

## CLIENT ALERT

### R-E-V-E-R-S-A-L Spells Reversal! The Sixth Circuit Holds Varsity Brands' Cheerleading Uniform Designs to be Copyrightable

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**May 2, 2016 UPDATE:** The U.S. Supreme Court granted *certiorari* to address the question: "What is the appropriate test to determine when a feature of a useful article is protectable under § 101 of the Copyright Act?"

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A recent decision from the Sixth Circuit highlights the ongoing significance of copyright law for the retail and garment industries. On August 19, 2015, the Sixth Circuit held in *Varsity Brands et al v. Star Athletica* that the "stripes, chevrons, zigzags, and colorblocks" on Varsity Brands' cheerleading uniforms are protectable by copyright. In reversing the lower court's decision, the Sixth Circuit dipped into the murky waters of copyright protection for fashion design and reiterated the need for greater legislative and judicial guidance regarding fashion design and copyright law. Nonetheless, the Court ultimately found, as other Circuits have, that "fabric design," unlike "dress design," is protectable.

Varsity Brands sued Star Athletica for infringing its registered copyrighted designs for cheerleader uniforms. On summary judgment, the federal district court in Tennessee determined that a cheerleading uniform cannot exist without its hallmark "stripes, chevrons, zigzags, and colorblocks," and therefore found Varsity's copyrights of such designs to be invalid because they were inseparable from the utilitarian aspects of a cheerleading uniform.

In a 2-1 decision, the Sixth Circuit reversed, holding Varsity's designs to be "copyrightable pictorial, graphic, or sculptural works." The Court started with a determination that the Copyright Office is entitled to *Skidmore* deference in its decisions to issue copyrights. Then, after presenting a survey of approaches taken by various courts in determining whether "the design of a useful article [is] ... conceptually separable from [its] utilitarian aspects," the Court cited the Copyright Act to find Varsity's designs to be separable, and therefore protected under U.S. copyright law. The Court presented "a series of questions ... grounded in the text of the Copyright Act" to guide its inquiry:

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—an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information?
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 aspects of the [useful] article[?]
5. Can the pictorial, graphic, or sculptural features of the design of the useful article exist independently of the utilitarian aspects of the useful article?

17 U.S.C. §§ 101,102 (internal citations omitted).

In the end, the Court held that "the arrangement of stripes, chevrons, color blocks" was copyrightable, because the design was "wholly unnecessary to the performance of the garment's ability to cover the body, permit free movement, and wick moisture"—that is, the utilitarian aspects of a cheerleading uniform. In doing so, the Court essentially likened Varsity's designs to more traditional fabric designs that have long-enjoyed established copyright protection. Note that the Court issued no opinion on originality as the issue was not presented to the Court.

The dissenting opinion, however, aggressively dismissed the notion that the design of a cheerleading uniform is separable from its utilitarian aspects. Judge McKeague maintained that the sole purpose of a cheerleading uniform design—"to identify the wearer as a cheerleader"—renders the design inseparable from the utilitarian aspect of the uniform. Judge McKeague was nonetheless sympathetic to the majority's attempts to sort out the law, and noted that this issue gives rise to continued confusion within the fashion and garment industries. Further, he urged Congress and the Supreme Court to take action to clarify U.S. copyright law "with respect to garment design," noting that both the courts and businesses are clamoring for such clarity.

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