

Supreme Court Creates New Test That Could Grant Broader Copyright Protection to Clothing Designs

March 22, 2017

On Wednesday March 22, 2017, the Supreme Court of the United States held that the decorative elements of a cheerleading uniform – zig-zags, stripes and chevrons – are protected under copyright law.¹ In this 6-2 written decision, the Court resolved the "widespread disagreement over the proper test" to determine whether and when useful articles, such as clothing, warrant copyright protection.

The Copyright Act affords limited protection to useful items, like clothing, in that copyright protection is only available to elements of the clothing that are capable of being "identified separately from, and ... existing independently of, the utilitarian aspects of the article."² Simply put, the issue in *Star Athletics, L.L.C. v. Varsity Brands Inc.* was whether the zig-zags, stripes and chevrons on cheerleading uniforms are "separable" from the uniforms themselves and therefore copyrightable. Courts across the country have used at least ten unique tests for analyzing the issue of separability so, until today, the answer was far from clear.³

In its decision, the Court laid out a simple two-part test for determining whether a feature incorporated into the design of a useful article is eligible for protection: (1) can the feature be perceived as a two- or three-dimensional work of art separate from the useful article (the "identification" requirement)?; and (2) would the feature qualify as a protectable pictorial, graphic, or sculptural work – either on its own or fixed in some other tangible medium of expression – if it were imagined separately from the useful article into which it is incorporated (the "imagining separately" requirement)? If so, then the feature of the design is eligible for protection.

The court wrote that applying the test to surface decorations on cheerleading uniforms is "straightforward": (1) One can *identify* the decorations as having "pictorial, graphic or sculptural qualities"; and (2) one can *imagine* these elements apart from the article – "if the arrangement of colors, shapes, stripes, and chevrons on the surface of the cheerleading uniforms 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,' §101." Thus, the designs are protected.

The court clarified that the only feature of the uniform eligible for copyright protection is the art – the zig-zags, stripes and chevrons – itself, not the overall uniform. The decision does not grant respondent Varsity Brands, Inc. the right to prohibit any other person from manufacturing a cheerleading uniform of identical shape, cut or dimension.

The surprisingly simple two-part test will likely provide greater protection for fashion brands in copyright, who have traditionally turned to trademark and patent law to protect their designs.

For further information, please contact one of the lawyers listed here.

Notes

1. *Star Athletics, L.L.C. v. Varsity Brands, Inc.*, No. 15-866, 2017 WL 1066261 (U.S. Mar. 22, 2017)

2. 17 U.S.C. § 101.

3. *Varsity Brands, Inc. v. Star Athletics, LLC*, 799 F.3d 468, 484-5, 487-8 (6th Cir. 2015)

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