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## Useful Article or Creative Design: Varsity Brands, Inc. v. Star Athletica, LLC

Kristy Diesner

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## USEFUL ARTICLE OR CREATIVE DESIGN: VARSITY BRANDS, INC. V. STAR ATHLETICA, LLC

### I. INTRODUCTION

Mary Quant, a fashion icon, once stated, “the fashionable woman wears clothes. The clothes don’t wear her.”<sup>1</sup> Fashion can reasonably be viewed as both utilitarian and expressive. When it comes to copyright protection, however, the distinction between creative expression and utilitarian function must be determined and copyright law has struggled with this precise problem for decades.<sup>2</sup>

The global fashion industry is worth 3 trillion dollars and accounts for 2 % of the world’s Gross Domestic Product, yet little copyright protection is given to designers to protect his or her creative works in the fashion industry.<sup>3</sup> New York Fashion Week generates approximately 900 million dollars for the city per year, which is more revenue than the 2014 Super Bowl.<sup>4</sup> On average, American households spend roughly \$2,000 on apparel, footwear,

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<sup>1</sup> ‘I Don’t Do Fashion. I Am Fashion’ – *The 50 Best Style Quotes of All Time*, MARIE CLAIRE (Nov. 4, 2016, 10:07 PM), <http://www.marieclaire.co.uk/fashion/the-40-best-style-quotes-of-all-time-122453>. Mary Quant is a London fashion designer icon known as the originator of the miniskirt. Bio, *Mary Quant Biography*, (Nov. 4, 2016, 10:12 PM), <http://www.biography.com/people/mary-quant-21273453>.

<sup>2</sup> See *Jovani Fashion, Inc. v. Fiesta Fashion*, 500 F. App’x 42, 45 (2d Cir. 2012); *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989, 993 (2d Cir. 1980); *Whimsicality, Inc. v. Rubie’s Costume Co., Inc.*, 891 F.2d 452, 454 (2d Cir. 1989).

<sup>3</sup> *Global fashion industry statistics - International apparel*, FASHIONUNITED (Sept. 12, 2016, 9:45 AM), <https://fashionunited.com/global-fashion-industry-statistics>. The fashion industry includes sub industries of womenswear, menswear, childrenswear, sports footwear, and bridalwear.

<sup>4</sup> *Fast Facts from Fashion Weeks in New York, London, Milan, and Paris*, WOMEN’S WEAR DAILY (Sept. 12, 2016, 11:00 AM), <http://wwd.com/fashion-news/fashion-features/fashion-week-new-york-london-milan-paris-10283305/>. Fashion Week in New York runs for approximately 7-9 days and has more than 100 fashion shows from designers all around the world with nearly 232,000 attendees. Fashion Week in Milan has 67 fashion shows with 16 million dollars in revenue; 91 shows and 430 million dollars in revenue in Paris; and 78 designers showings with a 39.5 billion dollars in revenue in London.

and other similar products annually.<sup>5</sup> On the other hand, other works of authorship, such as novels, articles, periodicals, poems, while having greater copyright protection, have a lesser effect overall on the global economy as compared to the fashion industry. Susan Scafidi, a law professor at Fordham University, stated that fashion designers do not receive the same intellectual property protection afforded to authors, songwriters, and painters because of the “perception that fashion isn’t art, [and] clothing . . . serves a utilitarian purpose rather than an aesthetic one.”<sup>6</sup> To contrast with the figures provided above, in 2011 the global book publishing industry was worth 130 billion dollars and was projected to be worth 273 billion dollars by 2016.<sup>7</sup> In 2014, the United States book and journal publishing industry generated 28 billion dollars in net revenue.<sup>8</sup>

Copyright law in the United States provides the basis of protection for creative and original works of authorship.<sup>9</sup> Fashion designers have a difficult time receiving copyright protection because apparel and footwear are usually classified as a useful articles.<sup>10</sup> Courts around the country have struggled with the

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<sup>5</sup> *30 Shocking Figures and Facts in Global Textile and Apparel Industry*, BUSINESS 2 COMMUNITY (Sept. 12, 2016, 11:15 AM), <http://www.business2community.com/fashion-beauty/30-shocking-figures-facts-global-textile-apparel-industry-01222057#1rmPeKqKluLP1bxd.97>.

<sup>6</sup> L.J. Jackson, *Some Designers Say Their Work Deserves Copyright Protection; Others Say it Would Harm the Industry*, 97 A.B.A. J. 48, July 2011, at 50, [http://www.abajournal.com/magazine/article/the\\_genuine\\_article](http://www.abajournal.com/magazine/article/the_genuine_article).

<sup>7</sup> *Global Publishing Industry Worth \$130 Billion, Autographing E-books, and More*, POETS & WRITERS (Sept. 12, 2016, 10:15 AM), [http://www.pw.org/content/global\\_publishing\\_industry\\_worth\\_130\\_billion\\_autographing\\_ebooks\\_and\\_more?cmnt\\_all=1](http://www.pw.org/content/global_publishing_industry_worth_130_billion_autographing_ebooks_and_more?cmnt_all=1); PR Newswire, *Global Publishing Industry to be Worth \$273 Billion by 2016: ReportLinker* (Sept. 12, 2016, 10:30 AM), <http://www.prnewswire.com/news-releases/global-publishing-industry-to-be-worth-273-billion-by-2016-reportlinker-173097291.html>.

<sup>8</sup> *U.S. Publishing Industry’s Annual Survey Reveals \$28 Billion in Revenue in 2014*, ASSOCIATION OF AMERICAN PUBLISHERS (Sept. 12, 2016, 10:40 AM), <http://www.publishers.org/news/us-publishing-industry’s-annual-survey-reveals-28-billion-revenue-2014>.

<sup>9</sup> 17 U.S.C. § 101 *et seq.* (2012).

<sup>10</sup> Useful article is defined as an “article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information.” § 101.

uncertainty of copyright law with respect to garment design.<sup>11</sup> The dissenting judge writing in the Sixth Circuit in *Varsity Brands, Inc. v. Star Athletica, LLC*, stated in his conclusion, that “until [the courts] get much-needed clarification, courts will continue to struggle and the business world will continue to be handicapped by the uncertainty of the law.”<sup>12</sup> The Supreme Court’s decision in *Varsity Brands* will hopefully create a clear rule on how courts should analyze and resolve copyright issues with respect to garment designs.

This article analyzes the Sixth Circuit opinion *Varsity Brands, Inc. v. Star Athletica, LLC*, and suggests that cheerleading uniforms, along with other fashion design elements, should have copyright protection. Part II provides background and will address the law as it applies to copyright infringement of useful articles, as well as court decisions that found a resolution for copyright infringement of useful articles.<sup>13</sup> Part III summarizes *Varsity Brands, Inc. v. Star Athletica, LLC*.<sup>14</sup> Part IV analyzes the complications of copyright law of useful articles leading up to the Supreme Court case of *Varsity Brands, Inc. v. Star Athletica, LLC*, examines different approaches of conceptual separability, and discusses how other countries resolve copyright protection issues for useful articles.<sup>15</sup> Part V explains the potential affects of the Supreme Court’s decision on American jurisprudence, the fashion industry, and copyright law.<sup>16</sup> Part VI concludes the overall discussion.<sup>17</sup>

## II. BACKGROUND

### A. Copyright Law: The Basics

Article 1, Section 8 of the United States Constitution gives Congress the power “to promote the Progress of Science and

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<sup>11</sup> See *infra* Section II.C.

