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The fashion industry in the European Union
Paolo Butturini
Margherita Cera
Diletta Danieli
Roberto Flor
Patrizia Salvaterra

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Direzione scientifica:
Prof.ssa Maria Caterina Baruffi

Comitato scientifico:
Prof.ssa Maria Caterina Baruffi, mariacaterina.baruffi@univr.it
Prof.ssa Laura Calafà, laura.calafa@univr.it
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Prof. Matteo Ortino, matteo.ortino@univr.it
Dott.ssa Isolde Quadranti, isolde.quadranti@univr.it

Comitato di redazione:
Dott.ssa Diletta Danieli, diletta.danieli@univr.it
Dott.ssa Caterina Fratea, caterina.fratea@univr.it
Dott.ssa Marta Gatti, marta.gatti@univr.it
Dott.ssa Cinzia Peraro, cinzia.peraro@univr.it
Dott.ssa Isolde Quadranti, isolde.quadranti@univr.it

Editore:
Centro di documentazione europea dell'Università degli Studi di Verona
Dipartimento di Scienze giuridiche
Via Carlo Montanari, 9
37122 Verona
Tel. +39.045.8028847
Fax +39.045.8028846
http://cde.univr.it

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The Fashion Industry in the European Union

Foreword

The publication of this special issue of the journal *Papers di diritto europeo* is envisaged among the scientific activities of the project «Univr Fashion Week», co-funded by the European Union as Jean Monnet Module 2015-2018 within the Erasmus+ Programme. More precisely, it follows the delivery of the second edition of the Summer School on the fashion industry in the European Union, which was held at the Law Department of the University of Verona from 19 to 24 June 2017, and allows to further deepen the research on such topics, as well as to provide a wider dissemination of the project's results.
The issue is structured in two parts, «Articles» and «Comments». All papers were drafted by members of the Teaching Staff of the Summer School, analysing selected subject matters that formed part of the programme of the course with the aim of fostering the academic value of the project.

Searching for the appropriate IP regime for fashion designs: the EU *vis-à-vis* the US

Diletta Danieli

Abstract

This paper addresses the issue of the IP protection afforded to fashion designs as such, i.e. the overall appearance of a fashion garment resulting from a specific combination of lines, contours, colours, shapes, textures and materials. In particular, the chosen perspective compares the legislative frameworks currently existing in the EU and the US systems, and then analyses two examples taken from the respective case law in order to evaluate the different practical approaches. In light of the above, some concluding remarks on the importance of an appropriate IP regime in this context will be provided.

Searching for the appropriate IP regime for fashion designs: the EU *vis-à-vis* the US

Diletta Danieli*

CONTENTS: 1. Introduction: the protection of fashion designs as such. – 2.1. The legal framework in the EU: Community designs and (possibly) national copyright laws. – 2.2. The legal framework in the US: the (limited) scope of application of copyright protection. – 3. Examples from the case law: the *Moon Boot* case in Italy and *Star Athletica v Varsity Brands* in the US. – 4. Concluding remarks.

1. Introduction: the protection of fashion designs as such.

Throughout the centuries, garments and accessories have far exceeded the mere utilitarian function of covering one's body and rightly acquired a further dimension as forms of applied art. In parallel, the possibilities of access to fashion creations have multiplied, and so has the risk of imitation, which is often degrading from an acceptable source of inspiration into straight-up copying through the so-called knockoffs[1]. This is also reflected in a progressive "awareness" by consumers at all levels, who have generally developed a keen sense of valuing the various features of pieces of clothing that directs their choices.

As a result, it was almost natural to start introducing into the IP discourse the issue of fashion designs *per se*, in order to afford protection to the overall appearance of a specific garment deriving from the combination of lines, contours, colours, shapes, textures and materials it possesses. Indeed, as new designs have been suggestively referred to as «the heart of fashion»[2], their related IP paradigm needs however to take into proper account their inherent functional character, as well as the rapidly evolving seasonal trends of the industry at issue. In this regard, in the EU legal system a rather tailored form of protection for fashion designs has been established, i.e. the regulatory framework governing registered and (especially) unregistered designs[3]. This specific IPR is further complemented by domestic

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* Research Fellow in European Union Law at the University of Verona, Law Department; Lawyer of the Bar of Verona.

