The Utility of Prettiness

THE UTILITY OF PRETTINESS:
COPYRIGHT PROTECTION FOR MARDI GRAS INDIAN SUITS
IN THE ERA OF THE USEFUL ARTICLE ANALYSIS

by Azita Mirzaian*

ABSTRACT

The Mardi Gras Indians of New Orleans, who honor a cultural tradition that arose during the time of slavery, have been masking as Plains Indians for over a century. Each year, tribe members spend hundreds of hours and thousands of dollars hand-crafting beautiful “suits” that are embellished with colorful beads, sequins, and feathers. These suits, which are considered to be some of the finest examples of African American folk art in North America, are then debuted at annual Mardi Gras street processions and festivities. Because the suits are so stunning, it has become common practice for photographers to photograph the suits and then use these images in commercial projects such as prints, books, calendars, and tourism ads. The creators of the suits generally have not authorized these commercial uses, nor are they compensated for them.

In recent years, some Mardi Gras Indian tribe members have been looking to copyright law to protect their suits from this unauthorized commercial exploitation. This article aims to examine the Mardi Gras Indians’ struggle for copyright protection for their suits, and to determine whether or not courts will uphold their recent copyright registrations, once they inevitably result in litigation. The article examines the legal treatment of “useful articles” over the past six decades, with a focus on the way courts have handled the copyrightability of costume-like articles of clothing. Although costumes are generally presumed to be copyright ineligible, this article applies the useful article analysis to the Mardi Gras Indian suits and sets forth several grounds upon which the suits should be afforded copyright protection, regardless of whether they are categorized as mere costumes or as highly regarded sculptural works of art.

I. INTRODUCTION

Each year, during Mardi Gras, thousands of revelers gather along New Orleans’ affluent St. Charles Avenue to celebrate, drink, join in

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"krewe" parades, and catch the bead necklaces that are tossed from the Mardi Gras floats. But while all this is going on, in the streets of New Orleans' working class, predominantly black neighborhoods, a different type of tradition is being honored: the city's Mardi Gras Indians are donning the incredibly ornate "suits" that they have spent the past year handcrafting and are taking to their neighborhood streets to engage in singing, chanting, and dancing. Historically, the Mardi Gras Indians, who honor a tradition that arose during the era of slavery, have been marginalized by society. However, they are a long-established feature of New Orleans culture, and in recent years, they have gained more mainstream acceptance and have become well known for their stunning suits and vibrant processions.¹

With this newfound acceptance has come a particular problem: it has become common practice for photographers to take photographs of the Mardi Gras Indians and their suits, and then use these images in commercial projects such as prints, books, calendars, and tourism ads. The creators of the suits are rarely asked for permission, and needless to say, they are not compensated for these commercial uses. Recently, some Mardi Gras Indian tribe members have begun looking to copyright law to protect their suits from this commercial exploitation. If the Mardi Gras Indians are able to obtain copyright protection for their suits, they may be able to derive some profit from their commercial uses (or, alternatively, have the power to put a stop to the unauthorized commercial uses).

But it is unclear whether or not, and to what extent, copyright law protects the suits. In the words of the Fifth Circuit Court of Appeal, "the case law on costume design is, to say the least, uneven."² Historically, courts have treated articles of clothing and costumes as functional "useful articles" that are not afforded copyright protection.³ However, a survey of the relevant policy decisions and case law surrounding useful articles and

¹ The New Orleans Convention & Visitors Bureau's Web site acknowledges the "elusive African-American Indian tribes," stating that "their presentations and chants as they show off their 'new suits' [are] a Mardi Gras day highlight." See Mardi Gras – How it Works, NEW ORLEANS CONVENTION & VISITORS BUREAU, http://www.neworleanscvb.com/static/index.cfm/contentID/363/sectionID/1/subsectionID/0 (last visited Oct. 23, 2012). In perhaps an even more surprising show of mainstream acceptance, Mardi Gras Indians can now be hired to perform at private events (see mardigrasindianshow.com), have been featured on National Geographic's Web site. See Mardi Gras Indian Tribe, NAT’L GEOGRAPHIC, http://travel.nationalgeographic.com/travel/american-festivals/st-josephs-day-indians-photos (last visited Oct. 24, 2012), and are prominently featured on the popular HBO television show Treme.

