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Copyright decisions from the Supreme Court are rare, so when it sees fit to hear a copyright-related case, it is likely to be a game changer, and the decision in *Star Athletica, L.L.C. v. Varsity Brands, Inc.* is no exception (137 S. Ct. 1002 [2017]). In the course of one decision, the Supreme Court selected the appropriate test to delineate the line between copyrightable creative expression and non-copyrightable functional work, reversed a long-standing rule about the inability to copyright fashion, and changed the game for graphic and industrial designers wishing to protect the more pragmatic pieces of their art.

For decades, lower courts struggled to define the line between creative art that could be subject to copyright and functional work, which would normally be subject to design patent laws. The last time the Supreme Court addressed the issue of separation between copyright and utilitarian work was in 1954 in the *Mazer v. Stein* decision—noting that indeed a statuette attached to the base of a lamp could be protected by copyright (347 U.S. 201 [1954]). After that decision, the 1976 Copyright Act followed *Mazer* to delineate the line between art and function by providing that "'pictorial, graphic, or sculptural ["PGS"] features' of the 'design of a useful article' are eligible for copyright protection as artistic works if those features 'can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.'" (*Star*

Athletica, 2017 [quoting 17 U.S.C. § 101]). However, courts interpreting and applying the act in particular instances have developed at least eight tests over the years, ranging from the "ordinary observer approach" to the "design process approach" to the "likelihood-of-marketability" approach. (799 F.3d 468, 484 [6th Cir. 2015]). "Widespread disagreement" among the lower courts "over the proper test" to delineate the line between art and function finally led to a Supreme Court decision (*Star Athletica*, 2017). One of the most widely applied principles emanating from this confusion was the physical versus conceptual test for dividing copyrightable works from non-copyright protected works in the area of industrial design. The Supreme Court dismantled this test, along with all the others, in the *Star Athletica* decision. Now, all courts of the land attempting to judge whether a particular two-dimensional or three-dimensional work of art constitutes a copyrightable work will have to apply the same two-part test that was articulated by the Supreme Court in the *Star Athletica* decision. This clarification is necessary and will (hopefully) assist the Register of Copyrights, artists, and courts alike when attempting to decide whether a particular two- or three-dimensional piece of art is copyrightable.

This article proceeds with a brief history of the *Star Athletica* case, including the lower court judgments, a discussion of the Supreme Court holding in the case, the applicability of the Supreme Court holding to fashion, graphic design, and industrial design industries going forward, and concludes with some final thoughts about the implications of the outcome of the case.

History of the *Star Athletica* Case

This lawsuit began when the defendant, Star Athletica, LLC, published a catalogue detailing its latest fashions of cheerleading sports uniforms in 2010 (*Varsity Brands, Inc. v. Star Athletica, L.L.C.*, No. 10-2508, 2014 WL 819422 [2014]). When the plaintiffs, Varsity Brands, Inc., Varsity Spirit Fashions and Supplies, and Varsity Spirit Corporation ("Varsity") saw the images of the fashion in the catalogues, they recognized many of their own fabric patterns included in the designs. In fact, Varsity had registered five of their cheerleading uniforms with the Copyright Office and had listed the designs as "2-dimensional artwork" (*Varsity Brands*, 2014). Varsity notes that it hires designers to create the designs and uses two primary methods of incorporating the designs "onto the surface of cheerleading uniforms," including "cutting and sewing and sublimation," which involves printing the design first onto a piece of paper and then heating the ink on the paper to transfer it to the fabric (*Varsity Brands*, 2014).

Varsity sued Star Athletica, claiming that the use of their designs in

Star's products infringed on their copyrights. Both parties filed motions for summary judgment, and in the first court ruling at the United States District Court for the Western District of Tennessee, Star Athletica won. The key inquiry was whether the useful aspects of the design could be separated from the creative aspects of the design. If so, the copyright would be valid and Varsity would prevail. If not, the copyright could not be recognized for a primarily useful article and Star Athletica would win. The lower court concluded that it was "not possible to either physically or conceptually sever Varsity's designs from the utilitarian function of the resulting cheerleading uniforms"; therefore, the court issued judgment in favor of Star Athletica—ruling that they could continue to sell the designs without Varsity's permission (*Varsity Brands*, 2014).

Varsity appealed the decision to the Sixth Circuit Court of Appeals—and won. The Court of Appeals adopted a complicated multipart test to answer the question, including a question about whether the "viewer of the design [could] identify 'pictorial, graphic, or sculptural features . . . separately from . . . the utilitarian aspects of the [useful] article" and whether the pictorial, graphic, or sculptural features "of the design of the useful article 'exist[] independently of . . .the utilitarian aspects of the [useful] article" (*Star Athletica*, 2016). The Court of Appeals rejected the likelihood of marketability and a design process approach as a sole measure of separability. But, the court found that the design process approach was helpful to "offer clues as to which components of the design [were] essential to the functioning of the useful article" (*Star Athletica*, 2016). This portion of the court's opinion seems to nod to the physical separability test, which the Supreme Court rejected in its analysis.

Some of the more interesting parts of the court's opinion include its statement that a holding suggesting that the PGS features of the cheerleading uniform are "inextricably intertwined with the utilitarian aspects of [the] uniform because they serve a decorative function . . . would render nearly all artwork unprotectable" (*Star Athletica*, 2016). This statement exaggerates the policy implications of the case quite a bit. Ultimately, the court noted that "because the graphic features of Varsity's cheerleading uniform designs are more like fabric design than dress design . . . they are protectable subject matter under the Copyright Act" (*Star Athletica*, 2016).

