

# Star Athletica, LLC v. Varsity Brands, Inc | analysis



## Introduction:

The Copyright Act of 1976 was put in place in order to protect a creator's original work from being copied or used by others, and also to address the issue of "fair use" when discussing copyright infringement. However, this act did not cover what is protected when it comes to separating the design elements from the functionality of the product. There was not a consistent holding when it came to defining the separability between functionality and aesthetics. With the introduction of the *Star Athletica, LLC v. Varsity Brands, Inc.* case came the discussion of being able to distinguish aesthetic elements separate from the practical use of the item. Both Star Athletica, LLC and Varsity Brands, Inc. are companies that create and design Cheerleading Uniforms. Varsity Brands felt that Star Athletica was creating new uniforms that stole design elements from Varsity's uniforms and therefore Varsity sued Star Athletica alleging that they had violated the Copyright Act. This paper will focus on the facts of the case and the effects that it had on the fashion world, as well as explore the makings of a strong separability test when it comes to Copyrights, and what this could mean for the future of designs in the fashion industry.

## The case:

The case of *Star Athletica, LLC v. Varsity Brands, Inc.* is an important case when focusing on copyright laws when it comes to the fashion world. As stated above, Star Athletica, LLC and Varsity Brands, Inc. are both companies that mainly specialize in creating and designing Cheerleading Uniforms. Varsity Brands origins have been found to trace back to 1948 <sup>[1]</sup>

and officially began in 1974, and since then they have remained a prominent brand in both the athletic, cheerleading, and dance worlds. Varsity Brands is known for being a leader in the cheerleading uniform industry, as well as the largest cheerleading and sports uniform manufacturer in the world, loved by both high school and college cheerleading teams when it comes to buying uniforms. Varsity Brands was unable to register copyrights on the design of their uniforms as clothing but instead applied for copyrights on the two-dimensional artwork of the uniforms. <sup>[2]</sup> They held three copyrights for their uniforms as “two-dimensional” designs and two as “fabric design” <sup>[3]</sup> with a total of 5 copyrights for their cheerleading uniforms.

Star Athletica was founded in 2010 as a subsidiary of the Liebe Company. <sup>[4]</sup> Star Athletica is a new up and coming company when it comes to cheerleading uniforms, and is known for their reasonably priced uniforms. Varsity Brands and Liebe had once held a deal together through Liebe’s sports lettering subsidiary, however Varsity Brands cancelled this deal and felt that the creation of Star Athletica was an act of retaliation because of this. Varsity Brands then sued Star Athletica claiming they had infringed five of their copyrighted designs for their new uniforms. Star Athletica counter sued under the Lanham Act claiming that Varsity Brands was creating a monopoly in the cheerleading uniform industry. The issue at hand was whether Varsity’s copyright was valid in the designs of their uniforms. Because the uniforms were both utilitarian as well as aesthetic they were considered useful articles, and because of that their design features such as shape, style and cut, were not eligible to be copyrighted. In 2014, the United States District Court for the Western District of Tennessee ruled in favor of

Star Athletica that the designs were not eligible for copyright restrictions. [5]

Judge Cleland found that if you were to remove the designs of the uniforms from the fabric, they would still evoke the concept of a cheerleading uniform.

The Sixth Circuit reversed the decision, with Judge Karen Nelson Moore and Judge Ralph B. Guy Jr. claiming that the Copyright Office had determined that a design is copyrightable and had already granted valid copyright registration for Varsity Brands' cheerleading uniform. Moore questioned the separability test used to determine the first ruling, and consequently created a new 5 step separability test in order to better determine future cases.

Moore's separability test included the following steps:

“ First, the court must determine that the design in question is Pictorial, Graphic or Sculptural (PGS)

Second, the object must be confirmed as useful article

Third, define the articles “ utilitarian aspects”

Fourth you must ensure that the utilitarian and PGS features are separately identifiable

Fifth the utilitarian and PGS aspects can exist independently of one another.”

[6]

Through this test, if an article can fully function without the PGS design then the design can exist independently. A cheerleading uniform does not need stripes, chevrons or specific cuts in order to perform its task and therefore the uniform designs are able to be copyrighted. The court ruled in Varsity's

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favor and found that their designs were in fact separable from the functionality of the useful article.

