determination. Adding functionality back into the analysis should also be augmented by the test rejected by Star Athletica that considered the marketability of the useful article to address any possible concerns of market impact noted above. Congress will need to address these two items in particular if it decides to amend the statute, and it has a variety of options to provide the most clarity and guidance for courts in the separability analysis. A petition for such an amendment might be the last resort to clear up the ambiguity of the separability analysis, and the prior tests provide at least some legitimate launching point for the discussion.

148. These are the tests that involve some level of functionality within the separability analysis: (2) the primary-subsidiary approach, which states that conceptual separability exists "if the artistic features of the design are 'primary' to the 'subsidiary utilitarian function,'" (quoting Kieselstein-Cord v. Accessories by Pearl, Inc., 632 F.2d 989, 993 (2d Cir. 1980)); (3) the objectively necessary approach, which provides that "if the artistic features of the design are not necessary to the performance of the utilitarian function of the article," then the article is conceptually separable . . . (5) the design-process approach, which provides for conceptual separability if the design elements reflect the "designer’s artistic judgment exercised independently of functional influences," (quoting Brandir Int’l, Inc., v. Cascade Pac. Lumber Co., 834 F.2d 1142, 1145 (2d Cir. 1987)); (6) the stand-alone approach, which provides for conceptual separability if “the useful article’s functionality remain[s] intact once the copyrightable material is separated,” (quoting Pivot Point Int’l, Inc. v. Charlene Prods., Inc., 372 F.3d 913, 934 (7th Cir. 2004) (Kanne, J., dissenting)) . . . (8) Patry’s approach, which asks whether designs are “separable from the ‘utilitarian aspects’ of the article,” rather than the article itself, satisfying separability if the discernable PGS features are “capable of existing as intangible features independent of the utilitarian aspects of the useful article,” and are not “dictated by the form or function of the utilitarian aspects of the useful article,” (quoting 2 William F. Patry, Patry on Copyright § 3:146 (2015)); and (9) the subjective-objective approach, which determines separability by balancing the extent “to which the designer’s subjective process is motivated by aesthetic concerns [and the extent] to which the design . . . is objectively dictated by [the article’s] utilitarian function,” (quoting Barton R. Keyes, Note, Alive and Well: The (Still) Ongoing Debate Surrounding Conceptual Separability in American Copyright Law, 69 Ohio St. L.J. 109, 141 (2008)).

Spina, supra note 31, at 244 n.41.

149. Id.

150. This is the test that approaches separability with the market in mind: (7) the likelihood-of-marketability approach, which states that conceptual separability exists when, “even if the article ha[s] no utilitarian use it would still be marketable to some significant segment of the community simply because of its aesthetic qualities.” (quoting Galiano v. Harrah’s Operating Co., 416 F.3d 411, 419 (5th Cir. 2005)).

Id.
B. Thin Copyright

If the *Star Athletica* test remains unchanged by Congress, then the best solution is for courts to provide thinner copyright protection for a work of art as the separability analysis becomes more difficult (i.e., as it becomes more difficult to separate the work of art from the useful article). In general, thin copyright is a term that relates to the amount of copying of a certain work that will be actionable. Usually, when a court applies thin copyright protection, it provides lesser protection to a work seeking copyright protection because the work is made up of primarily unprotectable parts. The result of thin copyright protection is that it effects the infringement analysis by requiring a greater amount of similarity between the original and infringing works before the copying is considered improper appropriation. In essence, this means that the “thinner” the copyright protection that a court applies, the more “virtually identical” the infringing work must be to the copyrightable material. Applying thin copyright protection makes a copyright infringement claim more difficult for the author of the original work, as less kinds of copying of the copyrighted material will be actionable. The aspects of thin copyright that can address the overprotection of works makes thin copyright the appropriate analytical tool to address the concerns that the new separability analysis leads to overprotection of functional elements of useful articles.

Some commentators like Professor Levi have argued that applying limiting doctrines to the broad separability analysis—such as thin copyright—might be insufficient due to the overall anti-competitive impact of the aggregation of copyrights in the fashion industry. But the same motivations behind applying thin copyrights in other scenarios—to provide reduced protection to works that contain less copyrightable material—also apply to the new separability analysis. In addition to limiting overprotection by preventing useful articles from passing through both a low bar of separability and originality, the application of thin copyright protection is reasonable on its own terms.

As previously mentioned, the decision to apply thin copyright protection is associated with the infringement component of a copyright infringement claim. In other words, this decision would occur once the

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151 See Balganesh, supra note 39, at 223.
152 Id.; see also JANE C. GINSBURG & ROBERT A. GORMAN, COPYRIGHT LAW 30–32 (2012).
154 Ets-Hokin v. Skyy Spirits Inc., 323 F.3d 763, 766 (9th Cir. 2003) (explaining that the thin copyright doctrine provides protection only for copying that is “virtually identical”).
156 Balganesh, supra note 39, at 209.
work of art incorporated into the useful article meets the new separability test and is copyrightable. Once an author shows that an infringer factually copied the protectable elements of the work, they must also show that the copying amounted to improper appropriation. A court will determine that copying constituted improper appropriation by looking at the similarity or substantial similarity between the two works, and there are various infringement tests that articulate when certain copying is improper. But there can also be an additional layer within this analysis; a court can vary the level of scrutiny it uses to compare the works and ultimately decide whether copying amounts to improper infringement. This variation can be referred to as thickness and thinness: “The thicker the entitlement, the greater the forms and types of copying that are likely to be actionable; conversely, the thinner the entitlement, the fewer the forms and types of copying that are considered actionable.”

