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### High Court's First Ruling on Fashion Copyright: Broadening IP Rights

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In a first-ever fashion copyright decision, the U.S. Supreme Court analyzed whether design elements on a cheerleading uniform could be copyright protected. This decision marks an important milestone for the fashion industry and will no doubt spawn further litigation as designers press newfound copyright protection and copycats wonder what is safe.

Under the Copyright Act of 1976, uniforms and other clothing are generally considered useful articles and therefore such items cannot be copyright protected. However, the Supreme Court in a majority 6-2 decision March 22 ruled in favor of Varsity Brand, finding that individual design elements incorporated into



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such useful articles are 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.”

At issue were two competing manufacturers of cheerleading uniforms, Star Athletica LLC and the Varsity companies: Varsity Brands Inc., Varsity Spirit Corp. and Varsity Fashions & Supplies Inc. Varsity had successfully acquired approximately 200 copyright registrations for two- and three-dimensional designs that appear on its

cheerleading uniforms. Varsity sued Star Athletica for infringing five of Varsity's copyright registered designs.

In 2014, the district court held that fashion-related patterns for apparel were non-copyrightable if the work of art was not identified separately from its garment. It reasoned that the cheerleading uniform's designs served a useful function of identifying a cheerleading uniform as such.

The U.S. Court of Appeals for the Sixth Circuit reversed the district court's decision holding that the designs were "separately identifiable" because a blank cheerleading uniform can appear beside a designed cheerleading uniform and both would still be identified as a cheerleading uniform. It further reasoned that the designs could stand alone because the designs could be incorporated onto other tangible mediums.

## NEW AVENUE

The fashion industry has customarily relied on other areas of intellectual property law such as trademark, trade dress or design patents to protect their fashion designs and brand. This is because although some

elements of fashion can be protected by copyright law, such as drawings, photographs, editorial content and software embedded in wearable tech, before this ruling fashion designs were not copyright protectable.

What does this mean for the fashion industry? The Supreme Court's interpretation of the Copyright Act opens a new avenue for fashion designers to seek copyright protection. Fashion companies that typically copy original designs must now think twice or they may find themselves on the other side of a copyright infringement action.

A designer wishing to obtain copyright protection for a design must still prove ownership of an original "pictorial, graphic or sculptural work which include two-dimensional and three-dimensional works of fine, graphic and applied art," and obtain a registration from the U.S. Copyright Office in order to protect its rights against infringers. Although registration is not required to prove ownership of an original work of art, registration is a requirement in order to maintain a copyright infringement action in federal court.

As a last note, Justice Ruth Bader Ginsburg, in her concurring opinion could have decided this matter in just one page. She succinctly found the analysis of separability of the design from the useful article unnecessary because the designs at issue are not designs of useful articles, rather the designs are themselves copyrightable pictorial or graphic works reproduced on useful articles.

Given that the design is copyrightable, she points out that the right "includes the right to reproduce the work in or on any kind of article, whether useful or otherwise." This common sense approach may send a clear message to the U.S. Copyright Office as it reviews the inevitable influx of copyright registrations which will follow this opinion.

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