² Galiano v. Harrah's Operating Co., Inc., 416 F.3d 411, 420 (5th Cir. 2005).

costumes indicates that the Mardi Gras Indians’ particular situation may be one in which the protections of the Copyright Act can be invoked.

This article aims to examine the Mardi Gras Indians’ struggle for copyright protection for their suits, and to determine whether or not courts will uphold their recent copyright registrations, should they result in litigation. Part II will discuss the history of the Mardi Gras Indians, the relevance of their suits, and the unauthorized commercial exploitation of their suits. Part III will examine the evolution of the treatment of useful articles in case law over the course of the past six decades. It will also examine the way courts have handled the question of the copyrightability of costume-like articles of clothing in recent years. Part IV will discuss several theories under which the Mardi Gras Indian suits should be given copyright protection. Ultimately, this article argues that the Mardi Gras Indians’ suits should be afforded copyright protection, regardless of whether they are categorized as mere costumes or as highly regarded sculptural works of art.

II. WHO ARE THE MARDI GRAS INDIANS, AND WHY ARE THEIR SUITS SO SPECIAL?

A. The Tribes and the Suits

The concept of adult men dressing up as “Indians” and parading through the streets of New Orleans may seem bizarre, but the Mardi Gras Indians are actually a well-established New Orleans cultural institution dating back to the 1800s. The exact origins of the Mardi Gras Indian traditions are obscure, but most accounts state that they arose as a way for former slaves to connect with their African culture, while simultaneously paying homage to certain Native American groups in the South. These Native American groups, who had suffered their own share of persecution and abuse at the hands of white people, assisted escaped and freed slaves, offered them sanctuary, and welcomed them into their societies. The former slaves felt a close kinship with the Native Americans, and so as they developed their own “outsider” traditions and culture, they incorporated

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many aspects of Native American culture. Because these former slaves were excluded from the lavish Mardi Gras celebrations of the wealthy whites of New Orleans, they developed their own outsider masking traditions in which they dressed up as Plains Indians. The first “Mardi Gras Indian” tribe, the “Creole Wild West,” was established around 1885, and by 1900, it was reported that the favorite disguise of a masking black New Orleanian during Mardi Gras was that of the “Indian warrior.” Today, anyone familiar with the “dress, dance, music, and rituals of the [Mardi Gras] Indians . . . knows without a doubt that this is virtually the same African-American culture described in all the historical accounts.”

Notably, throughout history, the Mardi Gras Indians were seen as rogue (and possibly dangerous) groups — this was attributable to societal racism, as well as the tribe members’ low socio-economic statuses, their penchant for having violent showdowns with other tribe members, and their unfortunate habit of referring to their tribes as “gangs.” Tribes refused to obtain parade permits for their street processions, the press often reported on the “bloody battles” that occurred during Mardi Gras Indian events, and fearful authorities used these reports to justify harsh oppression of the tribes’ ritual activities. But as the decades passed and violent showdowns between tribes became more infrequent, Mardi Gras Indian

7 SMITH, supra note 5, at 74, 97; “Native and black Americans were kin in spirit, ways, and hopes. In addition to sharing an interest in the struggle against European hegemony, blacks and Indians shared a similar world view and an interest in ceremonial arts, masking, and seasonal renewal.” Id. at 145; see also Rick Bragg, Another Battle of New Orleans: Mardi Gras, N.Y. TIMES, Feb. 19, 1995, at 1, available at http://www.nytimes.com/1995/02/19/us/another-battle-of-new-orleans-mardi-gras.html.
8 SMITH, supra note 5, at 97, 106.
9 Id. at 145.
10 Id. at 65. Not surprisingly, the New Orleans Police Department has a long history of tense confrontations with the Mardi Gras Indians, but in recent years, it has been trying to change its habit of treating the Mardi Gras Indians as unlawful gangs and breaking up their street processions. Katy Reckdahl, Mardi Gras Indians, New Orleans Police Meet to Avoid Conflicts on St. Joseph’s Night, TIMES PICAYUNE, Mar. 18, 2011, http://www.nola.com/mardigras/index.ssf/2011/03/mardi_gras_indians_new_orleans.html.
11 SMITH, supra note 5 at 65. “Unlike the middle- and upper-class Social and Pleasure clubs that register for parade permits, hire bands, and allow their parades to be routed, monitored, and timed by the city, the underclass black Indians remain tribal and anonymous, perform their own music, and march through the city on the back streets, where they come and go as they please. As in colonial times, they still deny outside authority and refuse to subject themselves to the financial burdens and humiliation of being monitored and controlled by the city.” Id. at 51.
culture evolved into a more mainstream and accepted aspect of New Orle-

