Cultural Appropriation of Traditional Garment Designs in the Post-*Star Athletica* Era[[1]](#footnote-1)♦

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Introduction

In 2015, Salome Awa discovered that high-end fashion designer, Kokon To Zai (KTZ), had been selling a replica of her great-grandfather’s caribou skin parka as a sweater for over $900.[[2]](#footnote-2) Her great-grandfather, shaman Ava, envisioned the design of this parka in the early 1900s and wore it to protect himself from his enemies who wanted to drown him.[[3]](#footnote-3) The patterns on the parka include two hand-sized white images on the chest, a little man in the center, and three circles in the belly area.[[4]](#footnote-4) These patterns served as safeguards.[[5]](#footnote-5) KTZ did not arrange a contract with Salome’s family and never requested to use the parka’s design.[[6]](#footnote-6) The London-based fashion label could have come across Ava’s parka in many forms. Ava was a prominent world shaman person; photos of him are published in books and online, and his character is featured in the film *Journals of Knud Rasmussen*. Regardless, Salome was certain that KTZ copied the design; the patterns were simply unique enough that it would be virtually impossible for KTZ to come up with the same combination thereof.[[7]](#footnote-7)

After multiple attempts to speak with a representative of the fashion company, Salome received a “bittersweet” apology email.[[8]](#footnote-8) KTZ apologized for unintentionally offending the Inuit family, and claimed that “[it is] part of [the company’s] DNA to celebrate multiculturalism . . . and to encourage appreciation for traditions, ethnicities, and religions’ diversity.”[[9]](#footnote-9) KTZ further stated that “it has always been inspired by and paid homage to indigenous cultures and tribes,” and at the time the sweater was released, KTZ credited the Inuit community in online features, referencing a *Vogue* article on KTZ’s Fall 2015 Menswear.[[10]](#footnote-10) The article, however, merely discusses the company’s “fetishism” for the skinheads and the Eskimos.[[11]](#footnote-11) Later, KTZ removed the sweater from its online and retail stores.[[12]](#footnote-12)

This is not the first time KTZ has been accused of stealing indigenous designs.[[13]](#footnote-13) Even though the fashion label claims its intention was to pay tribute to the Inuit tribe, it appears that KTZ merely copied elements of an indigenous design “and for profit of all things.”[[14]](#footnote-14) At no time did KTZ reference shaman Ava’s parka as the source of its inspiration. Moreover, the company failed to pay monetary compensation to Salome’s family following this controversy.

KTZ is not the only fashion company that has been criticized for copying cultural expressions. For example, in 2015, French designer Isablel Marant was criticized for “plagiarizing” the design of a 600-year-old traditional Tlahuitoltepec blouse in her Etoile Spring-Summer 2015 collection.[[15]](#footnote-15) Also, in 2016, Urban Outfitters settled a five-year lawsuit with Navajo Nation due to the company’s use of the Navajo name and sacred emblems and symbols on its products.[[16]](#footnote-16) More recently, Tory Burch’s Resort 2018 collection included an almost identical copy of a traditional Romanian coat displayed at the Metropolitan Museum of Art in New York.[[17]](#footnote-17) The company marketed this item as a garment inspired by Africa, until La Blouse Roumaine, an online group, publicly requested that Tory Burch give credit to the source of its inspiration.[[18]](#footnote-18)

Evidently, cultural appropriation in the fashion industry is a recurring issue that has resulted in numerous controversies. Some of these disputes served to protect the intellectual property rights of the indigenous people. However, most often, either these people did not come to realize their rights were being violated, or they did not have a legal channel to protect such rights; otherwise, they would probably not have settled for a mere apology. If indigenous people had access to a legal regime that fairly remedied them—similar to any other copyright holder—they could be compensated when fashion labels infringed their work (i.e., the designs of their cultural garments). This Note argues that *Star Athletica, L.L.C. v. Varsity Brands, Inc.* created a plaintiff-friendly legal avenue for indigenous people to protect their intellectual property rights in their cultural expressions against fashion designers*.*[[19]](#footnote-19) In other words, as the first Supreme Court decision focused on copyright protection of fashion designs, *Star Athletica* has strengthened copyright law as a medium for protecting cultural expressions. Furthermore, this Note explores whether cultural appropriation controversies that took place prior to this case would have resulted in different outcomes had they emerged today.

Part I of this Note analyzes legal avenues commonly employed to protect garment designs prior to *Star Athletica*. Part II introduces the case, and explains the substantive change it has caused in Copyright Office practices. Part III discusses how the Supreme Court’s decision may influence controversies over cultural appropriation in the fashion industry. This section considers copyright law’s limitations in protecting indigenous garments and analyzes whether—in light of such limitations—disputes that arose prior to *Star Athletica* would have reached a different outcome today.

1. Legal Avenues Used Before *Star Athletica*

Clothing has traditionally been considered ineligible for copyright protection, because it is a “useful article.”[[20]](#footnote-20) As such, in the past few decades, fashion brands have sought other legal means to protect their designs. For example, design patents, which last for fourteen years, are used to protect the ornamental and decorative aspects of functional fashion items such as footwear, jewelry, and handbags.[[21]](#footnote-21) Alexander Wang and Nike are two fashion labels that hold design patents for handbags and shoes, respectively.[[22]](#footnote-22) However, clothing designs have been more difficult to patent, mainly because of the lack of sufficient novelty to merit patent protection. Moreover, design patens are costly, and can take up to a year to obtain.[[23]](#footnote-23) Thus, by the time a fashion label obtains patent protection, the seasonal design has served its lifespan and been subject to copying by fast fashion brands.[[24]](#footnote-24)

Due to patent law’s limited use in fashion, many designers resort to trademark protection.[[25]](#footnote-25) Aside from protecting a designer’s logo, trademark law also protects design elements, such as prints and patterns,[[26]](#footnote-26) distinctive stitching,[[27]](#footnote-27) and colors.[[28]](#footnote-28) Trade dress protection, a special form of trademark, also extends to the overall appearance of a product. For example, Hermés’ Birkin bag[[29]](#footnote-29) and Converse’s Chuck Taylor sneakers[[30]](#footnote-30) are trade dresses registered with the Unites States Patent and Trademark Office. To receive trademark protection, a product must be non-functional and distinctive;[[31]](#footnote-31) to satisfy the latter requirement, the item must be either inherently distinctive or entitled to a secondary meaning in the marketplace.[[32]](#footnote-32) In *Wal-Mart Stores, Inc. v. Samara Brothers, Inc.*, however, the court held that fashion design could never satisfy the “inherently distinctive” prong, because clothes are useful objects that have utilitarian purposes.[[33]](#footnote-33) As such, for designs to receive trademark protection, they must have “secondary meaning.”[[34]](#footnote-34) This is problematic, because new designs that premier on the runway do not yet have secondary meanings, as they have not yet established consumer-source recognition.[[35]](#footnote-35) Furthermore, while one may protect distinctive design elements or a combination thereof through trademark law, obtaining protection for the entire “look” of a garment is difficult.[[36]](#footnote-36)

Within the last decade, fashion designers shifted to Congress to protect their work as intellectual property. Members of Congress introduced bills to protect fashion designs several times.[[37]](#footnote-37) Most notably, the Innovative Design Protection and Piracy Prevention Act (IDPPPA), which was nearly passed by the Congress after the 2010 election,[[38]](#footnote-38) would have proposed to fit copyright protection for fashion design into the U.S. Code.[[39]](#footnote-39) It would have defined an “infringing article” as “any article the design of which has been copied from a design protected under this chapter, or from an image thereof, without the consent of the owner of the protected design.”[[40]](#footnote-40) Furthermore, the proposed IDPPPA went on to state, “[i]n the case of fashion design, a design shall not be deemed to have been copied from a protected design if that design (A) is not substantially identical in overall visual appearance to and as to the original elements of a protected design; or (B) is the result of independent creation.”[[41]](#footnote-41) This Act would have given fashion designers a three-year monopoly over their work, in light of the transitory lifetime of fashion design.[[42]](#footnote-42) However, the legislation did not reach the Senate floor before the new Congress was seated in 2011; after 2011, fashion lost its priority to patent legislation.[[43]](#footnote-43) Thus, until *Star Athletica*, the legal and business environments “seemed to favor either ‘inspiration’ or knockoffs—depending upon whom you ask.”[[44]](#footnote-44)

1. *Star Athletica* and Its Influence
2. Before Star Athletica: Standard of Copyrightability of Works of Art with Utilitarian Applications

In 2017, the Supreme Court issued its first decision on copyright protection for fashion design. While traditionally clothes were held uncopyrightable due to their utilitarian purpose, the Court in *Star Athletica* proposed a test that, if met, would warrant copyright protection to the design of a useful article (e.g., clothing).[[45]](#footnote-45) However, this was not the first time the Supreme Court addressed the line between useful articles and copyright. In 1954, in *Mazer v. Stein*, the Court held that an article having a utilitarian application may be copyrighted—a work of art, made into a useful article, is not uncopyrightable per se.[[46]](#footnote-46) However, the Court offered little guidance on how to draw the line between the useful article and the copyright. As such, for more than sixty years since *Mazer*, the circuit courts, academia, and the U.S. Copyright Office have had inconsistent interpretations of the holding and how it applied to real-world copyrightability issues.[[47]](#footnote-47) Particularly, the Copyright Office required that the copyrightable element either be capable of being physically removed from the useful article without altering its useful aspects, or be “capable of being visualized” as existing separately, but only if “the artistic feature and the useful article could both exist side by side and be perceived as fully realized, separate works—one an artistic work and the other a useful article.”[[48]](#footnote-48) Even though this approach generally controlled, different circuits adopted slightly different tests; some were broader, and some were narrower.[[49]](#footnote-49) For example, in *Kieselstein-Cord v. Accessories by Pearl, Inc.*, the Second Circuit held that a useful article may be copyrighted if its ornamental aspects are primary and conceptually separable from its subsidiary utilitarian function.[[50]](#footnote-50) In *Carol Barnhart Inc. v. Economy Cover Corp.*, the Second Circuit distinguished *Kieselstein-Cord*, describing that case as being “on a razor’s edge of copyright law.”[[51]](#footnote-51) In *Barnhart*, the Court held that an article will only be copyrightable if its aesthetic characteristic is not “in any respect required by [its] utilitarian [function]; the artistic . . . features [must] be conceived as having been added to, or superimposed upon, an otherwise utilitarian article.”[[52]](#footnote-52) In other words, the artistic designs must be “wholly unnecessary to performance of the utilitarian function.”[[53]](#footnote-53) Furthermore, such designs must be “physically or conceptually separable” from the utilitarian aspects of the article.[[54]](#footnote-54) To meet the “conceptual separability” test, the dissent proposed the following standard: “the article must stimulate in the mind of the beholder a concept that is separate from the concept evoked by its utilitarian function.”[[55]](#footnote-55) In *Brandir International v. Cascade Pacific Lumber Co.*, the Second Circuit provided a more refined test for conceptual separability, holding that