Effects on the fashion world:

After this case was decided in favor of Varsity Brands, the company's founder came out and said that this was a win for "the basic idea that designers everywhere can create excellent work and make investments in their future without fear of having it stolen or copied" <sup>[7]</sup> As good as this was for Varsity, how far will this go before there is no creation left in the world, as everything new is kept in fear of infringing on someone else's copyright? Justice Sotomayer brought this up during the Oral Argument for this case, stating that Varsity Brand will be "killing knock-offs with copyright" which might not necessarily be a bad thing. <sup>[8]</sup>

Following this case, Puma sued Forever 21 over a pair of furry slippers that Puma felt Forever 21 stole from them. <sup>[9]</sup> However, Forever 21 used the argument that the strap on their shoe was "capable of being represented in another tangible medium, and therefore covered by copyright as separable from the shoe itself." <sup>[10]</sup> Today, there are plenty of brands who profit off "knocking off" high end brands and selling them at a fraction of a cost, marketing to a group of people who want the high end designs at low end costs. Fast fashion brands such as Forever 21, Fashion Nova, and Romwe have found themselves in hot water after creating clothing that is meant to resemble outfits worn by celebrities such as Kim Kardashian and Kylie Jenner.

In February, Kim Kardashian spoke out on the issue on Twitter stating “ Only two days ago, I was privileged enough to wear a one-of-a-kind vintage Mugler dress and in less than 24 hours it was knocked off and thrown up on a site – but it’s not for sale. You have to sign up for a waitlist because the dress hasn’t even been made to sell yet. It’s devastating to see these fashion companies rip off designs that have taken the blood, sweat and tears of true designers who have put their all into their own original ideas.” <sup>[11]</sup> Fashion Nova quickly put out a statement addressing the issue stating that “ Fashion Nova is an ultra-fast-fashion brand that is capable of executing design within hours and believes in fairness in pricing.” Fashion Nova also said “ Kim Kardashian West is one of the top fashion icons in the world that our customers draw inspiration from. However, we have not worked with Kim Kardashian West directly on any of her projects, but have been driven by her influential style.” <sup>[12]</sup>

Being able to protect fashion designer’s creations and designs through copyright will help to establish protection for new up and coming designers who are looking to create a name in the industry, and allow their products to not be duplicated on fast fashion sites like Fashion Nova. But will this squash any creativity if the copyrights start to go too far and begin to cover things such as a simple as a specific sleeve cut on a shirt? Copyrighting prints on fabric or logos is an easy task as of now, but how do you protect a white jumpsuit with no fabric prints or design elements other than the physical cut of the suit. In 2015 Taylor Swift was seen wearing a white Balmain jumpsuit on the red carpet. Online fast fashion retailer Nasty Gal posted a photo on instagram stating that Taylor Swift was wearing their Balmain knock off

jumpsuit. <sup>[13]</sup> How do you copyright an item such as this with very few design elements that would allow for copyright ability.

While it is hard to know exactly how this case will affect the fashion industry this early on, it is important to watch the future of the fashion world in regards to copyright. Currently the copyright laws are very broad when it comes to fashion design, because clothing is often considered an article of utility and articles of utility cannot be copyrighted. This case could work in favor of the fashion industry by protecting both new and established designers from having their works copied by fast fashion sites. But on the other hand it could hurt the fashion industry by laying a precedent for the restriction of others gaining inspiration from already created designs and therefore eliminating all future creativity in the fashion industry. There is a belief that knock-offs inspire fashion designers to constantly be innovating and creating new fashions, and that knock-offs are actually beneficial to the fashion industry. <sup>[14]</sup>

### The Separability Test

In 2017 the Supreme Court affirmed the Sixth Circuit's conclusion that the design elements of a cheerleading uniform were in fact under protection of copyright <sup>[15]</sup>. Although they agreed with the Sixth Circuit's conclusion, they did not use Moore's 5 step separability test, and instead based their findings off of the two-part inquiry derived from the 1976 Copyright Act. The two-part separability analysis says:

- Whether the feature at issue can be “identified separately from” the utilitarian aspects of the article; and,
- Whether the feature is “capable of existing independently of” the utilitarian aspects of the article. <sup>[16]</sup>

This two part separability test breaks down the item into first being able to identify “pictorial, graphic, or sculptural qualities” in the elements featured on a two or three dimensional item. Secondly, the test analyzes whether the item is able to exist independently from the article of utility and still be recognizable as a “pictorial, graphic, or sculptural” item on its own. In the sense of this case, the judges were able to look at the chevrons, colors, stripes, and shapes of the cheerleading uniforms and label them as pictorial, graphic or sculptural qualities. Once these items were removed and held independently of the uniforms, they could be placed on a separate medium, say a canvas or a tote bag, and would be able to qualify for copyright protection. The test created and used in this case can be applied to future cases of similar status.

