Star Athletica v. Varsity Brands: Supreme Court Rules Apparel Design Copyrightable

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With regard to garments and fashion, the accepted wisdom historically has been that copyright does not protect garment designs. Here is a representative headline of that wisdom, "Fashion Designs Aren't Protected By Copyright Law, So Knockoffs Thrive as Designers Suffer."[1]

The Supreme Court just changed that in the case of *Star Athletica v. Varsity Brands*. Or did it?

On May 2, 2016, the Supreme Court granted Star Athletica's request for review on the following question: "What is the appropriate test to determine when a feature of a useful article is protectable under Section 101 of the Copyright Act?" In a remarkable moment, the Supreme Court took up, for the first time ever, a case centering on apparel design copyrights. In an unusual moment for the Roberts court, the answer was addressed broadly, passing up every opportunity to narrow or confine its ruling.

While a novel question for the Supreme Court, that question had percolated through the federal circuit courts for a long time. Over the years, federal judges had developed at least nine distinct approaches to answering that question. Uncertainty was the result. In *Star Athletica*, the lower court commented that the question had "confounded courts and scholars."

In a 6-2 decision written by Clarence Thomas, the nine different tests were replaced with a new, nationwide unified standard. While clarifying and resolving the challenge of too many different approaches by offering one standard, questions remain. First, let us review the facts that led to the new clarity.

[1] https://www.bustle.com/articles/4527-fashion-designs-arent-protected-by-copyright-law-so-knockoffs-thrive-as-designers-suffer
In 2012, U.S. Senator Chuck Schumer of New York introduced legislation that proposed to create new protection for fashion design. That legislation did not pass.

Varsity Brands (aka "the empire of pep") is the market leader of designing and manufacturing cheerleader and team dance uniforms. The relatively new market entrant in cheerleading uniform design and sales, Star Athletica, allegedly copied the Varsity Brands cheerleading uniform design and specifically copied the chevrons and stripes. Star Athletica defended itself, claiming that the designs could not be separated from the uniform's utilitarian function and on that basis, the Varsity Brands designs are not eligible for copyright protection. The trial court agreed with Star Athletica; the Sixth Circuit reversed; the Supreme Court accepted certioriari; and on March 22, 2017, affirmed the Sixth Circuit.

The Supreme Court majority held that when a design can be "identified and imagined apart from the useful article," it is eligible for copyright protection. Using the distinction between two- and three-dimensional art, the majority focused on when designs can exist separately from the uniform — for instance, as a design for a shower curtain or a painting — then copyright applies. The Court offered the analogy that the situation of the cheerleading uniform is not that different from a "design etched or painted on the surface of a guitar or a fresco painted on a wall."

Rejecting the arguments by Star Athletica that measure the likelihood that the "pictorial, graphic or sculptural feature would still be marketable" without the utilitarian function, the Court stated that that consideration is not grounded in the statute. Returning to literal reading of the Copyright Statute, Thomas focused on Section 101, which states that features are separable when those features "can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article."

Heralded as a win for team copyright, this opinion does offer much needed clarity on what the test for separability is; however, the Court stopped there. Lacking from the *Star Athletica* opinion is an analytical standard for applying the new test. The opinion does not offer factors or balancing tests or any of the usual guideposts for proving the issue.

Many in the design and apparel industries would have benefitted from more explicit guidance in what remains a subjective analysis. While there is greater clarity in the single national standard, there is little derived clarity in how to apply that standard in the real world, which is where the subjective intermingling of functional and expressive creative matter actually happens.

The greatest guidance in interpreting this new standard is to be found in an explicit statement that the *Star Athletica* opinion is not to be read as expanding copyright to protecting apparel itself. "To be clear, the only feature of the cheerleading uniform eligible for copyright in this case is the two-dimensional work of art. Respondents have no right to prohibit any person from manufacturing a cheerleading uniform of identical shape, cut and dimensions to the ones on which the decorations in this case appear."

While the ruling in *Star Athletica* abides as a win for the creatives, it is a narrow win with much yet to be determined rather than articulating a disruptive sea of change. The case is remanded for the trial court to determine whether the Varsity Brands decorations of chevrons and stripes are eligible for copyright protection. It is entirely possible that Varsity Brand's victory contribution to clarity in separability may be for naught.

This landmark decision will resonate in the fashion and creative industries for years to come. Designers will now argue that the more conceptual, less obviously useful aspects of their designs should be protected by copyright. Luxury design houses now have some basis to challenge the fast fashion retailers who quickly market replicas of expensive, runway designs, often before the original enters retailers' stores.

Other creative industries are also expecting to feel the impact of *Star Athletica*. Three-dimensional (3D) printing is a revolutionary industry where many of the plans and designs are freely shared. A particular fact pattern offered up by several law professors involves a young man, Colin Consavage, who with help from his mother, 3D-printed a prosthetic hand. That design for the prosthetic hand includes decorative elements. Allowing copyright to halt home production of objects that are primarily utilitarian but involve aesthetic elements is what 3D printers fear. Sharing of useful 3D designs, and the productive consumer output that results from that sharing and innovation, could be thwarted by an overbroad rule of copyright. Sequential innovation of preexisting designs will also be fettered.

On balance, *Star Athletica* offers greater certainty than before. The application of the new test will include new efforts of interpretation. The Supreme Court offered substantive improvement in our expectations in holding that designs of garments may be protectable and it greatly simplified and expanded our understanding of copyright eligibility for the two-dimensional features of three-dimensional useful articles.

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