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IF THE SHOE FITS: THE EFFECTS OF A UNIFORM COPYRIGHT DESIGN TEST ON LOCAL FASHION DESIGNERS

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ABSTRACT

Fashion design is a revolutionary walking art form, becoming increasingly accessible to consumers. The increase in accessibility is, in part, due to the presence of technology and social media platforms. While this allows the consumer to have access to a designer's goods at unprecedented levels, this has led to an increase in claims of copyright infringement against large fashion corporations. This comment discusses how local-based fashion designers have lodged complaints against large fashion corporations of stealing their designs. Additionally, this comment discusses a recent United States Supreme Court case *Star Athletica, L.L.C., v. Varsity Brands, Inc.*, and the implications of its recent opinion. In order to address the inadequacies of protection afforded to fashion designers, and specifically local-based fashion designers, this comment proposed the following solutions: (1) promotion of a licensing scheme, that requires large corporations to pay for the materials taken; and (2) promotion of a fashion design collaboration.

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ELISE RUFF*

I. INTRODUCTION

“[T]hey are making a statement about themselves. They’re saying who they are. The clothes on the hanger do nothing; the clothes on the woman do everything. And that is, I think what fashion is about.”¹

Put yourself in the shoes a fashion designer.² You begin by sketching designs and put your ideas to life.³ A significant amount of time goes into ensuring your designs and every intricate detail is something new and innovative.⁴ Now imagine that a large fashion corporation begins to sell clothes eerily similar to yours. What can you do? Do you go to the courts for a legal remedy? Do you even have a legal course of action? You are in the shoes of Tuesday Bassen, Emily Oberg, and James Soares.⁵

* © Elise Ruff 2017. Elise Ruff is the Candidacy Editor for the John Marshall Review of Intellectual Property Law. Many thanks to my parents, Ronald and Valerie Ruff, my friends and family for their constant support and words of encouragement. Special thanks to Christian Luciano Santiago, who inspired me to write this comment.

¹ Shearman & Sterling LLP, *Star Athletica v. Varsity Brands: Supreme Court Evaluation Copyrights in Features of Useful Articles*, (Nov. 2016) <http://www.shearman.com/en/newsinsights/publications/2016/11/star-athletica-v-varsity-brands-supreme-court>; quoting transcript of oral argument, *Star Athletica v. Varsity Brands, Inc.*, 2016 WL 6426437, No. 15-866, page 47 lines 11-15 (Oct. 31, 2016).

² *Designer*, Merriam-Webster Dictionary (Feb. 19, 2016) <https://www.merriam-webster.com/dictionary/designer> (for the purposes of this comment, a fashion designer is defined as one that creates and manufactures a new product style of design; especially one who designs and manufactures high-fashion clothing).

³ Prachi Gupta, *Get That Life: How I Launched A Successful Fashion Brand*, Cosmopolitan Maganize, (Sep. 14, 2015) <http://www.cosmopolitan.com/career/interviews/a46165/get-that-life-rebecca-minkoff-fashion/> (discussing how designer Rebecca Minkoff spent hours a day sketching, pattern-making, and doing costume design).

⁴ *Id.*

⁵ Dayna Evans, *Talking with Tuesday Bassen About Her David Vs. Goliath Battle Against Zara*, *New York Mag.* (July 29, 2016, 8:00am), <http://nymag.com/thecut/2016/07/tuesday-bassen-on-her-work-being-copied-by-zara.html>; Avery Matera, *Forever 21 Accused of Stealing Indie Designer’s Work*, *Teen Vogue*, (Aug. 9, 2016, 6:21pm) <http://www.teenvogue.com/story/forever-21-emily-obeng-sporty-rich-lawsuit-copyright-drama>; Jamie Feldman, *Urban Outfitters Accused of Ripping Off Artist’s Design, Sparks Tumblr Fury*, *The Huffington Post* (May 28, 2014, 9:51am) http://www.huffingtonpost.com/2014/05/28/urban-outfitters-spires-copyright-infringement_n_5403244.html (Bassen’s article posted the following photo to show her designs that have been allegedly stolen:

The first photo is the print sold by Soares on his website, Society6. The second photo is Urban Outfitter’s miniskirt that sparked the controversy:

Tuesday Bassen is an independent illustrator and artist based in Los Angeles California.⁶ Bassen has a large following on Instagram.⁷ On her Instagram account, Bassen accused Zara of using her pins and iron-patches, placing the designs on its own products.⁸ Emily Oberg is an indie fashion designer, and has accused the large fashion company, Forever 21, of duplicating her graphic sweatshirt designs.⁹ James Soares sells his goods on his e-commerce website, Society 6.¹⁰ Soares accused the fashion giant Urban Outfitters of stealing his graphic printing design and selling the design as its own.¹¹ While all three parties have yet to take legal action, the eerily similar designs make it likely that their claims have merits.

Star Athletica, L.L.C. v. Varsity Brands, Inc., is a recently decided United States Supreme Court case that affirmed the Sixth Circuit's determination that the lines, chevrons, and colorful shapes on a cheerleading uniform were copyrightable.¹² This comment will focus on the implications of the proposed tests to determine whether a useful article is copyrightable under Section 101 of the Copyright Right Act.¹³ Additionally, it will consider any future implications for fashion design copyright protection, post-*Star Athletica*.

Part One will discuss 17 U.S.C. § 101 of the Copyright Right Act, *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, and the proposed tests to determine whether a useful article is copyrightable. Part two will analyze the strengths and disadvantages of the proposed tests. Part three will analyze the separability tests, and *Star Athletica's* implications for future fashion design copyright claims. Part Four will discuss a proposal of what the best avenue could be for local-based fashion designers. Part Five will conclude the discussion on local-based fashion designers. Part Five will suggest the use of licensing schemes or royalties to promote the protection of these designs.

II. BACKGROUND

Copyright law gives property rights in an original work of authorship, fixed in a tangible medium of expression, exclusive rights to reproduce, adapt, distribute, perform, and display the work.¹⁴ Copyright law extends protection to various artistic expressions, including literary, musical, dramatic, pictorial, graphic, and sculptural

⁶ Evans, *supra* note 4.