Today, there are approximately thirty “tribes” of Mardi Gras Indians that represent the various neighborhoods of New Orleans. Each tribe is led by a “big chief,” while other tribe members serve important roles such as that of “wildman,” “spyboy,” “first flag,” and “queen.” Tribe members regularly meet to engage in traditional chanting, drumming, singing, and dancing, and they are known for their vibrant musical street proces-
sions. In fact, the Mardi Gras Indians are recognized “as principal carri-
ers of African-American dance and drumming traditions fundamental to
the creation and development of jazz and other popular musics in the city [of New Orleans].” But perhaps the most distinctive feature of the Mardi Gras Indian culture is the Mardi Gras Indian suits — the colorful, elaborate, hand-made outfits that are showcased in dances and processions in the back streets of New Orleans during Mardi Gras each year. In the past, the tribes would often have violent showdowns with one another during these processions, but in recent decades, the processions have focused less on tribal aggression, and more on ritualized displays of dance and protocol, with an emphasis on the respectful showcasing of the suits. At the heart of these displays is the question of whose suit is the “prettiest.” The members of each tribe carefully inspect the complexity, artistry, and colors of the new suits of the other tribes’ members. Tribe members then present speeches and dances that describe the history and symbolism of the decorative elements of their suits. Finally, after inspecting each others’ new suits, making ritual challenges and responses, and singing songs, each tribe continues on to seek encounters with other tribes.

Historically, Mardi Gras Indian suits were constructed using turkey feathers, shards of glass, eggshells, bottle caps, and whatever else came to hand. Not surprisingly, as the focus of Mardi Gras Indian processions shifted from warmongering to displays of aesthetic superiority, the suits took center stage and became more and more elaborate. Today, the typi-

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12 Robertson, supra note 5.
13 Smith, supra note 5, at 57.
14 Id. at 65. The tribe members frequently hold “practices” where they dance, drum, and chant — their music is considered to be one of their most impor-
tant contributions to the culture of New Orleans. Id.
15 Smith, supra note 5, at 18.
16 Robertson, supra note 5.
17 Smith, supra note 5, at 65.
18 Robertson, supra note 5.
19 Smith, supra note 5, at 65.
20 Id.
21 Id.
22 Gill, supra note 6, at 140.
cal Mardi Gras Indian suit is an ornate and colorful extravaganza of brightly-dyed ostrich feathers, velvet, and meticulously-affixed glass beads, rhinestones, and sequins. A suit will usually have several parts, including a headpiece (the “crown”), a chest piece (the “necklace”), a torso covering (the “apron” and “belt”), leggings, and matching regalia (such as shields). Each suit can weigh up to one hundred pounds, and is worn over regular clothing. Tribe members take pride in creating new suits from scratch each year, so as soon as one year’s processions are over, they must begin designing and crafting the next year’s suits.

Mardi Gras Indian historian Michael P. Smith notes:

It would not be unusual for a prominent Mardi Gras Indian to spend three months designing and planning, and then labor three to five hours a day for six months to build a respectable new suit. Most of this time is spent in the sewing of the elaborate bead patches, which include hundreds of thousands of colored beads, usually depicting a scene of special significance to the maker of the suit, or, as in the case of the more Africanesque tribes, as many sequins and other materials in elaborate sculptural constructions. Feathers are always the final touch, being the last element incorporated into the new suit . . . in both African and in Native American cultures, feathers symbolized flight and freedom.