If design elements reflect a merger of aesthetic and functional considerations, the artistic aspects of a work cannot be said to be conceptually separable from the utilitarian elements. Conversely, *where design elements can be identified as reflecting the designer’s artistic judgment exercised independently of functional influences, conceptual separability exists*.[[56]](#footnote-56)

Ultimately, the two-pronged test in *Star Athletica* replaced these tests, creating a uniform standard among all circuits.[[57]](#footnote-57)

1. Star Athletica, L.L.C. v. Varsity Brands, Inc.

Varsity Brands, Inc., Varsity Spirit Corporation, and Varsity Spirit Fashions & Supplies, Inc. (“Respondents”) design, make, and sell cheerleading uniforms.[[58]](#footnote-58) They registered over 200 copyrights for two-dimensional designs on their garments.[[59]](#footnote-59) Such designs consisted of combinations, positioning, and arrangements of chevrons, lines, curves, diagonals, coloring, stripes, and shapes that appeared on their uniforms and other garments.[[60]](#footnote-60) Respondents sued Star Athletica (“Petitioner”) for copying five of their registered designs. The district court granted summary judgment for Petitioner, holding that the designs failed to qualify as pictorial, graphic, or sculptural (PGS) works. Such designs, according to the court, served the utilitarian function of identifying the garments as “cheerleading uniforms” and could not be “physically or conceptually” separated from such function.[[61]](#footnote-61)

The Court of Appeals for the Sixth Circuit reversed, holding that graphic designs on the cheerleading uniforms were “separately identifiable.”[[62]](#footnote-62) Such designs, according to the court, could exist “side by side” with a blank cheerleading uniform—the former would qualify as a PGS work, and the latter would be a useful article.[[63]](#footnote-63) A cheerleading uniform, as a useful article, covered the body, wicked away moisture, and permitted free movement; such functions did not depend on the design.[[64]](#footnote-64) The court further determined that the designs were “capable of existing independently,” as they could be “incorporated onto the surface of different types of garments, or hung on the wall and framed as art.”[[65]](#footnote-65) A dissenting judge, however, wrote that the designs were “integral” to and inseparable from the utilitarian function of the uniforms, which was to “[identify] the wearer as a cheerleader.”[[66]](#footnote-66)

The Supreme Court, in a 6-2 majority opinion written by Justice Thomas, affirmed the Sixth Circuit’s decision. The Court, relying on statutory interpretation, proposed a two-part test to determine when expressive elements of useful articles are copyrightable under 17 U.S.C. § 101:

[A] feature incorporated into the design of a useful article is eligible for copyright protection only if the feature (1) can be perceived as a two- or three-dimensional work of art separate from the useful article and (2) would qualify as a protectable pictorial, graphic, or sculptural work—either on its own or fixed in some other tangible medium of expression—if it were imagined separately from the useful article into which it is incorporated.[[67]](#footnote-67)

In order to satisfy the first prong of this test, one must spot two- or three-dimensional decorations—incorporated in the design of a useful article—that have PGS features. The second prong, which is more difficult to satisfy, requires that the useful article’s PGS features be separable and capable of existing independently from the “utilitarian function” of the article.[[68]](#footnote-68) With this prong, the Supreme Court clarified two grounds for confusion within the district courts prior to *Star Athletica*. First, it abandoned the distinction between “conceptual” and “physical” separability tests and held that “separability is a conceptual undertaking.”[[69]](#footnote-69) As such, it is no longer required that the PGS features be capable of existing separately from the useful article while leaving the article’s utilitarian aspects intact.[[70]](#footnote-70) As long as such features are conceptually removed from the uniform and illustrated in another medium—without replicating the original article—they are regarded as separable.[[71]](#footnote-71) Second, the Court held that the separability inquiry must focus on the “extracted feature and not on any aspects of the useful article that remain after the imaginary extraction.”[[72]](#footnote-72) Under this new test, the underlying article is no longer required to remain as fully functioning without the artistic features. As long as *some* aspects of the useful article are “left behind” and the extracted features qualify as non-useful PGS works, the test is met.[[73]](#footnote-73)

Applying this two-part test, the majority concluded that the designs on the surface of Respondents’ cheerleading uniforms were copyrightable. However, the Court’s ruling did not resolve all pending issues in regards to the dispute between Respondents and Petitioner. For example, the Court expressed no opinion on whether the uniform designs were sufficiently original to warrant copyrightability. Furthermore, the Court limited its holding to the design features only. As the majority held, Respondents did not have the right to prevent others from “manufacturing a cheerleading uniform of identical shape, cut, and dimension to the ones on which the decorations in this case appear. They may prohibit only the reproductions of the surface design.”[[74]](#footnote-74)

Justice Ginsburg, concurring in the Court’s judgment, stated that the separability test was unnecessary.[[75]](#footnote-75) She explained the designs at issue were not designs of useful articles, but rather reproductions of standalone pictorial and graphic works that were initially sketched on paper.[[76]](#footnote-76) A copyright in such works “includes the right to reproduce the work in or on any kind of article, whether useful or otherwise . . . [and to] . . . exclude a would-be infringer from reproducing that work on a useful article.”[[77]](#footnote-77) Respondents sought to copyright these two-dimensional designs, not the cheerleading uniforms. As such, a separability analysis is not required.

Justice Breyer, joined by Justice Kennedy, dissented. Although they agreed with much in the Court’s opinion, they argued that “the designs *cannot* ‘be perceived as . . . two- or three-dimensional work[s] of art separate from the useful article.’”[[78]](#footnote-78) According to the dissent, separating the surface decorations of a cheerleading uniform and placing them on a different medium would only convey a “picture” of the garment.[[79]](#footnote-79) As cheerleading uniforms are useful articles, their “pictures” replicate their useful nature. In other words, “the design features . . . are not ‘capable of existing independently o[f] the utilitarian aspects of the article.’”[[80]](#footnote-80) Hence, the designs on a cheerleading uniform are not copyrightable.

1. After Star Athletica: How the Standard of Copyrightability Has Changed

The test adopted in *Star Athletica* significantly modified the practices of the Copyright Office going back half a century.[[81]](#footnote-81) Prior to this case, some competing tests, including the one adopted by the Copyright Office, required that the useful article fully retain its utilitarian functions after the design features were separated.[[82]](#footnote-82) *Star Athletica* rejected this requirement and removed it from copyright jurisprudence. As such, it is now easier to copyright artistic elements of useful articles like clothing.[[83]](#footnote-83)

While the Court in *Star Athletica* replaced inconsistent standards used by different courts with one unified test, it did not sufficiently explain how the test must be employed. For now, the Copyright Office’s *Compendium* quotes the standard from *Star Athletica*, and states that “[t]he U.S. Copyright Office is developing updated guidance on the registration of pictorial, graphic, and sculptural features incorporated into the design of useful articles.”[[84]](#footnote-84) In the meantime, the Copyright Office has published a set of guidelines related to this topic in its *Circular 40*.[[85]](#footnote-85) The document lists “[a]rtwork applied to clothing or to other useful articles” as an example of two or three-dimensional works of fine, graphic, and applied art that—if found original—could be copyrighted.[[86]](#footnote-86) “Patterns for sewing” and “fabric . . . designs” are also mentioned on this list; however, “familiar symbols or designs” are held uncopyrightable.[[87]](#footnote-87) Lastly, the text highlights the limitation to *Star Athletica*’s holding: “[c]opyright in a work that portrays a useful article extends only to the artistic expressions of the author of the PGS work. It does not extend to the design of the article that is portrayed.”[[88]](#footnote-88)

Unfortunately, *Circular 40*’s guidelines do not help clarify how the new standard of copyrightability will affect the fashion industry. Therefore, until the Copyright Office publishes its updated guidance or “a few motions to dismiss are granted in pending litigation, the sky will be the limit in the . . . industry.”[[89]](#footnote-89)

1. Copyright Protection of Cultural Expressions
2. Common Concerns Regarding Copyrightability of Cultural Expressions

Before discussing *Star Athletica*’s influence in extending copyright protection to indigenous designs, it is important to first note common factors that threaten claims of copyright validity in the context of cultural appropriation. Such factors include authorship, originality, duration of copyright, and the useful-articles doctrine. This Note argues that *Star Athletica* has helped resolve the last concern to some extent, even though the former three still exist. Below is a brief discussion of those obstacles.

1. Authorship

Authorship, in the context of U.S. copyright law, “has its grounding in Romantic Individualism, which can run directly contrary to authorship as it is conceived by indigenous people.”[[90]](#footnote-90) Ordinarily, members of an indigenous tribe contribute to its heritage by collectively creating songs, stories, dance choreographies, garments, medicine, etc. Unlike modern-day Americans, indigenous people do not consider their creation as property—that is something owned by its author and used for extracting economic benefits.[[91]](#footnote-91) On the contrary, indigenous people view their works as building blocks of their heritage, which, to them, “is a bundle of relationships rather than a bundle of economic rights.”[[92]](#footnote-92) As such, in order to extend copyright protection to cultural expressions, it is critical to conceptualize authorship in a fashion that recognizes communal interest and responsibility over such works.

Unfortunately, extending group copyrights to indigenous people has not found much support in American jurisprudence. However, there still are some legal avenues that could help indigenous people protect their collective rights. For example, when a member of a tribe creates a copyrightable work, he or she could transfer his or her rights to the community as a corporate entity, thereby extending copyright ownership to the group.[[93]](#footnote-93) By doing this, other members of the community will earn the right to (1) make derivative works and reproductions, and (2) stop outsiders from violating the copyright. However, this approach may not be appealing, because some artists may refuse to transfer their authorship rights. Another option would be to mandate that all creations by members of the community are works made for hire.[[94]](#footnote-94) Under U.S. copyright law, corporate entities are entitled to authorship rights of a copyrightable work if an employee creates that work within the scope of his or her employment (i.e., if the work is made for hire).[[95]](#footnote-95) Under this approach, when outsiders copy the work of a member of the tribe, a representative of that community will have legal standing to seek recourse on behalf of the author and the community. However, indigenous tribes may hesitate to adopt this approach, because it would turn community relationships into employment ones.

Another less paved legal avenue for indigenous people concerns the concept of cultural patrimony.[[96]](#footnote-96) The Tenth Circuit defines this term as any object that has “(1) ongoing historical, cultural or traditional importance; and (2) [is] considered inalienable by the tribe by virtue of the object’s centrality in the tribal culture.”[[97]](#footnote-97) Furthermore, the property must be of such central significance to the tribe that it is owned communally and cannot be appropriated or conveyed by anyone regardless of his or her membership in the tribe.[[98]](#footnote-98) In *United States v. Corrow*, the defendant—an outsider—was convicted of trafficking Indian ceremonial adornments.[[99]](#footnote-99) Even though conflicts in opinion existed as to whether such adornments belonged to the tribe, as opposed to an individual member, the court held that the former had collective ownership rights. Using the language and purpose of the Native American Graves Protection and Repatriation Act, the court concluded that non-Indian persons could not resell items of cultural patrimony for profit.[[100]](#footnote-100) If the same legal framework were to apply to copyright practice, “it could . . . be an effective vehicle to grant rights regarding the cultural [expressions] . . . of indigenous people.”[[101]](#footnote-101)

Ultimately, until U.S. copyright law is modified to account for the unique nature of indigenous intellectual property, the issue of authorship remains as an impediment to claims of copyright validity by indigenous people. Fortunately, however, this problem is limited to a certain number of cases. For example, in the controversy between Salome and KTZ, authorship is not an issue, as the author of the garment is identified.

