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Star Athletica, LLC v. Varsity Brands, Inc. and IP Protection for Fashion Designs

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Star Athletica v. Varsity Brands, Inc., recently argued before the U.S. Supreme Court, has brought fashion to the forefront of the IP world and prompted a fresh look at the ways to protect fashion designs using intellectual property. In particular, copyright, trademark and patent law all offer various levels of protection to fashion designs.

Copyright and Fashion Design

Copyrights protect original works of authorship including literary works, musical works, dramatic works, photographs, paintings, clothing designs, poetry, novels, movies, songs, software, and architecture. A copyright exists automatically upon fixation of the work in a tangible medium of expression (i.e., in a material form that can be read, visually perceived, or heard). Registration is, however, necessary in order to accrue certain additional rights and collect certain types of damages. For example, timely registration of a copyright with the United States Copyright Office establishes a public record of the claim and allows for the possibility of statutory damages.

The life span of a copyright depends on the facts surrounding the creation and/or publication of the work. Typically, a copyright lasts for the life of the author plus 70 years after their death. If, however, the work is a work made for hire (made by an employee within the scope of their employment, or specially ordered or commissioned), or is done anonymously or with a pseudonym, then the term of the copyright may be 95 years from the first publication of the work, or 120 years from its creation, whichever date comes first. A valid copyright allows the copyright holder to exclude others from, among other things, copying the work, making derivatives of the work, or performing the work. To prove infringement of a

registered copyright, the copyright holder must show that the infringer had access to the copyrighted work, and that the subsequently created work is substantially similar in whole or in part to the copyrighted work. Damages for copyright infringement potentially include compensatory damages (any money that the holder lost as a result of the infringement), and the infringer's profits from their infringing work.

Typically, clothing receives very limited copyright protection. Fabric designs are generally copyrightable because they are viewed as a work of art. However, the overall shape of an article of clothing (e.g., neckline, sleeves, pockets) is generally not copyrightable because it is considered to be a "useful article" that serves the utilitarian function of covering or enclosing the body of the wearer. The "separability" test provides copyright protection for the design of a useful article "only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that are conceptually or physically separable from the utilitarian aspects of the article."ⁱ Thus, it is possible to use copyright to protect discrete portions of a fashion design. But formulating a test for actually determining conceptual separability has proven difficult for courts, particularly with regard to clothing.

In *Star Athletica*, the U.S. Supreme Court will review an August 2015 ruling by the 6th U.S. Circuit Court of Appeals to determine the appropriate test for deciding when a feature of a useful article, such as a decorative element of a uniform, is protectable under section 101 of the Copyright Act.

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Varsity designs, manufactures, and sells cheerleading apparel and received U.S. copyright registrations for several of its cheerleading uniform designs for “two-dimensional artwork” including graphical elements such as stripes, chevrons, zigzags, and colorblocks, for example:



In 2010, Varsity filed an infringement lawsuit against its competitor Star Athletica, alleging that Star illegally copied the ornamentation of its cheerleading uniforms.

At the district court, Star asserted that Varsity’s copyright registrations were invalid because clothing is a useful article and therefore ineligible for copyright protection. In entering summary judgment for Star, the district court defined Varsity’s uniforms as having a utilitarian function as uniforms for cheerleading so as “to clothe the body in a way that evokes the concept of cheerleading.”ⁱⁱⁱ The district court concluded that the designs (e.g., stripes, chevrons, zigzags, and colorblocks) in Varsity’s cheerleading uniforms were not separable from the clothing’s utilitarian function of identifying the wearer as a cheerleader.

The U.S. Court of Appeals for the Sixth Circuit reversed and found in favor of Varsity, holding that its designs could be separated from the utilitarian aspects of its uniforms

and were therefore copyrightable.ⁱⁱⁱ Star has appealed this ruling, and the U.S. Supreme Court now has the opportunity to create a “separability” test that will impact future clothing copyright cases. A decision by the U.S. Supreme Court is expected later this year.