The materials and supplies required for each suit can cost several thousand dollars. Since most Mardi Gras Indians hail from working-class black neighborhoods, the costs of their suits can take up most or all of their disposable income.

Traditionally, Mardi Gras Indian tribe members would disassemble their suits after each year’s festivities, re-using some elements (such as the beads) and burning whatever they could not re-use. Today, if a suit is...
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dismantled after Mardi Gras Festivities, its beaded patches are saved and displayed in the tribe member’s home, “much the same as a ‘religious altar’ in that [they serve] as a spiritual reminder — and then incorporated into the design of a new suit the following year.” In recent years, as the suits have gained wide recognition as being some of the best examples of African-American folk art in North America, the practice of dismantling the suits has become less common. The suits’ value in the art market has escalated in recent decades, and they are now ardently sought after by collectors and museums. For example, the Backstreet Cultural Museum in New Orleans, a museum that exhibits African American cultural artifacts, houses a large collection of past years’ Mardi Gras Indian suits.

B. The Unauthorized Commercial Uses of the Mardi Gras Indian Suits

Over the years, the Mardi Gras Indians have become iconic figures in New Orleans, representative of the city’s vibrancy and cultural heritage. Each year, crowds of spectators gather to watch the tribe members debut their new suits and engage in impressive dances and street processions. The spectators frequently bring cameras and snap photographs of the Mardi Gras Indians and their picturesque outfits. However, not all of these photographs are used as personal mementos; many of them are put to commercial use, published in coffee-table books, calendars, tourism ads, and posters. Some photographers even sell high-quality prints of the images online and in art galleries throughout the city. The Mardi Gras Indian tribe members, who have often put thousands of dollars and months of hard work into their suits, never see a dime of the profits gained from these commercial uses.

For years, the Mardi Gras Indians have been aware of the commercial exploitation of their suits, but have not had the ability or resources needed

31 Smith, supra note 5, at 122.
32 Id.
33 Id.
35 Mardi Gras Indians Seek to Copyright Costumes, supra note 25.
36 Id.
37 Id.
38 Christopher Porché West is one New Orleans photographer who is famous for his photographs of the Mardi Gras Indians. His Web site features his portfolio of Mardi Gras Indian photographs, as well as an online store where people can purchase prints of the photographs for approximately $450 each. See Porché West, http://www.porche-west.com/116/mardi-gras-indians.html (last visited Oct. 23, 2012).
39 Mardi Gras Indians Seek to Copyright Costumes, supra note 25.
to stop it from occurring.\textsuperscript{40} The Mardi Gras Indian culture has never been about making money, and even today, some think that it is distasteful that tribe members are trying to get a portion of the profits from commercial uses of their suits.\textsuperscript{41} But even those who have viewed these unauthorized commercial uses as exploitation all along have traditionally been powerless to stop them. Most Mardi Gras Indian tribe members hail from working class neighborhoods and have little disposable income to spend on legal advice. Furthermore, it always seemed that the most obvious avenue of legal redress, copyright protection, was closed to the Mardi Gras Indians; copyright law categorically does not protect costumes or clothing, so it was unclear what kind of legal protections the Mardi Gras Indians could get for their suits.\textsuperscript{42}

In 2006, a Tulane Law School professor named Ashlye Keaton began working with the Mardi Gras Indians, hoping to use copyright law to help them stop the commercial exploitation of their suits.\textsuperscript{43} Since the suits are “original works” (conceived and handmade by the tribe members who wear them), and are “fixed in [a] tangible medium of expression” (cloth, feathers, sequins, beads, etc.), it seems that they should fall under the protection of copyright law.\textsuperscript{44} Unfortunately, costumes and articles of clothing are considered to be “useful articles” and thus are generally exempt from copyright protection.\textsuperscript{45} Keaton’s position, however, is that the suits are not really costumes or articles of clothing, but are actually sculptural works of art.\textsuperscript{46} And because the Copyright Code does protect works that fall under the category of “sculptural works,” the tribe members’ suits should get full copyright protection, including the right to license the production of derivative works that feature the suits (such as photographic prints, coffee table books, posters, and advertisements), and the right to bring legal action against parties who produce unauthorized derivative

\textsuperscript{40} Id.