1. Originality

In the U.S. copyright system, protection is only extended to “original works of authorship.”[[102]](#footnote-102) There are two aspects to originality: independent creation and a modest quantum of creativity. In *Feist Publications, Inc. v. Rural Telephone Service Company, Inc.*, the Supreme Court declared that originality, the “*sine qua non* of copyright,” is a constitutional requirement for copyright protection.[[103]](#footnote-103) This requirement may be problematic in the context of protecting cultural expressions, because innovation is simply not the core value of indigenous art. Such works are intrinsically traditional and created to faithfully reproduce and reinterpret preexisting works. Simply put, the emphasis in their production is “on derivation, and not deviation.”[[104]](#footnote-104) Thus, even though the originality threshold is low, many indigenous artworks will not satisfy the originality requirement, as they vary only trivially from their predecessors.[[105]](#footnote-105) The ones that do satisfy the standard must demonstrate sufficient variation from pre-existing works and will only receive protection in those variations.[[106]](#footnote-106) This is what is known as a “thin” copyright.[[107]](#footnote-107)

Consider Khātam-kari as an example. Khātam is an ancient Persian marquetry art form, where surfaces of wooden articles—such as jewelry boxes and chess boards—are decorated with extremely small geometric pieces made of metal, bone, ivory, and various kinds of wood.[[108]](#footnote-108) The basic design of Khātam includes a pattern of six-point stars made of triangles.[[109]](#footnote-109) This general form is present in almost all Khātam marquetry. However, aesthetic value of each work depends on the quality of material used and the level of precision, as defined by the number of triangles per square inch.[[110]](#footnote-110) Numerous Persian artists have produced masterpieces that incorporate the core structure of Khātam.[[111]](#footnote-111) While the works of such artists enjoy tremendous respect and cultural value, most of them would not enjoy copyright protection, because under U.S copyright regime, works that are only trivially different from their predecessors are not entitled to protection.

Evidently, since a substantial amount of each indigenous artwork is derived from preexisting works (e.g., sacred symbols), outsiders could still plagiarize core elements of cultural expressions without authorization. This is what is troubling to indigenous people. However, the authorship analysis above may help solve this problem to some extent. If each member of a cultural group is entitled to intellectual property rights of the whole group, each author will have title to not only the aspects of his or her work that vary from pre-existing elements, but to those core elements as well.

1. Duration of Copyright

Article I, Section 8 of the U.S. Constitution allows Congress to pass laws that protect authors for “limited times.”[[112]](#footnote-112) Lord Macualay, in a speech before the House of Commons in 1841, reflected on the length of the copyright term:

It is good that authors should be remunerated; and the least exceptionable way of remunerating them is by a monopoly. Yet monopoly is an evil. For the sake of the good we must submit to the evil; but the evil ought not to last a day longer than is necessary for the purpose of securing the good.[[113]](#footnote-113)

Currently, for most works created on or after January 1, 1978, the copyright term is measured by the life of the author plus seventy years.[[114]](#footnote-114) In the context of cultural expressions, it is unclear whether such a rule is consistent with the constitutional language “to promote the progress of science and the useful arts.”[[115]](#footnote-115) In other words, intellectual property protection of folklore entails unique problems that the current copyright regimes do not readily account for. Therefore, it is difficult to decide whether copyright law promotes the “private creative contributions of ‘usually unknown members of . . . [communities].” For example, a prominent issue is that most folklore “lack identifiable creators or holders of right.”[[116]](#footnote-116) Hence, considering the “life of the author plus seventy years” provision, it is rather difficult to determine when such indigenous works of art enter the public domain. Additionally, while the current statutory duration is a suitable monopoly period for most works, it does not adequately serve the interests of folklore. Most indigenous productions gain value and communal importance after centuries—at which point they are no longer protected by copyright. For example, today, shaman Ava’s parka is regarded as a symbol of Nunavut’s rich culture and history. The fact that copyright law would only protect this garment decades ago—when it did not hold the significance that it does today—proves that contemporary legal regimes fail to adequately protect indigenous intellectual property.

Fortunately, however, there still are legal avenues that could extend the duration of copyright protection in indigenous works of art. For example, since cultural expressions commonly share certain characteristics that are unique to their group, it is possible to view each work as a “derivative” of previous creations. Under U.S. copyright law, a derivative work is “based upon one or more preexisting works, such as . . . art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted.”[[117]](#footnote-117) Such works are copyrightable if they meet the originality standard.[[118]](#footnote-118) Under this scheme, it is possible to consider the new generations of indigenous folklore as derivative works, entitled to copyright protection. This could “[ensure] lasting [protection] for vital, cultural [creations].”[[119]](#footnote-119) However, one significant problem with this approach is that derivative works, to be copyrightable, must contain a sufficient amount of new material that the underlying work does not have.[[120]](#footnote-120) In other words, contemporary cultural artworks will only receive copyright protection as derivative works if they evolve significantly from their original form. This modification, however, is unlikely to happen in most instances; as discussed *supra*, innovation is simply not the touchstone of indigenous art.

Luckily, the issue of duration concerns only a certain group of cases. There are numerous new cultural creations that do not share this problem, as they have not lived past the statutory period for copyright. Bethany Yellowtail’s Apsaalooke Nights holiday dress, discussed below, is an example of such contemporary indigenous works.

In light of the aforementioned impediments to claims of copyright validity of some, but not all, folklore, we must now shift our focus to the last concern—the useful-articles doctrine—and analyze whether *Star Athletica* lowered the bar for protection of indigenous garments in that respect.

1. How Would Star Athletica Affect the Outcome of Copyright Disputes Over Cultural Garment Design?

To understand the influence of *Star Athletica* in future cases, one must resort back to the controversies that took place prior to that case and determine whether they would have reached a different outcome today. For purposes of this Note, I will first consider the dispute between Salome Awa and KTZ.[[121]](#footnote-121) Then, I will consider the controversy between Native-American designer Bethany Yellowtail and KTZ.[[122]](#footnote-122)

To the extent of public knowledge, Salome never sued KTZ for copying the design of her grandfather’s parka. To settle the dispute, the fashion label merely issued an apology and suspended further sale of the “copied” parka.[[123]](#footnote-123) Similarly, when Tory Burch and Isabel Marant were accused of plagiarizing the design of certain cultural garments, they either removed the items from their stores and websites or credited the cultural groups that “inspired” production of such “stolen” pieces.[[124]](#footnote-124)

Below, I will apply the pre- and post-*Star Athletica* legal frameworks to the dispute between Salome and KTZ and determine whether *Star Athletica* has created a plaintiff-friendly legal channel for indigenous people to protect two-dimensional designs of their cultural garments.

1. The Legal Framework Before *Star Athletica*

In 1991, the United States Copyright Office issued a policy decision to elaborate on its practices regarding garment designs. It stated that “[g]arment designs (excluding separately identifiable pictorial representations of deigns imposed upon the garment) will not be registered even if they contain ornamental features, or are intended to be used as historical or period dress.”[[125]](#footnote-125) The office further added that “[f]anciful costumes will be treated as useful articles, and will be registered *only* upon a finding of separately identifiable pictorial and/or sculptural authorship.”[[126]](#footnote-126)

Professor Nimmer’s leading treatise breaks down copyright protection of design works into two categories: (1) dress designs and (2) fabric design. The former, also known as garment design, refers to the “shape, style, cut, and dimensions for converting fabric into a finished dress or other clothing garment.”[[127]](#footnote-127) The latter refers to patterns or artistic features “such as a unique rendition of a rose that is printed in a repetitive and consistent pattern throughout the dress fabric, or appears ‘but once’ on the final dress product.”[[128]](#footnote-128) Fabric designs seldom face obstacles posed by the useful-articles doctrine; as such, they are generally entitled to copyright protection.[[129]](#footnote-129) On the contrary, dress designs are rarely held copyrightable, because they lack artistic elements that are separable from the utilitarian function of the garment.[[130]](#footnote-130)

1. Fabric Design

When studying copyrightability of fabric design, the question “is not whether the design itself is useful, but whether the fabric on which the design is printed is useful.”[[131]](#footnote-131) According to the Second Circuit, “if any ‘fabric’ is useful, fabric that is made to be worn as clothing surely is.”[[132]](#footnote-132) Even though fabrics may be uncopyrightable, two-dimensional ornamental designs imprinted onto or incorporated within fabrics are generally regarded as copyrightable[[133]](#footnote-133) “writings.”[[134]](#footnote-134) For example, in *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, the Second Circuit held that ornamental designs printed on cloth for women’s dresses were copyrightable; the defendant’s designs were similar enough in terms of general color, arches, scrolls, and rows of symbols to warrant copyright infringement.[[135]](#footnote-135)

The Second Circuit, in two other cases, elaborated on its holding in *Peter Pan*.[[136]](#footnote-136) First, the court held that if basic ornamental fabric designs are in the public domain, they may still be copyrighted in plaintiff’s work to the extent that plaintiff’s expression of them is original.[[137]](#footnote-137) Second, for a valid claim of copyright infringement, an average layperson must find substantial similarity in the fabric designs of the plaintiff and the defendant.[[138]](#footnote-138) In other words, due weight must be given “to ‘the uses for which the design is intended, especially the scrutiny the [ordinary] observers will give to it as used.’”[[139]](#footnote-139) Judicial determination of substantial similarity is disfavored, because the differences that appear under courtroom’s sharp scrutiny “fade away within a few feet.”[[140]](#footnote-140)

1. Dress Design

Unlike fabric designs, dress designs—as three-dimensional sculptural works—are less likely to be held copyrightable, as they rarely pass the separability test.[[141]](#footnote-141) Various circuits have proposed different tests of separability to determine whether garment designs were copyrightable.[[142]](#footnote-142) For example, in *Galiano v. Harrah’s Operating Co., Inc.*, the Fifth Circuit employed the “likelihood of marketability”[[143]](#footnote-143) approach and held that “conceptual separability exists where there is a substantial likelihood that even if the article had no utilitarian use[,] it would still be marketable . . . simply because of its aesthetic qualities.”[[144]](#footnote-144) In other words, for a garment design to receive copyright protection, it must (1) be capable of being conceptually separated, and (2) retain its marketability, independent of its utilitarian function as a part of the garment.[[145]](#footnote-145) This approach, however, has been widely criticized for “viewing conceptual separability through the scope of commercial viability, because it relies on current market demand for the PGS design element at issue.”[[146]](#footnote-146)