Design Patents and Fashion Design

Design patents protect any new and non-obvious aesthetic or ornamental design, as applied to an item of manufacture. This protection is limited to the visual characteristics of the article, its configuration, shape, or surface ornamentation and does *not* include the structural or functional features.

Unlike copyrights, design patents do not arise automatically with the creation of a design. Rather, they are granted by the United States Patent and Trademark Office (USPTO). To receive a design patent, an applicant must file an application that includes one claim and enough drawings to fully exhibit all of the ornamental features that they wish to claim and protect. The application is then examined by the USPTO and, if it meets all of the requirements for patentability, a design patent registration is issued. A design patent expires, and the claimed design enters the public domain, either 14 or 15 years after the date of issuance, depending on the filing date of the application.

A design patent grants the holder the right to exclude others from making, using, selling, offering for sale, or importing an article of manufacture with the protected design. To prove infringement, a design patent holder must show that the two designs are so similar that an ordinary observer might be so deceived as to purchase one while thinking it was the other. Damages for design patent infringement potentially include not only compensatory damages but also the infringer’s total profit from their unauthorized use of the protected design.

Historically, design patents have typically been granted for apparel, as well as purses, shoes and jewelry. The key is that the design must be sufficiently new and non-obvious. It is also possible to patent certain elements of an apparel design individually. For example, U.S.

Design Patent Number D664,739, is directed to a specific arrangement of rectangular cloth, regardless of the overall design of the apparel (note that portions of the drawing shown in broken lines are not part of the claimed design):



The holder of such a registration would have the ability to stop competitors from making, using, selling or offering to sell clothing including such a design element in the United States for the life of the patent.

Trademarks and Fashion Design

A trademark is a sign, design or expression that identifies the source of certain goods or services. A trademark may be, for example, a word, phrase, smell, color, taste, sound, or product configuration or packaging (also known as “trade dress”).

Like copyright, trademark rights do not require any formal registration. Trademark rights arise once a mark has been used in commerce and achieved secondary meaning. Registration is, however, necessary to acquire certain additional rights and collect certain types of damages. For example, registration of a trademark with the USPTO acts as constructive notice to the public of the mark’s existence and the owner’s exclusive right to use it and also allows for the possibility of enhanced damages.

A trademark remains in effect as long as the mark is continuously used in commerce as a distinctive source identifier. A trademark may, however, be abandoned if the owner stops using it in commerce with no intent to resume, or if the mark becomes generic, thereby

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losing its ability to function as a source identifier. Abandonment is presumed if the mark is not used for at least a three-year period.

A valid trademark allows the holder to exclude others from using a similar mark in commerce as a source identifier for similar goods or services. Trademark infringement occurs where someone else uses a confusingly similar mark in commerce and the unauthorized use of the trademark on or in connection with the goods or services is likely to cause confusion, deception, or mistake about the source of the goods. Potential damages for trademark infringement include an injunction requiring the infringer to stop using the mark, an order requiring the destruction of infringing articles, and/or monetary damages.

In the world of fashion, trade dress may be used to protect the non-functional, visual characteristics of a product that serve a source-identifying function. However, trade dress protection for the design of a product, which would include most fashion designs, requires a showing that consumers actually associate the design with the brand. This can be a difficult showing to make, but it is not impossible. In 2012, the U.S. Court of Appeals for the Second Circuit held that Louboutin was entitled to trademark protection for its use of a contrasting red shoe sole, as shown below:



This gives Louboutin the ability to stop any of its competitors from selling shoes with a contrasting red sole in the U.S.

Weighing the Options

Deciding which type of protection is best for a given fashion design is a complicated task. If the design is separable from the functional aspects of an article, then a copyright may be the best option. On the other hand, if separability is an issue, then a design patent may make more sense. And if the design is something that the public associates with a specific "brand," then a trademark may be advisable. Moreover, there may be situations where more than one avenue of protection could apply to a design at the same time.

Ultimately, the type of design, budget, and desired scope of protection should inform the decision as to what type of IP protection to choose. But designers should know that there are multiple forms of IP available to protect their work.

