

There are many implications that the precedential case *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002 (2017) will have on the industry of fast fashion. Fast fashion is the term used to describe companies whose business models aim at producing on-trend apparel inexpensively, with unnatural materials, with the expectation that consumers will wear the product a few times before disposing of it, then return to buy more items to replace the old. Fast fashion products frequently sustain damage after one wear or one wash. Fast fashion is quickly gaining notoriety as a major contributor to pollution both in its production chain and because of its disposable nature. With cases like *Star Athletica* leading the way, major fashion brands can retain their copyright privileges and help stem the flow of fast fashion products being produced in an irresponsible manner. For example, a case against fast fashion producer Rue 21 recently survived a motion to dismiss citing to *Star Athletica*¹. This is a step in the right direction to protect producers of fashion protected by copyright, whose prices reflect a responsible approach to manufacturing, rather than fast fashion's race to the bottom mentality to produce as cheaply and quickly as possible, knowing that its clothing products will be thrown away and replaced in an environmentally unfriendly manner.

A. The Supreme Court's *Star Athletica* Decision

Varsity Brands, Inc. designs, manufactures, and sells cheerleading uniforms that feature copyrighted graphic designs consisting of stripes, lines, chevrons, and

¹ *L.A. T-Shirt & Print, Inc. v. Rue 21, Inc.*, No. 16-CV-5400 (RA), 2017 WL 3575699 (S.D.N.Y. Aug. 17, 2017).

other design elements.² Star Athletica, LLC engages in a similar business of designing, manufacturing, and selling cheerleading uniforms.³ Varsity Brands contended that Star Athletica infringed on five of over 200 copyrights that Varsity Brands owns.⁴

The District Court for the Western District of Tennessee granted Star Athletica's motion for summary judgment on the basis that Varsity's designs were not separable from the uniforms' utilitarian function and were therefore ineligible for copyright protections.⁵ The Court of Appeals for the Sixth Circuit reversed, finding the design could be identified as separable from the useful article; only one judge dissented.⁶ The Supreme Court of the United States granted certiorari to resolve the conflict among the circuit courts as to the appropriate test to apply in copyright cases involving designs on useful items, such as apparel, to determine if the design is separable and independent of the useful item.⁷ Oral arguments took place on October 31, 2016.⁸

The Court responded to the question presented: Can Varsity Brands, Inc.'s copyrighted designs be determined as separable from the cheerleading uniforms on which they are applied, affording the designs protection from infringement under the Copyright Act of 1976?⁹

² *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1007 (2017).

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 1007-8.

⁶ *Id.* at 1008.

⁷ *Id.* at 1007.

⁸ *Star Athletica, LLC., Petitioner, v. Varsity Brands, Inc., et al., Respondents.*, 2016 WL 6426437 (U.S.) (U.S.Oral.Arg.,2016).

⁹ *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1008 (2017).

Justice Thomas delivered the opinion of the Court, with which Chief Justice Roberts, Justice Alito, Justice Sotomayor, and Justice Kagan joined. Justice Ginsburg wrote a concurring opinion and Justice Breyer wrote a dissenting opinion, with which Justice Kennedy joined. The Court established a two –part test for copyright protection --first, whether there is separability of the design, and second, whether the design would qualify for copyright protection independent of the useful article upon which it was applied.¹⁰

To sustain a copyright infringement claim, the copyright holder must show ownership of the copyright, obtained pursuant to the Copyright Act of 1976.¹¹ Copyright protection extends to original works of design including 2-dimensional expressions of art that can be copied onto items of various material.¹² An exception to copyright protection is that of a “useful article,” meaning an object that has a useful function outside merely displaying artistic design. For the design to be protected, it must be separable from the useful article and “exist independently”.¹³

The Court first looked at whether the copyrighted works of art were designs applied to the cheerleading uniforms, and therefore separable from the useful article, or design of the useful article, rendering the design inseparable and unprotected from copyright infringement.¹⁴ The Court analyzed the language of 17

¹⁰ *Id.* at 1016.