⁷ Evans, *supra* note 4 (Bassen's Instagram account has 156,000 followers as of July 2016); Tuesday Bassen (@tuesdaybassen), INSTAGRAM (Oct. 7, 2016, 12:26am) <https://www.instagram.com/tuesdaybassen/?hl=en> (Bassen has 170,000 followers as of November 20, 2017).

⁸ Evans, *supra* note 4 (Bassen posted a letter to her Instagram account accusing Zara of intellectual property theft. She posted the letter after hiring an attorney to litigate her claim, and after Zara refused to take her claims seriously).

⁹ Matera, *supra* note 4.

¹⁰ Feldman, *supra* note 4.

¹¹ Feldman, *supra* note 4; See <http://spires.tumblr.com/post/86417858784/urban-outfitters-is-ripping-me-off-with-the-help>.

¹² *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1006 (2017).

¹³ 17 U.S.C. § 101 (1976).

¹⁴ *Copyright*, Black's Law Dictionary (10th ed. 2014).

works.¹⁵ Copyright law's main principal to allow for the author to enjoy the benefits from their intellectual creativity, but this same protection is not extended for fashion designs.¹⁶

The main difference between the listed works protected under the copyright act and fashion is public perception.¹⁷ The listed works in the Copyright Act are ones that are commonly known artistic expressions.¹⁸ Fashion falls outside of this perception.¹⁹ Most fashion designers consider themselves artists, as their clothes are an artistic expression of themselves. Clothes are a necessary consumer good whose artistic value is often underappreciated.²⁰ The battle of balancing the artistic value of the garment against its economic value has seeped into the Court's struggle of interpreting Copyright law today.

A. *The History of Fashion Design Protections*

American fashion Manufacturers found themselves in a battle against cheap knockoffs in 1932.²¹ Fashion manufacturers were able to make cheap knockoffs of its designs and unable to protect the design itself either.²² In response to this crisis, the Fashion Originators Guild of America was established to monitor and track original fashion designs.²³ Fashion manufacturers would register the designs, and the guild would track the designs use.²⁴ In theory this was a successful idea because designers were finally able to protect their designs, but because the guild violated antitrust laws the practice eventually ceased.²⁵ Parties continued to make efforts to have Congress

¹⁵ United States Copyright Office, *Copyright Basics*, May, 2012.

¹⁶ U.S. Copyright Office, *United States Copyright Office: A Brief Introduction and History*, <https://www.copyright.gov/circs/circ1a.html>

¹⁷ See Janet Bennett Kelly, *Trend Report: Is fashion Art?* The Washington Post, March 28, 2013 https://www.washingtonpost.com/news/arts-and-entertainment/wp/2013/03/28/trend-report-is-fashion-art/?utm_term=.39990df53e69.

¹⁸ 17 U.S.C. §101 (3).

¹⁹ *Id.*

²⁰ *Andrew Rossi*, Fashion vs. Art, The New York Times, April 15, 2016 <https://www.nytimes.com/2016/04/15/opinion/fashion-is-not-trivial.html>; Norman Norell, Louise Nevelson, Irene Sharaff, Alwin Nikolais, Andre Courreges, *Is Fashion Art?* The Metropolitan Museum of Art Bulletin, <https://www.metmuseum.org/pubs/bulletins/1/pdf/3258881.pdf.banned.pdf>.

²¹ See James Surowiecki, *The Piracy Paradox*, The New Yorker Financial Page (Sept. 24, 2007) <http://www.newyorker.com/magazine/2007/09/24/the-piracy-paradox>; *Knock Offs*, Black's Law Dictionary (10th ed. 2014) (Black's Law Dictionary defines knock offs as to make an unauthorized copy of (another's product) for sale at a substantially lower price than the original).

²² James Surowiecki, *The Piracy Paradox*, The New Yorker Financial Page (Sept. 24, 2007) <http://www.newyorker.com/magazine/2007/09/24/the-piracy-paradox>.

²³ James Surowiecki, *The Piracy Paradox*, The New Yorker Financial Page (Sept. 24, 2007) <http://www.newyorker.com/magazine/2007/09/24/the-piracy-paradox>.

²⁴ James Surowiecki, *The Piracy Paradox*, The New Yorker Financial Page (Sept. 24, 2007) <http://www.newyorker.com/magazine/2007/09/24/the-piracy-paradox>.

²⁵ James Surowiecki, *The Piracy Paradox*, The New Yorker Financial Page (Sept. 24, 2007) <http://www.newyorker.com/magazine/2007/09/24/the-piracy-paradox> (The Supreme Court in 1941 found that the Fashion Originators Guild violated antitrust law in *Fashion Originators' Guild of America v. Federal Trade Commission*) (See *Fashion Originators Guild of America v. Federal Trade Commission*, 312 U.S. 668, 707 (1941)).

enact legislation that would afford protections to fashion designers and create a legal remedy when others use the designs.²⁶ These attempts to protect designs were rarely, if ever, successful.²⁷ In 1998 there was a big push before Congress to enact fashion design protection legislation, but the only thing that came of it was that boat hull designs were afforded copyright protection under the act.²⁸ Other attempts have come before Congress in 2006, 2010, and 2013, but subsequently fell short.²⁹ While these unsuccessful attempts disappointed the fashion community, the judicial system offers a different approach.

B. 17 U.S.C. § 101 of the Copyright Act of 1976

Legislative history of copyright law began long before the 17 U.S.C. § 101 of the Copyright Right Act of 1976. The original legislation passed in 1790, and was based in the promotion of progression in the sciences and useful arts.³⁰ Revisions were enacted intermittently, but the major reform came in 1909.³¹ The Copyright Act of 1909 was repealed and later replaced by the Copyright Act of 1976.³² The call for a new copyright law was based in two reasons: First, the progression of technology into our society and in turn creating new copyright issues. Second the United States was anticipating participation in the Berne Convention.³³ The Copyright Act, while fundamentally similar to its predecessor, had a few important differences.³⁴ The new Act expanded the types of mediums that could be copyrightable, it granted exclusive rights to copyright holders, codified the idea of the fair use doctrine, amongst other new revelations.³⁵

C. *Star Athletica, L.L.C. v. Varsity Brands, Inc., et al.*

The United States Supreme Court delivered its opinion on *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, (“Star Athletica”) on March 22, 2017.³⁶ Petitioner, Star Athletica, designs clothing and accessories, and was accused for incorporating various elements and designs of *Varsity Brands, Inc.*, (“Varsity Brands”).³⁷ Varsity Brands, the Respondent, also designs clothing and accessories for various athletics, including

²⁶ *Id.*

²⁷ See Eric Wilson, *O.K., Knockoffs, This Is War*, The New York Times, (March 30, 2006) <http://www.nytimes.com/2006/03/30/fashion/thursdaystyles/ok-knockoffs-this-is-war.html>.

