

The Supreme Court Will Review the Copyrightability of Apparel in Dispute Over Cheerleading Uniforms

By Stephanie Sivinski | May 3, 2016

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The United States Supreme Court agreed on Monday, May 2, 2016 to hear argument on what one party called “the single most vexing, unresolved question in all of copyright”—determining when a feature of a “useful article” like clothing is eligible for copyright protection. Section 101 of the Copyright Act prohibits copyright protection for “useful articles” like clothing unless the clothing’s component features can be “identified separately from, and existing independently of, the utilitarian aspects” of the clothing itself. In *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, the Court will look at whether the stripes and chevron designs on five of Varsity’s cheerleading uniforms are copyrightable. But many commentators hope that, regardless of the outcome, the decision will clarify how to apply § 101’s “useful article” provision, as there are now numerous approaches that have been developed by the circuit courts and the Copyright Office. Most agree that the decision will have far-reaching effects in the garment industry, and possibly other industries where the aesthetic value of products is important.

Varsity sued Star in 2010 for copying five of Varsity’s uniform designs. The district court initially ruled that the designs were inseparable from the uniforms themselves, and therefore were not eligible for copyright protection. Varsity appealed to the Sixth Circuit, which ruled 2-1 that because the designs were merely aesthetic, they could be separated from the uniforms and were eligible for copyright protection.

The Sixth Circuit rejected the tests previously articulated by other circuit courts and the Copyright Office and developed its own five-question approach for determining whether aspects of a useful article are copyrightable. The dissenting judge summarized the test as requiring the court to define the work’s function and then determine whether the claimed elements can exist independently of that function. Therefore, a key dispute in the case is how to define a cheerleading uniform’s function. Star advocated that the uniforms were meant to identify the wearer as a cheerleader, and therefore that Varsity’s designs were not independent of that function and not copyrightable. Varsity argued that the uniforms’ function consisted of covering the body, wicking moisture, and withstanding the rigors of athletic movements. Under Varsity’s articulation of a uniform’s function, which the Sixth Circuit adopted, the stripes and chevrons could exist independently of the function.

In finding the designs copyrightable, the Sixth Circuit gave *Skidmore* deference to the Copyright Office’s finding that Varsity’s designs were eligible for copyright registration. Under *Skidmore*, a court can give judicial deference to an agency’s decision based on the quality and consistency of the agency’s reasoning. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Star also sought Supreme Court review as to whether *Skidmore* deference is appropriately extended to the Copyright Office’s registration decisions. The Court declined to grant certiorari on that issue, however.

For more information please contact one of the lawyers listed below.

