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Who Are Fashion Industry And Others Cheering For?

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The United States Supreme Court has decided to address in next term an important question for the fashion industry—namely when apparel can be protected by copyright law. In agreeing to hear the case of *Star Athletica LLC v. Varsity Brands Inc.*, case number 15-866, in the Supreme Court of the United States, the Court has accepted the challenging of resolving "the single most vexing, unresolved question in all of copyright," as the petitioner describes it. There are, of course, many reasons why this question has been so vexing, and many in the apparel industry who have been vexed by it.

At its base, apparel has generally not been protectable under United States copyright law because apparel is considered a kind of "useful item" that cannot be protected by copyright law. The circuit court of appeals nonetheless allowed the copyright claims of Varsity Brand Inc. to proceed concerning its cheerleading uniforms because Varsity's particular chevron-and-stripe designs were "conceptually separable" enough from the underlying clothing that they could be eligible for copyright protection. But

exactly what the legal test was, or should be, for such separable-ness has proved a difficult question, one which the dissenting circuit judge said reflected "The law in this area is a mess — and it has been for a long time." *Varsity Brands, Inc. v. Star Athletica, LLC*, 799 F. 3d 468, 496-97 (6th Cir. 2015). The Supreme Court has taken the case to sort that out.

The analysis of separability generally starts with one of two approaches. One first looks to determine whether a pictorial, graphic, or sculptural work is separable from the utilitarian aspects of an article as a matter of physical separability and conceptual separability. But, as the circuit court noted, few scholars or courts embrace relying on the physical-separability test without considering whether the pictorial, graphic, or sculptural features of an article are conceptually separable because the physical-separability test has limitations. Indeed, courts have struggled mightily to formulate a test to determine whether "the pictorial, graphic, or sculptural features" incorporated into the design of a useful article "can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the [useful] article" when those features cannot be removed physically from the useful article. In fact, no less than eight different tests have emerged, *Id.* at 485-86, before the Sixth Circuit fashioned its own, which is yet another reason that the Supreme Court has decided to take this case.

The Supreme Court will hear argument in the case during its 2016-17 term, and thus we may have no result until as late as June 2017, though it could be decided earlier. The Court's decision, whenever it comes, may significantly impact the apparel business. If the Court adopts the narrower definition of functionality found in the circuit court's decision, designers and apparel manufacturers will enjoy design protection broader than those that have traditionally been granted. At the same time, however, this definition will narrow what designers, manufacturers and retailers can copy without exposing themselves to liability. Conversely, a rejection of that narrow definition will leave much of the fashion industry's work as unprotected or unprotectable. As designers frequently alternate from pioneering originators to homage-ing echoers, one must wonder which party the fashionistas are cheering toward victory in this Supreme Court. Are they looking for an established test of the US status quo, or a softening toward the more easily obtained design protections of the EU? Or is the answer somewhere in between? It will be interesting to watch the Court fashion from the scraps and threads of the numerous extant approaches a single standard in this vexing area.

Indeed, amicus briefs have included those representing interests outside the fashion industry, and these amici have noted a single, predictable test for conceptual separability is critical beyond the apparel business, particularly for innovative industries such as 3d printing. Noting that nearly forty years after the copyright act of 1976, lower courts have still failed to provide a single, coherent test for conceptual separability, such amici have argued that the uncertainty inherent in such multiple tests chills innovation and creativity.

The case will prove one of interest for many to follow.

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