[1] For a thorough analysis, see C.S. HEMPHILL, J. SUK, *The Law, Culture and Economics of Fashion*, in 61 *Stanford Law Review*, 2009, pp. 1147-1199.

[2] E. VAN KEYMEULEN, *Copyrighting couture or counterfeit chic? Fashion design: a comparative EU-US perspective*, in *J. of Intellectual Property L. & Practice*, 2012, pp. 728-737, at p. 729.

[3] The legislative "package" comprises the Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs, *OJ* L 289 of 28 October 1998, p. 28 ff., and Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs, *OJ* L 3 of 5 January 2002, p. 1 ff.

copyright regimes enacted by the EU Member States, which may offer a strong and broad protection while also requiring narrow conditions, so that they are more suitable to *haute couture* or particularly iconic pieces of fashion design. By contrast, in the US no similar design right has ever been introduced, and the only relevant form of protection comes from statutory copyright law[4], whose scope of application, in its current version, does not expressly include pieces of garment because of their prevailing nature as useful articles. Fashion designs would rather fall into the category of pictorial, graphic and sculptural works, but only insofar as their features are both separately identifiable from and existing independently of the utilitarian aspects of the whole product.

Starting from a more detailed analysis of the mentioned legal frameworks, the aim of this paper is thus to illustrate two examples taken from the relevant case law in order to point out the different approaches followed by courts in the EU (more precisely, in one of its Member States) and the US. Then, some final considerations are drawn concerning the value of an appropriate IP regime for the protection of fashion designs as such.

2.1. The legal framework in the EU: Community designs and (possibly) national copyright laws.

The objective of a full-scale approximation of the existing laws of the Member States on protected designs was fulfilled with the Community Design Regulation (hereinafter also CDR), which entered into force on 6 March 2002[5]. This piece of EU legislation implemented a unified system providing for two forms of protection, namely the registered and the unregistered design. The definition of the subject matter eligible for protection applies equally to both of them, and it refers to «the appearance of the whole or a part of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture and/or materials of the product itself and/or its ornamentation» (Art. 3(a) CDR), whereby a product is understood as «any industrial or handicraft item» (even complex ones: Art. 3(b) and (c) CDR). Also the requirements for protection are common to both forms of designs, and they are the novelty and the individual character. The former, pursuant to Art. 5 CDR, entails the lack of any identical design made available to the public, while the latter calls for a different overall impression produced on the informed user[6] within the meaning of Art. 6 CDR[7]. Both

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[4] US Copyright Law, 17 U.S.C. §101 ff.

[5] For a comprehensive overview of this legal instrument see, for example, A. BULLING, A. LANGÖHRIG, T. HELLWIG, *The Community Design: A New Right of Design Protection for the European Community*, in 86 *J. of the Patent & Trademark Office Society*, 2004, pp. 111-133.

[6] It is worth mentioning that the chosen viewpoint of the informed user refers to a particular subject possessing a deeper knowledge of the product than the average consumer, although to a lesser extent than an industry expert. The CJEU has been called upon the rule on this notion in a case regarding the IT sector, and has clarified the threshold of «a relatively high degree of attention» shown by the informed user when using the

requirements are to be evaluated prior to the relevant date for becoming eligible for protection, which differs between registered and unregistered designs[8].