²⁸ Wilson, *supra* note 24.

²⁹ Association of Research Libraries, *Copyright Timeline: A History of Copyright in the United States*, <http://www.arl.org/focus-areas/copyright-ip/2486-copyright-timeline#Top>.

³⁰ Association of Research Libraries, *supra* note 26.

³¹ Association of Research Libraries, *supra* note 26.

³² Association of Research Libraries, *supra* note 26.

³³ Association of Research Libraries, *supra* note 26.

³⁴ Association of Research Libraries, *supra* note 26.

³⁵ Association of Research Libraries, *supra* note 26.

³⁶ See generally *Star Athletica, L.L.C.*, 137 S. Ct. at 1002.

³⁷ *Varsity Brands, Inc. v. Star Athletica, LLC*, No. 10-2508, 2014 WL 819422, *1 (W.D. Tenn. March 1, 2014).

cheerleading.³⁸ Varsity Brands cheerleading uniform designs incorporate various elements into its designs, including but not limited to color, shapes, and lines.³⁹ Varsity Brands sued Star Athletica, claiming they had violated the copyright act by using various elements of its designs in Varsity Brands Uniforms.⁴⁰

Summary judgment motions were filed in District Court.⁴¹ Star Athletica argued that Varsity Brands did not have valid copyright protections, as the designs were for “useful articles,” which cannot be copyrighted, and thus the designs cannot be separated from the uniform itself.⁴² Varsity Brands argued that the designs were separable, thus copyrightable and subsequently infringed by Star Athletica.⁴³ Star Athletica’s summary judgment motion was granted, and the District Court held that the designs were an integral part of the cheerleading uniform.⁴⁴ Varsity Brands appealed.⁴⁵

The Sixth Circuit reversed the district court’s holding and found that the Copyright Act allows graphic features of a design to be copyrighted even when the designs are not separable from a useful article.⁴⁶ The Sixth Circuit’s opinion provided an in-depth discussion of the nine different approaches when reviewing whether a useful article can be copyrightable.⁴⁷ The sixth circuit’s opinion detailed the nine different approaches most commonly accepted by scholars when determining whether a useful article may be protectable under copyright law.⁴⁸

Star Athletica filed a petition for writ of certiorari on January 5, 2016.⁴⁹ The petition for writ of certiorari was granted on May 2, 2016, but limited to the first question presented.⁵⁰ Fifteen amicus curiae briefs have been submitted before the court.⁵¹ At least nine different tests have been created to analyze the separability of

³⁸ *Id. Id.*

³⁹ *Varsity Brands, Inc. v. Star Athletica, LLC*, 799 F.3d 468, 471 (6th Cir. 2015).

⁴⁰ *Varsity Brands, Inc.* 2014 WL 819422 at *1 (Discussing how Varsity Brands, Inc. learned of Star Athletica, L.L.C.’s catalogue that showed its uniforms, Varsity Brands, Inc., amongst other parties, filed suit against Star Athletica claiming copyright infringement, trademark infringement, and some state-wide claims).

⁴¹ *Id. Id.*

⁴² *Id. Id.* at *8 (Discussing how the court granted plaintiff’s (Star Athletica, L.L.C.) summary judgment motion because they found the cheerleading form to serve a utilitarian function, and without all design the court calls the uniform a blank canvas).

⁴³ *Id. at* *1 (discussing how Varsity Brands argues that the designs of its cheerleading uniforms are conceptually separable from the “utilitarian features” of the uniforms, and thus protected).

⁴⁴ *Varsity Brands, Inc.*, 799 F.3d at 471.

⁴⁵ *Id. Id.*

⁴⁶ *Id. at* 494. *Id. at*

⁴⁷ *Id. at* 484-86.

⁴⁸ *Id. at* 484. *Id. at*

⁴⁹ *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 799 F.3 468 (6th Cir. 2016), *petition for cert. filed*, 2016 WL 94219 (U.S. Jan 5, 2016) (No. 15-866).

⁵⁰ *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 799 F.3 468 (6th Cir. 2016), *cert. granted*, 84 U.S.L.W. 3407 (U.S. May 2, 2016) (No. 15-866).

⁵¹ See Brief for Public Knowledge, The Royal Manticoran Navy, and the International Costumers Guild as Amici Curiae Supporting Petitioners, *Star Athletica, LLC, v. Varsity Brands, Inc.*, (2016) (No. 150866) 2016 WL 492305; Brief of Public Knowledge, The International Costumers Guild, Shapeways, Inc., The Open Source Hardware Association, Formlabs Inc., Printrbot Inc., The Organization For Transformative Works, The American Library Association, The Association of Research Libraries, and the Association of College and Research Libraries as Amici Curiae Supporting Petitioner, *Star*

components of a fashion design, but the Court is to determine which is the appropriate one.⁵²

The Court was asked to focus on specific language from 17 U.S.C. § 101 of the Copyright Act, which narrows in on the language of what is defined as a useful article.⁵³ Lower courts have often struggled with how to interpret this statutory language, how to balance the idea of a useful article, if the contested article is conceptually different from the original article, and if that useful article is original enough to warrant copyright protection.⁵⁴

