

Fashion Law

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The Long, Slow Road to Protecting Fashions by Copyright

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The first Copyright Act was promptly made law in 1790, just over one year following ratification (by quill pen) of the Constitution that enabled Congress to do so. It has been revised comprehensively only four times since. The current version, which became effective in 1978, is charmingly obsolescent despite heavily promoted, patchwork updates. That has left much of the modernization to the scholarship, skill and, on occasion, predilections and fancies of a federal judiciary tasked with applying the current Copyright Act to things unknown when it was enacted, such as smartphones, the Internet, and something my 12-year-old says goes by the name of TikTok.

Such was the perambulating pace of change that, when the first modern case of whether and

to what extent fashion could be protected by copyright made its way to a federal appellate court, the opinion started with, “This case is on a razor’s edge of copyright law.” *Kieselstein-Cord v. Accessories by Pearl*, 632 F.2d 989 (2d Cir. 1980). The question presented to the U.S. Court of Appeals for the Second Circuit by predecessors at my law firm on behalf of the plaintiff, the jeweler Barry Kieselstein-Cord, was whether the ornamental elements of the buckles on two styles from his line of luxury belts were protectable by copyright. In copyright law terms, the issue was whether those decorative elements could be separated conceptually from the utilitarian elements, even if embodied together in a single, molded piece of precious metal. The court held that it could. “We see in appellant’s belt buckles conceptually separable sculptural elements, as apparently have the buckles’ wearers who have used them as ornamentation for parts



of the body other than the waist.” 632 F.2d at 993.

It remains the law today that, merely because an object has a function—such as holding up your pants—does not mean that decorative elements of the object are precluded from protection by copyright. The converse is not true: Just because it is decorative does not mean it is protectible, and that devil brings some of the details that have inhabited lawsuits ever since.

Indeed, for fashion and accessory designs, the various federal circuits developed a stream of often-conflicting tests and standards about what can and cannot

be protected by copyright until, 37 years after *Kieselstein-Cord*, the U.S. Supreme Court at last stepped in. The case was *Star Athletica v. Varsity Brands*, 137 S. Ct. 1002 (2017), and the MacGuffin that drove the story was not a collection of chic belt buckles in precious metal but a line of cheerleader uniforms that presented the question whether arrangements of chevrons and stripes on uniforms qualified for copyright protection regardless of the functional aspect of the garments themselves.

Stated Justice Thomas for the court: “The ultimate separability question, then, is whether the feature for which copyright protection is claimed would have been eligible for copyright protection as a pictorial, graphic or sculptural work had it originally been fixed in some tangible medium other than a useful article before being applied to a useful article.” 137 S. Ct. at 1011.

In simple and surely oversimplified terms, what that basically means is that, if you could put a frame around a fabric pattern, hang it on the wall and call it original enough to pass as art of some kind, it does not matter that you first cut into the shape of a cheerleader uniform; the pattern is protectible by copyright.

Running parallel to the development of the fashion branch of copyright law was the rise, fall and rise of the doctrine of fair

use. That is the doctrine, judge-made but codified into the current Copyright Law, that gives a free pass to some unauthorized uses of copyright-protected content that might otherwise be infringing. The statute provides examples of what can be fair use—by no extent intended to be complete: “purposes such as criticism, comment, news reporting, teaching, ... scholarship, or research ...” Much debate has centered around how much the user can take of the work before reaching the statutorily vague tipping point at which the use ceases to be fair and becomes infringing.

The statute helpfully provides, at 17 U.S.C. §107, four factors to help courts make that determination. They are expressly stated to be non-inclusive, but a shout out to anyone who finds a case in which a federal judge did not list all of them, opine as to the effect of each, and draw his or her conclusion entirely from there:

- (1) the purposes and character of the use ...;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

In the last century, fair use came to be found judicially in sparing ways that were almost

parsimonious. It was likely no coincidence that the development of the law was in step with then-ongoing consolidation of studios, record labels, publishers and bookstores (remember them?) whose lawsuits, mostly against other businesses, were the proving ground of copyright law. With the new millennium, however, came the technology that permitted consumers to make perfect copies of professional, electronically delivered content. Federal judges were coming home to find their children and grandchildren playing pirated music and illegally downloading text and images. The law of fair use started to bend in favor of the copyist.

The apex in the Second Circuit came with *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013), in which the appropriation artist Richard Prince got away with making and selling (handsomely, at Gagosian) works from his *Canal Zone* series, all of which heavily appropriated photographs taken of Rastafarians over six years by a lesser-known artist, Patrick Cariou, and collected into a book entitled *Yes Rasta*. Prince’s main contribution was to add doodles, drops of paint, guitars, pictures of nude women (likely appropriated from others), and such onto, or to splice those elements into, accurate copies of *Yes Rasta* photographs or portions of them. Acting essentially as art critics, the panel concluded, on the esthetics but without a

trial, that 25 of those *Canal Zone* works were fair use. (Five others were left for trial, and the parties settled out of court, but the damage was done.)

That something had gone wrong in *Cariou* can be seen by how the Second Circuit has been skating around that decision ever since—not exactly overruling itself, and not exactly agreeing with itself either. Its latest attempt, *The Andy Warhol Foundation v. Goldsmith*, 992 F.3d 99 (2d Cir. 2021), again involved photography, this time an image taken by Linda Goldsmith of the late musician Prince (no relation to Richard Prince). It was used by no less an artist than Andy Warhol as the basis for 16 of his own works (14 silkscreens, two apparent tracings in pencil). This time, however, the photographer solidly won, despite the fact that Warhol had been so altering the photographs of others long before appropriation art even had a name.

The case was driven in part by licensing issues that tipped the fourth fair use factor toward Goldsmith, but it is more noteworthy for the palpably greater scrutiny that the court gave to the underlying work and the alterations made to it than it had provided to *Cariou* seven years earlier. Warhol's variations on the Goldsmith photograph were more abstracted from the original than were a good number of the 25 Richard Prince variations

on *Cariou* photographs that were held to be fair use. To resolve that apparent inconsistency, the court interpreted around *Cariou* with the grace of an Olympic figure skater—in part by calling its current holding a “clarification” of the earlier decision (which, it graciously admitted, “has not been immune from criticism”).

With that guidance post-*Star Athletica*, we can glean that fair use of graphics is being put back into its rightful place as an exception and not a kind of putative rule. That has immediate implications for the use of graphic elements in fabrics, as well as sculptural elements in accessories (such as belt buckles), that may have originated with others but that can be protected by copyright. Those include images, such as those seen on graphic T-shirts, complex fabric patterns and fanciful renderings of flora and fauna in jewelry and accessories hardware.

In our Fashion and Luxury Practice we get this question regularly, and giving the answer first, *Jeopardy!* style, the answer is “No.” Just because you discover a pattern or image on a garment in a thrift shop does not mean you can use it as what designers call inspiration and lawyers call a pattern for the making of a potentially infringing copy. As a guidepost, anything that was apparently made within 95 years before your work and that might qualify for copyright protection

under the standards summarized here should be treated as if it is so protected unless good evidence suggests otherwise.

Fair use will remain about as subjective in application as is the quality of the artworks and all the rest to which it is intended to apply. When in doubt, remember that originality is what copyright protects. For the designer who steps forward with something new and original, all these difficult legal propositions pivot on stiletto heels and come around to protect what the designer has created. And that is a very nice position from which to start any exploration into the effect of copyright law on fashion.

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