\textsuperscript{41} Robertson, supra note 5. On the other end of the spectrum, there are some (primarily photographers) who feel that if the Mardi Gras Indians want to make money off of their culture, they should commodify and self-exploit, instead of going after others who successfully commercially exploited their images. Id.

\textsuperscript{42} See Copyright Office Policy Decision: Registrability of Costume Designs, supra note 3. “The Copyright Office has generally refused to register claims to copyright in three-dimensional aspects of clothing or costume design on the ground that articles of clothing and costumes are useful articles that ordinarily contain no artistic authorship separable from their overall utilitarian shape.” Id.

\textsuperscript{43} Mardi Gras Indians Seek to Copyright Costumes, supra note 25.

\textsuperscript{44} See 17 U.S.C. § 102(a) (2006).

\textsuperscript{45} Id. § 101; U.S. Copyright Office, Useful Articles, http://www.copyright.gov/fls/fl103.html (last visited Oct. 23, 2012).

\textsuperscript{46} Mardi Gras Indians Seek to Copyright Costumes, supra note 25.
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works. Operating under this theory, over the course of the past few years, Keaton has been helping the Mardi Gras Indians register their suits for copyright protection with the U.S. Copyright Office. But should these copyright registrations become the subject of litigation in the future, it is unclear whether and to what extent they will be upheld by a court of law.

It is worth noting here that the Mardi Gras Indians are not seeking copyright protection in order to ban people from taking photographs of their suits. They are perfectly happy allowing spectators to take photographs for their own personal uses. Furthermore, even if the suits are copyrighted, the principles of fair use would still apply — so the photographs could also be used for purposes of education, news reporting, criticism, and other fair uses. Essentially, if the Mardi Gras Indians’ suits were granted copyright protection, anyone could still photograph the suits, but they would not be permitted to use these photographs for unauthorized commercial purposes; a commercial use that focused on a copyrighted Mardi Gras Indian suit would be considered to be a derivative work, and thus would require a license granted by the copyright-holding tribe member. Chief Howard Miller of the Creole Wild West tribe summarized many tribe members’ feelings on the subject when he said, “A lot goes into the suits — time, hours, blood, sweat, tears, [and] money. And

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48 Mardi Gras Indians Seek to Copyright Costumes, supra note 25.
49 Id.
50 Id.
52 Robertson, supra note 5. Note that the strength of the copyright protection that a photograph gets is largely based on the original contribution of the photographer in depicting the subject matter. See generally Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884). The more a photographer contributes to the photograph (in terms of framing, composition, lighting, and other factors), the more likely that the photographer may claim his or her own copyright rights. If a photograph simply depicts a copyrighted original work (such as a Mardi Gras Indian suit), without any artistic contribution on the part of the photographer, it will likely be found to be in violation of the original work’s copyright. Notably, most of the unauthorized, commercially-used suit photographs that the Mardi Gras Indians are concerned about are taken during fast-paced dances and street processions, so it seems that photographers would have a very hard time claiming credit for many of the photographs’ features (such as lighting and composition). Because the photographers’ original contributions to such photographs are minimal, they would probably have problems claiming their own copyright rights over the images.
so it’s only fair that . . . we should be able to be compensated if someone else is going to be paid.”

III. THE COPYRIGHTABILITY OF USEFUL ARTICLES AND COSTUMES

In the event that the Mardi Gras Indians’ suits’ copyright registrations become the subject of litigation — and it seems that it is only a matter of time before they do — it is unclear whether or not a federal court will uphold them. The case law is unclear on whether or not “costumes” like the Mardi Gras Indian suits are eligible for copyright protection or not. In order to address the copyrightability of the Mardi Gras Indian suits, it is necessary to first examine the way the relevant case law and policy has treated useful articles and costumes over the past few decades.

A. Useful Articles

The primary goal of copyright law is to protect the creators of eligible “original works” by granting them a bundle of rights in regards to their works. These rights include the right to reproduce the work, the right to distribute the work, the right to publicly display the work, and the right to permit derivative works to be produced.