Athletica, LLC, v. Varsity Brands, Inc., (2016) (No. 15-866) 2016 WL 3965163; Brief of Professors Christopher Buccafusco and Jeanne Fromer As Amici Curiae Supporting Petitioner, *Star Athletica, LLC, v. Varsity Brands, Inc.*, (2016) (No. 15-866) 2016 WL 3971299; Brief of Intellectual Property Law Professors Amicus Curiae Supporting Petitioner, *Star Athletica, LLC, v. Varsity Brands, Inc.*, (2016) (No. 15-866) 2016 WL 3971299; Brief of American Intellectual Property Law Association as Amici Curiae in supporting neither party, *Star Athletica, LLC, v. Varsity Brands, Inc.*, (2016) (No. 15-866) 2016 WL 5116852; Brief of New York Intellectual Property Law Association as Amici Curiae supporting neither party, *Star Athletica, LLC, v. Varsity Brands, Inc.*, (2016) (No. 15-866); Brief of Intellectual Property Law Association of Chicago as Amici Curiae supporting neither party *Star Athletica, LLC, v. Varsity Brands, Inc.*, (2016) (No. 15-866); Brief of Intellectual Property Owners Association as Amicus Curiae supporting respondent, *Star Athletica, LLC, v. Varsity Brands, Inc.*, (2016) (No. 15-866); Brief of United States as Amicus Curiae supporting respondents, *Star Athletica, LLC, v. Varsity Brands, Inc.*, (2016) (No. 15-866); *Brief of Professor Suk Gersen and C. Scott Hempill as Amici Curiae supporting respondents, Star Athletica, LLC, v. Varsity Brands, Inc.*, (2016) (No. 15-866); *Brief of Fashion Law Institute et al.*, as Amici Curiae supporting respondents, *Star Athletica, LLC, v. Varsity Brands, Inc.*, (2016) (No. 15-866); *Brief of Chosun International Inc.*, as Amicus Curiae supporting respondents, *Star Athletica, LLC, v. Varsity Brands, Inc.*, (2016) (No. 15-866); and Brief of Council of Fashion Designers of America, Inc., as Amicus Curiae in Support of Respondents, *Star Athletica, LLC, v. Varsity Brands, Inc.*, (2016) (No. 15-866).

⁵² Brief for Petitioner at 20, *Star Athletica L.L.C v. Varsity Brands, Inc.*, No. 15-866 (6th Cir. July 15, 2016); Carl Barnhart Inc., v. Economy Cover Corp., 773 F.2d 411, 420 (2d Cir. 1985) (Dissent, Jon O. Newman) (citing *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989, 993 (2d Cir 1980) (defining a separable article as an article that is conceptually separate and distinct from the physical separability of the article).

⁵³ The pertinent parts of the Copyright Act of 1976, 17 U.S.C. §101 state the following:

“Except as otherwise provided in this title, as used in this title, the following terms and their variant forms mean the following:

“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. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design, incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.

A “useful article” is an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a “useful article.”

⁵⁴ *Varsity Brands, Inc. v. Star Athletica, LLC*, 799 F.3d 468, 471 (6th Cir. 2015).

Oral Arguments were heard by the bench on October 31, 2016.⁵⁵ Petitioner argued two points before the court.⁵⁶ First, Congress made it clear that two-dimensional and three-dimensional designs must be analyzed for separability by subjecting two-dimensional pictures to section 101 separability test.⁵⁷ Second, that section 101's text established two questions.⁵⁸ First, whether the designs features can be identified from the useful article's utilitarian aspects.⁵⁹ Second, whether those two can exist independent, by not adding or changing the useful article's utilitarian aspects.⁶⁰ The Respondents argued two main points.⁶¹ First, that pictorial, graphic, and sculptural works can exist independently.⁶² Second, that courts and the Copyright office are not required to determine how effective the visual or artistic expression of the copyrighted work is.⁶³

Each test approaches the analysis differently, but generally speaking it emphasizes one of the following: (1) the artistic value of the article; (2) the utilitarian function of the article; or (3) a viewer's observation of the article.

The Supreme Court delivered its opinion on March 22, 2017, in which Justice Thomas affirmed the Sixth Circuit's determination that the lines, chevrons, and colorful shapes on the surface of a cheerleading uniform are eligible for copyright protection.⁶⁴ The slip opinion made three distinct findings: (1) that a feature in a design is eligible for copyright protection only if the feature can be seen as a two or three dimensional work of art separate from the useful article, and that it would qualify as a pictorial, graphic, or sculptural work, fixed into a tangible medium of expression; (2) the lines, chevrons, and colorful shapes on the uniform are eligible for copyright protection, separate from the uniform's protection; and (3) a distinction between physical separability and conceptual separability is unnecessary.⁶⁵

Justice Thomas notes the importance of this decision, as the long history of copyright protection continues to struggle between art and industrial design.⁶⁶ But the

⁵⁵ Transcript of Oral Argument, *Star Athletica v. Varsity Brands, Inc.*, 2016 WL 6426437, No. 15-866, page 1 line 10 (Oct. 31, 2016).

⁵⁶ Transcript of Oral Argument, *Star Athletica v. Varsity Brands, Inc.*, 2016 WL 6426437, No. 15-866, page 3 lines 14-24 (Oct. 31, 2016).

⁵⁷ Transcript of Oral Argument, *Star Athletica v. Varsity Brands, Inc.*, 2016 WL 6426437, No. 15-866, page 3 lines 14-18 (Oct. 31, 2016).

⁵⁸ Transcript of Oral Argument, *Star Athletica v. Varsity Brands, Inc.*, 2016 WL 6426437, No. 15-866, page 3 lines 19, 20 (Oct. 31, 2016).

⁵⁹ Transcript of Oral Argument, *Star Athletica v. Varsity Brands, Inc.*, 2016 WL 6426437, No. 15-866, page 3 lines 19-22 (Oct. 31, 2016).

⁶⁰ Transcript of Oral Argument, *Star Athletica v. Varsity Brands, Inc.*, 2016 WL 6426437, No. 15-866, page 3 lines 22-24 (Oct. 31, 2016).

⁶¹ Transcript of Oral Argument, *Star Athletica v. Varsity Brands, Inc.*, 2016 WL 6426437, No. 15-866, page 27, lines 9-15 (Oct. 31, 2016).

⁶² Transcript of Oral Argument, *Star Athletica v. Varsity Brands, Inc.*, 2016 WL 6426437, No. 15-866, page 27, lines 9-15 (Oct. 31, 2016).

