

1 JUSTICE BREYER: What about Lemley's --

2 MR. FEIGIN: What we're here about --

3 JUSTICE BREYER: What about Lemley's test on
4 page 17 of his brief? As I -- as I read it, as I read
5 it and I thought -- and I'm sure you've read it -- and
6 it seemed to me that it does say that a two-dimensional
7 picture of a three-dimensional piece of clothing is not
8 entitled to copyright because it is not a design of
9 anything but a utilitarian object, the clothes, whether
10 they are beautiful clothes, ugly clothes, cheerleader,
11 or anything else.

12 MR. FEIGIN: Well, Your Honor, I think I --
13 we disagree that you can't take the aesthetic aspects of
14 the cheerleading uniform and put them in a different
15 medium.

16 JUSTICE BREYER: But do you agree with
17 Lemley's statement, which, I mean, it's such an -- all
18 the professors are there --

19 MR. FEIGIN: No. Your Honor --

20 JUSTICE BREYER: -- and that's why I thought
21 probably you've read it. And it's from all over the
22 country, and I wanted to get your opinion of it.

23 MR. FEIGIN: Your Honor, as you've
24 characterized the statement, we don't agree with it. We
25 do think that the two-dimensional artwork here is

1 separable from the garment, the cut and shape of which
2 is not copyrightable. Let me just make a couple of
3 points.

4 One is about the act and what it's doing
5 overall. The act overall is drawing a distinction
6 between the kinds of aesthetic communicative expressive
7 functions that are traditionally protected by copyright
8 and the kinds of mechanical, pragmatic, utilitarian
9 functions that are exclusively the domain of a "useful
10 article." And the kinds of functions that Mr. Bursch is
11 talking about here are fundamentally expressive
12 functions.

13 First of all, conveying the information that
14 someone is a cheerleader. When someone is wearing a
15 particular piece of clothing intended to convey that
16 they're a member of a particular group or that they hold
17 a particular belief, that is the kind of expressive
18 function that copyright traditionally protects.

19 And, indeed, there is an express exception
20 in the definition of a "useful article" for conveying
21 information. And I think this is indistinguishable from
22 putting a sports team logo on a T-shirt to identify
23 someone as a Washington Capitals fan, for instance.

24 JUSTICE KAGAN: Well, what do you do in
25 Mr. Bursch's examples of military uniforms or police

1 officer uniforms, something like that?

2 MR. FEIGIN: So, Your Honor, those also are
3 conveying information. Now, if someone were trying to
4 assert a copyright in the design of a policeman uniform
5 in such a way that it turned out there were, say, only a
6 limited number of ways to identify someone as a
7 policeman and a copyright were being asserted to prevent
8 identification of someone as a policeman, then the
9 defenses that we discuss at pages 39 to 40 of our brief,
10 the "merger" doctrine, the "scènes à faire" doctrine,
11 would apply to prevent what would effectively be
12 monopolization of that idea.

13 So if that were really happening in this
14 case -- and there are some reasons to think that's not
15 actually happening in the cheerleading realm, and we
16 discuss those in our brief -- if that were happening,
17 those defenses would apply.

18 JUSTICE GINSBURG: What about the Galiano
19 case? That was the casino uniform. Why is that
20 different from the cheerleader uniform?

21 MR. FEIGIN: Well, Your Honor, we -- we
22 don't agree with the result in the Galiano case. To the
23 extent there was some sort of unique, two-dimensional
24 elements that some casino wanted to put on its uniforms
25 to identify its employees, that artwork would be

1 copyrightable and -- just like the cheerleading uniforms
2 in this case.

3 I also want to address the argument --

4 JUSTICE BREYER: Well, before you get away
5 from that, one thing very quick, because maybe I really
6 agree with you.

7 MR. FEIGIN: I hope so.

8 JUSTICE BREYER: I had looked at page 22 of
9 your brief at figure 8. And what I had seen there when
10 I took the arms away was a picture of a thing that was a
11 picture of the cut and style and not just a picture of
12 chevrons. And so -- but if that's what it is, then you
13 would agree and I would agree that it's not -- everybody
14 would agree, I guess, it's not copyrightable.