Endnotes



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Stephanie's primary practice focuses on patent preparation and prosecution, including infringement, validity, freedom-to-market and patentability studies. She has handled patent matters for domestic and international clients involving a variety of technologies in the chemical and mechanical arts, including small scale reactors, fuel additives, polymers, building materials and imaging devices.



Nick is a partner at Renner Otto and has experience in preparing and prosecuting both design and utility patent applications in a wide variety of technical fields, as well

as preparing and prosecuting trademark applications. Nick's practice also extends to counseling clients with respect to intellectual property matters including policing, licensing and transferring patents, trademarks, copyrights and trade secrets. Finally, Nick has extensive litigation experience enforcing and defending against all types of intellectual property in state and federal courts and administrative proceedings at the USPTO. ■

- i 17 U.S.C. §101.
- ii *Varsity Brands, Inc. v. Star Athletica, LLC*, No. 10-2508, 2014 WL 819422, at *8 (W.D. Tenn. Mar. 1, 2014).
- iii *Varsity Brands, Inc. v. Star Athletica, LLC*, No. 14-5237 (6th Cir. 2015).

A Review of Federal Circuit Decisions Regarding Procedural Issues in AIA Post-Grant Proceedings

Luis A. Carrion, TaeRa Franklin and Cory Neseemann

The American Invents Act (AIA)'s post-grant proceedings have greatly increased opportunities to challenge patents in the U.S. Patent and Trademark Office (USPTO). Most notably, inter partes reviews (IPR) have emerged as a popular and less expensive alternative to invalidate patents to invalidation litigation held in courts. Covered Business Method (CBM) review and Post Grant Review (PGR) are also increasing in popularity. Numerous procedural issues have been raised by parties involved in post-grant proceedings and many growing pains have been dealt with by the Patent Trial and Appeal Board (PTAB) who conducts the proceedings and the U.S. Court of Appeals for the Federal Circuit who hears appeals. The substantial number of invalidated patent claims by the PTAB in post-grant proceedings and the substantial deference extended by the Federal Circuit to the PTAB particular in procedural issues have been good news to some practitioners and a source of concern to others. Nonetheless, recent cases seem to indicate the Federal Circuit may be moving from near blanket deference to the PTAB toward more instructive guidance in its decisions involving post-grant proceedings. This article provides a brief review of Federal Circuit's decisions involving procedural issues in post-grant proceedings.

PTAB's Reliance on Whether the Patent Claims Activities "Incidental to" or "Complementary to" a Financial Activity as the Legal Standard to Determine whether the Patent is a CBM Patent Is Not in Accordance with Law

In *Unwired Planet, LLC v. Google Inc.*, the Federal Circuit vacated and remanded the PTAB's decision instituting a CBM because the Federal Circuit found the PTAB's definition of a CBM to be overly broad.ⁱ The PTAB originally decided that the subject matter of the claims at issue met the definition for CBM

since "the subject matter recited in claim 25 of the '752 patent is incidental or complementary to' potential sales resulting from advertising."ⁱⁱ The Federal Circuit explained that the PTAB's reasoning was improper and in doing so pointed out that applying the PTAB's reasoning to claims directed to a method of lighting a bank vault or digging a ditch would lead to the absurd result of considering each method to be a CBM. The Federal Circuit held that the PTAB's "reliance on whether the patent claims activities 'incidental to' or 'complementary to' a financial activity as the legal standard to determine whether a patent is a CBM patent was not in accordance with law."ⁱⁱⁱ

PTAB's Decision to Vacate an Institution Decision and Terminate CBM Review Is Not a Final Written Decision, but an Institution Decision