⁶³ Transcript of Oral Argument, *Star Athletica v. Varsity Brands, Inc.*, 2016 WL 6426437, No. 15-866, page 27, lines 9-15 (Oct. 31, 2016).

⁶⁴ *Star Athletica, L.L.C.*, 137 S. Ct. at 1007.

⁶⁵ *Id.* at 1007-08, 1014. The Court's determination that a distinction between physical separability and conceptual separability is unnecessary abrogated *Chosun Int'l, Inc. v. Chrisha Creations, Ltd.*, 413 F.3d 324 (2nd Cir. 2005).

⁶⁶ *Star Athletica, L.L.C.*, 137 S. Ct. at 1007.

key component to the court's opinion is declining to discuss the differences between the physical and conceptual separability.⁶⁷

III. ANALYSIS

The *Star Athletica* opinion has been hailed as a sigh of relief for fashion innovators, who have sought protection by the court for their designs.⁶⁸ This has been considered a large step forward for clothing designers, who have sought protection for their designs for a long time.⁶⁹ While it is too early to determine the future consequences of this holding, what has become clear is that fashion designers not have the judicial system on their side.⁷⁰ This holding will impact the copyright industry far beyond just fashion, as innovators and designers have continued to stretch the bounds of feasibility with their design.⁷¹

Economically, fashion producers are likely to have higher prices as a direct result of this holding.⁷² The Supreme Court declined to discuss the difference between physical and conceptual separability, as it was not appealed.⁷³ As Justice Breyer discussed in his dissent, the true issue is whether the court can decipher the difference between a design application onto a utilitarian object, and if the two can stand alone.⁷⁴ This opinion broadly expands copyright protection for industrial designs.⁷⁵ *Star Athletica* critics scrutinized the new standard, as it requires a useful articles eligibility for copyright protection is simply removing the article, putting it on a blank canvas, and determining whether it can stand alone, and independent of that original article.⁷⁶ As this opinion has a potentially large impact on the fashion industry, economically, it is crucial to understand other avenues in which useful articles can receive copyright protection.⁷⁷

A. The Copyright Office Approach

The Copyright approach determines whether a useful article is copyrightable is as follows: A pictorial, graphic or sculptural feature satisfies the separability requirement of copyrightable work so long as the artistic feature and the useful article

⁶⁷ *Supra*, Note 62.

⁶⁸ Patrick H.J. Hughes, *Attorneys cheer (and jeer) high court's cheerleading outfit copyright holding (U.S.)*, 2017 WL 1087433 (March 23, 2017).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Supra*, note 62.

⁷⁴ *Id.*

⁷⁵ Ronald Mann, *Opinion analysis: Court uses cheerleader uniform case to validate broad copyright in industrial designs*, *Scotusblog: Supreme Court of the United States Blog* (March 22, 2017) <http://www.scotusblog.com/2017/03/opinion-analysis-court-uses-cheerleader-uniform-case-validate-broad-copyright-industrial-designs/>.

⁷⁶ *Id.*

⁷⁷ *Id.*

could both exist separately, and be perceived as separate artistic works.⁷⁸ The Sixth Circuit recognized that the contested articles satisfied the Copyright Office's long standing approach.⁷⁹ While this approach may produce results, it fails to consider the artistic origins of the article itself. By failing to consider the aesthetic and artistic features and focusing solely on the practicableness, Courts can misconstrue the dangerous results of applying this test.⁸⁰

Proponents of the Copyright Office Approach argue that the Court should adopt this approach because it reflects a pre-established agreement between the legislative branch the judicial branch.⁸¹ Additionally, the Copyright Office approach is practical, as it follows the exact approach the Copyright Office follows when evaluating copyright applications.⁸²

B. The Primary-Subsidiary Approach

The Primary-Subsidiary approach allows for a feature to be separate if the artistic features are "primary" to the subsidiary function."⁸³ The test has pitfalls, as it is unclear how to measure or determine the primary or secondary aspect of a copyrightable element. The test offers minimal to no guidance about how the trier of fact should come to these determinations, thus making the test somewhat unreliable.

C. The Objectively Necessary Approach

The Objectively Necessary approach states that a pictorial, graphic, or sculptural feature is separable if the artistic feature of the design is not necessary to the performance of the utilitarian function of the article.⁸⁴ While important from an economic perspective, the test fails to consider the artistic and aesthetic importance of the two components.

⁷⁸ *Varsity Brands, Inc. v. Star Athletica, LLC*, 799 F.3d 468, 484 (6th Cir. 2016).

⁷⁹ Brief for The United States as Amici Curiae Supporting Respondents, *Star Athletica, LLC, v. Varsity Brands, Inc.*, (2016) (No. 150866) 2016 WL 492305 (Discussing how the sixth circuit argued that the decorations for the cheerleading uniforms may look best on garments, the particular shapes and symbols can be found on any type of work and plausibly be seen as a useful article).

⁸⁰ Brief for The United States as Amici Curiae Supporting Respondents, *Star Athletica, LLC, v. Varsity Brands, Inc.*, (2016) (No. 150866) 2016 WL 492305 (Discussing how the conceptual separability test, as it takes a practical examination of the decorations from the garment, and if that decoration has any relevant functionality).

⁸¹ Brief for The Intellectual Property Law Association of Chicago as Amici Curiae Supporting Neither Party, *Star Athletica, LLC, v. Varsity Brands, Inc.*, (2016) (No. 150866) 2016 WL 492305 (The Intellectual Property Law Association of Chicago contends that the Copyright Office approach is consistent with the Congressional Act, the Copyright Act, and reflects the judgment of the legislature and judicial branches).

⁸² Brief for The Intellectual Property Law Association of Chicago as Amici Curiae Supporting Neither Party, *Star Athletica, LLC, v. Varsity Brands, Inc.*, (2016) (No. 150866) 2016 WL 492305 (Discussing how the Court and other judges are equally as capable of determining the separability and if the useful article can coexist outside of the original article).

⁸³ *Varsity Brands, Inc.*, 799 F.3d at 484.