The distinguishing features of the two IPRs reside rather in the respective terms and effects of protection. As for registered designs, it is in fact necessary to carry out the registration procedure that starts with the filing of the related application with the European Intellectual Property Office (EUIPO). If granted, the resulting exclusive right spans for a period of five years from the date of the application, which can be extended for further five-year periods up to a maximum of twenty-five years (Art. 12 CDR). On the contrary, no specific formalities are provided for unregistered designs, whose protection covers a more limited term of three years from the date on which it was first made available to the public within the EU (Art. 11 CDR). For these purposes, the disclosure comprises a number of events[9] from which it can be inferred that the design has become known to the circles specialised in the sector concerned. With regard to fashion designs, for instance, it is frequent that this requirement is met through the presentation at fashion shows or specialised fairs. Another peculiarity of the EU design system in this respect consists in the so-called "grace period" laid down in Art. 7(2) CDR, under which the right of protection as registered design is not affected by a disclosure made within a twelve-month timeframe preceding the date of filing of the application or, if a priority is claimed, the date of priority. Consequently, a designer is able to first introduce its creation into the relevant market and evaluate its success during the grace period, and then decide whether or not to file the application for registered design, or rather rely on the unregistered form of protection.

Concerning the rights conferred by registered and unregistered designs, the main difference amounts to the protection against independent creation that is available only to the holder of the former IPR. In other words, even though the scope of protection is the same and includes «any design which does not produce on the informed user a different overall impression», the unregistered form only allows its owner to contest a use resulting from copying the protected design, but not from an independent work of creation by another designer who may reasonably not be familiar with the prior design (Art. 19(2) CDR).

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designs in question: see General Court, 22 June 2010, case T-153/08, *Shenzhen Taiden Industrial Co. Ltd v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, EU:T:2010:248, paras. 46-50.

[7] The CJEU has ruled on the interpretation of such character with specific regard to an unregistered fashion design in its judgment of 19 June 2014, case C-345/13, *Karen Millen Fashions Ltd v Dunnes Stores and Dunnes Stores (Limerick) Ltd*, EU:C:2014:2013. For further comments see M. CERA, *Il* design *non registrato: una strategia di tendenza*, in *Riv. dir. industriale*, 2015, II, pp. 237-249.

[8] For the sake of completeness, in the case of unregistered design it is «the date on which the design for which protection is claimed has first been made available to the public», and in the case of registered design it is «the date of filing of the application for registration of the design for which protection is claimed, or, if priority is claimed, the date of priority».

[9] More precisely, Art. 11(1) CDR recalls the publication, exhibition, use in trade or other means of disclosure.

It is thus possible to share the view of those who argue the suitability of the outlined IP regime for fashion designs[10]. Indeed, short-life-cycled products (as many pieces of fashion collections are, appearing at least twice a year) may immediately and freely benefit from the anti-copying protection granted by the unregistered design, while also taking advantage of the grace period for a possible subsequent registration in the event the product would enjoy particular success. Moreover, fashion items that result particularly "timeless" could directly accede to the registered form of protection, which ensures a broader and renewable exclusive right.

This last consideration is also appropriate to introduce a further level of protection that fashion creations may enjoy upon certain (narrow) conditions, i.e. copyright[11]. The possibility of combining the two IPRs is provided in the first place by the above-mentioned Directive 98/71/EC on Community designs. Its Art. 17 states in fact that a design registered in or in respect of a EU Member State «shall also be eligible for protection under the law of copyright of that State», leaving the determination of the extent and the conditions under which the protection is conferred to national law. For the purposes of this paper, it is thus worth directing the inquiry to the copyright legislation of a specific EU Member State, Italy, as it will be recalled later in the case law analysis. The relevant legal instrument in this regard is the Law of 22 April 1941, No. 633, on the protection of copyright and neighboring rights (hereinafter also Italian Copyright Law), that has been repeatedly amended throughout the years. More precisely, one of the legislative changes was passed precisely to give effect to the Directive 98/71/EC[12]: on the one hand, it deleted the requirement of "separability" between the industrial nature of the work and its artistic value (former Art. 2, No. 4 of the Italian Copyright Law) and, on the other hand, it introduced an additional type of protected works to the list provided in Art. 2 of the same Law, which has since then included «works of industrial design having inherent creative character and artistic value» (Art. 2, No. 10). The former requirement stems from the authorship and originality of the work, while the latter pertains to its aesthetic appeal and prestige, to be evaluated according to the response obtained among experts of the industry in question. If the work does qualify for copyright protection

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[10] Among others, E. VAN KEYMEULEN, *Copyrighting couture or counterfeit chic?*, cited above, p. 729 f.; E. FANO, *Tutela del* design *nella moda tra registrazione e diritto d'autore. Una comparazione tra Europa e Stati Uniti*, in *Dir. industriale*, 2012, pp. 354-360, at p. 357; J. BUCHALSKA, *Fashion Law: A New Approach?*, in *Queen Mary L. J.*, 2016, pp. 13-26, at p. 23.