Copyright protection is afforded to “original works of authorship, fixed in any tangible medium of expression,” including literary works, photographs, pictorial or graphic artwork, and sculptural works. While it seems that the scope of the Copyright Act’s protection is broad, it does not extend to certain areas, such as ideas, concepts, and discoveries. Technically, copyright law also does not protect things that are “useful articles” — these are things that have “intrinsic utilitarian function that is not merely to portray the appearance of the article.” Useful articles include things such as clothing, automobile bodies, furniture, and machinery —

53 Mardi Gras Indians Seek to Copyright Costumes, supra note 25. Notably, the fact that the Mardi Gras Indians put countless hours of labor, “blood, sweat, and tears” into the creation of their suits is not, in and of itself, an adequate basis for copyright protection; mere “sweat of the brow” does not entitle the creator of a work to copyright protection. Feist Publ’ns, Inc. v. Rural Telephone Serv. Co., Inc., 499 U.S. 340, 360 (1991). Rather, the work must exhibit originality and “more than a de minimis quantum of creativity.” Id. at 360, 363-64.

54 17 U.S.C. § 106 (2006). A derivative work is a work that is based on a pre-existing work, where the original work has been recast, transformed, or adapted in some way. Id. § 101. An art reproduction or photograph of an original, copyrighted work is considered to be a derivative work. Id.

55 Id. § 102(a).

56 Id. § 102 (b).

57 Id. § 101.
things that are functional and have designs that are very closely tied to their functions. Although the general rule is that a useful article is not copyrightable as a whole, some artistic aspects of the article may be afforded copyright protection in certain instances. For years, "courts have twisted themselves in 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." It seems that courts really began grappling with the copyrightability of useful articles in 1954, when the Supreme Court heard a case called *Mazer v. Stein*. In *Mazer*, in which the copyrightability of lamps with statuette bases was in question, the court established that utility and art are not mutually exclusive; it held that "neither the Copyright Statute nor any other says that because a thing is patentable it may not be copyrighted." Years later, the 1976 Copyright Act attempted to codify and clarify the standard set by *Mazer*, which Congress understood to be "that works of art which are incorporated into the design of useful articles, but which are capable of standing by themselves as art works separate from the useful article, are copyrightable." The 1976 Copyright Act attempted to designate when a useful article could and could not be copyrighted, stating, "The design of a useful article . . . shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article." But this newly-articulated "separability" test was vague and needed to be fleshed out; it seemed to imply that the design elements of a useful article could be copyrighted only if they could be physically separated from the useful article, but this was something that could be done in only select instances (such as in the case of the *Mazer* lamp base statuettes).

The separability test became even more complicated in 1980, when the Second Circuit Court of Appeals heard *Kieselstein-Cord v. Accessories by Pearl, Inc.* In *Kieselstein-Cord*, a case concerning the copyrightability of ornamental belt buckles, the court indicated that the separability test

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58 U.S. Copyright Office, Useful Articles, *supra* note 45.
60 Masquerade Novelty, Inc. v. Unique Indus., Inc., 912 F.2d 663, 670 (3d Cir. 1990).
62 *Id.* at 217.
65 632 F.2d 989 (2d Cir. 1980).
could be satisfied by not only physical separability, but also by *conceptual* separability.\textsuperscript{66} The court in that case determined that the belt buckles in question were entitled to copyright protection to some extent because their “primary ornamental aspect . . . [was] conceptually separable from their subsidiary utilitarian function.”\textsuperscript{67} In light of *Kieselstein-Cord*, it was clear that the copyrightability of a useful article could hinge on either physical separability or conceptual separability, but this was a standard that was still too vague to be practically put to use by courts.

