



## Things fashion brands need to know after the Supreme Court's ruling in *Varsity Brands*

By Staci Jennifer Riordan and Sydney Pritchett

As most of you already know, fashion cannot be protected by copyright. That is because clothing, no matter how fashion forward the item is, is utilitarian—meaning clothing is something useful to protect the wearer from the elements and the wearer's modesty. Certain *elements* of fashion items, however, are eligible for copyright protection, like the graphic screen printed onto a t-shirt, or the design on a textile (be it printed or woven). That is because those elements are separable from the underlying garment.

Yet, it is not always clear when elements are separable as was the case in *Star Athletica, L.L.C. v. Varsity Brands, Inc., et al.*, No. 15-866 (U.S. Mar. 22, 2017), which was decided by the Supreme Court on March 22, 2017. That case involved cheerleading uniforms and at issue before the Supreme Court was the question of what test should be used to determine whether the designs found on the cheerleading uniforms were sufficiently separable from the useful article of a uniform and therefore eligible for copyright protection.

### Three things to know after the *Varsity Brands* ruling

#### 1. Clothing is still not protected by copyright

Contrary to many headlines, the Court did not extend copyright protection to cheerleading uniforms. In fact, the Court went out of its way to make sure readers of the opinion understood that it was not expressing any opinion on whether Varsity's design elements, including stripes, chevrons and color blocks, were sufficiently original to qualify for any copyright protection. Moreover, the Court confirmed the rule that clothing still remained ineligible for copyright protection, a point underscored at length by the dissent.

#### 2. The new test

Since there were 9 to 10 legal standards or "tests" for separability (depending on who was counting), the Court determined that a single test should govern nationwide. This, in fact, was the reason why the Court decided to hear this case in the first place. This ruling is good for brands as it means they should get the same outcome regardless where in the country you sue or are sued. The Court held that a design element on clothing is separable, and potentially copyrightable, if it can "be perceived as a two- or three-dimensional work of art separate from the useful article," and when "imagined

separately from the useful article into which it is incorporated,” it must be the type of work that could qualify for protection.

If you think this test is similar to what it was before, you are right. It is what most fashion brands consider when evaluating whether there is protection. Interestingly though, when the Court applied this test to cheerleading uniforms, only five justices agreed that the elements at issue here passed the separability test. This was because uniforms, compared to everyday wearing apparel, serve another purpose, which is to identify the wearer as a member of a certain group, here cheerleaders.

So, while the Court hoped to bring uniformity to the nation, given the lack of agreement here, inconsistent results seem likely and the outcome will depend on the article being examined.

### 3. Hurry up and wait

Now that the Court has reconciled separability, this case will go back to the district court for it to decide the more interesting question—whether these particular design elements warrant protection, either alone or in combination. Current case law suggests that they will be protectable in combination, given the very low threshold for originality in copyright.

So don't go changing your practices anytime soon. For brands, to make sure you are taking advantage of what little protection there is remember:

- Document your inspiration for each design;
- If you use reference materials or inspiration materials, put them away before creating the new item;
- Record your creation process;
- Remember, there is no such thing as a “20%” rule (or any other percentage)—if a regular (i.e., non-designer) would think two prints or graphics look alike, you are likely infringing; and
- File for your own copyrights for original works of authorship.

If you buy or use textiles or graphics supplied by others, make sure your agreements have a good indemnity provision that also allows you to control litigation. If you have suppliers, have them represent and warrant that their items do not infringe on the rights of any other person or entity and require your supplier to apply for a copyright certificate for each and every textile or graphic you buy.

Or, if you really want to be safe, just use solids.

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