In the context of thin copyright and infringement, Feist Publications v. Rural Telephone Service Co. is the leading case and provides a good example. The Court in Feist used the words thin copyright to describe the point at which compilations of facts can obtain copyright protection. While the facts themselves would not be copyrightable, arrangements of facts might have the minimal level of originality for those specific arrangements to be protected. The Court explained:

This inevitably means that the copyright in a factual compilation is thin. Notwithstanding a valid copyright, a subsequent compiler remains free to use the facts contained in another’s publication to aid in preparing a competing work, so long as the competing work does not feature the same arrangement.

157. LEAFFER, supra note 35, at 407–12; Balganesh, supra note 39, at 207.
158. LEAFFER, supra note 35, at 412.
159. Id.
160. See MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW 412–25 (4th ed. 2005) for the various tests for infringement, including the “virtual identity” test that will be discussed later in this section.
161. Balganesh, supra note 39, at 207.
165. Id.
166. Feist Publ’ns, Inc., 499 U.S. at 349.
Professor Ginsburg explained that the amount of copyright protection afforded to works under the thin copyright doctrine is “virtually none, short of extensive verbatim copying.”

A decision to apply thick or thin copyright protection turns on the extent to which the copyrighted work is in line with the overarching policies of copyright. Thus, works that serve “copyright’s primary purpose only marginally” receive only thin copyright protection. Originality appears as a focal copyright policy involved in the decision to apply thin copyright protection, as it is often described as “the sine qua non of copyright.” While the amount of creativity needed for a work to be original is low, the creativity and authorship required for a work to be original are at the center of a significant copyright policy: to incentivize creativity. Thus, given that originality represents an important policy incentive in copyright, the choice of when to apply thin copyright protections sometimes turns on the level of creativity embodied in the work: “Many copyrights represent significant creative effort, and are therefore reasonably robust, whereas others reflect only scant creativity. The Supreme Court labels the latter ‘thin.’”

If a work of art is less creative, and therefore less original, it normally follows that the amount of the work that is copyrightable also decreases. The lack of copyrightable material can trigger thin copyright protection because there is simply less of the work that can be protected. Accordingly, a work that is made “primarily of unprotectable material” usually only gets thin copyright protection to ensure that protection is not haphazardly extended to other parts undeserving of protection. The underlying rationale of applying thin copyright to works composed of primarily unprotectable material demonstrates why thin copyright protection should generally be applied to useful articles. Useful articles will always be partly comprised of uncopyrightable material because their

169. Id.
171. Shipley, supra note 170, at 95.
172. See U.S. CONST. art. I, § 8, cl. 8; THE FEDERALIST NO. 43 (James Madison).
175. See NIMMER & NIMMER, supra note 173, § 13.03[A][4].
176. Balganesh, supra note 39, at 223.
functional elements do not receive copyright protection.\textsuperscript{177} It follows that, while the work of art may possess a high level of creativity, it is still conveyed within a work containing many functional, uncopyrightable elements. The separability analysis is supposed to remove the copyrightable material from the uncopyrightable aspects of the useful article. But the separability analysis is now so easy to meet that it no longer can be depended upon to satisfactorily separate the copyrightable material (the work of art) from the uncopyrightable material (the utilitarian aspects of the useful article). The only bar is originality. Thus, in terms of the thin copyright’s policy considerations, courts should apply thin copyright protection to works of art incorporated into useful articles in the following way: the more difficult it is to separate the expressive part of the article from its unprotectable, functional elements, the thinner the copyright protection the court should apply in its final analysis.\textsuperscript{178}


\textsuperscript{178} Here is a visual of what the new analysis would look like:
This “thin separability” approach would allow for flexibility. It would offer protection to designs incorporated into useful articles in cases like *Mazer* where Congress intended to extend copyright protection. But most importantly, such a test would offer a normative mechanism that courts can use to limit the overprotection of functional elements of useful articles after *Star Athletica*. The separability analysis no longer provides an appropriate limit to the overprotection of functional elements of useful articles. By restricting the amount of copying that will be improper, thin separability is a reasonable response to concerns that the new separability analysis leaves only originality as a limit to the overprotection of functional elements of useful articles. If a court decides to apply thin copyright, the original author will win in an infringement case only if the copier has copied the work of art in a way that creates a virtually identical copy of the original. At the same time, as a design becomes more clearly separable from the useful article, the test provides courts with the flexibility to require something less than virtually identical copying. Thin separability is the proper step for courts given the principles and policies of copyright if the legislature remains unwilling to act.

**CONCLUSION**

The new separability standard of *Star Athletica* is insufficient because it utilizes the abstract language of the statute. The cases surveyed in this Note give inklings as to the issues that courts will face in the future if the test remains unchanged. Issues exist both with how courts struggle to make sense of the standard and with the way the test is applied.

Thin copyright protection could take pressure off of courts trying to limit and make sense of the new and broad separability. A petition to Congress to amend the statute is another viable option. If Congress decided to amend the statute, it could use the prior separability tests as the baseline for a new standard. While total clarity of separability seems like a lofty goal, this Note strives to provide the appropriate angles by which courts and lawmakers might think about solving the problem.