In 1983, a University of Nebraska law professor named Robert C. Denicola published an influential article on the topic of the copyrightability of useful articles such as works of industrial design.\textsuperscript{68} In his article, Denicola suggested that, because the dominant characteristic of a useful article is “the influence of nonaesthetic, utilitarian concerns, copyrightability ultimately should depend on the extent to which the work reflects artistic expression uninhibited by functional considerations.”\textsuperscript{69} In this way, copyright protection would be afforded to a useful article’s “features and shapes that reflect, even in their utilitarian environment, the unconstrained aesthetic perspective of the artist.”\textsuperscript{70}

Three years after the publication of Denicola’s article, the Second Circuit Court of Appeals adopted this “Denicola test” in *Brandir International v. Cascade Pacific Lumber*.\textsuperscript{71} In assessing the copyrightability of a bicycle rack that had been based on a sculptural work of art, the court clarified the test for conceptual separability: “Where design elements can be identified as reflecting the designer’s artistic judgment, exercised independently of functional influences, conceptual separability exists,” but where a design element is “influenced in significant measure by utilitarian concerns,” the design is not conceptually separable from the underlying article.\textsuperscript{72}

In 2004, the Seventh Circuit Court of Appeals also adopted the Denicola/ *Brandir International* test for conceptual separability in the case of *Pivot Point International, Inc. v. Charlene Products, Inc.*\textsuperscript{73} The court

\textsuperscript{66} *Id.* at 993.

\textsuperscript{67} *Id.*. It is worth noting that courts today do not seem to concern themselves with what the primary function and subsidiary function of an article are; this “primary function” inquiry was long ago deemed to be too subjective and problematic to be practical. See Robert C. Denicola, *Applied Art and Industrial Design: A Suggested Approach to Copyright in Useful Articles*, 67 MINN. L. REV. 707, 733-34 (1983).

\textsuperscript{68} See Denicola *supra* note 67.

\textsuperscript{69} *Id.* at 741.

\textsuperscript{70} *Id.* at 748.

\textsuperscript{71} 834 F.2d 1142, 1145 (2d Cir. 1987).

\textsuperscript{72} *Id.* at 1145, 1147.

\textsuperscript{73} 372 F.3d 913 (7th Cir. 2004).
stated: “Conceptual separability exists . . . when the artistic aspects of an article can be conceptualized as existing independently of their utilitarian function. This independence is necessarily informed by whether the design elements can be identified as reflecting the designer’s artistic judgment exercised independently of functional influences.”\(^\text{74}\) In 2010, the Fourth Circuit followed suit in *Universal Furniture International, Inc. v. Collezione* and accepted the formulation of the conceptual separability test as set forth in *Pivot Point*.\(^\text{75}\) The court held that a set of highly ornate furniture was eligible for copyright protection because the decorative elements that adorned the furniture — three-dimensional shells, leaves, columns, finials, rosettes, and other carvings — were “superfluous nonfunctional adornments for which the shape of the furniture (which [was] not copyrightable) serve[d] as the vehicle.”\(^\text{76}\) The designer’s design and placement of the decorative elements “was not as much the result of utilitarian pressures as aesthetic choices.”\(^\text{77}\)  

Today, the definition of conceptual separability that was set forth in *Brandir*, *Pivot Point*, and *Collezione* seems to be generally accepted by courts and is used to assess the copyrightability of various types of useful articles.\(^\text{78}\)

### B. Costumes and Costume-Like Articles of Clothing

Over the course of the last few decades, the case law regarding the copyrightability of costumes has evolved along with the case law regarding the copyrightability of useful articles. Although costumes and costume-like articles of clothing have generally been subjected to the same separability test that all useful articles are subjected to,\(^\text{79}\) cases in recent decades show courts grappling with the question of the purpose and functionality of costumes and costume-like articles of clothing.\(^\text{80}\)

In 1984, prior to the general acceptance of the Denicola test for separability, the Ninth Circuit Court of Appeals heard *Poe v. Missing Persons*.\(^\text{81}\) The case addressed the copyrightability of an article that resembled a swimsuit, but which the designer insisted was a conceptual
“artwork in the medium of soft sculpture.” \(^{82}\) While the court did not ultimately decide whether the work in question was or was not copyrightable, it did hold that there was a disputed issue of material fact as to whether the sculptural work in question was a useful article. \(^{83}\) The court pointed out that the work, which was constructed of clear plastic and crushed rock, was so impractical as an article of clothing, that it was unclear whether or not the work could be worn as an article of clothing for swimming or any other utilitarian purpose. \(^{84}\) Indeed, it seemed to the court that “the only reason for existence of [the work] was as a work of art.” \(^{85}\) The court noted that, when evaluating the work’s copyrightability, some relevant inquiries included: the usefulness of the article, whether its functional aspects could be separated from its artistic aspects, what the designer’s intent was when he designed the article, and whether or not the article would be considered by the art world to be a piece of marketable artwork. \(^{86}\)