¹¹ *Id.* at 1008.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

U.S.C. § 101 as requiring an analysis of separability, including for two-dimensional copyrighted designs.¹⁵

The United States pointed out that Varsity Brands, Inc. could have argued that the copyrighted designs had simply been reproduced on articles of clothing, however the Court declined to address an argument not developed below.¹⁶

The Court then discussed the need to apply the clear language of the Copyright statute to determine the test to apply to the facts at hand.¹⁷ The statute provided a two-part inquiry as to whether a copyrighted image was separable from the useful item on which it was applied, and whether the copyrighted image could have existed independently from the useful article.¹⁸ Therefore, to satisfy the second part of the inquiry, it must have been possible for the design or image to exist apart from the useful article upon which it was applied.¹⁹ Further, the Court stressed that the design cannot be protected by copyright if the design is a feature of the useful article, or if the useful article was merely copied using another medium.²⁰ The statutory language of the Copyright Act supports this analysis as it provides protection for a copyrighted design to be reprinted on various mediums and copied as the owner sees fit.²¹

Next, the Court reflected upon its decision in *Mazer v. Stein*, 347 U.S. 201 (1954), in which it held that copyright protection extends to designs that may also

¹⁵ *Id.*

¹⁶ *Id.* at 1010.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 1010-11.

serve as a useful article.²² In *Mazer*, the court upheld copyright protection of a statuette, that was also used as a lamp base, because the statuette was a design standing alone even though it had also been applied to create the useful article of a lamp base.²³ Following the *Mazer* decision, the Copyright Office enacted legislation that introduced the language discussed in the case at bar, which established protection if the design in question is separable and can exist independently from the useful article upon which it is applied.²⁴

The Court then applied the test established in the Copyright Act, based on the holding of *Mazer*, to the facts in the case at bar, and determined that the design on the uniforms qualified for copyright protection because it was both separable and capable of existing independently of the uniforms.²⁵ Varsity Brand's copyrighted design is separable because it can be removed from the uniform and placed on a different medium, regardless of the shape that the design would take on that different medium.²⁶ The Court emphasized that the protected design was what was applied to the uniform, not the uniform itself.²⁷

Star Athletica claimed that the design failed the separability test, arguing the design served a strictly utilitarian function because the design cannot stand alone as anything besides a cheerleading uniform.²⁸ The Court reconciled this argument, reasoning that the test to determine separability requires only that the

²² *Id.* at 1011.

²³ *Id.*

²⁴ *Id.* at 1011-12.

²⁵ *Id.* at 1012.

²⁶ *Id.*

²⁷ *Id.* at 1013.

²⁸ *Id.*

design can stand alone when removed from the useful article, not that the useful article will remain intact by the removal of the design.²⁹ The Court further notes that accepting Star Athletica’s argument would essentially “read applied art out of the statute.”³⁰

The Court further rejected Star Athletica’s argument that the artist’s intent when making the design should be considered, because the perception of the finished product of the design is considered under the two-part test, not the development.³¹ Finally, the Court dismissed Star Athletica’s argument for a presumption against copyright protection based on industrial design statutes.³² The Court again emphasized that the design on the cheerleading uniform is protected and not the uniform itself.³³

Justice Ginsberg concurred with the opinion, providing that the designs were simply reprinted onto a useful article and therefore, the separability inquiry was unnecessary as the designs already stood alone as protected copyright designs.³⁴

Justices Breyer and Kennedy dissented on the basis that they did not believe Varsity Brand’s designs could be separated from the useful article of cheerleading uniforms.³⁵ The dissent provided that the useful article must be left intact if the

²⁹ *Id.* at 1013-14.

³⁰ *Id.* at 1014.

³¹ *Id.* at 1015.

³² *Id.*

³³ *Id.* at 1015-16.

³⁴ *Id.* at 1018-19.

³⁵ *Id.* at 1031.

design is removed.³⁶ The dissent focused on conceptual separability and the intent of Congress to balance the economic interests of artists with those of consumers.³⁷

B. Historical Background

In deciding *Star Athletica*, the Court cited to the precedential case of *Mazer v. Stein*, 347 U.S. 201 (1954) (superseded by statute).³⁸ In this case, the Court addressed the question: “Can statuettes be protected in the United States by copyright when the copyright applicant intended primarily to use the statuettes in the form of lamp bases to be made and sold in quantity and carried the intentions into effect?”³⁹

The Court found that the language established in the Copyright Act of 1870, Copyright Act of 1874, and Copyright Act of 1909 (reworded in 1917) subsequently expanded the types of works that can be copyrighted to include designs that can be reproduced as utilitarian items.⁴⁰ Over time, the Copyright Acts were rewritten and enacted to expand coverage to a larger amount of works.⁴¹ The statutory language that was developed displayed the intent of Congress to afford protection of to a

³⁶ *Id.* at 1031-32.

