How Copyright Law Can Help Courts Analyze Business Objections in Unconventional Artistry [Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719 (2018)]

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The U.S. Supreme Court reversed the Colorado Court of Appeals' upholding of a cease-and-desist order issued by the Colorado Civil Rights Commission against a bakery and its religious owner. The owner alleged that compelling him to create cakes for same-sex weddings would violate both his rights to free speech and to free exercise of religion. The Supreme Court's review was limited to the Commission's discrimination against the owner. Unfortunately, any analysis of the protectable nature of wedding cakes or cake artistry was inherently frustrated by the parties' disagreement over whether the owner had refused service for all goods, or only for wedding cakes. By limiting its analysis to the Commission's impermissible hostility to religion, the Court could not provide additional guidance for what it admitted to be a complex balancing process. Future similar cases may benefit by importing recent copyright standards on sculpture protection to separate protectable expression from general business accommodation, sidestepping future disagreements by directly addressing the expression's protectable nature through a field of law designed for the task.

I. INTRODUCTION

In *Masterpiece Cakeshop*, the Supreme Court reaffirmed its longstanding stance that religious hostility and viewpoint discrimination would not survive judicial review.[1] On the facts presented, the majority performed no other substantive analysis.[2] Regrettably, this missed the opportunity to provide more detailed guidance for evaluating similar cases, and other courts remain with an inquiry that may be similarly frustrated by factual disagreements on the scope of a business refusal.[3] While not suited to every case, copyright law may help

1. Masterpiece Cakeshop, Ltd. v. Col. Civil Rights Comm'n, 138 S. Ct. 1719, 1731–32 (2018) (citing Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 534 (1993)).

2. *See id.* at 1727–32. While the majority briefly considers that Colorado could have raised viable arguments against the shop owner, the analysis spans fewer than five pages, providing some historical context before exploring the Colorado Civil Rights Commission's apparent failure to treat religious individuals with neutrality. *See id.*

3. *See id.* at 1723.

avoid this frustration by separating the nature of a business action away from the scope of an alleged refusal of service.[4]

Business discrimination disputes highlight the problem.[5] Religion-based business objections generally fall within the field of religious conduct subject to neutral regulation and, as a matter of First Amendment and public accommodations law, may not be invoked to deny general and non-religious services that are provided to the public at-large.[6] As in *Masterpiece Cakeshop*, this creates an unusual problem when a business provides a first group of general goods (baked goods other than wedding cakes), and a second group of goods which may inherently involve religious expression and artistic creativity (custom wedding cakes).[7] Copyright law helps to address this problem by providing a mechanism for discerning between the two groups, and is especially helpful when the business refusal in question deals with unconventional artistry and expression, protectable under the First Amendment.[8] After *Star Athletica, L.L.C. v. Varsity Brands, Inc.*,[9] the copyright law standard for pictorial, graphic, and sculptural ("PGS") works contemplates the possibility of cake as another protectable form of sculpture.[10]

II. BACKGROUND

A. Case Description

Masterpiece Cakeshop concerns a religious objection to the making of a wedding cake for a same-sex wedding.[11] In 2012, a same-sex couple visited a Colorado bakery to ask an expert cake artist to create a cake for their wedding reception.[12] The cake artist, a devout Christian who sincerely believed that marriage "should be the union of one man and one woman," refused on religious grounds.[13]

4. *Compare id.* at 1723–24 (identifying the frustration), *with* Star Athletica, L.L.C. v. Varsity Brands, Inc., 137 S. Ct. 1002, 1008–09 (2017) (directly approaching the protectability of a work).

5. *See Masterpiece Cakeshop*, 138 S. Ct. at 1723.

6. *Id.* at 1723–24 ("The Court's precedents make clear that the baker, in his capacity as the owner of a business serving the public, might have his right to the free exercise of religion limited by generally applicable laws."); *id.* at 1727 (citing Newman v. Piggie Park Enter., Inc., 390 U.S. 400, 402, n.5 (1968); Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557, 572 (1995)); *see also* Emp't Div., Dept. of Human Res. of Or. v. Smith, 494 U.S. 872, 879–80 (1990).