In *Jovani Fashion, Ltd. v. Fiesta Fashions*, the Second Circuit employed two approaches in deciding whether three-dimensional designs on a prom dress were copyrightable: (1) the design process test and (2) the temporal placement test.[[147]](#footnote-147) Under the first approach, the court held that design elements[[148]](#footnote-148) were not copyrightable, because their removal from the underlying garment “would adversely affect [its] ability to function as a prom dress, a garment specifically meant to cover the body in an attractive way for a special occasion.”[[149]](#footnote-149) Under the second approach, the court reached the same result by reasoning that incorporating the ornamental designs onto the dress “did not invoke in the viewer a concept other than that of clothing.”[[150]](#footnote-150) The design elements were intended to “enhance the functionality of the dress as clothing for a special occasion.”[[151]](#footnote-151)

Before applying the aforementioned legal framework to the KTZ dispute, one must address two issues in the pre-*Star Athletica* era. First, even though in its policy decision the Copyright Office held that pictorial works must pass a separability test,[[152]](#footnote-152) the weight of case law suggests that such works, imprinted onto a garment, qualify as two-dimensional fabric designs.[[153]](#footnote-153) Hence, they are generally tested for originality, rather than separability.[[154]](#footnote-154) Second, it appears that before *Star Athletica*, there was a common judicial belief that enhancing the aesthetic appeal of the wearer was part of clothing’s utilitarian function.[[155]](#footnote-155)

1. Salome Awa vs. KTZ Under Pre-*Star Athletica* Legal Regime

In the case of Ava’s parka, the illustrations incorporated onto the garment fall squarely within judicial interpretation of fabric design.[[156]](#footnote-156) Since two-dimensional ornamental designs imprinted onto fabrics are regarded as copyrightable,[[157]](#footnote-157) it follows that the images of hands, circles, and a little man on Ava’s parka are also copyrightable if they are sufficiently original.

One, however, could argue that the parka’s designs are insufficiently original to warrant copyright protection. This argument would not prevail, because even if abstract forms of the designs are in the public domain, Ava’s expression of them was sufficiently original to warrant copyrightability. For example, the size of the handprints and the general angle in which they were positioned on the parka are due to Ava’s creative authorship. Additionally, even if the designs were uncopyrightable on their own, their arrangement—as a compilation—was original, and thus copyrightable.[[158]](#footnote-158) There was no one way of arranging the designs onto the parka.[[159]](#footnote-159) Thus, the fact that KTZ’s design closely resembled Ava’s arrangement suggests copying of an original compilation.

To prevail on a claim of copyright infringement—after proving originality—Ava’s family must demonstrate substantial similarity between the two works. The judicial test in this respect is not hard to meet. As long as the images appear to be substantially similar to the lay observer, the test is met. The layperson will most likely disregard subtle differences between the two garments.[[160]](#footnote-160) To that person, the two pieces are black jackets that share the same arrangement of white basic shapes. As such, an ordinary observer would consider them substantially similar. Thus, it is plausible that if the KTZ dispute arose prior to *Star Athletica*, a court would find that (1) the two-dimensional design of Ava’s parka was copyrightable subject matter, and (2) KTZ violated that copyright.

1. Salome Awa vs. KTZ Under Post-*Star Athletica* Legal Regime

Today, KTZ would be held liable for copyright infringement if it were found that (1) Ava held a valid copyright in his parka, and (2) KTZ infringed on that copyright. To prove copyright validity, one must satisfy the two-pronged test proposed in *Star Athletica*. The first prong is similar to the pre-*Star Athletica* judicial interpretation of fabric design copyrightability. This prong requires that the design of the Inuit parka incorporate features that are PGS works, which include two- or three-dimensional works of fine, graphic, and applied art.[[161]](#footnote-161) The artistic merit of such artworks, however, is irrelevant to their copyrightability.[[162]](#footnote-162) Therefore, as long as the surface designs of the parka qualify as original, two- or three-dimensional PGS works that are capable of being identified separately from the mechanical aspects of the medium on which they are presented[[163]](#footnote-163) (i.e., the parka), they satisfy the first prong.[[164]](#footnote-164) Furthermore, the separability requirement of this prong is not “onerous”; all that is required is that the decision maker is “able to look at the useful article and spot some two- or three-dimensional elements that appear to have pictorial, graphic, or sculptural qualities.”[[165]](#footnote-165)

Shaman Ava’s parka has two hand-sized white images on the chest, a picture of a little man in the center, and three circles drawn in the belly area.[[166]](#footnote-166) Each of these elements qualifies as a two-dimensional pictorial or graphic work of art. Furthermore, the designs are original, because they are expressions of a vision that Ava had.[[167]](#footnote-167) There are two alternative theories as to what that vision was;[[168]](#footnote-168) however, for purposes of copyright, what matters is that the design elements are the product of Ava’s creative authorship.[[169]](#footnote-169) Finally, it must be determined whether such two-dimensional pictorial and graphic designs are separable from the useful article (i.e., the parka). If a liberal interpretation of this test is applied, one could argue that the parka’s utilitarian function is to cover the body and keep it warm. This function does not depend on the surface designs.

Therefore, the designs are separable. However, due to the unique nature of this garment as a “protection parka,” a more conservative (and unusual) test of separability could be adopted, where one could argue that the utilitarian function of the garment was to protect Ava from danger.[[170]](#footnote-170) As his great-granddaughter explained, the parka was created to “save [Ava’s] life.”[[171]](#footnote-171) The surface designs were integral to achieving this function; hence, they are not separable. This conservative interpretation suggests that two-dimensional pictorial and graphic designs of a garment could have an acquired utilitarian function that is inseparable from their non-useful, artistic features. Hence, when such designs are incorporated onto an article of clothing, they govern what the utilitarian purpose of that article is. In other words, the designs are not copyrightable.

The conservative application of the separability test, however, is unlikely to find judicial support after *Star Athletica*. In that case, the Court rejected the argument that the lines, chevrons, and colorful shapes “served the useful . . . function of identifying the garments as ‘cheerleading uniforms’ and therefore could not be . . . separated ‘from the utilitarian function’ of the uniform.”[[172]](#footnote-172) Before cheerleading uniforms acquired a stereotypical “look,” the chevrons and shapes normally incorporated into their designs were only two-dimensional pictorial and graphic works of art that could be copyrighted when included in the design of a useful article. The majority in *Star Athletica* seemed to prefer that such surface designs with secondary meanings remain copyrightable as non-useful pictorial and graphic works of art. Therefore, by the same line of reasoning, it seems unlikely that a court today would hold the drawings on Ava’s parka inseparable from the useful function of the garment.

The second prong of *Star Athletica*’s test requires that the surface designs be capable of existing independently from the “utilitarian function” of the garment.[[173]](#footnote-173) To satisfy this prong, the designs should be capable of being conceptually removed from the parka and illustrated on another medium—for example, on a painter’s canvas—without replicating the original article.[[174]](#footnote-174) After this imaginative extraction, the removed designs should qualify as “two-dimensional . . . works of . . . art.”[[175]](#footnote-175) This rule, however, does not limit copyright protection to those designs that are “solely artistic” and capable of existing alone as copyrightable works.[[176]](#footnote-176) In other words, if the designs “advance . . . the utility of the article,” they are not uncopyrightable per se.[[177]](#footnote-177) Additionally, unlike the pre-*Star Athletica* legal regime,[[178]](#footnote-178) it is no longer required that the underlying article remain equally useful after the artistic features are removed.[[179]](#footnote-179) Therefore, as long as the parka retains *some* aspects of its useful function after the designs are extracted, and those features qualify as non-useful “two-dimensional . . . works of . . . art,” the test is met.[[180]](#footnote-180)

In the present case, the picture of a little man in the center, the two hand-sized images on both sides, and the three circles drawn underneath them can be conceptually extracted from the parka and incorporated onto another medium, such as another article of clothing or a painter’s canvas. After separation, the images will qualify as copyrightable two-dimensional pictorial works of art, as long as they are found to be non-useful.[[181]](#footnote-181) One could argue that these artistic features carry some utilitarian functions and are thus uncopyrightable. For example, as Salome asserted, they were primarily intended to protect and save the wearer from danger.[[182]](#footnote-182) As such, one could claim that if the images are removed from the parka, they will take away its utilitarian function.

However, a similar argument was raised in *Star Athletica*, and the Court dismissed it.[[183]](#footnote-183) The argument was that the designs on cheerleading uniforms were uncopyrightable, because they had the intrinsic function of identifying the wearer as a cheerleader.[[184]](#footnote-184) There, the Court held that the separability inquiry must be limited to the separated features, not the utility of the underlying useful article.[[185]](#footnote-185) Hence, it was unnecessary to compare the relative utility of a plain, white cheerleading uniform against one with chevrons, shapes, and lines on its surface. Similarly, here, the inquiry should be limited to whether the removed surface designs could qualify as two-dimensional works of art. With respect to satisfying the conceptual separability test, the parka will retain *some* degree of its utility after the surface designs are extracted. This article of clothing was not solely created to save the wearer from danger; it also served the purpose of keeping him warm and covering his body. These are utilitarian functions that will remain intact after the surface images are removed.

Lastly, the separated features must not “replicate” the original article.[[186]](#footnote-186) This requirement appears to be easily satisfied here, as the images on Ava’s parka are not depicted in a fashion that suggests their expression was confined to and dictated by the shape of the garment. The features are simply basic forms depicted on the front center of the parka. This is different than *Star Athletica*, where the lines and chevrons appeared to be closely following the shape of the garment. However, the majority in that case still held that the design features—when conceptually separated—did not replicate the original article.[[187]](#footnote-187) Since *Star Athletica* was a closer case than the one at hand, it is plausible that a court would not conclude that the design features on Ava’s parka replicated the garment when conceptually removed from it.

In conclusion, if this controversy arose today, a court would hold that Ava has a valid copyright in the two-dimensional designs of his parka, just as it would have held before *Star Athletica* was decided. Thus, it appears that the Supreme Court’s decision did not significantly change the copyright regime to favor plaintiffs in cases of two-dimensional fabric design infringement.

1. *Star Athletica*’s Influence in Cases of Three-Dimensional Garment Design

Before the Supreme Court’s decision in *Star Athletica*, garment designs were rarely held copyrightable.[[188]](#footnote-188) Now, however, under the new conceptual separability test, a different outcome may emerge. Below, I will discuss another instance of KTZ being accused of copying a cultural garment design—this time, a three-dimensional dress design.

KTZ’s Fall/Winter 2015 line at New York Fashion Week included a piece that “copied”[[189]](#footnote-189) elements of a dress from Bethany Yellowtail’s 2014 Crow Pop Collection. Yellowtail is a Native-American clothing designer known for incorporating features of her indigenous heritage[[190]](#footnote-190) into her works. One example is the triangular “hourglass motif” incorporated onto the upper-middle and lower-middle parts of her dress.[[191]](#footnote-191) Interestingly, the KTZ dress has a similar hourglass figure in the lower-middle part of it.[[192]](#footnote-192) The dress also shares two large yellow rectangles on both sides of the hourglass figure, which have two additional rectangles within them; the middle rectangle is the darkest of the three. Between the hourglass figure and the rectangles, on each side, are triangles. Also, extending from each rectangle—towards the top and bottom—is a long, thin rectangle that is compartmentalized with dark bands. The color of these bands is the same as the middle rectangle, discussed *supra*.