<sup>12</sup> *Varsity Brands, Inc. v. Star Athletica, LLC*, 799 F.3d 468, 497 (6th Cir. 2015).

<sup>13</sup> See *infra* notes 18–53 and accompanying text.

<sup>14</sup> See *infra* notes 54–105 and accompanying text.

<sup>15</sup> See *infra* notes 106–134 and accompanying text.

<sup>16</sup> See *infra* notes 135–146 and accompanying text.

<sup>17</sup> See *infra* notes 147–154 and accompanying text.

useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>18</sup> This power allows a monopoly to be granted only to authors for their writings.<sup>19</sup> The goal of copyright law is to strike a balance and encourage authors and inventors to create new works by receiving compensation for their investment, while making sure that those rights do not unfairly inhibit new creativity.<sup>20</sup> The Copyright Act of 1976 protects original works of authorship fixed in a tangible medium of expression.<sup>21</sup> The Copyright Act protects works of authorship including “pictorial, graphic and sculptural works.”<sup>22</sup> Pictorial, graphic, and sculptural works include two-dimensional and three-dimensional works of fine, graphic and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans.<sup>23</sup>

### B. Fashion Law: Useful Articles

Copyright protection is not available for useful articles unless the design elements can be identified separately from, and is capable of existing independently of, the utilitarian aspects of the useful article.<sup>24</sup> A useful article is defined as, “a vessel, hull or deck, including a plug or mold, which in normal use has an intrinsic utilitarian function that is not merely to portray the

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<sup>18</sup> U.S. CONST. Art. 1, § 8.

<sup>19</sup> *Mazer v. Stein*, 347 U.S. 201, 220 (1954).

<sup>20</sup> *Fair Use and Intellectual Property: Defending the Balance*, ELECTRONIC FRONTIER FOUNDATION (Nov. 8, 2016, 9:43 AM), <https://www.eff.org/issues/intellectual-property>. See also *Can You Copyright Clothing Designs?*, NEW MEDIA RIGHTS (Nov. 8, 2016, 9:54 AM), [http://www.newmediarights.org/business\\_models/artist/can\\_you\\_copyright\\_clothing\\_designs](http://www.newmediarights.org/business_models/artist/can_you_copyright_clothing_designs) (stating, “[b]ecause the law exists for the public’s benefit, not to make creators rich, it strikes a balance between giving creators enough rights so that they’ll have an incentive to continue to create, and making those rights limited and temporary enough so that the public can start adding onto the creations and advance culture, technology, and society.”).

<sup>21</sup> 17 U.S.C. § 102(a) (2012).

<sup>22</sup> § 102(a)(5).

<sup>23</sup> *Id.* § 101.

<sup>24</sup> *Id.*

appearance of the article or to convey information.”<sup>25</sup> When determining whether an article is useful, the pertinent question is whether the article has an intrinsic utilitarian function that is not merely used to portray the appearance of the article or to convey information.<sup>26</sup> The useful article doctrine attempts to create a division between the rights of the public to enjoy the physical designs of utilitarian significance, while allowing protection to aesthetic designs.<sup>27</sup>

Copyright law in fashion is a balancing act between the economic and moral interests of the creator of the work and society’s desire to benefit from the creator’s labor.<sup>28</sup> Currently, the fashion industry is vulnerable to significant judicial uncertainty with regards to how the courts should draw the line between artistic craftsmanship and industrial design.<sup>29</sup> Apparel has been considered a useful article, as defined by § 101 of the Copyright Act of 1976, because clothing has an “intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information.”<sup>30</sup>

To determine whether an article is protected, a court must conduct a two-part inquiry and ask: (1) whether the design for which the author seeks copyright protection is a “design of a useful article”, and if so, (2) whether the design of the useful article “incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing

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<sup>25</sup> *Id.* § 1301(b)(2).

<sup>26</sup> Transcript of Oral Argument at 16, *Varsity Brands Inc. v. Star Athletica LLC.*, Published on Oct. 31, 2016 at [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2016/15-866\\_j426.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2016/15-866_j426.pdf).

<sup>27</sup> Wendy J. Gordon & William Fairfield Warren, *Useful Articles in Copyright: Proposed Amendments to Sections 101 and 114* (Nov. 8, 2016, 10:51 AM), [https://www.law.berkeley.edu/files/Wendy\\_Gordon.pdf](https://www.law.berkeley.edu/files/Wendy_Gordon.pdf).

<sup>28</sup> Jennifer Mencken, *A Design for the Copyright of Fashion*, 1997 B.C. INTELL. PROP. & TECH. F. 4., at 9, available at <http://bciprf.org/wp-content/uploads/2011/07/54-A-DESIGN-FOR-THE-COPYRIGHT-OF-FASHION.pdf>.

<sup>29</sup> Lee Burdunder, *The Supreme Court May Give Product Designers Little to Cheer in Star Athletica*, IPWATCHDOG (Nov. 10, 2016, 12:24 AM), <http://www.ipwatchdog.com/2016/09/19/supreme-court-may-give-product-designers-little-to-cheer-star-athletica/id=72515/>.

<sup>30</sup> 17 U.S.C. § 101; NIMMER ON COPYRIGHT § 2.08[B][4] (2015).

independently of, the utilitarian aspects of the useful article.”<sup>31</sup> There are two ways to determine whether a pictorial, graphic, or sculptural feature is separable from the utilitarian aspect of an article: (1) physical separability and (2) conceptual separability.<sup>32</sup> Physical separability means that the useful article contains pictorial, graphic, or sculptural features that can be identified separately and is capable of existing independently from the article while leaving the utilitarian aspects fully intact.<sup>33</sup> Conceptual separability means that a feature of the useful article is clearly recognizable as a pictorial, graphic, or sculptural work, notwithstanding the fact that it cannot be physically separated.<sup>34</sup>

### C. Courts Interpreting Copyright Protection for Apparel

Over the years, courts have come to different conclusions as to the conceptual separability of useful articles. Courts and scholars have proposed nine different approaches to determine conceptual separability of a useful article: (1) The Copyright Office's Approach: "A pictorial, graphic, or sculptural feature satisfies [the conceptual-separability] requirement only if the artistic feature and the useful article could both exist side by side and be perceived as fully realized, separate works — one an artistic work and the other a useful article;"<sup>35</sup> (2) The Primary-Subsidiary Approach: A pictorial, graphic, or sculptural feature is conceptually separable if the artistic features of the design are "primary" to the "subsidiary utilitarian function;"<sup>36</sup> (3) The Objectively Necessary Approach: A pictorial, graphic, or

<sup>31</sup> *Varsity Brands*, 799 F.3d at 481.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 482. Courts have struggled to formulate a test to determine when the pictorial, graphic, or sculptural features may be removed physically from the useful article. *Id.* at 484. See *infra* Section II. C.