[11] As is well known, this IPR revolves around the principle of territoriality (enshrined in Art. 5 of the Berne Convention), so that the related exclusive rights are acquired and enforced on a country-by-country basis. Moreover, as concerns the EU, a significant harmonisation has been progressively enacted in order to improve the functioning of the internal market, especially as concerns the impact of information technologies and the digital revolution. As the general framework on copyright falls however outside the more limited scope of this paper, the following works can be referred to in this regard: J.C. GINSBURG, E. TREPPOZ, *International Copyright Law. U.S. and E.U. Perspectives*, Cheltenham-Northampton 2015; P. GOLDSTEIN, P.B. HUGENHOLTZ, *International Copyright. Principles, Law and Practice*, Oxford 2012.

[12] More precisely, the Directive was implemented in the Italian legal order by the Legislative Decree of 2 February 2001, No. 95.

under these conditions, the resulting exclusive right is particularly extensive as it covers the entire life of the designer and additional 70 years (Art. 25 of the Italian Copyright Law).

Applying these provisions to fashion designs, it seems easy to predict that the eligibility for copyright protection would indeed have a limited extent, only including works whose artistic value is able to appeal to the public regardless of the actual product (garment, bag, shoe, jewelry, etc.) in which it is conveyed. As a result, copyright would possibly apply to one-of-a-kind creations that, additionally, have a significant cultural and historical impact for the fashion industry, and has actually been recognised by courts in very few cases. Otherwise, where the conditions of copyright protection are not met, fashion designs may nonetheless be afforded design protection, which still entitles the designer to a broad range of exclusive rights[13].

2.2. The legal framework in the US: the (limited) scope of application of copyright protection.

As mentioned above, the situation in the US legal order regarding IP protection of fashion designs as such is in striking contrast to that existing in the EU. Not only has US Congress never passed legislation comparable to that concerning Community designs, but furthermore, the design of a garment (understood as its cut and construction) is not protectable under any IP paradigm provided in the US system. Actually, over the years the issue of design piracy legislation specifically addressing the fashion industry has been much debated both in the literature and the specialised circles[14]. The two most recent legislative attempts were made in 2009 and 2010 – the Design Piracy Prohibition Act (DPPA)[15] and the Innovative Design Protection and Piracy Prevention Act (IDPPPA)[16], respectively – but neither of them was successful[17], as already were over ninety similar proposals since 1914.

[13] For a comprehensive overview of the forms of IP protection for fashion creations see, in the Italian literature, G. CARUSO, *La protezione delle creazioni di moda*, in *Riv. Dir. Autore*, 2014, pp. 409-444.

[14] One of the most authoritative references arguing against design piracy legislation is K. RAUSTIALA, C. SPRINGMAN, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, in 92 *Virginia L. Rev.*, 2006, pp. 1687-1777, who claim that it would even be counterproductive for the creativity and the investments in the industry. The majority, however, advocate for the introduction of a tailored IP regime for fashion designs: among others, see B. SCRUGGS, *Should Fashion Design Be Copyrightable?*, in 6 *Northwestern J. of Technology and Intellectual Property*, 2007, pp. 122-137; A. MANFREDI, *Haute Copyright: Tailoring Copyright Protection to High-Profile Fashion Design*, in 21 *Cardozo J. of International and Comparative L.*, 2012, pp. 111-152; G.C. JIMENEZ, J. MURPHY, J. ZERBO, *Design Piracy Legislation. Should the United States Protect Fashion Design?*, in *Fashion Law*, edited by G.C. Jimenez, B. Kolsun, New York 2014, pp. 66-77. This position is furthermore maintained by some of the main actors in the US fashion industry, such as the Council of Fashion Designers of America (CFDA) and the American Apparel and Footwear Association (AAFA).