7. *See Masterpiece Cakeshop*, 138 S. Ct. at 1723 (considering the importance of the difference for analyzing claims to protected creations).

8. *See* supra note 4 and accompanying text.

9. 137 S. Ct. 1002 (2017).

10. *See* Brief for Cake Artists as *Amici Curiae* in Support of Neither Party, at 38–39, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (2018) (citing *Star Athletica*, 137 S. Ct. at 1007).

11. *Masterpiece Cakeshop*, 138 S. Ct. at 1723.

12. *Id.*

13. *Id.*

B. Legal Background

Following the cake artist's refusal to create a same-sex wedding cake, the couple filed a charge of discrimination with the Colorado Civil Rights Commission.[14] After public hearing, the Commission issued a cease-and-desist order against Masterpiece Cakeshop, requiring "comprehensive staff training and alteration to the company's policies to ensure compliance with [the Colorado Anti-Discrimination Act]," and "quarterly compliance reports" describing those measures and documenting both patrons denied service and the reasons for denial.[15] Masterpiece Cakeshop timely appealed to the Colorado Court of Appeals, which affirmed the order of the Commission under rational basis review.[16] In June 2017, the United States Supreme Court granted certiorari.[17]

III. COURT'S DECISION

The Supreme Court, reviewing the decisions of the Colorado Court of Appeals and the state's Civil Rights Commission, determined that the underlying proceedings were tainted by impermissible discrimination against religious beliefs, and that this hostility violated the Free Exercise Clause.[18] The majority began by noting that their analysis was inherently frustrated by the parties' disagreement as to the extent of the baker's refusal to provide services, since the refusal to provide any service at all is distinct from the refusal to provide custom cake artistry.[19] Adding context to a modern dispute, the Court noted that while its decisions in *United States v. Windsor*[20] and *Obergefell v. Hodges*[21] abolished the nation-wide discriminatory nonrecognition of same-sex marriages, the original refusal in this case predated both decisions, and Colorado itself did not then recognize same-sex marriages.[22] At the time, although Colorado was actively denying same-sex couples the dignity allowed to opposite-sex couples, the Colorado Anti-Discrimination Act also protected individuals from discrimination on the basis of sexual orientation.[23]

After providing this context and the case's procedural posture, the Court turned briefly to the many interests at play in the dispute: the importance of dignity and equal protection; the significant religious objections that may arise

14. *Id.* at 1724. At oral argument, "Petitioners conceded, moreover, that if a baker refused to sell any goods or any cakes for gay weddings, that would be a different matter . . . ." *Id.* at 1728.

15. Craig v. Masterpiece Cakeshop, 370 P.3d 272, 277 (Colo. App. 2015).

16. *See id.* at 294–95.

17. *See* Masterpiece Cakeshop, Ltd. v. Col. Civil Rights Comm'n, 137 S. Ct. 2290, 2290 (2017).

18. *See Masterpiece Cakeshop*, 138 S. Ct. at 1732.

19. *See id.* at 1723 (explaining the disagreement and further noting "[t]he same difficulties arise in determining whether a baker has a valid free exercise claim.").

20. 570 U.S. 744 (2013).

21. 135 S. Ct. 2584 (2015).

22. *Masterpiece Cakeshop*, 138 S. Ct. at 1728.

23. *See id.* at 1725.

in the context of weddings; and the problem of drawing a line between a business's sincere religious expression and public accommodations without enabling widespread discrimination by merely articulating a farce of sincere religiosity.[24] Having explained this complexity and the concerns of businesses engaging in mere hostility, the Court turned to the state's Free Exercise obligation in religious claims, noting: "nonetheless, [Masterpiece Cakeshop's owner Jack] Phillips was entitled to the neutral and respectful consideration of his claims in all the circumstances of the case."[25]

