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In Fashion this Season (and also Eligible for Copyright Protection): Graphical Elements of Clothing Designs

On March 22, the Supreme Court issued its eagerly awaited opinion in *Star Athletica v. Varsity Brands* to resolve a “widespread disagreement over the proper test” for determining when artistic features of industrial designs—in many cases, mass-produced functional products—are eligible for copyright protection.

The disagreement arose because the Copyright Act distinguishes between useful articles (which are not eligible for copyright protection) and decorative and ornamental features of useful articles (which are eligible for copyright protection if they are sufficiently separable from the uncopyrightable product). Historically, most courts have interpreted to the Copyright Act’s text and legislative history to apply a “physical or conceptual” separability test to determine whether enough separability exists. Interpreting the Copyright Act’s text, the Court discarded this widely-applied test in favor of its own separability test. Applying that test, the Court found that two-dimensional graphical designs on cheerleading uniforms were eligible for copyright protection even though such designs were, at least in part, designed with functional considerations in mind.

Case Background and Analysis

Varsity Brands sued Star Athletica for copyright infringement based upon Star Athletica’s alleged copying of the designs of five of its cheerleading uniforms. The designs consisted of “arrangements of lines, chevrons, and colorful shapes appearing on the surface of Varsity Brands’ cheerleading uniforms.” At issue was whether the designs, which were created at least in part by functional considerations and applied to uncopyrightable clothing, were eligible for copyright protection.

Since cheerleading uniforms are articles of clothing, they are considered “useful articles” under the Copyright Act, which places limitations on their eligibility for protection. Section 101 defines “useful articles” as “items having an intrinsic utilitarian function which is not merely to portray the appearance of the article or convey information.”¹ Even though useful articles are not eligible for copyright protection, decorative and ornamental features of a useful article may be eligible for copyright protection “if, and only to the extent that, such design[s] incorporate[] pictorial, graphic, or sculptural features that can be **identified separately from, and are capable of existing independently of**, the utilitarian aspects of the article.” 17 U.S.C. § 101 (definition of “pictorial, graphic, and sculptural works”) (emphasis added). In short, when a useful article is concerned, the Copyright Act requires an analysis to determine whether its artistic features can be separated from the useful article itself. Such artistic features are only eligible for copyright protection if they can pass this separability test.

Varsity Brands had attempted to avoid a separability analysis altogether by arguing it was only claiming protection of the two-dimensional designs that appeared *on* useful articles—not the useful articles themselves. The Court rejected this argument as inconsistent with the statutory text. A separability analysis is required whenever “any pictorial, graphic, or sculptural features” are incorporated into the “design of a useful article,” and the cheerleading uniform designs met this threshold requirement.

Since a separability analysis was required, the issue concerned the appropriate test for “separability,” which, though frequently litigated, has resulted in numerous conflicting “separability” tests being applied throughout the courts. The Court interpreted the Copyright Act’s text to fashion its own separability test:

An artistic feature of the design of a useful article is eligible for copyright protection 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 in some other medium if imagined separately from the useful article.

Applying this test, the Court concluded the surface designs on the uniforms were eligible for copyright protection.² First, the arrangement of colors, shapes, stripes, and chevrons on the surface of the cheerleading uniforms could be identified as features having pictorial, graphic, or sculptural qualities. Second, if these decorations “were separated from the uniform and applied in another medium—for example, on a painter’s canvas,” they would qualify as two-dimensional works of art. In support of this conclusion, the Court noted that Varsity Brands had replicated the designs on other items of clothing without replicating the cheerleading uniforms.

Star Athletica had argued that the surface decorations could not be identified separately from the cheerleading uniforms because they both identified the wearer as a cheerleader and enhanced the wearer’s physical appearance. Without such designs, Star Athletica argued, the uniforms would be plain white and not equally useful, making the designs inseparable from their function and thus unprotectible. The Court dispensed with this argument as well as Star Athletica’s other arguments against protectability, finding:

- An artistic feature can have some utilitarian function; it does not have to be “solely artistic” to be protected. “[A]n artistic feature that would be eligible for copyright protection on its own cannot lose that protection simply because it was first created as a feature of the design of a useful article, even if it makes that article more useful.”
- The focus should be on the extracted design and not what, if anything, remains of the useful article once the design is extracted. The useful article does not have to remain equally useful after the artistic feature is extracted. Since the focus is on the extracted design, it would not matter if the useful article was destroyed by the extraction.
- An extracted design can still be eligible for copyright protection even if it remains in the shape of the useful article—what matters is that the extracted design be a non-useful work of authorship on its own. Here, the extracted design qualifies since it is a non-useful two-dimensional pictorial work.

- Design patents and copyrights are not mutually exclusive. Congress has provided limited copyright protection for certain features of industrial design. In this case, the surface design was eligible, but “the shape, cut, and physical dimensions of the cheerleading uniforms,” was not.
- The artistic feature need not be marketable by itself once it is separated from the useful article.

Going Forward

The Varsity Brands decision will likely be viewed as a victory for the fashion design industry, which has long advocated for legislation conferring broader copyright protection to clothing designs. The test articulated by the Court is arguably a lower bar to copyright eligibility than has been previously applied by most courts considering protectability of artistic elements of industrial designs and will therefore likely be used by designers to pursue claims against the “knockoff” industry. In addition, we can expect more registrations of (and future litigation relating to) artistic features of industrial designs that had formerly been thought of as only being eligible for design patent or trade dress protection.

If you design clothing or other functional products with artistic features, we recommend considering whether it would be advantageous to seek copyright registration in addition to any design patent or trade dress protection that you may be currently relying upon. Please contact [Sam Quimby](#), [Carl Eppler](#), or any other member of Frost Brown Todd’s [Intellectual Property Law and Litigation Practice Group](#) if you have any questions or would like to discuss further.

¹ 17 U.S.C. § 101. Other examples of useful articles include: cars, household appliances, furniture, lighting fixtures, tools, dinnerware, food, shoes, personal computers, and carrying cases for laptops. Compendium of U.S. Copyright Office Practices § 924.1 (3d ed. 2014).

² The Court did not go so far as to hold that the decorations were sufficiently original to be copyrightable, only that they were

separable from the uniform and therefore eligible for copyright protection. The issue of whether the uniform designs are original enough to merit copyright protection will be decided by the lower courts.

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