In *GTNX, Inc. v. INTRA, Inc.*,^{iv} the Federal Circuit dealt with an appeal of the PTAB's vacatur of its previous institution decisions for CBM reviews as well as its termination of the CBM reviews. The Federal Circuit held that the vacatur and termination did not constitute a final written decision "with respect to the patentability of" the challenged claims. Therefore, the Federal Circuit held that it lacked jurisdiction to review the PTAB's decision since the vacatur and termination fell outside of 35 U.S.C. §§328(a), 141(c) and 329, which provide that the Federal Circuit has jurisdiction only upon the PTAB issuing a final written decision with respect to the patentability of the challenged claims. To the Federal Circuit, the PTAB's decision to vacate and terminate upon reconsideration under 35 U.S.C. §325(a)(1) was merely an institution decision. Treating the appeal as a request for mandamus, the Federal Circuit found nothing that afforded GTNX mandamus relief, noting GTNX's failure to identify any statutory or regulatory provision proscribing the PTAB from

reconsidering an initial institution decision or invoking the 35 U.S.C. §325(a)(1). The Federal Circuit noted that "administrative agencies possess inherent authority to reconsider their decisions, subject to certain limitations, regardless of whether they possess explicit statutory authority to do so."^v

PTAB's Partial Institution of an IPR Affirmed

In *SAS v. Complementsoft* the PTAB instituted an IPR for only some of the challenged claims, a practice known as "partial" institution.^{vi} The patentee (SAS) challenged the PTAB's use of "partial" institution asserting that the statute requires the PTAB to either institute an IPR for all of the challenged claims or not institute at all. A Federal Circuit panel affirmed the PTAB's practice of "partial" institution. In dissent, Judge Newman asserted that based on the legislative history and the statutory provisions detailing IPR proceedings, the intent of Congress was for the PTAB to reach a final decision regarding either all of the challenged claims or none of the challenged claims, which precludes the PTAB's "partial" institution practice.^{vii} The Federal Circuit declined *en banc* review.

PTAB's Denial of Discovery on the Time-Bar Issue in IPR Is Not Reviewable

In *Wi-Fi One v. Broadcom* the PTAB instituted an IPR and denied the patentee's (Wi-Fi One) request for discovery to support its allegation that the petitioner (Broadcom) was in privity with a time-barred litigant under 35 USC §315.^{viii} The Federal Circuit panel declined to review the PTAB decision to institute. Instead, the majority re-affirmed the decision in *Achates*^x and held that time-bar issues are not reviewable. The panel majority also held that the PTAB's denial of discovery on the time-bar issue was not reviewable since reviewing the PTAB's denial of discovery "would render routine

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procedural orders reviewable, contrary to the entire thrust of the *Cuozzo* decision.”^x

In concurrence, Judge Reyna expressed a desire for *en banc* Federal Circuit review to overturn the *Achates* decision so that time-bar decisions (e.g., under 35 USC §315(b)) can be reviewed to prevent the PTAB from “exceed[ing] the scope of its delegated authority or violat[ing] a clear statutory mandate.”

On January 4, 2017, the Federal Circuit vacated the panel’s order and agreed to hear the case *en banc*. A decision is expected later this year.

Assignor Estoppel Issue Rejected at Institution Stage Is a Part of the Institution Decision Unreviewable by the Federal Circuit

Husky Injection Molding Systems Ltd. v. Athena Automation Ltd.,^{xii} is noteworthy in that the Federal Circuit held that it lacked jurisdiction to review the PTAB’s institution decision involving assignor estoppel issue in an IPR. Assignor estoppel precludes the party who has assigned the “rights to a patent (or [a] patent application)” from subsequently arguing that what was assigned has no value.^{xiii} In *Husky Injection*, a former owner and president of the patentee Husky and co-inventor of the patent at issue assigned his right in the patent to the patentee, sold Husky to a third party and then formed Athena the petitioner in the IPR. Husky filed the patentee’s preliminary response, arguing solely that assignor estoppel precluded Athena from petitioning for IPR. The PTAB instituted the IPR, rejecting Husky’s assignor estoppel argument, and issued a final written decision, invalidating certain claims at issue on the anticipation ground. The parties cross-appealed.