<sup>34</sup> *Varsity Brands*, 799 F.3d at 483. No court has relied exclusively on the physical separability test without considering the conceptually separability test. *Id.* The Copyright Office considered “an engraving on a vase,” “a carving on the back of a chair,” “artwork printed on a t-shirt,” and “a drawing on the surface of wallpaper” to be conceptually separable from the useful article. *Id.* at 483–84.

<sup>35</sup> U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES, THIRD EDITION § 924.2(B) (2014).

<sup>36</sup> *Kieselstein-Cord*, 632 F.2d at 993.

sculptural feature is conceptually separable if the artistic features of the design are not necessary to the performance of the utilitarian function of the article;<sup>37</sup> (4) The Ordinary-Observer Approach: A pictorial, graphic, or sculptural feature is conceptually separable if "the design creates in the mind of the ordinary reasonable observer two different concepts that are not inevitably entertained simultaneously;"<sup>38</sup> (5) The Design-Process Approach: A pictorial, graphic, or sculptural feature is conceptually separable if the "design elements can be identified as reflecting the designer's artistic judgment exercised independently of functional influences;"<sup>39</sup> (6) The Stand-Alone Approach: A pictorial, graphic, or sculptural feature is conceptually separable if "the useful article's functionality remain[s] intact once the copyrightable material is separated;"<sup>40</sup> (7) The Likelihood-of-Marketability Approach: A pictorial, graphic, or sculptural feature is conceptually separable if "there is substantial likelihood that even if the article had no utilitarian use it would still be marketable to some significant segment of the community simply because of its aesthetic qualities;"<sup>41</sup> (8) Party's Approach: There is no need to engage in a separability analysis if (A) the work is the design of a three-dimensional article, and (B) the design is not of a "useful article;"<sup>42</sup> and (9) The Subjective-Objective Approach: Conceptual separability is determined by balancing (A) "the degree to which the designer's subjective process is motivated by aesthetic concerns;" and (B) "the degree to which the design of a useful article is objectively dictated by its utilitarian function."<sup>43</sup>

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<sup>37</sup> *Carol Barnhart, Inc. v. Economy Cover Corp.*, 773 F.2d 411, 419 (2d Cir. 1985).

<sup>38</sup> *Id.* at 422. (Newman, J., dissenting).

<sup>39</sup> *Brandir Int'l, Inc., v. Cascade Pac. Lumber Co.*, 834 F.2d 1142, 1145 (2d Cir. 1987).

<sup>40</sup> *Pivot Point Int'l, Inc. v. Charlene Prods.*, 372 F.3d 913, 934 (7th Cir. 2003).

<sup>41</sup> *Galiano v. Harrah's Operating Co.*, 416 F.3d 411, 419 (5th Cir. 2005) (quoting 1 NIMMER ON COPYRIGHT § 2.08[B][3]).

<sup>42</sup> 2 PATRY ON COPYRIGHT § 3:145.

<sup>43</sup> Barton R. Keyes, *Alive and Well: The (Still) Ongoing Debate Surrounding Conceptual Separability in American Copyright Law*, 69 OHIO ST. L.J. 109, 141 (2008).



Several of the approaches require the artistic work and useful article to be independent concepts that could exist side by side.<sup>44</sup> Other approaches look to the designer's mens rea or subjective intent as independent of the utilitarian function and ask whether the designer's artistic feature is primary to the utilitarian function.<sup>45</sup> Most, but not all, of the approaches contain an objective standard. Some courts have found it beneficial to combine two approaches to create a hybrid approach to engage in an objective and subjective analysis of conceptual separability.<sup>46</sup>

The Second Circuit addressed the issue of separability in *Kieselstein-Cord v. Accessories by Pearl, Inc.*<sup>47</sup> In *Kieselstein*, the plaintiff designed, manufactured, and sold sculpted designed belt buckles.<sup>48</sup> The court found that ornate belt buckles could be worn non-functionally as jewelry, as well as worn at different parts of the body other than the waist.<sup>49</sup> The court used the Primary-Subsidiary Approach to determine whether or not the sculptural feature is conceptually separable from the utilitarian aspect of the useful article.<sup>50</sup>

Three decades later, the Second Circuit was asked to address the copyrightability of a designer's prom dress designs that applied sequins and crystals, ruched satin at the waist, and layers of tulle in the skirt.<sup>51</sup> The court used the Design-Process Approach and concluded that those design elements were used precisely to enhance the functionality of the dress for special occasions; therefore, the aesthetic merged with the functional aspects to cover the woman's body in an attractive way for the special occasion.<sup>52</sup> The court further explained that clothing serves the functional

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<sup>44</sup> See Compendium III § 924.2(B); see also *Varsity Brands*, 799 F.3d at 422 (Newman, J., dissenting).

<sup>45</sup> See *Kieselstein-Cord*, 632 F.2d at 993; see also *Brandir*, 834 F.2d at 1145; *Keyes*, *supra* note 43, at 141.

<sup>46</sup> See *Varsity Brands*, 799 F.3d at 487; *Universal Furniture Int'l, Inc. v. Collezione Eurpoa USA, Inc.*, 618 F.3d 417, 433 (4th Cir. 2010).

<sup>47</sup> See *Kieselstein-Cord*, 632 F.2d at 993.

<sup>48</sup> *Id.* at 990.

<sup>49</sup> *Id.* at 993.

<sup>50</sup> *Id.* The Primary-Subsidiary Approach states that a pictorial, graphic, or sculptural feature is conceptually separable if the artistic features of the design are "primary" to the "subsidiary utilitarian function." *Id.*

<sup>51</sup> *Jovani*, 500 F. App'x at 44.

<sup>52</sup> *Id.*

purpose of covering the body, but also serves as a “decorative function,” so the decorative elements of the clothing are intrinsic to the overall function, rather than separable from it.<sup>53</sup>

### III. VARSITY BRANDS, INC. V. STAR ATHLETICA, LLC

*Varsity Brands v. Star Athletica, LLC* involves the question whether or not designs on a cheerleading uniform can receive copyright protection.<sup>54</sup> The Sixth Circuit held that to prevail on a copyright claim, the claimant must show that (1) it owned a valid copyright, and (2) that the defendant copied protectable elements of the work.<sup>55</sup> There are five elements to establish the first prong: (1) originality in the author; (2) copyrightability of the subject matter; (3) a national point of attachment of the work, such as to permit a claim of copyright; (4) compliance with applicable statutory formalities; and (5) if the plaintiff is not the author, a transfer of rights or other relationship between the author and the plaintiff so as to constitute the plaintiff as a valid copyright claimant.<sup>56</sup> The second prong asks whether any copying occurred (a factual matter) and whether the portion of the work copied was entitled to copyright protection (a legal matter).<sup>57</sup>

The Sixth Circuit held that Varsity Brands’ cheerleading uniform designs are identified separately from the utilitarian aspects of the cheerleading uniforms, and thus the cheerleading uniforms are protectable subject matter under the 1976 Copyright Act.<sup>58</sup> The heart of the appeal to the Sixth Circuit was whether “cheerleading uniforms [are] truly cheerleading uniforms without the stripes, chevrons, zigzags, and color blocks.”<sup>59</sup>

#### A. *Facts and Issues*

Varsity Brands manufactures apparel and accessories for

<sup>53</sup> *Id.* (citing *Whimsicality*, 891 F.2d at 455.)