⁸⁴ *Id.*

D. The Ordinary Observer Approach

The Ordinary Observer approach allows for separability if the design “creates in the mind of an ordinary observer two different concepts that are not inevitably entertained simultaneously.”⁸⁵ The ordinary observer approach is also known as the temporal displacement test, which emanated out of the second circuit in *Carol Barnhart*.⁸⁶

The test, while appearing to be neutral, fails to consider the vast variety of artistic features, and how those features can be viewed differently amongst the observer. Also, judges often lack training in the aesthetics of artistic features. Thus, while it may appear on its face to have strong features, the ordinary observer approach asks judges to determine the useful merits of a work of art, when the judge themselves lacks the training.

E. The Design Process Approach

The Design process approach states that a useful article is separable from the original design if the design element can be identified as reflecting the designer’s artistic judgment exercised independently of “functional influences.”⁸⁷ The test looks to the designer’s intent, state of mind, and design process, when considering the whether the article is copyrightable. The design process approach asks for courts to consider the subjective intent of the designer, and make those determinations.

F. The Stand-Alone Approach

The Stand-Alone approach allows for a useful article is separable from the original design if it is a pictorial, graphic, or sculptural feature and the useful article’s functionality still exists once the copyright material is separated.⁸⁸ The test requires a determination by the trier of fact of what the observer would believe the aesthetic features are. Judges are often untrained in aesthetic features of art, thus requiring a determination made by an untrained trier of fact.

⁸⁵ *Id.Id.*

⁸⁶ Darren Hudson Hick, *Conceptual Problems of Conceptual Separability and the Non-Usefulness of the Useful Articles Distinction*, 57 J. COPYRIGHT SOC’Y U.S.A. 37, 43 (Fall 2009-Winter 2010) (Discussing how Judge Wexler determined that because the torso forms in *Carol Barnhart* could be removed from the forms and that the removal of the torso from the form did not service their overall function, the functional and nonfunctional aspects of the two have merged, thus the torsos were not copyrightable separate of the body forms).

⁸⁷ *Varsity Brands, Inc.*, 799 F.3d at 484.

⁸⁸ *Id.Id.*

G. *The Likelihood-of-Marketability Approach*

The Likelihood-of-Marketability approach extends copyright protections to useful articles if the article is pictorial, graphic, or sculptural in nature, and is 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.”⁸⁹ The approach evolved from *Nimmer on Copyright*, where Professor Nimmer provides an in-depth explanation of this approach.⁹⁰ The Fifth circuit later put the test to work in *Galiano*, where casino employee uniforms failed to pass the Marketability test.⁹¹ Articles that do not provide economic benefits independently fails to be protected by the marketability test, as there are multiple features for articles, which aesthetically are separable, but thus unmarketable.⁹²

H. *The Patry’s Approach*

The Patry’s approach allows for copyright protection for useful articles by not using a separability analysis.⁹³ Instead, this approach extends protections if the work is the design of a three-dimensional article, and the design is not of a useful article.⁹⁴

I. *The Subjective-Objective Approach*

The Subject-Objective approach uses a balancing test. This approach compares “the degree to which the designer’s subjective process is motivated by aesthetic concerns” against “the degree to which the design of a useful article is objectively dictated by its utilitarian function.”⁹⁵

J. *The Sixth Circuit’s Approach*

In response to the issue laid out in *Star Athletica*, the court proposed a new test.⁹⁶ First, the court asks if the design is a pictorial, graphic, or sculptural work.⁹⁷ Second,

⁸⁹ *Id.Id.*

⁹⁰ Darren Hudson Hick, *Conceptual Problems of Conceptual Separability and the Non-Usefulness of the Useful Articles Distinction*, 57 J. COPYRIGHT SOC’Y U.S.A. 37, 41 (Fall 2009-Winter 2010).

⁹¹ Darren Hudson Hick, *Conceptual Problems of Conceptual Separability and the Non-Usefulness of the Useful Articles Distinction*, 57 J. COPYRIGHT SOC’Y U.S.A. 37, 41 (Fall 2009-Winter 2010).

⁹² Brief for The Intellectual Property Law Association as Amici Curiae Supporting Neither Party, *Star Athletica, LLC, v. Varsity Brands, Inc.*, (2016) (No. 150866) 2016 WL 492305 (Discussing how the Likelihood of Marketability approach challenges the Constitutional ideals of promoting the “[p]rogress of the [s]ciences and useful arts . . .”) (See U.S. Const. art. 1 Section 8 Clause 8).

⁹³ *Varsity Brands, Inc.*, 799 F.3d at 484.

⁹⁴ *Id.Id.*

⁹⁵ *Id.Id.*

⁹⁶ *Id.* at 487.*Id.* at 487.

⁹⁷ *Id.Id.*

the test asks if the design is useful article.⁹⁸ The court takes it a step further by stating that if the design of the article of clothing is not useful in nature, then there is no need to inquire into the identifiable separability of the articles, or whether the two can have utilitarian aspects independently.⁹⁹

IV. PROPOSAL

Each test proposed by the circuits artfully attempts to balance the aesthetic, artistic, and economic features of copyrightable material. The unfortunate reality is that striking a careful balance amongst all important variables to determine the separability often creates an imbalance. A useful article may appear to be more utilitarian to some, but the utilitarian value often fails to consider the artistic of aesthetic value. The Court should consider balancing the artistic value of the design against its utilitarian function to determine whether protection should be offered, like the subject-objective test.

While a local-based fashion designer faces similar struggles to copyright their designs as other fashion designers, their struggle is a different one. The current system in place not only struggles to determine what is copyrightable, but fails to provide equal access to all artists.¹⁰⁰ Finding the perfect equilibrium amongst the tests will provide all fashion designers the long-awaited opportunity to copyright their designs. However, stricter policy regulations need to be in place.¹⁰¹

Providing a uniform test for separability for useful articles has too many policy complications, thus often inadequately protects any designer from copyright infringement.¹⁰² Even if the Court determines that a specific test is the best one, practical implications are still going to exist. Local-based fashion designers will still be unable to protect their work.

⁹⁸ *Id.Id.* (When referencing whether the article is useful, the court defined useful as “an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information”).

⁹⁹ *Varsity Brands, Inc. v. Star Athletica, LLC*, 799 F.3d 468, 487 (6th Cir. 2016).