Examining the record, the Court found numerous statements showing that the Commission was not neutral in its treatment of Phillips, with commissioners' remarks ranging between dismissive or flippant to naked hostility.[26] While the earliest meetings of the Commission contained remarks that were arguably neutral, in a later meeting the commissioner discussed Phillips' beliefs by comparing them to justifications for slavery and the Holocaust, and characterized Phillips' religious objection as "one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others."[27] The Court noted that these remarks doubly disparaged Phillips' beliefs: first as despicable, and second as insincere.[28] It further noted that not only had there been no objections by the Commission to these remarks, but the State had not disavowed the discriminatory statements in their briefing to the Court.[29]

IV. COMMENTARY

By resolving *Masterpiece Cakeshop* purely on discrimination grounds, the Court passed up the opportunity to discuss the interaction between copyright law and First Amendment protections in non-traditional speech.[30] Although the majority opinion and multiple concurrences show that a primary problem of *Masterpiece Cakeshop* was the subjective evaluation of the owner's various objections, the resolution of the case serves only to continue this problem.[31] By focusing on religious hostility and viewpoint discrimination, which inherently involve subjective analyses, the Court's instructions maintain—rather than reduce—opportunities for inconsistent treatment.[32] While not every

24. *See id.* at 1727–29.

25. *Id.* at 1729.

26. *Id.* at 1729–30. Justice Kennedy contemplated that the dismissive remarks in early public hearings could be construed solely to say that a Colorado business could not discriminate based on sexual orientation, regardless of the owner's personal views, however, further context showed these remarks to be impermissible hostility rather than mere bluntness. *Id.* at 1729.

27. *Id.*

28. *Masterpiece Cakeshop*, 138 S. Ct. at 1729.

29. *Id.* at 1730.

30. *See id.* at 1732.

31. *Id.* at 1734–35, 1737–38.

32. *See id.* at 1732 ("The outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without

case can be resolved objectively, copyright law poses one path to reducing subjective analysis and increasing consistency.[33]

A. Star Athletica and PGS Works

The eligibility of wedding cakes for protection in copyright law has not been squarely considered by the Supreme Court, but the Court's decision in *Star Athletica* suggests an answer.[34]

Copyrightable subject matter is enumerated in Section 102 of the Copyright Act.[35] In relevant part, the works of authorship to which copyright protection extends "include . . . pictorial, graphic, and sculptural works."[36] Wedding cakes present at least two problems either absent from *Star Athletica*, or uniquely different within the same legal grounds: the limitation against copyright in "useful articles," and the limitation against copyright in *scenes a faire*.[37]

As used in Section 101 and examined in *Star Athletica*, the Supreme Court's original examination of a "useful article" considered the idea or argument that Varsity Brands sought to protect not simply designs *on* cheerleading uniforms, but rather the uniforms themselves.[38] The heart of this argument was that the uniforms were "useful" because they were uniforms, and that the protected design was not merely a design separable from a uniform, but an inseparable design in the shape of a cheerleading uniform.[39]

The limitation against copyright in *scenes a faire* originates in drama, though current scholars will often encounter it in computer programming.[40] *Scenes a faire* are those "sequences of events that necessarily result from the choice of a setting or situation," and refer to the idea that there are only so many general ideas of expression that are possible within a field, and so to allow copyright on these general ideas would be to stifle all narrow expressions within these broader fields.[41] Conceptually, wedding cakes are typically a multi-tiered

undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market."). Notably, the majority does not substantially clarify the Court's jurisprudence for analyzing either protectable expression or impermissible hostility beyond what existed when this case arose. *See id.*

33. *See* Star Athletica, L.L.C. v. Varsity Brands, Inc., 137 S. Ct. 1002, 1005–06 (2017).

34. *See id.*

35. 17 U.S.C. § 102 (2018).

36. *Id.* § 102(a)(5).

37. *See Star Athletica*, 137 S. Ct. at 1004–05. "A 'useful article' is an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a 'useful article'." 17 U.S.C. § 101 (defining terms within copyright law).

38. *See Star Athletica*, 137 S. Ct. at 1012–13.

39. *See id.* at 1006.

40. *See, e.g.*, Mitel, Inc. v. Iqtel, Inc., 124 F.3d 1366 (10th Cir. 1997).