<sup>54</sup> *Varsity Brands*, 799 F.3d at 476–77.

<sup>55</sup> *Id.* at 476.

<sup>56</sup> *Id.* (quoting 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.01[A] (2003).

<sup>57</sup> *Id.*

<sup>58</sup> *Varsity Brands*, 799 F.3d at 492.

<sup>59</sup> *Id.* at 470.

cheerleaders and other athletes.<sup>60</sup> Varsity Brands' designers sketch out designs consisting of original combinations, positions, and arrangements of chevrons, lines, curves, stripes, angles, diagonals, colors, and stripes.<sup>61</sup> Varsity Brands testified that the designers do not consider the functionality of the uniform when creating the designs, and it is decided later whether the design is appropriate for a cheerleader's uniform or for another sport's uniform.<sup>62</sup>

Star Athletica markets and sells uniforms and accessories for cheerleading, football, baseball, and other sports.<sup>63</sup> Varsity Brands filed a copyright infringement lawsuit after becoming aware that Star Athletica advertised cheerleading uniforms that looked similar to the ones Varsity Brands registered with the Copyright Office.<sup>64</sup> Star Athletica argued that Varsity Brands did not have a valid copyright because the designs were "useful articles," which are exempt under federal copyright law, and the pictorial, graphic, and/or sculptural elements of Varsity's designs were not physically or conceptually separable from the uniforms.<sup>65</sup> The main issue facing the Sixth Circuit was the question of "when can pictorial, graphic or sculptural feature(s) that are incorporated into the design of the useful article be identified separately from and be capable of existing independently of the utilitarian aspects of the article."<sup>66</sup>

### B. Procedural History

In 2010, Varsity Brands initiated litigation alleging the Star Athletica committed copyright infringement by "selling, distributing and advertising goods bearing a design that is copied

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<sup>60</sup> *Id.* at 471.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 474.

<sup>64</sup> *Varsity Brands*, 799 F.3d at 474. See also Shrutih Tewarie, *Can I get a C-O-P-Y-R-I-G-H-T? Sixth Circuit Holds Cheerleading Uniform Designs Copyrightable*, TRADEMARK & COPYRIGHT LAW (Oct. 9, 2016, 2:34 PM), <http://www.trademarkandcopyrightlawblog.com/2015/10/can-i-get-a-c-o-p-y-r-i-g-h-t-sixth-circuit-holds-cheerleading-uniform-designs-copyrightable/> (showing images of the cheerleading uniforms).

<sup>65</sup> *Varsity Brands*, 799 F.3d at 475.

<sup>66</sup> *Id.* at 471.

from and substantially similar to designs over which [Varsity Brands] allege to have copyright protection.”<sup>67</sup> Star Athletica produced two expert witnesses who opined that Varsity Brands’ stripe designs and solid color panels are functional parts of the garment and that the individual components of the uniform cannot “‘exist separately’ as ‘independent works of art,’ do not have ‘any real independent marketable worth,’ and cannot be removed without ‘impacting the functionality of the uniform.’”<sup>68</sup>

The district court concluded that cheerleading uniforms are not the same without the stripes, chevrons, zigzags, and color blocks, therefore, Varsity Brands’ copyrights are invalid.<sup>69</sup> The district court did not find that Varsity Brands’ designs were physically or conceptually separable from the utilitarian function of the cheerleading uniform because the design aspects typically associated with sports make the cheerleading uniform recognizable as a cheerleading uniform.<sup>70</sup> The district court found the aesthetic features of the cheerleading uniform merged with the functional purpose of the uniform.<sup>71</sup> Varsity Brands appealed the district court’s entry of summary judgment on the issue of copyright infringement.<sup>72</sup>

### C. *The Sixth Circuit’s Opinion*

The Sixth Circuit had not yet adopted an approach to determine whether the pictorial, graphic, or sculptural features of the design of a useful article are separable from the utilitarian aspects of a useful article.<sup>73</sup> In *Varsity Brands, Inc. v. Star Athletica, LLC*, the Sixth Circuit first had to determine which of the nine approaches to conceptual separability it was going to follow, or whether it should create a new approach.<sup>74</sup> Upon review of each approach, the court decided to adopt the “hybrid”

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<sup>67</sup> *Varsity Brands, Inc. v. Star Athletica, LLC*, 2012 U.S. Dist. LEXIS 85836 at \*14 (W.D. Tenn. June 21, 2012).

<sup>68</sup> *Id.*

<sup>69</sup> *Varsity Brands*, 799 F.3d at 470–71.

<sup>70</sup> *Id.* at 475.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 477.

<sup>73</sup> *Id.* at 481.

<sup>74</sup> *See supra* Section II.C.

approach.<sup>75</sup>

The court addressed and answered five questions that would help determine whether a design is copyrightable.<sup>76</sup> The five questions are: (1) is the design a pictorial, graphic, or sculptural work; (2) if the design is a pictorial, graphic, or sculptural work, then is it a design of a useful article; (3) what are the utilitarian aspects of the useful article; (4) can the viewer of the design identify pictorial, graphic, or sculptural features separately from the utilitarian aspect of the useful article; and (5) can the pictorial, graphic, or sculptural feature of the design of the useful article exist independently of the utilitarian aspects of the useful article?

Question one was answered in the affirmative because Varsity Brands received a copyright registration for “two-dimensional works of . . . graphic . . . art.”<sup>77</sup> The court answered in the affirmative to question two because the designs of cheerleading uniforms have an intrinsic function that is not merely to portray the appearance of clothing or to convey information.<sup>78</sup> The court answered question three by noting that cheerleading uniforms have the utilitarian function to cover the body, wick away moisture, and withstand rigors of athletic movement.<sup>79</sup> The court answered the fourth question by stating that the designs do not enhance the cheerleader uniform’s functionality and that the skirt and top can easily be identified as a cheerleading uniform without the stripes, chevrons, color blocks, or zigzags.<sup>80</sup> The plain white cheerleading top and skirt cover the wearer’s body and allow the wearer to jump, kick, and flip.<sup>81</sup> The Sixth Circuit also found the record established that not all cheerleader uniforms must look

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<sup>75</sup> *Id.* at 484–85. (“The hybrid approach includes the Objectively Necessary Approach and the Design-Process Approach”); see *supra* Section II.C.