The Federal Circuit first reviewed the precedents regarding non-appealability of the PTAB’s institution decision under 35 U.S.C. §314(d) such as *Achates*, *Cuozzo*, *Proctor & Gamble*, *Dominion Dealer*, and *St Jude Med.*^{xiv} In light of those cases, the Federal Circuit stated that review of challenge to institution decision is a two-part process. The first part is whether the

challenge is “closely tied to the application and interpretation of statutes related to the Patent Office’s decision to initiate an inter partes review” or “implicate[s] constitutional questions,” ‘depend[s] from other less closed related statutes,’ or ‘present[s] other questions of interpretation that reach, in terms of scope and impact,’ ‘well beyond “this section.”’^{xv} If the answer is the former, the Federal Circuit stated that it lacks jurisdiction to review the institution decision under 35 U.S.C. §314(d). If the answer is the latter, the Federal Circuit’s authority to review the institution decision “appears unfettered.” The second part is that the Federal Circuit “must ask if [the challenge] is nevertheless directed to the PTAB’s ultimate invalidation authority with respect to a specific patent.” If the answer is yes, then the Federal Circuit still may review the challenge.^{xvi} At the case at bar, the Federal Circuit found that it must determine whether 35 U.S.C. §311(a) allowing non-patent owner to file an IPR petition constitutes “closely related” or “other less closely related” statute since assignor estoppel issue requires interpretation of 35 U.S.C. §311(a). The Federal Circuit then found that 35 U.S.C. §311(a) is “very ‘closely related’ to” to institution decision.^{xvii} However, the Federal Circuit found that the assignor estoppel issue did not relate to the PTAB’s “ultimate invalidation authority.”^{xviii} Then, the Federal Circuit held that it lacked jurisdiction to review the PTAB’s decision on appeal since any issue regarding assignor estoppel “necessarily implicates who may petition for review, and... such a question falls outside of the narrow exceptions to the otherwise broad ban on [its] review of the decision whether to institute.”^{xix}

PTAB’s Authority does not Allow it to Raise, Address, and Decide Unpatentability Theories Never Presented by the Petitioner and Not Supported by Record Evidence; Improper Burden-Shifting, and More...

In *re Magnum Oil Tool Int’l, Ltd.*^{xx} is an instructive case in which the Federal Circuit elucidated in detail the burden of proof during IPR. Writing for the panel, Judge O’Malley began by stating that in an IPR the petitioner has the burden to prove

unpatentability of the issued claims actually challenged in the petition and for which an IPR is instituted. The Federal Circuit then distinguished the burden of persuasion which is “the ultimate burden assigned to a party who must prove something to a specified degree of certainty” from the burden of production for “producing additional evidence and presenting persuasive argument based on new evidence or evidence already of record.”^{xxi} According to the Federal Circuit, in an IPR the burden of persuasion remains on the petitioner to prove unpatentability by a preponderance of the evidence under 35 U.S.C. §316(e). The Federal Circuit continued that the burden of production, which has been found to shift in certain circumstances, does not shift from the petitioner to the patentee where “the only question presented is whether due consideration of the four *Graham* factors renders a claim or claims obvious.”^{xxii} Thus, the Federal Circuit rejected the PTAB’s position that the burden of production shifted to the patentee upon an institution decision finding a “reasonable likelihood that the petition would prevail.” Recognizing the fact that the PTAB is not bound by the findings made in its institution decision and the “significant difference” between the standards of proof at institution and trial during an IPR, the Federal Circuit found the burden shifting “inappropriate” there.^{xxiii} Next, finding no statutory support, the Federal Circuit rejected the PTAB’s contention that the patentee was required to raise its concerns with the PTAB in its request for rehearing prior to filing the appeal. Then, the Federal Circuit agreed with the patentee that the PTAB improperly shifted the burden of production of nonobviousness on the patentee by requiring the patentee to rebut the petitioner’s assertions for motivation to combine the prior art without first mandating the petitioner to provide evidence to support its assertions when the petitioner failed to satisfy its burden of establishing obviousness. The Federal Circuit described the improper burden shifting as follows:
[T]he Board expected Magnum to explain, and faulted Magnum for allegedly failing to explain, why an

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obviousness argument based on a first set of prior art references ... that the Board did not adopt would not be applicable to a second set of prior art references...