In addition, both dresses have a similar collar, length, and shape. However, there are differences between the two. For example, KTZ’s dress does not have an hourglass figure in the upper-top area. The middle section of the KTZ dress has a large pentagon, encompassing two yellow triangles. On the other hand, Yellowtail’s dress has mirror-image thin, horizontal triangles that meet in the middle. Additionally, the color white is predominant in KTZ’s dress but absent in Yellowtail’s. Another distinguishable difference is that Yellowtail’s designs were created from Crow beadwork, while KTZ’s appeared as fuzzy embroidery on top of a white, plain garment.

1. Bethany Yellowtail vs. KTZ Under Pre-*Star Athletica* Legal Regime

Prior to *Star Athletica*,for cases concerning three-dimensional garment designs, the separability tests employed by courts varied from circuit to circuit. The courts, in these pre-*Star Athletica* three-dimensional garment design cases, “twisted themselves into knots trying to create a test to effectively ascertain whether the artistic aspects of a useful article can be identified separately from and exist independently of the article’s utilitarian function.”[[193]](#footnote-193) Over the decades, the courts developed eight notable, pre-*Star Athletica*, tests to determine separability: (1) the Copyright Office approach; (2) the Objectively Necessary approach; (3) the Stand-Alone approach; (4) the Ordinary Observer approach; (5) the Design-Process approach; (6) the Primary-Secondary approach; (7) the Likelihood-of-Marketability approach; and (8) the Subjective-Objective approach.[[194]](#footnote-194)

Essential to the first four tests was the requirement that, following the conceptual removal of the artistic elements, the utilitarian features of the underlying article remained intact.[[195]](#footnote-195) Alternatively, however, examined in the second four tests was namely whether the object—as a whole—was artistic, rather than functional.[[196]](#footnote-196) In other words, there existed two general competing tests. The first test was whether the artistic work could be conceptually separated from the utilitarian article, where the former remained as an artwork, and the latter remained as a useful article. The second test was whether the article, as a whole, had design aspects that were not dictated by function.[[197]](#footnote-197) For purposes of my analysis, I will use one test from each of these general categories, and examine whether—in the pre-*Star Athletica* era—Yellowtail’s designs would be entitled to copyright protection.

To meet the Copyright Office approach, the beadwork designs on Yellowtail’s dress must be either physically separable from the dress “without altering [its] useful aspects” or “capable of being visualized” separately from the garment.[[198]](#footnote-198) The latter requirement would be satisfied only if the beadwork and the plain dress could exist side by side and be perceived as separate works—one artistic and one useful.[[199]](#footnote-199) In order to apply this test, one must first determine what the utilitarian function of Yellowtail’s dress is. In *Jovani*, the Second Circuit noted that a prom dress’s utilitarian function was to serve as “a garment specifically meant to cover the body in an attractive way for a special occasion.”[[200]](#footnote-200)

The Second Circuit further added that three-dimensional design elements incorporated onto the prom dress enhanced the functionality of the garment and improved the aesthetic appeal of the wearer.[[201]](#footnote-201) Before *Star Athletica*, this was a common judicial belief among the circuits, and only in rare cases would they hold clothing design copyrightable. For example, in *Poe v. Missing Persons*, the court held a swimsuit was a “soft sculpture,” emphasizing the fact that it was only worn once and that it appeared in an art show.[[202]](#footnote-202) In other words, had the swimsuit been made with the intention to be worn at the beach, or if it had been mass-produced, the court would probably conclude that it was an uncopyrightable useful article.[[203]](#footnote-203)

The beadworks on Yellowtail’s dress depicted a unique arrangement of colorful geometric shapes and gave the dress a fanciful, aesthetically pleasing appearance. The dress was in fact advertised as an “‘Apsaalooke Nights’ holiday dress.”[[204]](#footnote-204) Furthermore, the placement of the shapes was directly related to the physique of the human body and created an opportunity for optical illusion.[[205]](#footnote-205) If the beadworks were physically or conceptually separated from the dress, they could still qualify as an artwork; however, the underlying plain-colored garment would no longer serve the utilitarian function of covering the body in an attractive way for a special occasion (e.g., a holiday event). As such, under the first category of tests, Yellowtail’s dress would probably not be held copyrightable.

Under the second category of tests, Yellowtail’s dress—as a whole—must have design aspects that are not dictated by function. For example, under the Design-Process approach, the beadworks would be conceptually separable, and entitled to copyright protection, if they could “be identified as reflecting [Yellowtail’s] artistic judgment exercised independently of functional influence.”[[206]](#footnote-206) Yellowtail’s dress could more easily meet this test, because the specific arrangement of the beadworks was not necessary for the utilitarian function of the article even if a court were to hold that the function was to cover the body in an attractive way. While Yellowtail’s garment design generally followed the rules of optical illusion in clothing,[[207]](#footnote-207) there was no one way of arranging the beadworks to reach the same result. For example, the triangular hourglass figure could be placed in the belly area, instead of the upper-middle/lower-middle area; this arrangement would equally suggest that the wearer has an hour-glass physique.

On the other hand, Yellowtail’s use of the color “turquoise blue” in the middle section further proves that her choice was not governed by function. It is generally known that contrasting darker colors with lighter ones on a garment exploits the observer’s perception, causing her to believe that the lighter areas are bigger and the darker ones are smaller.[[208]](#footnote-208) As such, many fashion designers incorporate brighter colors in the bust portion of dresses and darker ones in the middle area.[[209]](#footnote-209) Here, however, Yellowtail has done the opposite. Considering that this has been a consistent trend in her previous designs, one could conclude that her choice of color was purely an aesthetic one. This case is distinguishable from *Jovani*, where the Second Circuit held that beadwork, among other things, on a prom dress was uncopyrightable, because “each of the individual elements [was] plainly fashioned to fit the specific needs of a prom dress . . . . The cloth swatch containing the . . . beads [was only] formed to compose the bust portion of the dress.”[[210]](#footnote-210) In sum, under the second category of tests, Yellowtail’s dress would probably be held copyrightable.[[211]](#footnote-211)

1. Bethany Yellowtail vs. KTZ Under Post-Star Athletica Legal Regime

Under *Star Athletica*’s two-pronged test, one must first determine if Yellowtail’s dress design incorporated a PGS work. This prong is easily met, since the beadworks, if creatively arranged by the designer, would qualify as three-dimensional sculptural works of art. Second, the beadworks must be capable of being conceptually removed from the dress and exist independently from its utilitarian function. It is important to note that the test no longer concerns whether the underlying dress retains its utilitarian function. The focus is now whether upon separation the design qualifies as a three-dimensional work of art. Yellowtail’s dress would meet this prong as well. The beadworks, while illustrating a creative combination of colorful geometric shapes, could be conceptually separated from the underlying dress and depicted onto another medium without replicating the original dress. In fact, Yellowtail has applied the designs to other types of clothing without replicating the dress in question.

In conclusion, if this controversy arose today, as opposed to before *Star Athletica*, a court would hold that Yellowtail had a valid copyright in the three-dimensional designs of her dress. In other words, the Supreme Court’s decision in *Star Athletica* has resulted in a plaintiff-friendly change in the copyright regime that benefits three-dimensional garment designs. This change, however, only strengthens claims of copyright validity, but not infringement. Thus, even though it is now easier to protect three-dimensional indigenous designs as a matter of validity, many disputes concerning three-dimensional garment designs may still lose on infringement grounds. For example, the plaintiff in the Yellowtail dispute would probably lose, as KTZ would have a strong claim that KTZ has merely copied an idea (an arrangement of colorful geometric shapes), rather than an expression.

The case law on the idea-expression dichotomy suggests that, where a copyrighted work incorporates elements that are not wholly original, infringement may be shown only by a substantial similarity to the element properly copyrightable.[[212]](#footnote-212) In *Boisson v. Banian, Ltd.*—a case on the copyright infringement of alphabet quilts—the court focused on the arrangement and shapes of the letters, the colors chosen to represent the letters, and the quilting pattern.[[213]](#footnote-213)

Furthermore, the court articulated that under the “more discerning” ordinary observer test, one must look closely, but not too closely, when dissecting the works into their basic copyrightable elements; put differently, when applying the “more discerning” test, the total concept and feel of the works must be kept in mind.[[214]](#footnote-214) Applying this framework to the Yellowtail controversy, one could argue that the similarity in the arrangement of the shapes only stands out when one is set out to detect them. Furthermore, the designers’ choice of colors and textile is different. Simply put, the two garments have different concepts and feels and appear to be sharing only an idea: a colorful combination of geometric shapes with a triangular hourglass figure in the front-middle area. Thus, Yellowtail would likely lose as a matter of infringement.

Conclusion

Traditionally, it has been difficult to find an adequate legal avenue to protect cultural garment designs. Copyright, as a possible approach, has its flaws. For example, issues of authorship, originality, and duration threaten many claims of the copyright validity of folklore. However, per the Supreme Court’s recent decision in *Star Athletica*, three-dimensional garment designs can now be copyrighted more easily. Unfortunately, though, while *Star Athletica* has helped create a more plaintiff-friendly legal regime for indigenous designers, proving infringement is still difficult in many instances. As such, many cases of cultural appropriation may still lose as a matter of infringement.