<sup>76</sup> *Varsity Brands*, 799 F.3d at 487–88.

<sup>77</sup> *Id.* at 489.

<sup>78</sup> *Id.* at 489–90.

<sup>79</sup> *Id.* at 490. The dissent disagrees with this function and instead classifies cheerleader uniform’s function as a way to identify that the wearer is a member of a group. *Id.* at 495 (McKeague, J., dissenting).

<sup>80</sup> *Id.* at 491. The district court found otherwise; it found that the graphic features identifies a cheerleading uniform because with these design typically associated with sports, the uniform is not recognizable as a cheerleading uniform. *Id.* See *infra* Section IV. A.1 (discussing Star’s arguments for the cheerleading uniforms’ utilitarian aspects).

<sup>81</sup> *Varsity Brands*, 799 F.3d at 491.

alike to be considered cheerleading uniforms.<sup>82</sup> Varsity Brands' five designs exemplify how cheerleading uniforms still look like cheerleading uniforms no matter how different the arrangement of the aesthetic designs.<sup>83</sup> The court's answer to the fifth question is extremely interesting. The court found the designs to be transferable because the stripes, chevrons, color blocks, and zigzags may be incorporated on different types of garments such as t-shirts, warm-ups, jackets, and other apparel.<sup>84</sup> The interchangeability of the uniforms' designs prove that the graphic elements do not affect whether the uniform still functions as a cheerleading uniform.<sup>85</sup>

The court held that Varsity Brands' designs can be identified separately from, and are capable of existing independently of the utilitarian aspects of cheerleading uniforms, and thus, the graphic designs are copyrightable subject matter.<sup>86</sup> The copyright protection of Varsity Brand's graphic designs is consistent with other courts' holdings of protection over pictorial and graphic features that appear on clothing under the Copyright Act.<sup>87</sup>

#### *D. Dissent*

Judge McKeague, writing for the dissent, agreed with the majority regarding the sequence of how to address the separability problem: define the work's function first, and then determine whether the elements can be identified separately from the functions.<sup>88</sup> However, the dissent and the majority disagreed on how to define function.<sup>89</sup> The dissent defined a uniform's function as identifying the wearer as a member of a group.<sup>90</sup> When the

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<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 491–92.

<sup>86</sup> *Id.* at 492.

<sup>87</sup> *Varsity Brands*, 799 F.3d at 492.

<sup>88</sup> *Id.* at 494–95 (McKeague, J., dissenting).

<sup>89</sup> *Id.* at 496 (McKeague, J., dissenting). Should the court define it as its most basic function, to cover the body or should the court define it more broadly, as wicking away moisture and permitting the wearer to cheer, jump, kick and flip?

*Id.*

<sup>90</sup> *Id.* at 495.

stripes, chevrons, color blocks, and other elements are removed, the uniform becomes a blank pleated skirt and crop top, where the reasonable observer would not associate the blank outfit as a cheerleading uniform. The dissent favored a narrow approach to the function issue, which was supported in other circuits.<sup>91</sup>

Once the dissent properly defined the uniform's function, the separability of the placement of the stripes, braids, and chevrons from the function was examined.<sup>92</sup> The dissent found the stripes, color blocks, and chevron were not separable from the function of identifying the wearer as a cheerleader.<sup>93</sup> The dissent analogized this case to *Jovani Fashion, Ltd. v. Fiesta Fashions* by finding no evidence of Varsity Brands' designers exercising "artistic judgment independently of functional influences rather than as a merger of aesthetic and functional consideration."<sup>94</sup> The dissent found that Varsity Brands' designs would "lose their ability to identify the wearer as a cheerleader without these aesthetic elements," therefore, Varsity Brands' designs "enhance the garment's utility."<sup>95</sup> The dissent concluded its opinion by calling for attention the need to resolve this uncertainty in the law.<sup>96</sup>

#### E. Supreme Court of the United States

The question that was presented in the Sixth Circuit concerning the interchangeability of the aesthetic designs between cheerleader uniforms and other sports apparel became a significant arguing point for Star Athletica during oral arguments in front of the Supreme Court. Star Athletica argued that when Varsity Brands put the design elements on other articles of clothing, the

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<sup>91</sup> *Varsity Brands*, 799 F.3d at 495 (McKeague, J., dissenting). See *Jovani*, 500 F. App'x at 44; *Whimsicality*, 891 F.2d at 455; *Galiano v. Harrah's Operating Co.*, 416 F.3d 411 (5th Cir. 2005).

<sup>92</sup> *Varsity Brands*, 799 F.3d at 495 (McKeague, J., dissenting).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 496.

<sup>96</sup> *Id.* at 497 ("But until we get much-needed clarification, courts will continue to struggle and the business world will continue to be handicapped by the uncertainty of the law.").

design changed.<sup>97</sup> Star Athletica further argued that the designs remained the same because the designs were placed in the same place on other articles of clothing compared to the uniforms.<sup>98</sup> Varsity Brands rebutted this argument by pointing to § 113(A) of the Copyright Act, which states that the copyright owner has the exclusive right to reproduce a copyrighted pictorial, graphic, or sculptural work on any kind of article, whether it is useful or otherwise.<sup>99</sup>

Star Athletica further argued that Varsity Brands' designs on the uniforms are not fabric designs because when the stripes, chevrons, color blocks, and zigzags are altered by rotation or relocation on a different article of clothing, it does not provide the wearer with a slimming effect, define the style line, or make the wearer appear taller.<sup>100</sup> Star Athletica also argued that the designs on the cheerleading uniforms have a utilitarian function of covering the seams.<sup>101</sup> Star Athletica analogized the cheerleading uniforms to a Stella McCartney dress worn by Kate Winslet because that dress made the wearer slimmer and ultimately changed how others perceived the wearer.<sup>102</sup> Varsity Brands, on the other hand, argued it was not claiming protection for the uniforms' cut, folds, pleats, or shape, but the design that appeared on the uniform.<sup>103</sup> Varsity Brands analogized the cheerleading uniforms to a copyright holder's painting, in the instance that he or she wished to reproduce the painting on fabric or another textile.<sup>104</sup> The copyright holder of the painting created a fabric design, which would therefore be copyrightable, which is exactly what Varsity Brands did with its copyright in the designs on the uniform.<sup>105</sup>

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<sup>97</sup> Transcript Oral Argument at 29, *Varsity Brands, Inc. v. Star Athletica, LLC.*, Published on Oct. 31, 2016 at [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2016/15-866\\_j426.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2016/15-866_j426.pdf).

<sup>98</sup> *Id.* at 5.

<sup>99</sup> *Id.* at 30. See 17 U.S.C. § 113(A) (2012).

<sup>100</sup> *Id.* 5–6.

<sup>101</sup> *Id.* at 18.

<sup>102</sup> *Id.* at 7.