15 MR. FEIGIN: The point of figure 7 and 8 in
16 our brief, Your Honor, is that everything you see in
17 figure 7 that's also in figure 8 is not copyrightable.
18 That's the cut and shape of the dress. It's the stripes
19 and the coloration, the lines and the design in this
20 particular arrangement.

21 JUSTICE BREYER: So what happens if when you
22 look at the picture that they submit to the Copyright
23 Office and try to figure out if it's separable what you
24 see is a picture of a dress that goes around a woman
25 which does look like, you know, shape and cut and so

1 forth?

2 MR. FEIGIN: So they have generally checked
3 a box, as they did here, that says two-dimensional
4 artwork, and the Copyright Office understands all
5 they're trying to protect is the surface imagery of the
6 garment, and that, they'll register.

7 I do want to address this idea that making
8 the viewer look different is somehow the kind of
9 non-expressive function that is associated with the
10 "useful article" -- with a "useful article." And I
11 think that approach would be contrary to congressional
12 intent and completely inadministrable.

13 If you look at page 55 of the House report,
14 you'll see that Congress believed that two-dimensional
15 designs on fabric or on wallpaper would be separable and
16 thus copyrightable. But that wouldn't be true under the
17 approach petitioner is urging.

18 Under that approach, you'd have to look at a
19 particular two-dimensional design on wallpaper and try
20 to assess whether and to what degree it might make the
21 room look bigger or brighter or smaller or darker. I'm
22 not aware of any scientific reliable or consistent way
23 --

24 JUSTICE KAGAN: Well, that seems a problem.
25 But on the other hand, it seems a little bit strange

1 that, you know, take a garment designer who wants to do
2 a design that is slimming. And if -- there are all
3 kinds of structural things you can do that are slimming,
4 and those would not be copyrightable.

5 MR. FEIGIN: Correct.

6 JUSTICE KAGAN: Then you're saying that
7 the -- that the placement of stripes or color, that is
8 copyrightable, even though the garment designer is
9 really trying to do the same thing through color and
10 through graphic design as he was doing through the shape
11 of the article.

12 MR. FEIGIN: So, Your Honor, I definitely
13 think there is a spectrum here, but let me try to
14 explain why I think this is on the expressive side of
15 the line, not the non-expressive side of the line.

16 If I were to wear a shirt that said "Please
17 focus on my very nicely toned arms. I've worked very
18 hard on them," I think we'd all understand the message
19 conveyed by that shirt to be expressive and separable
20 from the non-expressive functions that the shirt
21 performs covering my body.

22 Now, what -- the kinds of things that we're
23 talking about here are essentially sending that same
24 message, albeit in a nonverbal, more subconscious way,
25 but they're still fundamentally expressive because

1 they're about how the wearer is trying to portray
2 themselves and their appearance to the world, and that's
3 all that's being copyrighted. That's traditionally
4 within the domain of copyright. It is not copyrighting
5 a particular functionality.

6 JUSTICE KENNEDY: Is the domain of copyright
7 to copyright the way people present themselves to the
8 world?

9 MR. FEIGIN: The way that someone
10 expresses -- the way that someone expresses an idea to
11 the world -- in this case, the idea would be how they
12 look -- is something that is very akin to traditional
13 expression that's protected by copyright.

14 Again, here we're just talking about
15 two-dimensional artwork. If we were -- if we adopted
16 petitioner's view, the Copyright Office, when it looks
17 at a particular two-dimensional design, would have to
18 figure out what effect it would have in all sorts of
19 contexts on various "useful articles," which would
20 really --

21 CHIEF JUSTICE ROBERTS: The whole point of
22 the case is we're not just talking about two-dimensional
23 artwork. We're talking about two-dimensional artwork
24 applied to a -- the fabric in a way that conveys a
25 utilitarian function. It's not just -- your friend

1 concedes that if you want to put a picture of this on a
2 lunchbox or whatever that you have a copyright in that.
3 It's only when you apply it to a garment -- because it
4 is what makes that garment a cheerleading outfit as
5 opposed to somebody else; it serves that utilitarian
6 function -- that you don't have a copyright.

