

Sis Boom Bah – Supreme Court Extends Copyright Protection to Cheerleading Uniform Designs

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by Jeffrey R. Cadwell

In a decision announced today, the Supreme Court held that Varsity Brands is entitled to assert copyright protection in two-dimensional designs featured on its cheerleading uniforms. These designs consist of various lines, chevrons, and colorful shapes. Varsity Brands had sued Star Athletica for copyright infringement, alleging that Star's uniform designs were substantially similar to Varsity Brands' designs.

The Copyright Act makes “pictorial, graphic, or sculptural features” of the “design of a useful article” (*i.e.*, an article having an intrinsic utilitarian function) eligible for copyright protection only if those features can be separated from and can exist independently of the useful article. The key issue in the case is whether Varsity Brands' design elements are separable from the cheerleading uniforms on which they are featured.

The District Court had ruled against Varsity Brands on the ground that a cheerleading uniform is inseparable from its colored designs, and therefore the designs on the uniforms were not entitled to copyright protection. The Sixth Circuit reversed on appeal, concluding that the designs of Varsity Brands' uniforms were separable from the functionality of the uniforms themselves. The Sixth Circuit also found it significant that Varsity Brands' designers created their designs without reference to the functionality of the uniform, but instead simply strived to create combinations of colors and shapes that were striking. The decision to place a design on a uniform was only made after a design concept was completed. The Sixth Circuit identified nine different approaches courts and scholars had been taking to determine whether a design feature is separable from a useful article.

The Supreme Court today crystallized the appropriate test for protection by holding that “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.” The Supreme Court

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rejected the oft-cited distinction between conceptual separability and physical separability, and instead said the language of the Copyright Act supports conceptual separability, even if the design at issue can only be “imagined apart from the useful article.”

The approach taken by the Supreme Court is consistent with both its past decision in *Mazer v. Stein* (which was decided under the 1909 Copyright Act and involved a statuette depicting a dancer intended for use as a lamp base) and with the language of the current Copyright Act, specifically Sections 101 and 113(a). The Court made clear that the Copyright Act extends protection to pictorial, graphic, and sculptural works “regardless of whether they were created as freestanding art or as features of useful articles.”

The key takeaway is confirmation that designs featured on useful articles are protectable under copyright law if they can be perceived independently as a 2-D or 3-D work of art and if they would otherwise qualify for copyright protection. Accordingly, copyright owners can prohibit reproduction of such designs not only on similar useful articles but in any other medium of expression. The protection afforded under copyright does not extend, however, to preventing anyone from manufacturing the useful article without any of the design features present.