<sup>103</sup> *Id.* at 14–15.

<sup>104</sup> *Id.* at 38.

<sup>105</sup> *Id.* at 40–41.



## IV. ANALYSIS

A. *Importance of Defining the Cheerleading Uniform's Function*

The majority and dissenting opinions in the Sixth Circuit held differently because of how they defined the term “functional” with regards to aspects of the cheerleading uniform’s designs.<sup>106</sup> How the Supreme Court ultimately frames and defines the function of the cheerleading uniform’s designs will affect whether or not the designs are conceptually separable from the utilitarian function, and whether the designs will be copyrightable going forward.<sup>107</sup> The more narrowly the Supreme Court defines the cheerleading uniform’s function, the more likely it will find copyright protection exists, because the aesthetic features will not contribute to the garment’s functional attributes and will be merely ornamental elements.<sup>108</sup> In the alternative, if the Supreme Court defines the cheerleading uniform’s function as having multiple or higher-level functions, such as identifying the wearer as a cheerleader, then the Court will be less likely to find the uniforms copyrightable.<sup>109</sup> The analysis turns on whether the work is perceived to contribute to the object’s utilitarian function or constitutes merely ornamental elements.<sup>110</sup>

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<sup>106</sup> *Varsity Brands*, 799 F.3d at 495 (McKeague, J., dissenting).

<sup>107</sup> Robert Welsh & Chad Rutkowski, *How Will the Supreme Court Function With the Varsity Brands Test?*, COPYRIGHT, CONTENT, AND PLATFORMS (May 6, 2016), <https://www.copyrightcontentplatforms.com/2016/05/how-will-the-supreme-court-function-with-the-varsity-brands-test/>.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* Having multiple or higher-level function could be that the clothing covers the body in a particular way that is socially recognizable. *Id.* *Jovani and Chosun Int’l, Inc. v. Chrisha Creations, Ltd.*, held differently based upon the function of the clothing had multiple or higher-level functions. 500 F. App’x at 44; 413 F.3d 324 (2d Cir. 2005). A design feature is not functional when it appears on a garment that is not useful, but is functional when the decoration is affixed to the garments to have some functional purpose that is more than covering the body. Welsh, *supra* note 107.

<sup>110</sup> Welsh, *supra* note 107.

1. *Rejection of Star's Argument: Design's Function is One of the Utilitarian Aspects*

Star Athletica argued that Varsity Brands' graphic designs could not be identified separately from the utilitarian aspects because the decorative function of the cheerleading uniform's design is a utilitarian aspect of the uniform.<sup>111</sup> Star Athletica relied on *Jovani Fashion, Ltd. v. Fiesta Fashions*, which held, "clothing, in addition to covering the body, serves as a 'decorative function,' so that the decorative elements of clothing are generally 'intrinsic' to the overall function, rather than separable from it."<sup>112</sup>

Star Athletica also argued that the pictorial, graphic, or sculptural features are intertwined with the utilitarian aspects of the cheerleading uniforms because it cannot be separated from the decorative function.<sup>113</sup> The Sixth Circuit rejected Star Athletica's argument.<sup>114</sup> Their argument of functionality contradicts the statutory language of § 101 of the Copyright Act and other precedent.<sup>115</sup> A finding that the decorative function is a utilitarian aspect would render all fabric designs ineligible for copyright protection, even though it serves no function but to make a garment more attractive.<sup>116</sup> If the Supreme Court reverses the Sixth Circuit's holding, it would contradict precedent and create more confusion in the fashion industry.

B. *Clearing up Confusion: Adopting the Hybrid Approach*

The Hybrid Approach adopted by the Sixth Circuit combines the Objectively Necessary Approach and the Design-Process

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<sup>111</sup> *Varsity Brands*, 799 F.3d at 490.

<sup>112</sup> *Id.* (citing *Jovani*, 500 F. App'x at 45).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> See *Gay Toys, Inc. v. Buddy L. Corp.*, 703 F.2d 970, 973 (6th Cir. 1983); *Home Legend, LLC v. Mannington Mills, Inc.*, 784 F.3d 1404, 1412 (11th Cir. 2015); *Mazer*, 347 U.S. 201; *Folio Impression, Inc. v. Byer California*, 937 F.2d 759, 763 (2d Cir. 1991).

<sup>116</sup> *Mazer v. Stein*, 347 U.S. 201 (1954) (citing *Folio*, 937 F.2d at 763). See *supra* Section III.C.

Approach.<sup>117</sup> This Hybrid Approach was also adopted by the Fourth Circuit.<sup>118</sup> The Fourth Circuit in *Universal Furniture v Collezione Eurpoa USA, Inc.* found that the designer's process reflects an "artistic judgment exercised independently of functional influences."<sup>119</sup>

Varsity Brands presented evidence and testimony of the designers' process when creating the designs for uniforms in general, and not exclusively cheerleading uniforms.<sup>120</sup> The evidence presented showed that the designs enhance the uniform's function, but are transferable to other articles of clothing for cheerleading and other sports.<sup>121</sup> The transferability of the designs to other articles of clothing demonstrates that the aesthetic designs and a blank cheerleading uniform can appear "side-by-side."<sup>122</sup> Therefore, the aesthetic design concepts are identifiable separately from the utilitarian aspects of the cheerleading uniform.<sup>123</sup>

The Supreme Court's primary challenge following the Sixth Circuit's decision is to establish a uniform "conceptual separability" test that will clarify the copyrightability of useful articles not only to the fashion industry, but also for other

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<sup>117</sup> *Varsity Brands*, 799 F.3d at 487. The Objectively Necessary Approach accepts a pictorial, graphic, or sculptural feature conceptually separable when the "design is not necessary to the performance of the utilitarian function of the article." *Id.* The Design-Process Approach holds a pictorial, graphic, or sculptural feature as conceptually separable when the "design elements can be identified as reflecting the designer's artistic judgment exercised independently of functional influences." *Id.*

<sup>118</sup> *Universal Furniture*, 618 F.3d at 433 (considering whether the decorative elements of furniture were eligible for copyright protection).

<sup>119</sup> *Id.* This evidence presented by Varsity Brands is important to point out if the Supreme Court decides to endorse the Design-Process Approach or the Objectively-Necessary Approach.

<sup>120</sup> *Id.* at 471. When the designer sketches a design, they do not consider the functionality of the uniform or the ease of producing the uniform. *Id.* Once the sketch is complete, the designer decides whether or not that sketch will apply to a cheerleading uniform or whether it would better suit another sportswear item. *Id.*

<sup>121</sup> Quinn Emanuel, *Supreme Court to Clarify Test for Copyright Protection of Useful Articles*, JDSUPRA BUSINESS ADVISOR (Oct. 14, 2016 3:13 PM), <http://www.jdsupra.com/legalnews/supreme-court-to-clarify-test-for-92364/>.

<sup>122</sup> *Varsity Brands*, 799 F.3d at 491.