³⁷ *Id.* at 1034-35.

³⁸ In which Respondent lamp manufacturer, who owned a copyright to a statuette depicting a dancing couple, filed a copyright infringement claim against Petitioner lamp manufacturer, who manufactured and sold lamp bases featuring Respondent’s statuette. 374 U.S. 202-3.

³⁹ *Mazer v. Stein*, 374 U.S. 201, 204-5 (1954).

⁴⁰ *Id.* at 209-14.

⁴¹ *Id.* at 210-13.

wider array of art and design.⁴² Congress updated the language in 1917 to provide protection for design as applied to a useful article, but not the useful article itself.⁴³

As recently as 2010, Congress has effected Copyright legislation by defining a useful article as “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 part of a useful article is considered a ‘useful article.’”⁴⁴

While the Court decided *Mazer* pursuant to the Copyright Act of 1909, the Court found it analogous to the case at bar because the rewording of the Copyright Act of 1976 expands the types of mediums that can receive copyright protection to include “pictorial, graphic, and sculptural works” and maintained the requirements for protection.⁴⁵

The design patent law provides for patent protection when one has invented a new industrial design to be manufactured.⁴⁶ Patent design law protects the original idea that one created, while copyright law protects the ability to copy a protected design.⁴⁷ The respondent did not have the ability to copyright all lamps featuring statuettes, just the ability to copy their protected statuette as a lamp fixture.⁴⁸ Thus, by updating the language of the Copyright Acts, Congress displayed its

⁴² *Id.*

⁴³ *Id.* at 212-13.

⁴⁴ 17 U.S.C.A. § 101 (West).

⁴⁵ *Star Athletica, LLC*, 137 at 1008.

⁴⁶ *Id.* at 215-16.

⁴⁷ *Id.* at 217-18.

⁴⁸ *Id.*

intention to afford copyright protection to items such as these statuettes.⁴⁹ Just because an object may be patented does not preclude it from being copyrighted.⁵⁰

Additionally, the *Star Athletica* decision abrogated *Chosun Inter., Inc. v. Chrisha Creations, Ltd.*, 412 F.3d 324 (2nd Cir. 2005).⁵¹ In *Chosun*, the court addressed the issue of “whether Halloween costumes, in their entirety or in their individual design elements, are eligible for copyright protection under federal law.”⁵²

The Court found that the Copyright Act does not protect useful articles, but will protect a design element if it is separable from the article.⁵³ There is a distinction between a useful article that would no longer achieve its purpose without the copyrighted design and a design element that does not lend to the functionality of the article.⁵⁴ One cannot copyright a useful article, however, one can copyright a design that is applied on a useful article as long as it can be separated from the function of the article and stand alone as a design.⁵⁵ In the case at bar, the costume itself could not be afforded copyright protection, however the plaintiff’s claim survived a Rule 12(b)(6) motion to dismiss so the plaintiffs had an opportunity on remand to show separability of elements of the costume that were worthy of copyright protection.⁵⁶

⁴⁹ *Id.* at 213-14.

⁵⁰ *Id.* at 217.

⁵¹ *Chosun Inter., Inc. v. Chrisha Creations, Ltd.*, 412 F.3d 324 (2nd Cir. 2005).

⁵² *Id.* at 325.

⁵³ *Id.* at 326-27.

⁵⁴ *Id.* at 328-29.

⁵⁵ *Id.*

⁵⁶ *Id.* at 329-30.