Sahara F. Farzaneh[[215]](#footnote-215)\*

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18. *Id.* [↑](#footnote-ref-18)
19. Star Athletica, L.L.C. v. Varsity Brands, Inc., 137 S. Ct. 1002 (2017). [↑](#footnote-ref-19)
20. Larry C. Russ & Nathan D. Meyer, *Fashion Forward: The Star Athletica v. Varsity Brands Decision Overturned Copyright Office Practices Going Back Half a Century*, 40-SEP L.A. Law. 20 (2017). [↑](#footnote-ref-20)
21. Natasha Reed, *From Runway to Replica: Intellectual Property Strategies for Protecting Fashion Designs*, Foley Hoag LLP: Trademark & Copyright L. Blog (Feb. 8, 2016), *http*://www.trademarkandcopyrightlawblog.com/2016/02/from-runway-to-replica-intellectual-property-strategies-for-protecting-fashion-designs. [↑](#footnote-ref-21)
22. Tyler McCall, *Copyright, Trademark, Patent: Your Go-To Primer for Fashion Intellectual Property Law*, Fashionista (Dec. 16, 2016), https://fashionista.com/2016/12/fashion-law-patent-copyright-trademark. [↑](#footnote-ref-22)
23. *Id.* [↑](#footnote-ref-23)
24. *See* Reed, *supra* note 20. [↑](#footnote-ref-24)
25. *See id.*  [↑](#footnote-ref-25)
26. *See, e.g.*,Registration No. 3,529,814 (“The mark consists of a tan background, light tan vertical and horizontal lines, black vertical and horizontal lines, white squares, and red vertical and horizontal lines, forming a plaid pattern. The mark also consists of a repeating check design applied in whole or in part on or in connection with the goods or services. The mark is not limited to position or placement.”). [↑](#footnote-ref-26)
27. *See, e.g.*,Registration No. 3,561,466 (“The mark consists of a stitching design consisting of the one-half inch stitch pattern used to outline the pocket and the chevron flap and to depict the “U” shape as well as the zigzagged stitching on the chevron flap.”). [↑](#footnote-ref-27)
28. *See, e.g.*,Registration No. 3,361,597 (“The mark consists of a red lacquered outsole on footwear that contrasts with the color of the adjoining (“upper”) portion of the shoe. The dotted lines are not part of the mark but are intended only to show placement of the mark.”). [↑](#footnote-ref-28)
29. *See, e.g.*,Registration No. 3,936,105 (“The mark consists of the configuration of a handbag, having rectangular sides a rectangular bottom, and a dimpled triangular profile. The top of the bag consists of a rectangular flap having three protruding lobes, between which are two keyhole-shaped openings that surround the base of the handles. Over the flap is a horizontal rectangular strap having an opening to receive a padlock eye. A lock in the shape of a padlock forms the clasp for the bag at the center of the strap. The broken lines in the drawing represent the location of the handles and are not part of the mark.”). [↑](#footnote-ref-29)
30. The mark consists of the design of the two stripes on the midsole of the shoe, the design of the toe cap, the design of the multi-layered toe bumper featuring diamonds and line patterns, and the relative position of these elements to each other. The broken lines show the position of the mark and are not claimed as part of the mark, Registration No. 4,398,753. [↑](#footnote-ref-30)
31. 15 U.S.C. § 1125(a) (2012). [↑](#footnote-ref-31)
32. Meese, Inc. v. Int’l Leisure Prods., Inc., No. 03 Civ. 8684, 2003 WL 22902594 at \*4­–5 (S.D.N.Y. Dec. 9, 2003). [↑](#footnote-ref-32)
33. Wal-Mart Stores, Inc. v. Samara Brothers, Inc., 120 S. Ct. 1339 (2000). [↑](#footnote-ref-33)
34. *Id.* [↑](#footnote-ref-34)
35. *See* Reed, *supra* note 20. [↑](#footnote-ref-35)
36. *Id.* [↑](#footnote-ref-36)
37. Russ & Meyer, *supra* note 19, at 22. [↑](#footnote-ref-37)
38. *Id.* [↑](#footnote-ref-38)
39. Innovative Design Protection and Piracy Prevention Act, H.R. 2511, 112th Cong. (2011). [↑](#footnote-ref-39)
40. *Id.* at § 2(e). [↑](#footnote-ref-40)
41. *Id.* [↑](#footnote-ref-41)
42. Meaghan M. Ehrhard, Note, *Protecting the Seasonal Arts: Fashion Design, Copyright Law, And the Viability of The Innovative Design Protection & Piracy Prevention Act*, 45 Conn. L. Rev. 285, 288 (2012). [↑](#footnote-ref-42)
43. Russ & Meyer, *supra* note 19, at 22. [↑](#footnote-ref-43)
44. *Id.* [↑](#footnote-ref-44)
45. U.S. Copyright Office, Compendium of U.S. Copyright Office Practices, §311.1 (3d ed. 2017) (“[C]lothing . . . [does] not constitute copyrightable subject matter under Section 102(a) of the Copyright Act.”). [↑](#footnote-ref-45)
46. Mazer v. Stein, 74 S. Ct. 460 (1954). [↑](#footnote-ref-46)
47. Russ & Meyer, *supra* note 19, at 22. [↑](#footnote-ref-47)
48. *See* U.S. Copyright Office, Compendium of U.S. Copyright Office Practices, §924.2 (2d ed. 2016). The Compendium, a guide to the Copyright Office’s practices, lays out its standards for registration, among other things. [↑](#footnote-ref-48)
49. Russ & Meyer, *supra* note 19, at 22. [↑](#footnote-ref-49)
50. Kieselstein-Cord v. Accessories by Pearl, Inc., 632 F.2d 989, 993 (2d Cir. 1980) (holding that decorative belt buckles that were used principally for their aesthetic purposes could be copyrighted). [↑](#footnote-ref-50)
51. Carol Barnhart Inc. v. Econ. Cover Corp., 773 F.2d 411, 418 (2d Cir. 1985). [↑](#footnote-ref-51)
52. *Id.* at 419. [↑](#footnote-ref-52)
53. *Id.* [↑](#footnote-ref-53)
54. *Id.* at 418. [↑](#footnote-ref-54)
55. *Id.* at 422 (Newman, J., dissenting) (“The test turns on what may reasonably be understood to be occurring in the mind of the beholder or, as some might say, in the “mind’s eye” of the beholder . . . [who is an] ordinary, reasonable observer.”). [↑](#footnote-ref-55)
56. Brandir Int’l, Inc. v. Cascade Pac. Lumber Co., 834 F.2d 1142, 1145 (2d Cir. 1988) (holding that bicycle rack was not copyrightable, because its form was influenced significantly by utilitarian concerns; hence, the aesthetic elements were not conceptually separable from the utilitarian ones) (emphasis added). [↑](#footnote-ref-56)
57. Star Athletica, L.L.C. v. Varsity Brands, Inc., 137 S. Ct. 1002, 1007 (2017). [↑](#footnote-ref-57)
58. *Id.* at 1007. [↑](#footnote-ref-58)
59. *Id.* at 1004. [↑](#footnote-ref-59)
60. *Id.*  [↑](#footnote-ref-60)
61. *Id.* at 1008. [↑](#footnote-ref-61)
62. Varsity Brands, Inc. v. Star Athletica, LLC, 799 F.3d 468 (6th Cir. 2015). [↑](#footnote-ref-62)
63. *Id.* at 488–89. [↑](#footnote-ref-63)
64. *Id.* at 490–92. [↑](#footnote-ref-64)
65. *Star Athletica*, 137 S. Ct. at 1008; *Varsity Brands*, 799 F.3d at 491, 492. [↑](#footnote-ref-65)
66. *Varsity Brands*, 799 F.3d at 496. [↑](#footnote-ref-66)
67. *Star Athletica*, 137 S. Ct. at 1007. [↑](#footnote-ref-67)
68. *Id.* at 1010. [↑](#footnote-ref-68)
69. *Id.* at 1014. [↑](#footnote-ref-69)
70. *Id.* [↑](#footnote-ref-70)
71. *Id.* at 1012. [↑](#footnote-ref-71)
72. *Id.* at 1013. [↑](#footnote-ref-72)
73. *Id.* at 1014. [↑](#footnote-ref-73)
74. *Id.* at 1013. [↑](#footnote-ref-74)
75. *Id.* at 1018 (Ginsburg, J., concurring). [↑](#footnote-ref-75)
76. *Id.* [↑](#footnote-ref-76)
77. *Id.* [↑](#footnote-ref-77)
78. *Id.* at 1030 (Breyer, J., dissenting). [↑](#footnote-ref-78)
79. *Id.* at 1035–36. [↑](#footnote-ref-79)
80. *Id.* at 1031. [↑](#footnote-ref-80)
81. Russ & Meyer, *supra* note , at 23. [↑](#footnote-ref-81)
82. *Id.* [↑](#footnote-ref-82)
83. *Id.* [↑](#footnote-ref-83)
84. U.S. Copyright Office, Compendium of U.S. Copyright Office Practices § 924 (3d ed. 2017). [↑](#footnote-ref-84)
85. *Circular 40:* *Copyright Registration for Pictorial, Graphic, and Sculptural Works*,U.S. Copyright Off., https://www.copyright.gov/circs/circ40.pdf (last updated Sept. 2015) (“Circulars are published by the Copyright Office to provide up-to-date and authoritative information . . . Circulars cover the basic and fundamental concepts of copyright law . . . and registration issues for specific categories of works. For full details regarding the Office’s policies and procedures, [one must] refer to the Compendium of U.S. Copyright Office Practices.”). *Id.* [↑](#footnote-ref-85)
86. *Id.* at 2. [↑](#footnote-ref-86)
87. *Id.* [↑](#footnote-ref-87)
88. *Id.* at 2–3. [↑](#footnote-ref-88)
89. Russ & Meyer, *supra* note 19, at 24. [↑](#footnote-ref-89)
90. Megan M. Carpenter, *Intellectual Property Law and Indigenous Peoples: Adapting Copyright Law to The Needs of a Global Community*, 7 Yale Hum. Rts. & Dev. L.J. 51, 58 (2004). [↑](#footnote-ref-90)
91. *See id.* at 62. [↑](#footnote-ref-91)
92. Comm. on Hum. Rts., Rep. of the Sub-Comm. on Prevention of Discrimination and Protection of Minorities on its Forty-FifthSession, U.N. Doc. E/CN.4/Sub.2/1993/45, at Agenda Item 14 ¶ 26 (1993). [↑](#footnote-ref-92)
93. *See generally* 17 U.S.C. § 201(d) (1978). [↑](#footnote-ref-93)
94. Carpenter, *supra* note 89, at 68, 71; *see* 17 U.S.C. § 101 (2010) (“[A] work prepared by an employee within the scope of his or her employment” is a “work made for hire.”); 17 U.S.C.A. § 201(b) (1978). [↑](#footnote-ref-94)
95. *See generally* 17 U.S.C. § 101 (2010). [↑](#footnote-ref-95)
96. *See* Carpenter, *supra* note 89, at 68–69. [↑](#footnote-ref-96)
97. U.S. v. Corrow, 119 F.3d 796, 800 (10th Cir. 1997). [↑](#footnote-ref-97)
98. *Id.*; *see also* 25 U.S.C. § 3001 (1992). [↑](#footnote-ref-98)
99. *Corrow*, 119 F.3d at 799. When searched by the F.B.I, Mr. Corrow was carrying Navajo religious objects, small bundles, herbs, mini prayer sticks, Yei B’Chei dance aprons headdresses, and a set of twenty-two Yei B’Chei, *id.* “Yei B’Chei or Yei B’Chei *jish* are ceremonial adornments . . . whose English label, ‘masks,’ fails to connote the Navajo perception these cultural items embody living gods.” *Id.* at 798. [↑](#footnote-ref-99)
100. *Id.* at 805. [↑](#footnote-ref-100)