<sup>123</sup> *Id.*

industries with similar dilemmas.<sup>124</sup> In the fashion industry, a designer takes a necessary item, *e.g.*, clothing, and uses his or her artistic judgment to make that article different than the one hanging next to it.

### *C. How Other Countries Resolve Copyright Issues in the Fashion Industry*

Fashion designers receive copyright protection differently around the world. In Australia, fashion designers have protection over their two-dimensional and three-dimensional designs under the Designs Act 2003 (*Cth*) and the Copyright Act 1968 (*Cth*).<sup>125</sup> In France, copyright protection extends to any “original work of the mind.”<sup>126</sup> Under the French Intellectual Property Code; garment designs in the fashion industry are protected and are specifically listed in the Code.<sup>127</sup> Italian Copyright Law protects “works of the mind having a creative character and belonging to literature, music, figurative arts, architecture, theater or cinematography, whatever their mode or form of expression,” and “[i]n particular, protection [extends] to . . . industrial design works that have creative character or inherent artistic character.”<sup>128</sup>

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<sup>124</sup> *Id.* See *supra* Section II.C. The nine approaches to conceptual separability have been applied to cases that did not involve fashion designs. See also *Bandir*, 834 F.2d at 1145; *Barnhart*, 773 F.2d at 419, 422; *Pivot Point*, 372 F.3d at 934.

<sup>125</sup> Jaimie Wolbers, *US Star Athletica v. Varsity Brands as Seen From Australia: Bring it on!*, NATIONAL LAW REVIEW (Nov. 9, 2016, 7:39 PM), <http://www.natlawreview.com/article/us-star-athletica-v-varsity-brands-seen-australia-bring-it>. Knowing which act to use depends on whether the designer is protection a two-dimensional or three-dimensional design and how the design intends to exploit the designs. *Id.*

<sup>126</sup> Code de la Propriete Intellectuelle, Article L. 111-1.

<sup>127</sup> Article L. 112-2. Creations of the seasonal industries of dress and articles of fashions shall be considered works of the mind. *Id.* “Industries which, by reason of the demands of fashion, frequently renew the form of their products, particularly the making of dresses, furs, underwear, embroidery, fashion, shoes, gloves, leather goods, the manufacture of fabrics of striking novelty or of special use in high fashion dressmaking, the products of manufacturers of articles of fashion and of footwear and the manufacture of fabrics for upholstery shall be deemed to be seasonal industries.”

<sup>128</sup> Holger Gauss, Boriana Guimberteau, Simon Bennett, & Lorenzo Litt, *Red Soles Aren't Made for Walking: A Comparative Study of European Fashion*

Italian Copyright Law further allows fashion designs to obtain an *ex parte* interim injunction in order to access and seize any copy of his or her design having creative and artistic value.<sup>129</sup> In the United Kingdom, fashion designs obtain automatic copyright protection if it is an original “artistic work.”<sup>130</sup> Once the fashion design receives copyright protection, it is protected for 70 years after the designer’s death or 45 years from the time that the fashion designer puts the design into production using an industrial process.<sup>131</sup>

As of 2016, Los Angeles and New York City have been ranked fourth and fifth respectively on a list of the top fashion cities in the world.<sup>132</sup> Despite the significant economic contribution of American fashion designers to the global fashion industry, designers in the United States are not currently protected under U.S. copyright law, nor do they receive any protections similar to their European counterparts.<sup>133</sup> In 2012, the Senate passed the Innovative Design Protection and Piracy Prevention Act, which extends copyright protection for three years to fashion designs that “(i) are the result of a designer’s own creative endeavor; and (ii) provide a unique, distinguishable, non-trivial and non-utilitarian variation over prior designs for similar types of articles.”<sup>134</sup> A Supreme Court decision in favor of Varsity Brands

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*Laws, LANDSLIDE: A PUBLICATION OF THE ABA SECTION OF INTELLECTUAL PROPERTY LAW* (Nov. 9, 2016, 8:17 PM)

[http://www.americanbar.org/publications/landslide/2012\\_13/july\\_august/red\\_soles\\_arent\\_made\\_walking\\_comparative\\_study\\_european\\_fashion\\_laws.html](http://www.americanbar.org/publications/landslide/2012_13/july_august/red_soles_arent_made_walking_comparative_study_european_fashion_laws.html) (citing Legge d’autore [LDA] 22 aprile 1941, n. 633, pt. I, ch. I (It.)).

<sup>129</sup> *Id.* A fashion design has the ability to request a permanent injunction and damages. *Id.*

<sup>130</sup> Gauss, *supra* note 128. Artistic works include graphic works, photographs, sculpture, or collage, irrespective of artistic quality and works of artistic craftsmanship. *Id.*

<sup>131</sup> *Id.* Fashion garments, patterns, sketches, prototypes, and computer-generated graphics are all capable of protection as design rights. *Id.*

<sup>132</sup> Cody Carmichael, *The Top Fashion Cities in the World – 2016 Update*, GAZETTE REVIEW (Nov. 9, 2016, 8:40 PM), <http://gazettereview.com/2016/08/the-top-fashion-cities-in-the-world-update/>.

<sup>133</sup> *See supra* Part I.

<sup>134</sup> Daryl Wander, *Trendsetting: Emerging Opportunities for the Legal Protection of Fashion Designs*, 42 RUTGERS L.J., 247 (2010).

may lead fashion designers in the United States one step closer to receiving protection similar to European fashion designers.

## V. FUTURE IMPLICATIONS OF A SUPREME COURT DECISION IN VARSITY BRANDS, INC. V. STAR ATHLETICA, LLC

### A. *Impact on the Courts*

The fashion industry has longed for a singular test to determine when a feature on a useful article, *e.g.*, clothing and shoes, can be protected under copyright law. In its forthcoming opinion, the Supreme Court will have to define the functionality of the cheerleader's uniform before tackling if the pictorial, graphic, or sculptural features can be separated physically or conceptually from the utilitarian aspect. How the Supreme Court defines the function of the cheerleaders' uniform will have an impact on the fashion industry as a whole, because in effect the Supreme Court will either broaden or narrow the scope of copyright protection as it applies to useful articles generally. Allowing the scope of copyright to extend to designs on a useful article will allow those designs to be analogous to fabric designs and, therefore, receive copyright protection.<sup>135</sup>

### B. *Impact on the Fashion Industry*

In the event that the Supreme Court affirms the Sixth Circuit's decision, protection over garment designs could have a clear cut rule and, in turn, provide copyright protection to the fashion industry. The Supreme Court decision, "should make clear whether the article's function is to be assessed by the product's practical usefulness or by the social or cultural context in which it is used."<sup>136</sup> One benefit of a clear cut rule would be the prevention of other fashion companies from impermissible copying.<sup>137</sup>

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<sup>135</sup> See *infra* Section V. C.

<sup>136</sup> Welsh, *supra* note 107.

<sup>137</sup> Charles Duan, *The Supreme Court Will Consider a Case About Cheerleading Uniforms*, MOTHERBOARD (Oct. 14, 7:25 AM), <http://motherboard.vice.com/read/star-athletica-varsity-brands>.