7 MR. FEIGIN: Your Honor, I think our
8 fundamental disagreement is whether this is actually
9 performing utilitarian functions. If I could just --

10 CHIEF JUSTICE ROBERTS: Sure.

11 MR. FEIGIN: -- finish my response.

12 And I think one -- I think one problem with
13 the approach you've just articulated is it really
14 divorces Section 101 and 113(a) because you could get a
15 copyright in the illustration, and then he would say
16 it's not copyrightable in certain applications, and that
17 doesn't make much sense.

18 Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.

20 Mr. Bursch, six minutes.

21 REBUTTAL ARGUMENT OF JOHN J. BURSCH

22 ON BEHALF OF THE PETITIONER

23 MR. BURSCH: Thank you, Mr. Chief Justice.

24 I want to start with that final point that
25 the government makes, that if you had a statement that

1 says look at my arms on your shirt that somehow that
2 would be conveying the same message. That -- that's not
3 what this is doing. No one is saying, look at my arms.
4 Like with camouflage, you're not saying, look, you can't
5 see me.

6 The camouflage is actually doing work when
7 it's put in connection with the garment that it was
8 designed for. That's the point.

9 And on that point, Justice Kagan, I just
10 want to make clear about the functionality that we are
11 claiming here with respect to these designs. It's not
12 just that the lines follow the figure of the human body.
13 It's that they actually make the human body appear to
14 look different than it would if they were not wearing
15 those designs. It's just like camouflage.

16 JUSTICE SOTOMAYOR: But the colors do. I
17 mean, the colors are just colors. You can -- what he is
18 saying is you can achieve the same thing with probably
19 most colors and stripes and whatever else is in these
20 designs.

21 MR. BURSCH: Well, they are not claiming
22 copyright in the colors. They -- they can't --

23 JUSTICE SOTOMAYOR: No, they are not.

24 MR. BURSCH: -- the arrangement.

25 And I would say even as to color, this Court

1 in the Qualitex case, that was a trademark case, you
2 said that black, the color black has the ability to make
3 a motor look smaller than it actually is. It has a
4 function that makes it ineligible for trademark
5 protection, and, really, that's the same thing that we
6 are talking about here. That you can use graphic design
7 like camouflage --

8 JUSTICE SOTOMAYOR: Before we are going much
9 further, you're now saying that any -- you're saying
10 there is no copyright on those things.

11 MR. BURSCH: Oh, no. We are saying --

12 JUSTICE SOTOMAYOR: On those pictorial
13 representations --

14 MR. BURSCH: Yes.

15 JUSTICE SOTOMAYOR: -- because they can
16 always be applied in a way that has a function.

17 MR. BURSCH: That -- that's not correct,
18 because if you took the sports logo that the government
19 mentioned, that's a perfect example of something that
20 doesn't require the garment for its functionality,
21 because, just like we were discussing earlier, you could
22 take the logo, and you could put it on your hat or your
23 socks or your lunch pail or on your -- your mitten that
24 you hold up when the folks hit the home run, right,
25 because it doesn't rely at all for the article on which

1 it's appeared for its functionality.

2 But here, these designs rely entirely --

3 JUSTICE SOTOMAYOR: Certain kinds make you
4 look fatter --

5 MR. BURSCH: Right. Exactly.

6 JUSTICE SOTOMAYOR: You believe that --

7 MR. BURSCH: And if --

8 JUSTICE SOTOMAYOR: So you're saying none --
9 even if you find a color rainbow of some weird elk that
10 could never be copyrighted, because --

11 MR. BURSCH: They -- they could have the
12 copyright in the two-dimensional design, but if there
13 was an application where it would create functionality
14 when paired with a garment, then, yes, their copyright
15 would not extend to prevent --

16 JUSTICE SOTOMAYOR: How about the gorilla, a
17 gorilla's hand around your -- one of the pictures in --

18 MR. BURSCH: Right. That -- that's a much
19 closer case than this one.

20 For starters, if we're walking through the
21 analysis, first you look at the identified separately,
22 and, here, when you look at the arrangements of the
23 stripes and the color blocks and the chevrons, you --
24 you see the cheerleader uniforms.

