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## Client Alert: Supreme Court Finds Cheerleading Uniforms Copyrightable in Landmark Apparel Copyright Case

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Intellectual Property

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In the first apparel copyright case ever considered by the U.S. Supreme Court, *Star Athletica, LLC v. Varsity Brands, Inc.*, the high court found on March 22, 2017 that decorative elements of a cheerleading uniform could be protected by copyright law.

Varsity Brands Inc., the country's largest cheerleading supplier, sued Star Athletica LLC, an upstart rival, claiming that Star Athletica has used several two-dimensional design elements, such as stripes and chevron patterns, in which Varsity claimed copyright protection.

Apparel has typically been beyond the scope of the Copyright Act because it does not protect functional items. However, certain aspects of apparel may be protectable if they are either physically or conceptually separable from the functional aspect of the apparel. Specifically, the Copyright Act provides protection to these certain aspects of a design "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 aspect of the article." 17 U.S.C. § 101.

In this case, the Court was asked to decide when such "separability" exists. A number of fashion designers sided with Varsity, arguing that the concept should be broadly construed to allow for copyright protection in design elements. Conversely, consumer advocates argued that such an approach would hinder competition. The district court judge previously sided with Star Athletica, finding that the designs were too integrally intertwined with the function of the cheerleading uniform to be separable for purposes of copyright protection. The Sixth Circuit later reversed the trial court's ruling, concluding that the graphic features of Varsity's designs could, in fact, be identified separately from the utilitarian aspects of the cheerleading uniform to properly be considered copyrightable subject matter.

Affirming the Sixth Circuit by a 6-2 vote, the Court found that (1) the surface decorations on the cheerleading uniforms "can be identified as features having pictorial, graphic, or sculptural qualities;" and (2) that "if those decorations were separated from the uniforms and applied in another medium, they would qualify as two-dimensional works of art under § 101." "Imaginatively removing the decorations from the uniforms and

applying them in another medium also would not replicate the uniform itself.” Applying this test for separability, the Court concluded that the surface decorations on the cheerleading uniforms were separable and therefore eligible for copyright protection.

The Court expressly abandoned the distinction between “physical” and “conceptual” separability, finding that the statute clearly contemplates a conceptual undertaking. This distinction is notable in that the Court found separability does not require an underlying useful article to remain, rendering the physical-conceptual distinction unnecessary.

The Court did note that, if applicable, the protection in this case did not extend to the shape, cut, or dimensions to the uniforms at issue, but only from copying the separable protectable elements of the surface decorations. In other words, Varsity was not afforded the right to prevent anyone from manufacturing a cheerleading uniform identical in shape, cut, or dimensions. The Court also noted that its holding solely applied to whether the surface decorations were copyrightable, and not whether the decorations were also sufficiently original to qualify for copyright protection or whether any other prerequisite of a valid copyright had been satisfied.

The Supreme Court’s holding is expected to have far reaching implications on fashion design and perhaps on other industries as well. However, this opinion does not affect design patent and trade dress law as each relates to apparel. We will continue to monitor the effects of this opinion.

### ***Designs at Issue***

#### APPENDIX TO OPINION OF THE COURT



*The IP litigation team at Shumaker is highly skilled at litigating all types of intellectual property disputes, both on the plaintiff and the defense side. The Shumaker IP litigation team has extensive experience litigating copyright infringement claims such as those asserted in this case, including representation of one of the parties before both the district court and the appellate court in one of the recent cases cited in the Supreme Court’s decision.*