41. Williams v. Crichton, 84 F.3d 581, 587 (2d Cir. 1996); *see also* Schwarz v. Universal Pictures Co., 85 F. Supp. 270, 275 (S.D. Cal. 1945) ("The entire dramatic literature of the world can be reduced to some three dozen situations."); Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930) ("These would

affair which depict two figures in formal attire.[42] The limitation against copyright in *scenes a faire* would likely exclude a three-tiered wedding cake with generic figurines or designs entirely, and the remaining protection would be that of any additional artistry.[43] It is the additional artistry, and those deviations from the norm, which is addressed here.[44]

In *Star Athletica*, the Supreme Court provided a test to resolve the questions of copyright protection that arise when an artist's creative expression exploits a useful article as her canvas.[45] The Court held "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."[46] Conceptually, this test is akin to peeling a sticker from a window: if after peeling away the image, one has art—and not the window itself—they are likely dealing with protectable expression.[47] Wedding cakes, due to the limitation against *scenes a faire*, merely modify *Star Athletica* by also removing those features necessary to the wedding genre.[48] Continuing with the sticker example, the application of the wedding genre would peel away the sticker and then further cut away the concepts of tiered architecture and formal attire.[49] The result of this patchwork protection is that acts of artistry beyond the genre itself would remain protected,

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be no more than Shakespeare's 'ideas' in the play, as little capable of monopoly as Einstein's Doctrine of Relativity, or Darwin's theory of the Origin of Species."). While *Nichols* deals with improper appropriation of copyrighted material, the material that *Nichols* finds allowable is the use of "stock figures" in a visual production. *Id.* at 122. The concept of "stock figures" or scenery is the essence of the limitation against copyright in *scenes a faire*. *See Williams*, 84 F.3d at 587. While wedding cakes are not dramatic literature, one would be hard-pressed to find a person who does not consider a wedding cake to be a multi-tiered affair. *See* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1743 (2018) (Thomas, J., concurring) ("If an average person walked into a room and saw a white, multi-tiered cake, he would immediately know that he had stumbled upon a wedding.").

42. *See Masterpiece Cakeshop*, 138 S. Ct. at 1743–44 (Thomas, J., concurring) (explaining the history and symbolism of wedding cakes).

43. *See* Cynthia Blake Sanders, *A Tale of Two Cakes: Can Copyright Law Protect this Cake Design?*, JDSUPRA (Jan. 23, 2017), https://www.jdsupra.com/legalnews/a-tale-of-two-cakes-can-copyright-law-49760/ [https://perma.cc/PB3Y-4TLL] (considering copyright and *scenes a faire* limitations in the context of a cake design replicated for a presidential inauguration).

44. *Id.*; *Masterpiece Cakeshop*, 138 S. Ct. at 1743–44 (Thomas, J., concurring).

45. *See* Star Athletica, L.L.C. v. Varsity Brands, Inc., 137 S. Ct. 1002, 1030 (2017) (Breyer, J., dissenting). The dissent argued that someone looking at the design would see "only pictures of cheerleading uniforms." *Id.* This is true: if one applies for copyright protection and draws the design, expressed upon a uniform, that drawing looks like a cheerleading uniform. The majority dealt with this by considering an etched design upon a guitar, which—because the etching must be on the guitar surface—necessarily then looks like a guitar. *Id.* at 1012–13; *see id.* at 1006 (noting that "two-dimensional fine art correlates to the shape of the canvas on which it is painted").

46. *See id.* at 1005–06.

47. *See id.* at 1013–14. The window sticker is an imperfect example; *Star Athletica* expressly rejects the idea that the imagined design and functional article must be completely separable—while the protectable image must be separable from the useful article (the window), it need not leave an intact useful article behind to satisfy the test. *Id.*

48. *See* Sanders, *supra* note 43 (rejecting bunting "in connection with government galas").

