

U.S. Supreme Court Rules on Copyright Protection for Cheerleader Uniform

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On March 22, 2017, the **U.S. Supreme Court** ruled in a 6-2 decision that decorative elements of cheerleader uniforms could be protected by copyright law, resolving “widespread disagreement” over the proper test for determining the copyrightability of works of art incorporated into the design of useful articles. ***Star Athletica, L.L.C. v. Varsity Brands, Inc., et al.***, No. 15-866, slip op. (U.S. Mar. 22, 2017).

Under the Copyright Act, articles with intrinsically utilitarian functions, such as clothing, are generally not subject to copyright. A useful article is copyrightable only if, and only to the extent that, it 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. Courts have described the analysis for determining whether a feature can be separately identified from, and exist independently of, a useful article as “separability.” Different courts have applied different standards for determining separability, leading to uncertainty as to when it exists.

Varsity Brands, Inc. (Varsity), a manufacturer of cheerleader uniforms, obtained copyright registrations for two-dimensional designs of cheerleader uniforms with various stripes, chevrons, and color blocks. Varsity sued Star Athletica, LLC (Star) in federal district court for copyright infringement, alleging that Star’s cheerleader uniforms illegally copied Varsity’s designs. Star claimed that Varsity’s designs were utilitarian and unworthy of copyright protection. The district court agreed with Star, holding that Varsity’s stripes, chevrons, and color blocks were so integrated into the function of a cheerleader uniform that they were not separable. Put another way, but for those decorative elements, Varsity’s designs would not function as cheerleader uniforms.

In a 2?1 decision, the 6th Circuit Court of Appeals reversed the ruling. The majority panel addressed the conflict among the circuits over the separability analysis, before concluding that the stripes, chevrons, and color blocks on Varsity’s cheerleader uniforms were copyrightable subject matter as they “can be identified separately from, and are capable of existing independently of, the utilitarian aspects of cheerleading uniforms.”

The majority opinion, written by Justice Clarence Thomas, relied on a two-part test where the “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 Supreme Court held that the decorations on the cheerleader uniforms were separable and eligible for copyright protection, as the uniform decorations have pictorial, graphic, or sculptural qualities, which would qualify as two-dimensional works of art if applied in another medium.

The majority opinion emphasized that the only features of the cheerleader uniforms eligible for copyright in this case were the artistic elements fixed in the uniform fabric. In no event will Varsity have a right under copyright law “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,” as such features are purely utilitarian.

The Supreme Court held that the separability test is purely conceptual in nature, rejecting the position of some lower courts that separability requires an artistic feature to be physically separable from the useful article in a way that leaves the utilitarian aspects of the article intact.

Although the Supreme Court found Varsity’s uniform decorations to be eligible for copyright protection, the Court did not hold that such decorations are actually copyrightable. The Court expressed no opinion on whether the decorations were sufficiently original to qualify for copyright protection, or whether any other prerequisites of a valid copyright had been satisfied. This case will now return to the trial court to determine whether Varsity’s aesthetic designs for cheerleader uniforms constitute original works of authorship capable of receiving copyright protection.

Some in the fashion industry had hoped a ruling in favor of Varsity would open the door to copyright protection for shapes, cuts, and other functional elements of fashion design. The prohibition on extending copyright to such elements remains intact under the Copyright Act and any changes in that regard will require Congressional action. This Supreme Court holding merely clarifies the applicable test for determining the extent to which certain aesthetic elements are separable from utilitarian features to be eligible for copyright protection.

If Varsity is successful in convincing the lower court that its stripes, chevrons, and color blocks are sufficiently original to merit copyright protection, we would expect increased filings for copyright registrations for a wide array of decorative elements of fashion designs, and a commensurate uptick in copyright infringement litigation.

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