[15] H.R. 2196, 111th Congress (2009-2010).

[16] S.3728, 111th Congress (2009-2010).

[17] For a comparative assessment of the two bills see S.R. ELLIS, *Copyrighting Couture: An Examination of Fashion Design Protection and Why the DPPA and the IDPPPA Are a Step Towards the Solution to Counterfeit Chic*, in 78 *Tennessee L. Rev.*, 2010, pp. 163-211.

Focusing on the current regime of statutory copyright[18], for a work of authorship to be eligible for protection, certain conditions must of course be met: in particular, that the work be original, be fixed in a tangible medium and be included in one of the categories provided in §102 of the US Copyright Law. Fashion designs are not mentioned in any of these enumerated works, but are rather said to adjust into the category of pictorial, graphic or sculptural works[19] (hereinafter also PGS) that «shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned» (§101 of the US Copyright Law). Given that apparel is primarily intended to have the utilitarian function of covering one's body, it is therefore subject to the so-called "useful article" doctrine, under which «the design of a useful article (…) 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» (again §101). In sum, under US Copyright Law only certain non-useful features of fashion designs may qualify for protection, as long as they satisfy the two conditions of separate identification and independent existence from the utilitarian aspects of the item. So would be, for instance, artwork applied to clothing, fabric prints and patterns, textures, and other similar elements.

The essential threshold then becomes to establish whether or not the mentioned features of fashion designs are actually separate and independent within the meaning of §101 of the US Copyright Law[20]. More precisely, the separability requirement can be intended as either physical or conceptual: while the former notion results quite straightforward, the latter gives rise to ambiguities in its interpretation[21]. A well known case that carries out an assessment of said notion with regard to a fashion design is *Kieselstein-Cord v Accessories by Pearl, Inc.*[22], where the contested item were decorative belt buckles inspired by Art Nouveau works of art. According to the Second Circuit, they were entitled to copyright protection in that they were conceptually separable sculptural elements, and their primary use was ornamental rather than utilitarian (indeed, they were used also as ornamentation for parts of the body other than the waist). Another interpretation has been given in the dissenting opinion rendered in

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[18] As the main focus of this paper is set on the IP paradigms of design and copyright from a comparative EU-US perspective, other (partial) forms of protection of fashion designs in the US, such as trademark, trade dress and patent laws, are not specifically dealt with.

[19] According to the definition provided §101 of the US Copyright Law, PGS 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».

[20] Actually, even prior to the current statutory law, US case law had illustrated the "useful article" doctrine in the landmark case *Mazer v Stein* (347 U.S. 201 (1954)), where it was held that works of art embodied in useful articles (here there were human statuettes used for base of lamps) were copyrightable because such artistic features could stand alone and the useful article would be equally useful without it.

[21] For a thorough assessment of this requirement see J.J. HUA, *Copyright protection of works of applied art: rethinking conceptual separability and the aesthetic requirement*, in *J. of Intellectual Property L. & Practice*, 2017, pp. 1-12.

[22] *Kieselstein-Cord v Accessories by Pearl, Inc.*, 632 F2d 989 (2d Circ 1980).

the case *Carol Barnhart Inc. v Economy Cover Corporation*[23], in which the conceptual separability was found «whenever the design creates in the mind of the ordinary observer two different concepts that are not inevitably entertained simultaneously»[24].

Taking into account the guidance provided by the case law, copyright protection may thus be afforded to fashion designs capable of being separable works of art, and it should be safe to say that such are those «hardly function[ing] as clothing»[25]. It appears indeed difficult to single out purely aesthetic features of fashion designs that are separable and exist independently from the function of the garment itself. This limited scope of statutory copyright will be also confirmed through the case study selected in the following paragraph.