Prior to this case the last time a separability test was used was in the 1954 case *Mazer v. Stein*. In this case a lamp that featured two dancers as the base of the pole was found in fact to be copyrightable, even though the lamp was an article of utility. <sup>[17]</sup> This case came before the Copyright Act of 1976, and was used in the formation of that act for a basis of separability. This case was also brought up in the *Star Athletica, LLC v. Varsity Brands, Inc.* case as it helped to finally solidify one unanimous test for separability.



## Conclusion:

In summary, the case of Star Athletica, LLC v. Varsity Brands, Inc. is an important case to study in regards to Business Law as it is important to be familiar with the legality of copyright issues pertaining to fashion when running a fashion business. With the emergence of these fast fashion companies like Fashion Nova and Romwe, new laws must be created in order to ensure the protection of both those companies, and already existing companies in the industry. For someone looking to start out in the fast fashion world it becomes imperative to have an understanding of the possible legal issues that could arise.

A quick summary of the case states that Varsity Brands alleged Star Athletica copied their cheerleading uniform designs, while Star Athletica argued that you can not copyright a cheerleading uniform as it's design is imperative to its role as athletic wear. The Supreme Court found that you in fact can separate a uniform's fashion design from its utilitarian design, and are able to copyright the fashion design element of the uniform. Therefore, the Supreme Court ruled in favor of Varsity Brands and their copyrighted cheerleading uniform designs.

I have personally had a hard time deciding my thoughts on this case. I believe that this case might have the ability to create a slippery slope regarding copyrights in the fashion industry. If copyrighting things like cheerleading uniforms becomes more common, what would this mean for other fashion items such as prom dresses, costumes, or accessories, that are no longer considered items of utility and instead looked at as bodies of art. I

think that if more items in the fashion industry begin to obtain copyrights, then we will see less and less creation of new products, as everything will already be protected by copyright.

However, I also see the immortality in sights like Fashion Nova and Romwe directly copying high end products that celebrities wear on the red carpet, and undermining the fashion designers by selling a knock-off version at half the price. I think it is important to protect the fashion creator's ideas and designs, because without protection we could also see a decrease in new designs as creators fear having their ideas stolen. I do believe that it is important to protect intellectual property and by doing so you are protecting the future of the fashion industry.

If I had to lean to one side, I would have to lean towards Star Athletica's because I believe that is just how business is done. The saying imitation is the highest form of flattery. If someone is able to produce the same item as you at a cheaper cost, then they will. James P. Flynn wrote on the International Lawyers Network how this case could possibly affect the food industry, as many chefs have tried to get their dishes copyrighted before.<sup>[18]</sup> With the emergence of "food porn" and "foodies" many "celebrity chefs" have begun creating food dishes that are more like works of art as opposed to just a plate of chicken.<sup>[19]</sup> Basing off of the slippery slope argument, if copyrighting everyday creations becomes more common, then there will be no competition left between companies in the business world, out of fear of copyright infringement.

Overall it is important to study cases as such and to learn the background of the case as well as previous cases that play an important role in the decision of cases. For example, in order to gain a comprehensive understanding of the Star Athletica, LLC v. Varsity Brands, Inc. case you need to understand both the 1954 case Mazer v. Stein as well as the Copyright Act of 1976, as they both help to shine a light on the future of decision making. The Star Athletica case has been a stepping stone for many future cases based on similar circumstances, and is a catalyst for the protection of individuals in the fashion industry. It will be interesting to see how this case will affect the future of copyrights for fashion designs.

