

p. 189 – insert the following after note 2:

2A. Clothing and its “Decorative Function.” In late 2012, the U.S. Court of Appeals for the Second Circuit upheld the District Court’s rejection of a copyright infringement claim involving a dress – holding that no element of the allegedly infringed dress was physically or conceptually severable from the dress as a functional item of clothing. “Clothing,” the court stated, “in addition to covering the body, serves a ‘decorative function,’ so that the decorative elements of clothing are generally ‘intrinsic’ to the overall function, rather than separable from it.” *Jovani Fashion, Ltd. v. Fiesta Fashions*, 2012 WL 4856412, **2 (2d Cir.) (quoting *Whimsicality, Inc. v. Rubie’s Costume Co.*, 891 F.2d 452, 455 (2d Cir. 1989)). In this case, “the artistic judgment exercised in applying sequins and crystals to the dress’s bodice and in using ruched satin at the waist and layers of tulle in the skirt does not invoke in the viewer a concept other than that of clothing Rather, these design elements are used precisely to enhance the functionality of the dress as clothing for a special occasion.” *Id.*

See It

To see two views of Jovani Fashion Prom Dress Style No. 154416, at issue in the cited case, [click here](#). For our recommendation of a matching outfit for the prom date of a young lady wearing the Jovani dress, [click here](#).

Does the logic of “decorative function” sweep too broadly? Take the case of wrapping paper for gifts. Surely it too serves a “decorative function,” as well as perhaps the function of protecting the wrapped item. Suppose that a company manufactured a special gift wrap that was in fact cloth with sequins of selected sizes applied in different shades of blue and green to create a dappled effect, exactly as Jovani Fashion did with the bodice of its Style No. 154416. If another company copied verbatim that cloth, would an infringement suit be lost on grounds of either insufficient originality or lack of conceptual severability? What if a two-dimensional version of the dappled color pattern were printed on paper?