3. Examples from the case law: the *Moon Boot* case in Italy and *Star Athletica v. Varsity Brands* in the US.

This section addresses the practical perspective of IP protection for fashion designs that complement the brief overview provided with regard to the relevant legal frameworks in the EU and the US.

The Italian *Moon Boot* case[26] is significant in this context in that copyright protection (more precisely, under Italian Copyright Law) was recognised to a fashion accessory, i.e. the world-renowned model of après-ski boots whose design was inspired by the 1969 Moon landing. The factual background of the case refers to the dispute initiated in 2013 before the Court of Milan by the holder of this exclusive right, Tecnica Group S.p.a, against the alleged counterfeiters, Gruppo Anniel S.n.c. and Anniel S.r.l., and the distributor of the counterfeit boots, Gruppo Coin S.p.a. The plaintiff claimed the counterfeit and the infringement of its exploitation rights pursuant to the Italian Copyright Law, the counterfeit of three registered Community designs[27], as well as the unfair competition under Art. 2598 of the Italian Civil Code, to which the defendants replied by claiming the nullity of the Community designs and contesting the counterfeit and the existence of an enforceable copyright.

The Court of Milan first assessed the copyright claim, and preliminarily recalled the above-mentioned substantial innovation brought about by the Directive 98/71/EC, that is the principle of cumulation of protection under registered design law and under copyright law. Indeed, as a result of the implementation of this EU act in Italy, the works eligible for copyright protection according to Art. 2, No. 10 of the Italian Copyright Law are precisely those already covered by the design regime, provided

[23] *Carol Barnhart Inc. v Economy Cover Corporation*, 73 F2d 411 (2d Cir 1985).
[24] *Ibid.*, at 422 (Newman J., dissenting).
[25] E. VAN KEYMEULEN, *Copyrighting couture or counterfeit chic?*, cited above, p. 732.
[26] Tribunale di Milano, sezione specializzata in materia di impresa, judgment of 12 July 2016, no. 8628.
[27] They were Community designs no. 001940313-0006, no. 001731159-0002 and no. 001731159-0003, available at DesignView.

of course that the requirements of inherent creative character and artistic value are met. With particular regard to the latter condition, the Court referred to one of its precedents[28] and held that it should be understood as objectively as possible in order to carry out a proper evaluation. To this end, the extent of the impression conveyed by the design should be assessed from the perspective of the general audience, especially cultural circles, rather than those who are more closely involved in the production and distribution chain. Applying these considerations to the case at issue, the Court held that Moon Boots were indeed eligible for protection under Art. 2, No. 10 of the Italian Copyright Law because of their significant impact on the aesthetic features of après-ski boots since they were first launched on the market, which has been able to influence the trend developments of a whole era. Moreover, Moon Boots have repeatedly appeared on specialised design magazines at both national and international levels, and, most importantly, in 2000 they were chosen by the Louvre Museum among the 100 most influential design pieces of the XX century. For these reasons, copyright protection was afforded to the iconic après-ski boots, and the models produced and commercialised by the defendants amounted to plagiarism.

With this holding, the Court did not address the subsequent plea regarding the infringement of the registered Community designs, but only regarding the counterclaim of nullity raised by the defendants, which was ultimately dismissed. In this regard, both the requirements of novelty and individual character were satisfied in the case. It is worth mentioning, as it is frequent in similar disputes concerning the "crowded" fashion industry, that a relatively low differentiation is necessary to establish the individual character. Similarly, the Court did not address the unfair competition claim since it was founded on the same constitutive elements as that on copyright.

The *Moon Boot* case is thus particularly instructive, as it confirms the interoperability of (national) copyright and (EU) design protection and shows the actual scope of application of the two IP regimes.