The Court in *Star Athletica* determined that there was no need to discuss whether a design is physically separable as opposed to conceptually separable, abrogating the *Chosun* decision and resolving conflict among the lower courts.⁵⁷ The Court cited to conflicting interpretations of legislative history found in H.R. Rep. No. 94-1476, p. 55 (1976),⁵⁸ however, the language in this Report uses the disjunctive phrase “physically or conceptually,” identifying two ways separability can be satisfied.⁵⁹ This means that distinguishing both physical and conceptual separability is not necessary, so long as either exists.

Furthermore, the Court relied on Judge Winter’s dissent of the Second Circuit’s decision not to extend copyright protection to a bicycle rack in *Brandir Int’l, Inc. v. Cascade Pac. Lumber Co.*, 834 F.2d 1142 (2d Cir. 1987)⁶⁰. In *Brandir*, the petitioner created an art installation that he later reproduced as a copyrighted bike rack.⁶¹ The circuit court adopted reasoning from an art and design article to test the ability to own a copyright by the conceptual separability of industrial design from the utilitarian elements.⁶² Judge Winter’s dissent provides that a conceptual separability analysis is not necessary because design and utility can be intermingled in design and that the process through which the design was created is immaterial to the validity of a copyright.⁶³ *Star Athletica* emphasizes that the

⁵⁷ *Star Athletica, LLC*, 137 S. Ct. at 1014.

⁵⁸ *Id.*

⁵⁹ H.R. Rep. No. 94-1476, p. 55 (1976).

⁶⁰ *Star Athletica, LLC*, 137 S. Ct. at 1015.

⁶¹ *Brandir Int’l, Inc. v. Cascade Pac. Lumber Co.*, 834 F.2d 1142, 1146 (2d Cir. 1987)

⁶² *Id.* at 1145.

⁶³ *Id.* at 1151-52.

process through which the cheerleading uniforms were designed was likewise immaterial and only the perception of the finished design was under scrutiny.⁶⁴

The language of the Copyright Act under which *Star Athletica* was decided provides:

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.

17 U.S.C.A. § 101 (West). However, the legislative intent to become more inclusive of modern media and design is supported by the language that updated the Copyright Acts over time.⁶⁵ The Constitution provides that Congress will have the power “to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries” in the Patents and Copyrights Clause.⁶⁶

C. Implications of the *Star Athletica* Decision

I. Greater protection for design houses that emphasize quality and responsible manufacturing

⁶⁴ *Star Athletica, LLC*, 137 S. Ct. at 1015.

⁶⁵ H.R. Rep. No. 94-1476, p. 47 (1976).

⁶⁶ U.S. Const. Art. I §8, cl. 8.

The Supreme Court's *Star Athletica* decision represents a monumental change in the protection that can be afforded to fashion designs and apparel. As clothing design has historically been exempt from copyright protection, because it is deemed a useful article exception, fashion designers have been limited to protection of only their prints and unique features that are separable from the utility of the article of clothing. The *Star Athletica* decision expanded what can arguably be protected as a design element and artistic intellectual property of designers.

Because the *Star Athletica* decision invalidated the need to distinguish between conceptual and physical separability of design and utility, designers' burdens were reduced in proving an infringement case. This means that high-end designers who emphasize quality in artistry over quantity in manufacturing, resulting in a higher price tag, now have increased protection from the threat of inexpensive reproduction of their work with substantially lower standards of quality. The disjunctive language of the Copyright Act was correctly applied by the Supreme Court, as the plain and unambiguous reading demands the need for either conceptual or physical separability, disregarding a requirement that both exist. The Court was justified in easing the burden on proving copyright protection, because as the globalized economy makes it difficult for designers to protect their creations from being copied, the United States has historically afforded increased protection of the creative arts. Furthermore, the United States stands out in a global scene in being a proponent of protecting creative design. Hopefully other countries will find

legislation and decisions like *Star Athletica* persuasive when promulgating their own protections and policy.

Protecting responsible manufacturers of apparel will have an impact on a problem that has escaped legislative regulation thus far. Fast fashion retailers see little governmental oversight because they profit on arguments such as those proposed by Star Athletica, LLC, that useful articles can be afforded no protection. Regulation is nearly impossible as these retailers and manufacturers enjoy high margins of profit based on quick turnover of inventory, so by the time a case is brought to court the retailer has already realized the economic return. Furthermore, trade restrictions with countries where products are produced inexpensively are political in nature and foreign relations cannot be compromised for a niche portion of industry.