¹⁰⁰ Noah Smith, *Are copyright trolls taking over the fashion industry?* Fortune Magazine (Oct. 7, 2015) <http://fortune.com/2015/10/07/patent-trolls-fashion/> (discussing how the structure of the American legal system fails to provide equal access, as the cost of litigation is so expensive and copyright infringement cases are expensive to defend).

¹⁰¹ Erin Geiger Smith, *Who Owns Cheerleader Uniform Designs? It's up to the Supreme Court*, The New York Times (Oct. 29, 2016) http://www.nytimes.com/2016/10/30/sports/who-owns-cheerleader-uniform-designs-its-up-to-the-supreme-court.html?_r=1 (Quoting Jon Morgan, a spokesman for Varsity Brands, Inc., who states “We believe that designers everywhere deserve protection for their investment of time, energy and capital in original artwork”); Erin Geiger Smith, *Who Owns Cheerleader Uniform Designs? It's up to the Supreme Court*, The New York Times (Oct. 29, 2016) http://www.nytimes.com/2016/10/30/sports/who-owns-cheerleader-uniform-designs-its-up-to-the-supreme-court.html?_r=1 (Quoting Brief of Council of Fashion Designers of America, Inc., as Amicus Curiae Supporting Respondents, *Star Athletica, LLC, v. Varsity Brands, Inc.*, (2016) (No. 15-866) 2016 WL 3971299) (stating that the already limited protection available to fashion designers leaves the designers defenseless against copyright infringers).

¹⁰² Protection for Fashion Design: Hearing Before the S. Comm. On Courts, The Internet, and Intellectual Property, Comm. On the Judiciary, 19th Cong. 2nd Sess. (2006) (statement of The United States Copy Right Office).

If the design can be shown to be an original work of authorship, fixed in a tangible medium of expression, thus there is no reason to deny a local based fashion design the protections that a copyright affords.¹⁰³ Thus, when a copyright protection is infringement upon, a fashion design would be able to pursue a lawsuit for copying a design.¹⁰⁴ However, there are ways around the potential litigation. Fashion Designers could work on a royalty basis, where an individual who uses a designer's product could pay for using the design. Fashion companies could also promote collaboration and showcase local-based designers in its own stores.

A. Pay for the Design Used

A licensing scheme in the fashion design industry can promote the protection of designs while encouraging innovation at the same time.¹⁰⁵ Licensing would allow a local based designer to still retain its rights to the fashion designs, while allowing another company to take over the production of the clothing.¹⁰⁶ By allowing for the designer to use a license, the designer can make a revenue Royalty is defined as a payment- in addition to or in place of an up-front payment- made to an author, inventor, for each copy of a work or article sold under a copyright or patent.¹⁰⁷ By licensing a design, a fashion design increases its revenue, its market profile and penetration, and reduces the risk that come with manufacturing a product.¹⁰⁸ Licensing allows for a designers to break into new parts of the market that they originally do not have access to.¹⁰⁹ Licensing allows for a local-based designer to have

¹⁰³ *Copyright*, Black's Law Dictionary (10th ed. 2014) (Black's law dictionary defines copyright right as the right to copy; specially, a property right in an original work of authorship [including literary, musical, dramatic, choreographic, pictorial, graphic, sculptural, and architectural works; motion pictures and other audiovisual works; and sound recordings] fixed in any tangible medium of expression, giving the holder the exclusive right to reproduce, adapt, distribute, perform, and display the work); 17 U.S.C. § 102.

¹⁰⁴ Larry C. Russ, Nathan D. Meyer, *Fashion Sense: Preserving a Clothing Brand Requires a Carefully Analyzed Application of the Four Main Instruments of Protection*, 39-AUG L.A. LAW 26, 30 (July/Aug. 2016) (discussing how traditionally, fashion copyright protections are afforded to prints, denim pocket designs, lace embroidery, and most decorative embellishments, and how infringement typically involves a blatantly reasonable copying of the design, i.e. a nearly identical print).

¹⁰⁵ George Gottlieb et al., *An Introduction to Intellectual Property Protection in Fashion*, in *Fashion Law: A Guide for Designers, Fashion Executives, and Attorneys* 35,39(Guillermo C. Jimenez, Kolsun eds., 2010) (discussing how licensing of fashion designs would give fashion houses the ability to manufacturing something that they are currently unwilling or unable to do so, in exchange for lump-sum payments plus royalty's).

¹⁰⁶ Centre for Fashion Enterprise, *Intellectual Property in the Fashion Design Industry: Licensing*, (March 2012) <http://www.fashion-enterprise.com/wp-content/uploads/2015/05/CFE-IP-Licensing-Download1.pdf>.

¹⁰⁷ *Royalty*, Black's Law Dictionary (10th ed. 2014) (discussing how royalties are often paid per item made, used, or sold, or per time elapsed).

¹⁰⁸ Centre for Fashion Enterprise, *Intellectual Property in the Fashion Design Industry: Licensing*, (March 2012) <http://www.fashion-enterprise.com/wp-content/uploads/2015/05/CFE-IP-Licensing-Download1.pdf>.

¹⁰⁹ Centre for Fashion Enterprise, *Intellectual Property in the Fashion Design Industry: Licensing*, (March 2012) <http://www.fashion-enterprise.com/wp-content/uploads/2015/05/CFE-IP-Licensing-Download1.pdf>.

access to experts in the manufacturing field, which can be critical to development and growth.¹¹⁰ By having a licensed good, a fashion designer can set royalty rates, so that each time their good is sold, they received a percentage of the commission.¹¹¹ This allows for the designer to control the look and quality of the product that is being put into the market.¹¹²

B. Fashion Design Collaboration

Target Corporations collaborates with fashion designers by showcasing a fashion line for a finite amount of time.¹¹³ Recently, Target announced that its most recent collaboration with British designer Victoria Beckham.¹¹⁴ In the past, Target has collaborated with fashion giants like Alexander McQueen, Lilly Pulitzer, Missoni, and Marimekko, to name a few.¹¹⁵ H&M has followed suit, with collaborations by Karl Lagerfeld, Stella McCartney, and even French Fashion House Balmain.¹¹⁶ A similar

¹¹⁰ Centre for Fashion Enterprise, *Intellectual Property in the Fashion Design Industry: Licensing*, (March 2012) <http://www.fashion-enterprise.com/wp-content/uploads/2015/05/CFE-IP-Licensing-Download1.pdf>.