101. Carpenter, *supra* note 89, at 69. [↑](#footnote-ref-101)
102. 17 U.S.C. § 102(a) (1990). [↑](#footnote-ref-102)
103. Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc., 111 S. Ct. 1282, 1287 (1991). [↑](#footnote-ref-103)
104. *See* Christine H. Farley, *Protecting Folklore of Indigenous People: Is Intellectual Property The Answer?*, 30 Conn. L. Rev. 1, 21 (1997). [↑](#footnote-ref-104)
105. *Id.* at 22. [↑](#footnote-ref-105)
106. *See* Kuddle Toy, Inc. v. Pussycat-Toy Co., 183 U.S.P.Q. (BNA) 642 (E.D.N.Y. 1974). (holding teddy bear design was drawn from public domain, and not plaintiff’s own authorship; hence, could not enjoin copying). [↑](#footnote-ref-106)
107. *See, e.g.*, Eng’g Dynamics, Inc. v. Structural Software, Inc., 26 F.3d 1335 (5th Cir. 1994). [↑](#footnote-ref-107)
108. *Khātam-kari: Artistic Heritage*, Iran Rev. (May 26, 2009), http://www.iranreview.org/content/Documents/Khatamkari\_Artistic\_Heritage.htm. [↑](#footnote-ref-108)
109. *Id.*  [↑](#footnote-ref-109)
110. In a work of average quality, there are more than 400 pieces per square inch. *Id.* [↑](#footnote-ref-110)
111. *Id.* [↑](#footnote-ref-111)
112. U.S. Const. art. I, § 8, cl. 8. [↑](#footnote-ref-112)
113. Thomas Babington, Macaulay’s Speeches and Poems 285 (A.C. Armstrong & Son ed., 1874) (“Lord Macaulay gave his speech pursuant to a legislative proposal to extend the copyright term to the life of the author plus sixty years.”); *see* Marshall A. Leaffer, Understanding Copyright Law 231 (6th ed. 2014). [↑](#footnote-ref-113)
114. 17 U.S.C. § 302(a) (1998); *see also* Understanding Copyright Law 232(“The 1976 Act has retained the bifurcated two-term system of copyright for works published before January 1, 1978. For works published before January 1, 1964, the author was required to file for renewal in the Copyright Office during the 28th year of the first copyright term. For works published between January 1, 1964, and December 31, 1977, renewal is automatic, and a copyright owner is no longer required to file a renewal registration in the Copyright Office.”). [↑](#footnote-ref-114)
115. U.S. Const. art. I, § 8, cl. 8. [↑](#footnote-ref-115)
116. Doris E. Long, *The Impact of Foreign Investment on Indigenous Culture: An Intellectual Property Perspective*, 23 N.C. J. Int’l L. & Com. Reg. 229, 270 (1998). [↑](#footnote-ref-116)
117. 17 U.S.C. § 101 (2010). [↑](#footnote-ref-117)
118. *See* Lee v. A.R.T Co., 125 F.3d 580 (7th Cir. 1997) (holding defendant’s “mundane” epoxy mounting of plaintiff’s note cards onto decorative tiles did not create derivative works); *see also* Norma Ribbon & Trimming, Inc. v. Little, 51 F.3d 45 (5th Cir. 1995) (finding a design of artificial flowers did not contain sufficient derivative authorship above preexisting public domain versions). [↑](#footnote-ref-118)
119. Carpenter, *supra* note 89, at 71. [↑](#footnote-ref-119)
120. *See* *Circular 14:* *Copyright in Derivative Works and Compilations*,U.S. Copyright Off., https://www.copyright.gov/circs/circ14.pdf (last updated Oct. 2013). [↑](#footnote-ref-120)
121. Since this controversy involved a two-dimensional pictorial/graphic work, a copyright analysis of it will shed some light on cases of similar nature, such as Tory Burch (Resort 2018 Romanian Coat) and Isable Marant (Etoile Spring-Summer 2015 Collection). [↑](#footnote-ref-121)
122. This controversy involves the copying of three-dimensional garment designs. A copyright analysis of it—using pre- and post-*Star Athletica* legal frameworks—will help our understanding of whether that case created a plaintiff-friendly copyright regime for cases concerning three-dimensional dress designs. [↑](#footnote-ref-122)
123. *See U.K. Fashion House Pulls Copied Inuit Design, Here’s Their Apology*, *supra* note . [↑](#footnote-ref-123)
124. *See Romanians Angered by Designer Tory Burch’s ‘Faux Pas’*, *supra* note ; *see also* *Inspiration or Plagiarism? Mexicans Seek Reparations for French Designer’s Look-alike Blouse*, *supra* note . [↑](#footnote-ref-124)
125. Registrability of Costume Designs, Copyright Office Policy Decision, 56 Fed. Reg. 56530-02, 56531 (Nov. 5, 1991). [↑](#footnote-ref-125)
126. *Id.* (emphasis added). [↑](#footnote-ref-126)
127. 1 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 2A.08[H][1] (2016). [↑](#footnote-ref-127)
128. Giovanna Marchese, *A Tri-Partite Classification Scheme to Clarify Conceptual Separability in the Context of Clothing Design*, 38 Cardozo L. Rev. 375, 394 (2016). [↑](#footnote-ref-128)
129. *See, e.g.*, Segrets, Inc. v. Gillman Knitwear Co*.*, 207 F.3d 56, 60 (1st Cir. 2000) (holding that the design of sweaters—the geometric patterns and the stitching—classified as fabric design, and was entitled to copyright protection); *see also* Knitwaves v. Lollytogs, Ltd., 71 F.3d 996, 1002 (2d Cir. 1995) (holding that artwork on plaintiff’s sweaters was copyrightable); Peel & Co. v. Rug Market, 238 F.3d 391, 394 (5th Cir. 2001) (holding that artistic designs woven or imprinted onto rugs were copyrightable); Langman Fabrics, Inc. v. Graff Californiawear, Inc., 160 F.3d 106, 114 (2d Cir. 1998) (“[T]he question is not whether the design itself is useful, but whether the fabric on which the design is printed is useful.”). [↑](#footnote-ref-129)
130. *See* Nimmer, *supra* note 126, § 2.08[B][3], at 2-101. Garment designs are not uncopyrightable *per se*; they are rather difficult to pass the “separability” test, *id.* *See also* Galiano v. Harrah’s Operating Co., Inc., 416 F.3d 411 (5th Cir. 2005). [↑](#footnote-ref-130)
131. Langman Fabrics, Inc. v. Graff Californiawear, Inc*.*, 160 F.3d 106, 114 (2d Cir. 1998). [↑](#footnote-ref-131)
132. *Id.* [↑](#footnote-ref-132)
133. *See* William F. Party, Textiles, Rugs, Fabric Designs & Clothing, 2 Party on Copyright §3:151 (2017) (“The separability test is not used where the pictorial or graphic elements are merely printed on the fabric. In such cases, the pictorial or graphic elements are not the “design of” a useful article, but are instead applied to a useful article, and thus the separability test is not used, but only the test for originality.”). [↑](#footnote-ref-133)
134. *See* Marchese, *supra* note 127, at 395; *see also* Eve of Milady v. Impression Bridal, Inc., 957 F. Supp. 484, 488 (S.D.N.Y. 1997) (lace designs were protectable); Knitwaves, Inc. v. Lollytogs, Ltd., 71 F.3d 996, 1002 (2d Cir. 1995) (“[F]abric designs, such as the artwork on [plaintiff’s] sweaters, are considered ‘writings’ for purposes of copyright law and are accordingly protectable.”); Folio Impressions, Inc. v. Byer Cal*.*, 937 F.2d 759, 763 (2d Cir. 1991) (“Among those forms of ‘writings’ now recognized as entitled to copyright protection are fabric designs . . . .”). [↑](#footnote-ref-134)
135. Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487 (2d Cir. 1960). [↑](#footnote-ref-135)
136. *See* Soptra Fabrics Corp. v. Stafford Knitting Mills, Inc., 490 F.2d 1092, 1093 (2d Cir. 1974) (holding that “[f]abric design copyright containing strip of crescents scalloping or ribbons between strip and rows of semicircles was infringed by design which was substantially similar . . .”); *see also* Millworth Converting Corp. v. Slifka, 276 F.2d 443 (2d Cir. 1960) (holding that “‘Schiffi’ embroidered design for a dress, which refers to a machine making embroidery of quality, was a “work of art” within copyright statute” and that “[a]n embroidered design which was in the public domain could be . . . printed . . . on dress fabric and the resulting flat printed design could be copyrighted . . . [if it] contains some substantial, not merely trivial, originality”). [↑](#footnote-ref-136)
137. *Millworth*, 276 F.2d, at 445 (stating that if the defendant creates a two-dimensional copy of a three-dimensional design incorporated onto the plaintiff’s work, he has not infringed the plaintiff’s copyright). [↑](#footnote-ref-137)
138. *Soptra* *Fabrics*, 490 F.2d at 1093. [↑](#footnote-ref-138)
139. *Id.* [↑](#footnote-ref-139)
140. *Id.* [↑](#footnote-ref-140)
141. *See, e.g.*, Fashion Originators Guild of Am. v. FTC, 114 F.2d 80 (2d Cir. 1940) (“To embody a design in a dress or fabric, and offer the dress for general sale was such a ‘publication’; nothing more could be done to bring it into the public demesne.”). *But see* Animal Fair, Inc. v. Amfesco Indus., Inc., 620 F. Supp. 175 (D.C. Minn. 1985); Chosun Int’l, Inc. v. Chrisha Creations, Ltd., 413 F.3d 324 (2d Cir. 2005). [↑](#footnote-ref-141)
142. *See* Brandir Intern., Inc. v. Cascade Pac. Lumber Co., 834 F.2d 1142, 1145 (2d Cir. 1988)(outlining the design process test);Carol Barnhart Inc. v. Econ. Cover Corp*.*, 773 F.2d 411, 418 (2d Cir. 1985) (Newman, J., dissenting) (explaining the temporal displacement test); Kieselstein-Cord v. Accessories by Pearl, Inc., 632 F.2d 989, 993 (2d Cir. 1980) (explaining the primary/subsidiary test). [↑](#footnote-ref-142)
143. Nimmer, *supra* note 126, § 2A.08[B][3]. [↑](#footnote-ref-143)
144. Galiano v. Harrah’s Operating Co., 416 F.3d 411 (5th Cir. 2005). [↑](#footnote-ref-144)
145. *Id.* [↑](#footnote-ref-145)
146. Marchese, *supra* note 127, at 398; *see also* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251–52 (1903) (“It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme, some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and educational value—and the taste of any public is not to be treated with contempt. It is an ultimate fact for the moment, whatever may be our hopes for a change.”). [↑](#footnote-ref-146)
147. Jovani Fashion, Ltd. v. Fiesta Fashions, 500 Fed. App’x 42 (2d Cir. 2012). [↑](#footnote-ref-147)