## Resources

- <https://blogs.loc.gov/copyright/2017/04/u-s-supreme-court-clarifies-separability-analysis-in-its-ruling-on-star-athletica-llc-v-varsity-brands-inc/>
- <https://www.ilnipsider.com/2017/09/will-it-be-known-as-michelin-star-athletica-why-the-us-supreme-court-may-have-given-american-chefs-a-reason-to-cheer/>
- <http://www.mondaq.com/unitedstates/x/310600/Copyright/District+Court+Struggles+With+Copyright+Protection+For+CheerleadingUniformness>

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[1] [https://en.wikipedia.org/wiki/Varsity\\_Spirit](https://en.wikipedia.org/wiki/Varsity_Spirit)

[2] [https://en.wikipedia.org/wiki/Star\\_Athletica,\\_LLC\\_v.\\_Varsity\\_Brands,\\_Inc.#Historical\\_copyrightability\\_and\\_Varsity\\_Brands](https://en.wikipedia.org/wiki/Star_Athletica,_LLC_v._Varsity_Brands,_Inc.#Historical_copyrightability_and_Varsity_Brands)

[3] <https://harvardlawreview.org/2017/11/star-athletica-llc-v-varsity-brands-inc/>

[4] [https://en.wikipedia.org/wiki/Star\\_Athletica,\\_LLC\\_v.\\_Varsity\\_Brands,\\_Inc.#Historical\\_copyrightability\\_and\\_Varsity\\_Brands](https://en.wikipedia.org/wiki/Star_Athletica,_LLC_v._Varsity_Brands,_Inc.#Historical_copyrightability_and_Varsity_Brands)

[5] [https://en.wikipedia.org/wiki/Star\\_Athletica,\\_LLC\\_v.\\_Varsity\\_Brands,\\_Inc.#Historical\\_copyrightability\\_and\\_Varsity\\_Brands](https://en.wikipedia.org/wiki/Star_Athletica,_LLC_v._Varsity_Brands,_Inc.#Historical_copyrightability_and_Varsity_Brands)

[6] <https://blogs.loc.gov/copyright/2017/04/u-s-supreme-court-clarifies-separability-analysis-in-its-ruling-on-star-athletica-llc-v-varsity-brands-inc/>

[7] <https://qz.com/939637/the-supreme-court-ruled-that-varsity-brands-cheerleading-uniform-designs-are-protected-by-copyright-law/>

[8] <https://www.venable.com/insights/publications/2017/03/emstar-athletica-llc-v-varsity-brands-inc-et-alem>

[9] <http://www.thefashionlaw.com/home/puma-files-design-patent-copyright-trade-dress-suit-against-forever-21-over-rihanna-footwear>

[10] [https://en.wikipedia.org/wiki/Star\\_Athletica,\\_LLC\\_v.\\_Varsity\\_Brands,\\_Inc.#cite\\_ref-OneYearLater\\_70-0](https://en.wikipedia.org/wiki/Star_Athletica,_LLC_v._Varsity_Brands,_Inc.#cite_ref-OneYearLater_70-0)

[11] <https://wwd.com/fashion-news/fashion-scoops/kim-kardashian-fashion-nova-mugler-knockoff-1203037428/>

[12] <https://wwd.com/fashion-news/fashion-scoops/kim-kardashian-fashion-nova-mugler-knockoff-1203037428/>

<https://assignbuster.com/star-athletica-llc-v-varsity-brands-inc-analysis/>

[13] <https://fashionista.com/2015/05/nasty-gal-balmain-knockoff-taylor-swift>

[14] <https://www.venable.com/insights/publications/2017/03/emstar-athletica-llc-v-varsity-brands-inc-et-alem>

[15] <https://www.wardandsmith.com/articles/supreme-court-announces-broad-separability-test-in-applying-copyright-law-to-useful-articles>

[16] <https://www.wardandsmith.com/articles/supreme-court-announces-broad-separability-test-in-applying-copyright-law-to-useful-articles>

[17] [https://en.wikipedia.org/wiki/Mazer\\_v.\\_Stein](https://en.wikipedia.org/wiki/Mazer_v._Stein)

[18] <https://www.ilnipsider.com/2017/09/will-it-be-known-as-michelin-star-athletica-why-the-us-supreme-court-may-have-given-american-chefs-a-reason-to-cheer/>

[19] <https://www.ilnipsider.com/2017/09/will-it-be-known-as-michelin-star-athletica-why-the-us-supreme-court-may-have-given-american-chefs-a-reason-to-cheer/>