Neither the Board nor the petitioner explained why borrowing the rationale for combining the first set of references equally applies to the second set of references, which was particularly necessary here where the two primary references plainly operate in different manners. This constituted an improper shifting of the burden to Magnum, the patentee, to prove that the claimed invention would not have been obvious.^{xxiv}

Additionally, the Federal Circuit rejected the PTAB's argument that it did not commit error in asserting an obviousness argument on behalf of the petitioner based on the primary reference because that argument "could have been included in a properly-drafted petition."^{xxv} The Federal Circuit stated despite the IPRs designed as an "efficient system for challenging patents that should not have issued," it is "still a system that is predicated on a petition followed by a trial in which the petitioner bears the burden of proof." Under such framework, the Federal Circuit saw no support for the position that the PTAB is "free to adopt arguments on behalf of petitioners that could have been, but were not, raised by the petitioner during an IPR" and "the PTAB must base its decision on arguments that were advanced by a party, and to which the opposing party was given a chance to respond."^{xxvi} The Federal Circuit concluded that "while the USPTO has broad authority to establish procedures for revisiting earlier-granted patents in IPRs, that authority is not so broad that it allows the USPTO to raise, address, and decide unpatentability theories never presented by the petitioner and not supported by record evidence."^{xxvii}

Endnotes



Luis represents clients in patent and trademark application preparation, prosecution, licensing and litigation. Among other technologies, Luis has handled patent matters in the fields of telecommunication systems, uninterruptible (data center and telco) power supplies, fluorescent lighting and ballasts, digital signal processing, audio signal processing, welding equipment, computer programs, software-based control systems, electrical circuits, optical devices, computer hardware, remote monitoring, and mechanical assemblies.



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- i *Unwired Planet, LLC v. Google Inc.*, No. 2015-1812, 2016 WL 6832978 (Fed. Cir. Nov. 21, 2016).
- ii Unwired at *3 (Citing to the PTAB's *CBM Institution Decision*, 2014 WL 1396978, at *7).
- iii Unwired at *5.
- iv *GTNX, Inc. v. INTTRA, Inc.*, 789 F.3d 1309 (Fed. Cir. 2015).
- v *Id.* at 1313.
- vi *SAS Inst., Inc., Appellant V. Complementsoft, LLC*, Cross-Appellant, No. 2015-1346, 2016 WL 6575090 (Fed. Cir. Nov. 7, 2016).

- vii *Id.*
- viii *Wi-Fi One, LLC v. Broadcom Corp.*, No. 2015-1944, 2016 WL 4933298 (Fed. Cir. Sept. 16, 2016).
- ix *Achates Reference Publ'g, Inc. v. Apple Inc.*, 803 F.3d 652, 658 (Fed. Cir. 2015), cert. dismissed sub nom. *Achates Reference Pub., Inc. v. Apple, Inc.*, 136 S. Ct. 998, 194 L. Ed. 2d 17 (2016).
- x *Wi-Fi One* at *4.
- xi *Id.* at *8.
- xii *Husky Injection Molding Systems Ltd. v. Athena Automation Ltd.*, 838 F.3d 1236 (Fed. Cir. 2016).
- xiii *Id.* at 1247.
- xiv 803 F.3d 652 (Fed. Cir. 2015), 793 F.3d 1268 (Fed. Cir. 2015), *aff'd by Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131 (2016), 749 F.3d 1376 (Fed. Cir. 2014), 749 F.3d 1381 (Fed. Cir. 2014), and 749 F.3d 1373 (Fed. Cir. 2014), respectively.
- xv *Husky Injection*, 838 F.3d at 1245.
- xvi *Ibid.*
- xvii *Id.* at 1246.
- xviii *Ibid.* (emphasis in original).
- xix *Id.* at 1248 (emphasis in original).
- xx *In re Magnum Oil Tools Int'l., Ltd.*, 829 F.3d 1364 (Fed. Cir. 2016).
- xxi *Id.* at 1375.
- xxii *Id.* at 1376.
- xxiii *Ibid.*
- xxiv *Ibid.*
- xxv *Id.* at 1380.
- xxvi *Id.* at 1380-81.
- xxvii *Id.* at 1381.