148. *E.g.*, decorative sequins, crystals on the dress bodice, horizontal satin around the dress waist, and layers of tulle on the skirt. [↑](#footnote-ref-148)
149. *Jovani Fashion*, 500 Fed. App’x at 1. [↑](#footnote-ref-149)
150. *Id.* at 2. [↑](#footnote-ref-150)
151. *Id.* (The primary purpose of the garment designs was functional; thus, “the aesthetic merged with the functional.”). [↑](#footnote-ref-151)
152. *See generally* Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487 (2d Cir. 1960) (Registrability of Costume Designs). [↑](#footnote-ref-152)
153. *See,* *e.g.*, *id.* [↑](#footnote-ref-153)
154. *See* Party, *supra* note 132. [↑](#footnote-ref-154)
155. *See* Christopher Buccafusco & Jeanne C. Fromer, *Fashion’s Function in Intellectual Property Law*, 93 Notre Dame L. Rev. 51 (2017); Lim v. Green, 243 F.3d 548 (9th Cir. 2000) (holding that mass-production, or an intent to mass-produce, shows that a clothing article is intended to be a useful article, rather than a work of art). *But see* Poe v. Missing Persons, 745 F.2d 1238, 1242–43 (9th Cir. 1984) (holding a swimsuit made of plastic and filled with crushed rock qualified as a “soft sculpture”—it was a non-useful work of art, and entitled to copyright protection. The Court found it important that the swimsuit had appeared in an art show, and its *only* evidence of useful function was that it was worn *once* in a photograph) (emphasis added). [↑](#footnote-ref-155)
156. *See, e.g.*, Central Mills, Inc. v. Iced Apparel, Inc., No. 97 Civ. 4492 JSM, 1998 WL 41584, at \*3 (S.D.N.Y. Jan. 30, 1998) (holding image screen printed on a t-shirt was copyrightable). [↑](#footnote-ref-156)
157. *See, e.g.*, *Peter Pan Fabrics*, 274 F.2d. 487. [↑](#footnote-ref-157)
158. *See generally* Feist Publications, Inc. v. Rural Telephone Service Co*.*, 499 U.S. 340 (1991) (“Factual compilations may possess required originality to qualify for copyright purposes; choices as to selection and arrangement, if independently made by compiler and entailing minimal degree of creativity, are sufficiently original to be subject to protection under copyright laws.”). [↑](#footnote-ref-158)
159. For example, the hand images could be depicted on the sleeves, or the back of the garment. The circles could be arranged vertically, rather than horizontally. The figure of the man could be positioned on the heart area, rather than the center of the chest. [↑](#footnote-ref-159)
160. For example, the neckline of KTZ’s coat has white patterns, which extend to the arms, and ultimately to the tip of the sleeves. Such patterns are absent in Ava’s parka. [↑](#footnote-ref-160)
161. 17 U.S.C. § 101 (2010). [↑](#footnote-ref-161)
162. *See* Haberman v. Hustler Magazine, Inc., 626 F. Supp. 201 (Mass. 1986). [↑](#footnote-ref-162)
163. U.S. Copyright Office, Compendium of U.S. Copyright Office Practices §920.1 (3d ed. 2017) (“[R]egistration [does not] extend to any useful article . . . such as an item of clothing.”). [↑](#footnote-ref-163)
164. 17 U.S.C. § 101 (2010). [↑](#footnote-ref-164)
165. James Buchwalter & Karl Oakes, *Pictorial, Graphic, and Sculptural Works as Copyrightable; Utilitarian Aspects*, 18 C.J.S. Copyrights § 18 (2017); *see also* 17 U.S.C. §§ 101, 102 (a)(5) (1990); Star Athletica, L.L.C. v. Varsity Brands, Inc., 137 S. Ct. 1002 (2017). [↑](#footnote-ref-165)
166. *See* *Collection Online: Parka*, *supra* note . [↑](#footnote-ref-166)
167. Michela Rosano, *Five Facts About the Shaman’s Parka*, Can. Geographic (Dec. 4, 2015), https://www.canadiangeographic.ca/article/five-facts-about-shamans-parka. [↑](#footnote-ref-167)
168. *Id.* [↑](#footnote-ref-168)
169. 17 U.S.C. § 102(a) (1990). [↑](#footnote-ref-169)
170. *See, e.g.*, Franz Boas, *The Eskimo of Bafflin Land and Hudson Bay*, *in* Bulletin of the American Museum of Natural History 509 (1907) (“[T]he hands . . . are intended to ward off evil spirits[,] while [t]he animal figures on the shoulders [represented] ‘children of the earth.’”). [↑](#footnote-ref-170)
171. *Nunavut Family Outraged After Fashion Label Copies Sacred Inuit Design*, *supra* note 2. [↑](#footnote-ref-171)
172. Star Athletica, L.L.C. v. Varsity Brands, Inc., 137 S. Ct. 1002, 1008 (2017). [↑](#footnote-ref-172)
173. *Id.* at 1010. [↑](#footnote-ref-173)
174. *Id.* at 1012. [↑](#footnote-ref-174)
175. 17 U.S.C. § 101 (2010). [↑](#footnote-ref-175)
176. *Star Athletica*, 137 S. Ct. at 1014. [↑](#footnote-ref-176)
177. *Id.* at 1013. [↑](#footnote-ref-177)
178. *See* Jovani Fashion, Ltd. v. Fiesta Fashions, 500 F. App’x 42 (2d Cir. 2012). [↑](#footnote-ref-178)
179. 17 U.S.C. § 101 (2010). [↑](#footnote-ref-179)
180. *Id.* [↑](#footnote-ref-180)
181. *Star Athletica*, 137 S. Ct. at 1005 (“[T]o qualify as a pictorial, graphic, or sculptural work on its own, the feature cannot be a useful article or ‘[a]n article that is normally a part of a useful article.’”). [↑](#footnote-ref-181)
182. *Nunavut Family Outraged After Fashion Label Copies Sacred Inuit Design*, *supra* note . [↑](#footnote-ref-182)
183. *Star Athletica*, 137 S. Ct. at 1013. [↑](#footnote-ref-183)
184. *Id.* [↑](#footnote-ref-184)
185. *Id.* [↑](#footnote-ref-185)
186. *Id.* at 1012. [↑](#footnote-ref-186)
187. *Id.* at 1006. [↑](#footnote-ref-187)
188. *See, e.g.*, Galiano v. Harrah’s Operating Co., 416 F.3d 411 (5th Cir. 2005); *see also* Jovani Fashion, Ltd. v. Fiesta Fashions, 500 F. App’x 42 (2d Cir. 2012). [↑](#footnote-ref-188)
189. *Fashion Week Controversy Over Native Design*, BBC Trending News (Feb. 21, 2015), http://www.bbc.com/news/blogs-trending-31541088. [↑](#footnote-ref-189)
190. Yellowtail’s family descends from Northern Cheyenne and Crow tribes. [↑](#footnote-ref-190)
191. *Bethany Yellowtail ‘Gutted’ by Crow Design on Dress at New York Fashion Week*, Indian Country Today (Feb. 20, 2015), https://indiancountrymedianetwork.com/culture/arts-entertainment/bethany-yellowtail-gutted-by-crow-design-on-dress-at-new-york-fashion-week. [↑](#footnote-ref-191)
192. *KTZ Autumn/Winter 2015 Ready-To-Wear Collection* *(Look 19)*, British Vogue (Feb. 17, 2015), http://www.vogue.co.uk/shows/autumn-winter-2015-ready-to-wear/ktz/collection. [↑](#footnote-ref-192)
193. Masquerade Novelty, Inc. v. Unique Indus., Inc., 912 F.2d 663, 670 (3d Cir. 1990). [↑](#footnote-ref-193)
194. Russ & Meyer, *supra* note , at 22. [↑](#footnote-ref-194)
195. *Id.* [↑](#footnote-ref-195)
196. *Id.*  [↑](#footnote-ref-196)
197. *Id.* [↑](#footnote-ref-197)
198. *Id.* [↑](#footnote-ref-198)
199. *Id.* [↑](#footnote-ref-199)
200. Jovani Fashion, Ltd. v. Fiesta Fashions, 500 Fed. App’x 42 (2d Cir. 2012). [↑](#footnote-ref-200)
201. *Id.* at 45. [↑](#footnote-ref-201)
202. *See* Poe v. Missing Persons, 745 F.2d 1238, 1239 (9th Cir. 1984). [↑](#footnote-ref-202)
203. *See generally* Lim v. Green, 243 F.3d 548 (9th Cir. 2000). [↑](#footnote-ref-203)
204. *Native Fashion Superstar Bethany Yellowtail Launches Official Site*, Indian Country Today (Dec. 17, 2014), https://indiancountrymedianetwork.com/culture/arts-entertainment/native-fashion-superstar-bethany-yellowtail-launches-official-site (internal quotation marks omitted). [↑](#footnote-ref-204)
205. Buccafusco & Fromer, *supra* note 154, at 55 (“Many features of garment design—line, shape, texture, color, and print—exploit features of human visual perception and optical illusions to influence the way in which the wearer’s body is perceived.” This is a functional aspect of garment design.). [↑](#footnote-ref-205)
206. Brandir Int’l, Inc. v. Cascade Pac. Lumber Co., 834 F.2d 1142, 1145 (2d Cir. 1988); *see also* Pivot Point Int’l, Inc. v. Charlene Prods. Inc., 372 F.3d 913, 930–31 (7th Cir. 2004). [↑](#footnote-ref-206)
207. *See* Buccafusco & Fromer, *supra* note 154, at 56. [↑](#footnote-ref-207)
208. British Seagull Ltd. v. Brunswick Corp*.*, 28 U.S.P.Q.2d 1197, 1199 (T.T.A.B. 1993). [↑](#footnote-ref-208)
209. *See, e.g.*, Fiona Raisbeck*, Kate Winslet Wows in Another Body-Con Stella McCartney Dress*, Marie Claire (Nov. 21, 2011, 12:58 PM), http://www.marieclaire.co.uk/news/fashion/532781/kate-winslet-wows-in-another-body-con- stella-mccartney-dress.html#index=1. [↑](#footnote-ref-209)
210. Jovani Fashion, Ltd. v. Fiesta Fashions, 500 Fed. App’x 42 (2d Cir. 2012). [↑](#footnote-ref-210)
211. However, this conclusion is limited to Yellowtail’s Apsaalooke Nights dress. Not all dresses that incorporate three-dimensional sculptural designs would pass the second test. For example, see Josh Duboff, *Beyoncé Shows Up Late to the Met Gala, Still Turns All Heads in Revealing Dress*, Vanity Fair (May 4, 2015, 11:07 PM), https://www.vanityfair.com/style/2015/05/beyonce-met-gala-20 (Beyoncé’s dress at Met Gala, 2015, designed by Givenchy, would not meet the test, because the arrangement of the beads is intentionally denser on intimate body parts and gradually fades out. The utilitarian purpose governing the arrangement of the beads was to cover the body. As the Sixth Circuit held in *Star Athletica*, covering the body was a utilitarian function.). [↑](#footnote-ref-211)
212. Boisson v. Banian, Ltd., 273 F.3d 262, 272 (2d Cir. 2001). [↑](#footnote-ref-212)
213. *Id.* at 273. [↑](#footnote-ref-213)
214. *Id.* at 272. [↑](#footnote-ref-214)
215. \* Executive Editor, *Cardozo Arts & Entertainment Law Journal*, Volume 37. J.D. Candidate (June 2019), Benjamin N. Cardozo School of Law; B.S., Dalhousie University, 2016. I would like to thank Professor Christopher Buccafusco for his guidance as my Note advisor, and for his invaluable insight and feedback throughout the research and writing process. I would also like to thank my friends and family for their continous support and encouragement. [↑](#footnote-ref-215)