Moving across the pond, the second selected case is a decision rendered earlier this year by the US Supreme Court regarding the extent of statutory copyright protection applied to two-dimensional designs appearing on the surface of a garment, namely cheerleading uniforms[29]. The factual circumstances involved Varsity Brands, the company holding more than 200 copyright registrations for these designs (consisting in stripes, chevrons, zigzags, and color-blocking), which sued the competitor Star Athletica for infringement of its exclusive rights. The District Court held that these designs did not actually qualify as protectable PGS works within the meaning of US Copyright Law, given that they did not pass the above-outlined separability threshold[30]. The Court of Appeals for the Sixth Circuit

[28] Tribunale di Milano, sezione specializzata in materia di impresa, order of 28 November 2006.
[29] *Star Athletica, L.L.C. v Varsity Brands, Inc.*, 580 U.S. ___ (2017).
[30] *Varsity Brands, Inc. v Star Athletica, LLC*, No. 10-2508, 2014 WL 819422 (W.D. Tenn. Mar. 1, 2014).

reversed this holding[31], maintaining that Varsity Brand's designs were both capable to be identified separately from and to exist independently of the cheerleading uniforms as required by §101 of the US Copyright Law. The case was ultimately granted certiorari to the Supreme Court, which affirmed the Sixth Circuit with a 6-2 majority. In its reasoning, the Court adopted a quite innovative interpretation of the requirements envisaged in the copyright statute. First, it considered that the surface decorations on the cheerleading uniforms could be identified as features having PGS qualities. Then, it held that if the given arrangement of decorations were to be separated from the uniforms and applied in another medium, they would qualify as two-dimensional works of art under §101 of the US Copyright Law, thus resulting eligible for copyright protection.

Surprisingly, no relevance was however given to the dual nature of the garment designs at issue, i.e. to the fact that they perform both expressive and utilitarian functions. More precisely, as it was argued in the *amicus* brief delivered by Professors Buccafusco and Fromer in support of the petitioner Star Athletica[32], the utilitarian aspect of a garment may reside also in an influence on the wearer's appearance, in addition to the more evident aspect of covering one's body. And this was indeed what the designs on the surface of the uniforms aimed at, with the consequence that they could not «be treated as physically or conceptually separable under any recognized test for separability»[33]. Otherwise, granting copyright protection would enable Varsity to acquire a competitive advantage that statutory law did not intend to afford.

This Supreme Court's decision thus seems to pave the way for a new reading of copyright law's treatment of dual-nature features of PGS works, which actually results at odds with the orthodox understanding of the statutory requirements. The literature has in fact underlined that from now on, as the separability test will be read in a very broad way, only purely functional aspects of designs should be left out from copyright protection[34].

4. Concluding remarks.

In light of the above, some final (albeit necessarily provisional) considerations may be drawn with regard to the appropriate IP paradigm for fashion designs.

In the EU the applicable regime is based on the two-tiered system of Community designs and national copyright laws, thus resulting quite protective towards the designers' creativity and the originality of their works. In a long-term perspective, however, a further step at the EU level could be

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

[32] Brief of Professors Christopher Buccafusco and Jeanne Fromer as *Amici Curiae* in Support of Petitioner, in *Star Athletica, L.L.C. v Varsity Brands, Inc.*, No. 15-866.

[33] *Ibid.*, at 29.

[34] C. BUCCAFUSCO, M.A. LEMLEY, *Functionality Screens*, Stanford Public Law Working Paper No. 2888094.

undertaken in the direction of a EU-wide regime covering copyright law, which is now still lacking. This would enable to overcome possible differences existing among national provisions, therefore ensuring a proper harmonisation also in this regard.

As for the US system, the protection afforded by statutory copyright does not seem to be sufficiently tailored on fashion designs, even considering the most recent interpretation given by the Supreme Court in *Star Athletica v Varsity Brands*. It would be rather preferable to enact specific design piracy legislation, as it has indeed been repeatedly attempted, which would be able to adapt the existing copyright regime to the peculiarities of the fashion industry.

To conclude this paper, a famous quote by Coco Chanel seems worth recalling, which says «imitation is the highest form of flattery». However, one should not forget that there is also a sensible difference between imitation and piracy that calls for the appropriate IP protection.