Confidence in the fashion industry will promote the production of creative works.<sup>138</sup>

Affirmation of the Sixth Circuit's decision will also greatly affect companies that sell copycat or knockoff products of luxury brands at an extremely low cost.<sup>139</sup> Fast-fashion companies, such as Forever 21, H&M, and Zara create clothing that is "low-cost, high scale, rapid copies" of runway styles.<sup>140</sup> Fast-fashion companies will have restructure their business models because these companies will no longer be able to exploit the ambiguity in copyright law.<sup>141</sup> The fashion designers in these companies will have to be more creative, and come up with ideas and concepts not previously seen on a luxury brand runway.<sup>142</sup>

In the alternative, if the Supreme Court adopts a test that declines copyright protection for the fashion industry, this would result in a huge setback for designers. One potential problem that could arise is the redefining of what constitutes a copyrightable fabric print, as designers have typically received copyright protection for textiles and prints.<sup>143</sup> In *Varsity Brands*, the Sixth

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<sup>138</sup> Currently, fashion designer's benefit to create apparel is innovation: first mover advantage. Serena Elavia, *How the Lack of Copyright Protection for Fashion Designs Affects Innovation in the Fashion Industry*, TRINITY COLLEGE DIGITAL REPOSITORY (NOV. 10, 2016, 7:13 PM), <http://digitalrepository.trincoll.edu/cgi/viewcontent.cgi?article=1370&context=theses>. Being the designer to create an innovative and new look first creates "buzz" for their company, which in turn drives sales. *Id.*

<sup>139</sup> Amanda Ciccattelli, *Star Athletica, LLC vs. Varsity Brands Case Continues to Spark Fashion Law Controversy*, INSIDE COUNSEL (Oct. 9, 2016, 5:22 PM), <http://www.insidecounsel.com/2016/05/18/star-athletica-llc-vs-varsity-brands-case-continue>.

<sup>140</sup> Wander, *supra* note 134.

<sup>141</sup> *Id.*

<sup>142</sup> During oral arguments, Justice Breyer raised the concern that if the Supreme Court holds that dresses are copyrightable, it could double the prices of women's clothes and could potentially create a monopoly. Oral Argument Published on Oct. 31, 2016 at [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2016/15-866\\_j426.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2016/15-866_j426.pdf).

<sup>143</sup> "Fabric designs are considered 'writings' for the purposes of copyright law and are accordingly protectable." *Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1002 (2d Cir. 1995) (quoting *Folio Impressions*, 937 F.2d at 763); *see also Soptra Fabrics Corp. v. Stafford Knitting Mills, Inc.*, 490 F.2d 1092 (2d Cir. 1974); *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.* 274 F.2d 487 (2d Cir. 1960).

Circuit held that chevron designs should be considered a fabric print or design rather than a utilitarian aspect of a cheerleading uniform.<sup>144</sup> A ruling in favor of Star Athletica would undermine the chevron designs and other design elements that were granted copyright protection by the Copyright Office.<sup>145</sup>

## VI. CONCLUSION

Conceptual separability in U.S. copyright law has been causing confusion in the fashion industry and amongst American judges since 1954.<sup>146</sup> A Supreme Court decision in *Varsity Brands* will establish the appropriate test that will be used to determine when a feature of a useful article is protectable under § 101 of the Copyright Act.<sup>147</sup> The Supreme Court's definition of conceptual separability will be affected by how narrowly or broadly the Court defines a cheerleading uniform's function.<sup>148</sup> A narrow definition will assist courts, as well as ordinary observers, identify the differences between graphic designs and the cheerleading uniform, making the useful article separable. The broad definition proposed by the Sixth Circuit's dissent, however, may be inapplicable because cheerleading includes male athletes.<sup>149</sup> The Sixth Circuit's dissent stated that without the stripes, chevrons, color blocks, and other design elements, we are left with a blank

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<sup>144</sup> *Varsity Brands*, 799 F.3d at 493. The court agreed with Varsity Brands that graphic features of the cheerleading uniforms are more like fabric design and therefore are protectable subject matter under the Copyright Act. *Id.* at 493.

<sup>145</sup> Amanda Ciccattelli, *Star Athletica, LLC vs. Varsity Brands Case Continues to Spark Fashion Law Controversy*, INSIDE COUNSEL (Oct. 11, 2016, 4:06 PM), <http://www.insidecounsel.com/2016/05/18/star-athletica-llc-vs-varsity-brands-case-continue>.

<sup>146</sup> See *Mazer*, 347 U.S. 201. For a discussion of *Mazer's* holding and its effects, see Barton Keyes, *Alive and Well: The (Still) Ongoing Debate Surrounding Conceptual Spearability in American Copyright Law*, 69 OHIO ST. L.J. 109, 115–19 (2008).

<sup>147</sup> *Star Athletica L.L.C. v. Varsity Brands, Inc.*, 136 S. Ct. 1823 (2016).

<sup>148</sup> Welsh, *supra* note 107.

<sup>149</sup> Approximately 50% of college cheerleaders are male. Stefani Bluestein, *Male Cheerleading is a Sport*, SERENDIP STUDIO (Oct. 14, 2016 6:44 PM), <http://serendip.brynmawr.edu/exchange/serendipupdate/male-cheerleading-sport>.



“pleated *skirt* and *crop top*.”<sup>150</sup> Pleated skirts and crop tops are not worn by male cheerleaders, so this narrow definition omits other elements that define a cheerleader besides the uniform and the design elements that are separate from the uniform’s function. Further, during oral arguments, Varsity Brands argued that Star features cheerleading uniforms without stripes nor chevrons nor color blocks in their catalog.<sup>151</sup> Therefore, the aesthetic designs are not essential to identify the cheerleader.<sup>152</sup>

No matter how the uniform’s function is defined or which approach the Supreme Court implements, the fashion industry will be affected. If designers receive copyright protection, then the fashion brands that sell copycat “fast fashion” products emulating luxury brands at lower price point will be forced to change their business models.<sup>153</sup> A decision in favor of Varsity Brands will give fashion designers similar incentives to those received by authors or other works of copyrighters, such as preventing piracy by incentivizing compensation for creative works. Fashion designers may soon have the confidence and ability to protect their creative work if the Supreme Court ultimately affirms the Sixth Circuit’s decision.

*Kristy Diesner*\*

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<sup>150</sup> *Varsity Brands*, 799 F.3d at 495 (McKeague, J., dissenting) (emphasis added).

<sup>151</sup> Oral Argument Published on Oct. 31, 2016 at [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2016/15-866\\_j426.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2016/15-866_j426.pdf).

<sup>152</sup> *Id.*

<sup>153</sup> Ciccattelli, *supra* note 139.

\* Juris Doctor Candidate 2018, DePaul University College of Law; B.S. 2015, Kent State University. I would like to thank my family for their support and my editor for her guidance and valuable advice.