25 And this is Justice Breyer's point about

1 page 17 of the Lemley brief, right, that the aesthetic
2 elements exist only as part of a cheerleader uniform.
3 There's nothing to extract. That's why this case is
4 different than the gorilla case.

5 So then what you have to ask is if the --
6 the -- the T-shirt in that case was less functional
7 without the design, and I think that's a -- a close
8 call.

9 But -- but this case is like the camouflage
10 because it's -- it's doing the work of changing the way
11 the body is perceived just the way camouflage changes
12 the way the body is perceived, and just like military
13 uniforms, having an identifying function which is
14 extremely important.

15 So I -- I bring this all back to what the
16 Chief Justice said, isn't it the test, if it's the
17 design that makes the article what it is, then you can't
18 copyright it. And I would say that that's almost
19 exactly right.

20 They can copyright the design and prevent
21 reproduction of the two-dimensional design on the
22 notebook or the lunchbox, but if it's the design that
23 makes the article what it is, you can't manufacture --

24 JUSTICE GINSBURG: How do we decide that
25 it's -- how do we decide that it's the design that makes

1 it what it is, as opposed to the cut of the garment, the
2 shape, the pleats or whatever, the tightness of the top?
3 What -- why should we say that -- that this
4 two-dimensional design, which could be put on many
5 things, is what makes this article utilitarian?

6 But what do you do about the shape?

7 MR. BURSCH: Well, here it's more than just
8 the shape. If we go back and look at page --

9 JUSTICE GINSBURG: But we -- everybody
10 agrees that the shape, the cut of the dress, that the
11 garment itself is not copyrightable, right?

12 MR. BURSCH: Correct. Everyone agrees.

13 JUSTICE GINSBURG: So we are talking about
14 the -- the design.

15 MR. BURSCH: Yes.

16 JUSTICE GINSBURG: So why -- why is this
17 close to a fabric design?

18 MR. BURSCH: Because, again, the fabric
19 designs work anywhere, anyplace, no matter how you move
20 them. If we are looking at page 5 and you've got the
21 waist narrowing Vs, which are not the shape of the dress
22 but they -- they make the illusion that the shape of the
23 dress is cutting in to make you slimmer, those only work
24 in that particular place on this article.

25 If you put those on the lunchbox, they don't

1 make the person look narrower. They don't even make the
2 lunchbox look narrower.

3 The designs, the shape of the designs work
4 just like the shape of the garment itself, and -- and
5 that's why this is different than that flowered print
6 that we were talking about in the -- the Folio case.

7 You know, in -- in conclusion, I want to go
8 back to what Justice Breyer and what Justice Sotomayor
9 said: That if you recognize their -- their
10 two-dimensional copyright extends to prohibit the
11 manufacture of actual three-dimensional cheerleader
12 uniforms, then -- then you're giving them 100-year of
13 copyright monopoly, and that school can't go anywhere
14 else. And that's really ironic because you have to keep
15 in mind that --

16 JUSTICE KAGAN: Well, can't the school just
17 go to somebody who puts the zigzag where the chevron
18 was, or the chevron where the zigzag was, or makes it a
19 couple of different colors or adds another stripe?

20 I mean, there's this -- my clerk found --
21 I'm sorry. Just add that --

22 CHIEF JUSTICE ROBERTS: No, you can --

23 JUSTICE KAGAN: I'm done with my question.

24 MR. BURSCH: Yeah, as my -- as my friend on
25 the other side said, it -- it would still be a copyright

1 problem because they would claim that it was too close
2 to the original.

3 And you can see from the last two pictures
4 that we have in our reply brief, that there are only
5 certain places that these stripes and chevrons and color
6 blocks can go, otherwise it doesn't look like a
7 cheerleader uniform anymore. It doesn't identify the
8 person. Certainly doesn't have the slimming effect, the
9 making taller effect, and all the other things that
10 camouflage do.

11 So we respectfully request that you not
12 grant a 100-year copyright monopoly in design.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.

14 The case is submitted.

15 (Whereupon, at 12:09 p.m., the case in the
16 above-entitled matter was submitted.)

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