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Feud In Fashion –

(a follow up analysis)

Clothing copyright case divides West, East coasts

A question as seemingly benign as whether stripes or zig-zags are integral to cheerleading uniforms has exposed a rift between L.A.'s apparel industry and its East Coast fashion cousins.

A dispute over whether certain clothing design elements can be copyrighted has landed before the U.S. Supreme Court, which will hear arguments this week in the case. Its decision could have major implications for the region's fashion industry.

Staci Riordan, partner and chairwoman of the fashion law practice group at downtown's **Nixon Peabody**, said that if the justices rule that simple designs can be copyrighted, it could usher in a new era of copyright restrictions and lawsuits. "I think it's going to have a devastating financial impact on the fashion industry," she said. "You're going to have to budget for litigation into your T-shirts."

Los Angeles County is a center for the manufacture of apparel in the United States, with more than 71,000 workers employed by manufacturers or wholesaling companies last year, according to a report from Los Angeles County Economic Development Corp.

While some creative shops, largely located on the East Coast, argue that expanded copyright protection is necessary and would benefit their business, many local firms are more concerned with the costly litigation that could come as a result, causing a notable split between the coasts.

"Clothing itself is functional and has never been classified as art in need of copyright protection," said **Lonnie Kane**, president of Vernon women's apparel company **Karen Kane**. The lines stand to blur, however, depending on what the high court decides in the pending case. Its ruling could establish a new way to test what constitutes copyrightable material. "If all of a sudden a piece of clothing, let's say a T-shirt with paint splatters on it, could be copyrightable, then the question is, What's copyrightable? The shirts? The paint splatters? The combination of the two?" Kane asked.

"Widening the coverage of copyright laws would also usher in an onslaught of copyright applications, which would lead to endless litigation for other apparel companies," he said. **Karen Kane** sells clothing and accessories to department and specialty stores throughout the country, and over the course of its more than 35-year history, several designs have been copied by other brands and sold for cheaper prices, said Kane.

He tries to view copycats as complimentary and accepts that this is just the way of the fashion industry. "We know that's the way this business is," said Kane. "You do as well as you can and move on."

Divergent view

While Kane and others in the local industry would prefer copyright law to be left alone, a coalition of lawyers and designers in New York and other East Coast cities has lobbied for years to expand intellectual property protection for apparel. The Council of Fashion Designers of America Inc. and the Fashion Law Institute both filed amicus briefs in the cheerleading case, supporting greater protections for clothing designs.

Maria Cornejo, founder and creative director of clothing brand Zero + Maria Cornejo, said that when one of her designs is stolen, the results are catastrophic. "We cannot compete when big companies copy them (then) sell them for half the price. To go after people, it costs a fortune," said Cornejo, whose company is headquartered in New York and operates a store on Melrose Place in Los Angeles.

The dispute before the court centers on whether a unique combination of geometric designs and color-blocking on cheerleading uniforms created by Varsity Brands, a Memphis, Tenn., company, should be protected.

Varsity alleges that Star Athletica, based in Chesterfield, Mo., copied its designs, and Star countered that because the details are integral parts of the uniform and cannot be separated from it, they aren't copyrightable material. A lower court ruled in Star's favor in the case, brought in 2010, but an appeals court reversed the decision. Star appealed that ruling to the Supreme Court.

Federal law and legal precedent have determined that while an actual piece of apparel – a T-shirt, a pair of jeans, a sweater – can't be copyrighted, the design on the back of a jean pocket or the pattern of the sweater can.

For Cornejo and Marysia Woroniecka, president of Zero + Maria Cornejo, the decision could hold the future of their 18-year-old brand, which produces its clothing in New York, an expensive market. "It means that our clothes are at a particular price point," said Woroniecka. "We're also not producing them in the thousands of thousands of thousands."

When other brands copy their designs, mass produce them and sell them at a cheaper price, the company's investment in design and development of the original product is undercut, she said.

The only way her line ensures any sense of protected exclusivity is by designing its own fabric in-house. If another company steals a Zero + Maria Cornejo print, Cornejo has her lawyers send a cease-and-desist letter, but hasn't filed any lawsuits in the United States as of yet, she said.

Cornejo said the rampant copycatting that takes place in the United States doesn't happen in other places she's worked, such as France and England, where fashion is subject to industry-specific copyright law.

"People have to be more creative," she said. "They can't just go shopping and copy something."

But attorney Riordan said while she understands the emotional attachment designers have to their creations, wider copyright protections would only add an element of instability to the thriving fashion business here. "We are on a steady uphill incline," said Riordan. "If the industry's doing well, why mess with it?"