During the oral arguments at the Supreme Court, a few interesting points were raised by the Justices. Justice Breyer raised the point that the fashion industry had not previously had copyright protection because of the idea that the design of clothing could not be separated from its utility (think about an off-the-shoulder dress, for instance—the design is both creative and functional) (Transcript of Oral Argument, *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, No. 15-866 (Oct. 31, 2016). However, Justice Breyer noted

that if the court recognized copyright protection in this case, "perhaps we'll double the price of women's clothes" (Transcript of Oral Argument, 2016). However, Justice Sotomayor voiced a different concern related to knockoff brands, recognizing that an opinion granting copyright protection to the design in this case would "kill" knockoff brands—something neither trademark nor patent design laws had been able to do (Transcript of Oral Argu-ment, 2016).

The *Star Athletica* Decision

Justice Thomas wrote the majority opinion in the *Star Athletica* decision, in which Chief Justice Roberts and Justices Alito, Sotomayor, and Kagan joined. In *Star Athletica*, the Supreme Court settled the long-standing confusion over the appropriate test to apply when determining whether a particular design is a piece of copyright-protectable art or a non-copyright-protected useful article. In doing so, the Court dodged the issue regarding whether the designs were original enough, under *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991), to satisfy the originality requirement—most likely because the originality of the designs was assumed by both parties to the case. The Court held that "a feature incorporated into the design of a useful article is eligible for copyright protection only 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 fixed in some other tangible medium of expression—if it were imagined separately from the useful article into which it is incorporated" (*Star Athletica*, 2017).

Prior to the *Star Athletica* decision, lower courts found a distinction between physical and conceptual separability to be useful. "Previously, where an artistic feature could be 'physically separated from the [useful] article by ordinary means while leaving the utilitarian aspects of the article completely intact,' such feature would be deemed 'physically separable,' and thus eligible for copyright protection" (Fertig, 2017 [quoting *Star Athletica*, 2017]). In *Star Athletica*, the Supreme Court dismantled this type of separability analysis by stating "that 'statutory text indicates the separability is a conceptual undertaking' and that it 'does not require the underlying useful article to remain' as a 'fully functioning useful article at all, much less an equally useful one'" (Fertig, 2017 [quoting *Star Athletica*, 2017]).

The Court ultimately affirmed the Sixth Circuit Court of Appeals' ruling, finding that the cheerleading uniform designs indeed satisfy the two-part separability test (*Star Athletica*, 2017). The decorations have a PGS quality and can qualify as two-dimensional works of art. Next, imagined separately from the uniform "and applying them in another medium would

not replicate the uniform itself" (*Star Athletica*, 2017). In fact, Varsity "applied the designs in this case to other media of expression—different types of clothing—without replicating the uniform" (*Star Athletica*, 2017).

Implications for Applied Art Educators Going Forward

The *Star Athletica* decision signals a change from the long-standing assumption that copyright does not apply to the fashion industry as a whole because of the inseparability of the design from the utility of the clothing. That assumption has now been debunked, and it stands to reason that many fashion producers will seek copyright protection going forward. Will the price of fashion rise considerably? Will knockoff brands fall by the wayside? Time will tell.

In terms of the meaning of the decision to the broader art education community, I think the decision signals a broader ability for fashion designers, graphic designers, and industrial designers to utilize copyright protection for their work. Indeed, in the *Star Athletica* majority opinion, Justice Thomas noted that the Court has "long held that design patent and copyright are not mutually exclusive" (*Star Athletica*, 2017). And, with a removal of focus on the viability of the remaining design when the artistic portion is conceptually removed, the Court's interpretation of separability broadens the scope of designs that may be protected under copyright, especially in the realm of industrial design. Hopefully, industrial designers will take note of this decision and apply more frequently for copyright registration of their two- and three-dimensional creative works. This broader ability to protect work under copyright should be promoted by art educators, who, in turn, can educate their students about additional methods to protect their work.

Final Musings

I largely agree with the holding of the *Star Athletica* case. When picturing the chevrons and lines at issue in the case, I could easily see a separation between the two-dimensional design and the final product (the cheerleading dress uniform). However, I found a couple of things to be less pleasing about the outcome.

First, the Supreme Court rejected a test that I particularly liked: a test based on the creative freedom of the designer. In the past, at least one court has considered whether the designer was sufficiently creative and exercised enough independent judgment in the design to consider it "separable" from the final useful product (*Pivot Point Int'l, Inc. v. Charlene Prods., Inc.*, 372 F.3d 913 [7th Cir. 2004]). The reason I liked this test was due to the fact that it was one way for industrial designers to protect their craft from the undue

influence of corporate clientele. Designers could argue that, legally speaking, the design was more likely to be afforded copyright protection if the designer had a greater ability to control the design. I particularly appreciated the fact that this test gave artists a tool in their arsenal to garner more respect and independence from their clients. The Supreme Court, however, explicitly rejected this test as outside of the plain meaning of the statute (*Star Athletica*, 2017), so the argument can no longer suffice.

Second, one of the big questions raised by Justice Sotomayor during oral argument was what this decision would do to "knockoff" brands (Transcript of Oral Argument, 2016). Presumably, the answer is that knockoffs will no longer exist in fashion because it will be much more possible for brand names to obtain copyright monopolies over more of their designs. This may be a good thing because knock-off brands are often lower in quality than their brand name counterparts. However, we could also see the price gouging effect of this monopoly, where brand names will get even more exclusive and use the larger price margins to sue their competitors. Time will tell, but all in all the fashion industry could use (in my opinion) some quality control, so this may not be such a bad thing.

In conclusion, the wider effects of the *Star Athletica* decision on the fashion and industrial design communities remain to be seen, but the Court, at the very least, attempted to settle a long-standing disagreement in the lower courts: where to draw the line between art and function under the separability test.

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