¹¹¹ Centre for Fashion Enterprise, *Intellectual Property in the Fashion Design Industry: Licensing*, (March 2012) <http://www.fashion-enterprise.com/wp-content/uploads/2015/05/CFE-IP-Licensing-Download1.pdf> (discussing how British designer's royalty fees are between 5%-15%, but note that a 15% royalty fee is rare in the field).

¹¹² Centre for Fashion Enterprise, *Intellectual Property in the Fashion Design Industry: Licensing*, (March 2012) <http://www.fashion-enterprise.com/wp-content/uploads/2015/05/CFE-IP-Licensing-Download1.pdf>.

¹¹³ Bea McMonagle, *Member of Target's Retail Collaboration—Class of 2017—Chat Generation Z's Shopping Habits*, *Forbes Magazine*, (Mar. 15, 2017) <https://www.forbes.com/sites/beamcmonagle/2017/03/15/members-of-targets-retail-collaboration-class-of-2017-chat-generation-zs-shopping-habits/#36e273960671> (discussing how Target launched a class of designers who created 100 pieces and are between 13-21 years old).

¹¹⁴ Phil Wahba, *Target Announces Posh New Collection from Victoria Beckham*, *Fortune Magazine* (Oct. 20, 2016) <http://fortune.com/2016/10/20/target-victoria-beckham/>.

¹¹⁵ Lauren David Peden, *New York Fashion Week: Right on Target*, *Vogue Magazine* (Feb. 16, 2009) <http://www.vogue.co.uk/article/alexander-mcqueen-reveals-his-range-for-target> (Discussing how Alexander McQueen introduced his limited-edition collection of Target); Mathew Schneier, *Lilly Pulitzer for Target: They Came, They Waited, They Went Home Mad*, *The New York Times* (April 22, 2015) <http://www.nytimes.com/2015/04/23/fashion/is-target-in-the-consumers-bulls-eye-after-the-lilly-pulitzer-dustup.html> (discussing Target's collaboration with Lilly Pulitzer which included women's wear, children's wear, home goods, and matching makeup); Stephanie Clifford, *Demand at Target for Fashion Line Crashes Website*, *The New York Times* (Sept. 13, 2011) <http://www.nytimes.com/2011/09/14/business/demand-at-target-for-fashion-line-crashes-website.html> (discussing Target's collaboration with Missoni, and how the introduction of this collaboration shut down Target's online store for a day); Khadeeja Safdar, *Target's Marimekko Collection Draws Muted Response*, *The Wall Street Journal* (April 17, 2016) <http://www.wsj.com/articles/targets-marimekko-collection-opens-to-muted-response-1460918624> (discussing how the purchasing urgency was much different from the urgency that customers had for Lilly Pulitzer's limited edition line).

¹¹⁶ Rebecca Cope, *H&M Best Designer Collaborations: From Karl Lagerfeld to Alexander Wang*, see *the best H&M link-ups*, *Harper's Bazaar* (July 26, 2016) <http://www.harperbazaar.co.uk/fashion/fashion-news/news/g23095/hms-best-designer-collaborations/>; Bibby Sowray, *Everything we know about Balmain x H&M*, *The Telegraph*, *Lifestyle*

strategy can apply to the problem at hand. Large companies can provide local based fashion designers a forum a forum to sell their own designs and establish their own brand recognition. Doing this type of business strategy not only provides the proper recognition to the local-based designer, but also allows the large corporations to sell unique items in their stores.

While both ideas have the potential to better protect the designs of local-based fashion designers, the consumers could bear the burden of the cost.¹¹⁷ Either approach would require large corporations to pay for the designs they use, and while that benefits the designer, that could result in a price increase.¹¹⁸

The bottom line is that local-based fashion designers lack accessibility to the legal system to argue for copyright infringement claims. Money should not determine the merits of artwork, and a shift in the artistic atmosphere is required.

V. CONCLUSION

Clothes are a walking art form, and the medium used should not determine the protections afforded. *Star Athletica* presents the Supreme Court with a unique opportunity to provide clarity and direction for the question of what test is appropriate to use when determining whether a useful article is separable.¹¹⁹ But this case goes far beyond a cheerleading form and its' chevron stripes. It effects the large corporation who mass produces garments at a low cost, high-end fashion houses, and the local-based fashion designers who have accused large corporations of stealing their designs.

By promoting either a licensing model, which uses royalties to ensure payment, or a collaboration approach, the fashion industry could finally receive the protections that they rightfully deserve. A fashion designer creates art, and deserves legal protection.

Fashion Section (Oct. 26, 2015). <http://www.telegraph.co.uk/fashion/brands/balmain-for-hm-everything-we-know-information/>

¹¹⁷ Shearman & Sterling LLP, *Star Athletica v. Varsity Brands: Supreme Court Evaluation Copyrights in Features of Useful Articles*, (Nov. 2016) <http://www.shearman.com/en/newsinsights/publications/2016/11/star-athletica-v-varsity-brands-supreme-court>; quoting transcript of oral argument, *Star Athletica v. Varsity Brands, Inc.*, 2016 WL 6426437, No. 15-866, page 34 lines 13-14 (Oct. 31, 2016) (where Justice Breyer discusses how if this Court determines that dresses are copyrightable, and because every one of them has a design, this presents the possibility of doubling the price of women's clothes).

¹¹⁸ Kal Raustiala and Chris Sprigman, *Copyrighting Fashion: Who Gains?* *Freakonomics*, (Aug. 30, 2010) <http://freakonomics.com/2010/08/30/copyrighting-fashion-who-gains/> (discussing how the producers of copyrighted works are the few who stand to gain from stricter copyright laws, while consumers would likely have to pay more because stronger copyright laws exist that prevent competition amongst low-cost copyists).

¹¹⁹ See *Star Athletica, L.L.C.*, 137 S. Ct. 1002 (2017).