The Court's decision does not overreach its judicial limitation, but merely interprets legislation as more protectionist than the Court has in the past, supported by historical legislative and Constitutional intent. The ongoing revision of the Act's language is the strongest evidence that the legislature intended this type of heightened protection.

- II. Decreases in demand for fast fashion retailers who attract consumers with "knock-off" versions of copyrighted material; decreases in importing from overseas manufacturers whose environmental regulations may be less stringent than those in the United States

With the threat of a copyright infringement case that they are not likely to win, retailers who produce designs imitating high-end retailers' products will be discouraged from infringing upon protected designs. This will cause consumers

seeking high-end quality designs to pay higher price tags in exchange for a better product that will last longer, discourage disposal of cheaply made imposter apparel, reducing the type of waste fast fashion has created. Fast fashion attracts customers by pirating runway trends from the current season, manufacturing the knock-offs inexpensively (either by using low quality material or questionable labor practices) and delivering them to consumers within days rather than months like high-end retailers. This attraction can be curtailed by severing the ability to copy protected designs from the low-quality products on these retailers' shelves, as consumers will be dissuaded from purchasing throw-away apparel when it no longer has the on-trend design element incorporated.

Due to the lax copyright restrictions in other countries, many fast fashion retailers not only manufacture halfway around the globe, but retailers must then ship tons of material and products to and around our country on an ongoing basis to keep up with the demand. Once retailers are unable to sell these unoriginal products, demand for poor quality substitutes will subside, resulting in reduced ecological cost created by shipping and transporting.

Furthermore, manufacturing in small batches, with high quality organic material and responsible manual labor, as opposed to machine production, results in products that will endure more wears and decrease the need to continually buy products to replace irreparable low-quality apparel. Longevity in usability will decrease the cycle of purchasing apparel, wearing it once, and then disposing of the articles quickly.

Additionally, as Amici discuss in their brief supporting the Respondents Varsity Brands, Inc., the “fashion industry employs more than 1.8 million people in the United States.”⁶⁷ By reducing demand of products from other countries, jobs in the American fashion sector will flourish.

III. Reduced consumption of manufactured fibers, less material ending up in landfills resulting in a reduced smaller carbon footprint
Generally, fast fashion retailers race to produce the cheapest products the fastest, and rely on manufactured materials such as nylon, polyester, and other petroleum based fibers that fail to break down in landfills. High-end fashion designers tend to use materials that are more expensive, such as organic cotton, silk, and wool, which are not only more ecologically sustainable fibers, but also break down naturally and discharge less waste during the production cycle.

While dyes and processing of natural materials contribute to pollutant discharges, the ecological impacts are far fewer than those of manufactured fibers. The nature of inexpensively manufactured products encourages consumers to discard items into the garbage cycle after as little as one use, contributing to burgeoning landfill space and potential leeching into major water sources.

High-end fashion retailers that applaud this decision base their higher price tags on quality material and manufacture. Consumers recognize this and purchase items with the intention to utilize apparel for multiple uses and for a greater amount of time. Haute Couture items become heirloom items that survive decades,

⁶⁷ *Brief of Council of Fashion Designers of America, Inc. as Amicus Curiae in Support of Respondents, Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 2016 WL 5404639 (U.S. 2016).

or sometimes centuries, of use and are frequently handed down through generations or sold as vintage items. Utilizing apparel in this sense encourages a reduction in the waste cycle that fast-fashion encourages.

Despite the impatient demand for quick turnover in trends that fast-fashion strives to increase, Americans will continue to seek out high-quality apparel with timeless design and pay a higher price tag knowing that in the long run it will be worth it. Synthetic material does not afford consumers repeated wearing of apparel, so decreasing production involving these materials will result in reduced environmental degradation and slow down the onslaught of clothing introduced into landfills.

In deciding *Star Athletica*, the Court may not have considered the specific effects that its decision will have, but the increased protection of artistic endeavors through copyright is a step in the right direction to circumvent the fast fashion cycle in which many consumers in the United States have been caught. In furtherance of this policy, the legislature should look to the positive impacts this decision will have when they enact legislation that updates copyright law and environmental protection.