

## CFA News Flash

November 2016

### **The U.S. Supreme Court is reviewing the Sixth Circuit's August 2015 ruling in "VARSITY BRANDS v. STAR ATHLETICA LLC"**

**Its decision has the potential for a far-reaching impact on the apparel and fashion industries. The case is set for argument on October 31, 2016**

The Supreme Court will determine the proper test to assess whether Varsity's two-dimensional cheerleading uniform designs are entitled to copyright protection. **Notably, this is the first time the Supreme Court will address copyright protection in the context of useful articles and apparel.**

The Copyright Act of 1976 extends copyright protection to "original works of authorship fixed in any tangible medium of expression, inclusive of 'works of authorship'" as "pictorial, graphic, and sculptural works." This encompass various works of art including both two and three-dimensional works.

Further, "the design of a useful article shall be considered a pictorial, graphic, or sculptural work, and subject to copyright only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of the utilitarian aspects of the article."

These provisions are critical to the case at hand, to determine whether an article is copyrightable.

**Varsity** designs and manufactures athletic apparel and accessories, including cheerleading gear. Varsity registered several "two-dimensional graphic designs" with the U.S. Copyright Office for several of its cheerleading uniform designs (see below). The designs include various graphic elements consisting of "original combinations, positioning, and arrangements of elements which include V's (chevrons), lines, curves, stripes, angles, diagonals, inverted V's coloring, and shapes ..."



**VARSITY design**



**STAR ATHLETICA design**

**Star** markets and sells uniforms and accessories for various sports, including cheerleading. Star circulated marketing materials for cheerleading uniforms strikingly like Varsity's five registered designs. After encountering these advertisements, Varsity filed suit against Star in the Western District of Tennessee, alleging five claims of copyright infringement for "selling, distributing, and advertising goods bearing designs that are copied from and substantially similar" to Varsity's designs.

At the district court level, both parties filed motions for summary judgment. Star asserted that it was entitled to summary judgment on Varsity's copyright-infringement claims on the grounds that Varsity **could not establish ownership of a valid copyright**. Specifically, Star purported that (1) Varsity's designs were for useful articles and therefore not entitled to a copyright; and (2) the pictorial, graphic or sculptural elements of Varsity's designs were not physically or conceptually separable from the uniforms, likewise making the designs ineligible for copyright protection.

The district court ruled in favor of Star, finding *Varsity's designs not copyrightable* because they are not physically or conceptually separable from the utilitarian function of a cheerleading uniform. Indeed, the court emphasized that the "colors, stripes, chevrons, and similar designs typically associated with sports in general, and cheerleading in particular" make the garments they appear on "recognizable as a cheerleading uniform." The district court determined that the aesthetic features and functional purpose of a cheerleading uniform are inseparable from one another.

*On appeal, the Sixth Circuit reversed.* It reviewed different tests set forth by the various circuit courts in determining the copyright ability of useful articles. It constructed a five-factor test to determine whether "pictorial, graphic, or sculptural features" are conceptually separable from the utilitarian function of a useful article. In applying the test, the Sixth Circuit concluded that the graphic features of Varsity's designs "can be identified separately from, and are capable of existing independently of, the utilitarian aspects of" the cheerleading uniforms, i.e. the useful article. Thus, it found that Varsity's graphic designs constitute copyrightable subject matter.

*Star then appealed to the U.S. Supreme Court.* Its petition was for a clarification as to which of the ten tests used by the various circuit courts should be applied in determining whether a design feature on a useful article is entitled to copyright protection. The Court noted that it will determine **only one issue on appeal** ... "what is the appropriate test to determine when a feature of the design of a useful article is protectable under § 101 of the Copyright Act?"

Because little protection currently exists for fashion designers under U.S. Copyright law, the Court's decision has the potential to significantly impact the fashion industry and related markets. Until now, the fashion industry has longed for clarity to determine whether a design feature on a useful article is subject to protection under U.S. copyright law. Should the Court rule in favor of Star and support application of a more preclusive test, this decision could change the legal landscape for copyright plaintiffs and defendants in apparel cases, *making it more difficult to protect such designs.*

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