49. *See id.* at 1005–06 (separating designs from PGS works where "perceived separately"); Williams v. Crichton, 84 F.3d 581, 587 (identifying *scenes a faire* within a work as not enjoying protection).

while mere replication of the genre would fall short of the threshold as failing to embody more than absolutely necessary to be a wedding cake.[50]

B. Compelled Acts of Creation

Once a reviewing court has determined that an act either would or would not qualify for copyright protection as a PGS work, the remaining analysis looks to First Amendment jurisprudence.[51] While not dispositive *per se*, the protectable nature of a work militates in favor of finding either an expressive process of artistry, an expressive work of art, or both.[52] While Justice Thomas reached a similar speech analysis by examining the scope of the Colorado court's order, the Court's artistry-based free speech cases suggest that an alternative approach through copyright law may be just as effective.[53]

While not every conceivable act of artistry eligible as a PGS work will be strongly protected under the umbrella of the First Amendment, the standard is fairly minimal.[54] Once within the scope of free expression, the law requires only that conduct be "intended to be communicative" and "in context, would reasonably be understood by the viewer to be communicative."[55] For expressive conduct that meets these minimal requirements, a State's power to disrupt or compel this expression is significantly limited.[56]

By first applying the *Star Athletica* test for PGS works, we necessarily limit our considered claims to those works which are original to their creator—not mass-made goods—and that contain sufficient additional expression to disallow blanket refusals on a good's archetypical form.[57] As a result, we identify claims that contain substantially more expression than required to invoke First Amendment protection, filtering away the most likely instances of insincerity and moving directly to compelled speech analysis.[58] We then need not struggle with the possibility of concealed discrimination, as either the

50. *See Williams*, 84 F.3d at 588 (citing Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930)).

51. *See* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1742 (2018). Exploring the Court's decision in *Hurley*, Justice Thomas reiterated the power of free speech protections to reach "the unquestionably shielded painting of Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll." *Id.* at 1742. While Thomas referred to "shielded" works in the First Amendment context, all of these "unquestionably shielded" works are also unquestionably within the realm of copyrightable subject matter. *See id.*; 17 U.S.C. § 102 (2018).

52. *See id.* at 1741–42 (Thomas, J., concurring).

53. *Masterpiece Cakeshop*, 138 S. Ct. at 1740. Justice Thomas found sufficient reason to address the cake artist's speech claim by reading the order's command to provide "any" cake as including custom cake artistry. *Id.*

54. *See* Stromberg v. California, 283 U.S. 359, 369 (1931) (flying a red flag).

55. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 294 (1984).

56. *See Masterpiece Cakeshop*, 138 S. Ct. at 1742 (Thomas, J., concurring) (citing Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557, 573 (1995)).

57. *See* supra note 41 and accompanying text (explaining the effect of excluding *scenes a faire*).

58. *See* supra note 49 (describing the filtering process); *Clark*, 468 U.S. at 294 (describing the minimal standard).

expression is demonstrably narrow and protectable, or lacks protections to justify refusal of service.[59]

V. CONCLUSION

While the proposed approach would not dispose of every case that could arise under the circumstances of *Masterpiece Cakeshop*, copyright law affords us substantial objectivity for consistent judicial review, and provides an answer for recurring problems.[60] Rather than being hampered by parties' disagreement over whether an apparent business service could be denied on the grounds of sincere religious belief, courts may use copyright analysis to identify unconventional creations which could be eligible for First Amendment protection, avoiding the need to choose between speech and expression claims by instead asking whether the claims present protectable artistry.[61] At the same time, the lack of protection for unoriginal or non-custom artistry will act to shield against mere discrimination in the guise of religion, using artistry to reveal insincerity.[62] By borrowing from copyright law, we may respect the core policy protections of individual speech and expression while simultaneously shielding vulnerable groups from denial of basic accommodations.[63]

59. *See Clark*, 468 U.S. at 294.

60. *See* supra Part IV(A).

61. *See* supra Part IV(B).

62. *See* Star Athletica, L.L.C. v. Varsity Brands, Inc., 137 S. Ct. 1002, 1004–05 (2017); Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930).

63. *See* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1727–29 (2018) (noting the many interests that must be simultaneously respected).