Although the nebulous Poe decision seemed to call for a broad inquiry into the usefulness of, marketability of, and designer intent behind costume-like articles of clothing, cases in the years that followed seemed to use a far more narrow inquiry that essentially examined separability. For instance, in the 1985 decision, Animal Fair, Inc. v. Amfesco Industries, Inc., the federal district court in Minnesota took up the question of the copyrightability of a furry novelty slipper that was shaped like a bear’s paw. \(^{87}\) The court held that the entire exterior design of the novelty slipper was protectable under the Copyright Act because virtually all of the design aspects of the slipper could be identified and conceptually separated from its utilitarian aspects. \(^{88}\) The court noted that the slipper’s impractical shape, the artwork on its sole, its particular combination of colors, and its profile were “all sculptural features which comprise[d] the artistic design and which [were] wholly unrelated to function.” \(^{89}\)

In 1988, a federal district court in California examined the copyrightability of Halloween costumes in National Theme Productions, Inc. v. Jerry B. Beck, Inc. \(^{90}\) The court held that the costumes were entitled to copy-

\(^{82}\) Id. at 1239. The piece was apparently constructed of clear plastic material, plastic tubing, and crushed rocks. \(\text{Id. at 1241.}\)
\(^{83}\) Id. at 1241.
\(^{84}\) Id. at 1242. “We are also unable to determine merely by looking at Poe’s creation whether a person wearing this object can move, walk, swim, sit, stand, or lie down without unwelcome or unintended exposure.” \(\text{Id.}\)
\(^{85}\) Id.
\(^{86}\) Id. at 1243.
\(^{87}\) 620 F. Supp. 175 (D. Minn. 1985).
\(^{88}\) Id. at 187.
\(^{89}\) Id. at 187-88.
right protection because their design and form had "little to do with their suitability as wearing apparel." The court referenced Denicola, noting that the costumes in question primarily represented the artists' arbitrary conceptions responsive to their aesthetic sensibilities, and that "the three dimensional nature of the costumes [did] not bar their classification as applied art." National Theme Productions, Inc. was notable because although the court cited the existence of conceptual separability as the main reason the costumes were copyrightable, its analysis seemed to dwell on the fact that the costumes did not "function well as articles of clothing." The court noted that the costumes did not permit the wearer to move freely or sit easily, and that their "artistic features simply [did] not advance their utilitarian purpose as clothing or accessories." Ultimately, it seemed as though the costumes were deemed copyrightable at least partially because they were so impractical as items of clothing that they had no utilitarian purpose; the court concluded that "given the minimal functional considerations [that] went into the design of the costumes, . . . they should be afforded protection as applied art under the copyright law."

Two years after National Theme Productions, Inc., the Third Circuit similarly placed a great emphasis on the utility of a costume-like accessory when assessing its copyrightability. In Masquerade Novelty, Inc. v. Unique Industries, Inc., the court held that masks did not fall into the category of "useful articles," because "masks have no utility that does not derive from their appearance." In other words, the Masquerade Novelty court's position was that masks do not even technically meet the definition of a "useful article" in the first place, so there is no need to assess the separability of their artistic and utilitarian qualities. The court concluded that the masks in question were copyrightable as sculptural works.

Shortly after the Masquerade Novelty decision, the Copyright Office, perhaps concerned that courts were being a little too unclear in their use-
ful article analyses, issued a policy decision that aimed to clarify the issue of the copyrightability of costumes and masks.\footnote{Copyright Office Policy Decision: Registrability of Costume Designs, supra note 3.} The Office’s 1991 policy decision acknowledged that “costumes, by their very nature, exist at the boundary between works of imagination and works of utility.”\footnote{Id.} The decision went on:

For purposes of copyright registration, fanciful costumes will be treated as useful articles. Costumes serve a dual purpose of clothing the body and portraying their appearance. Since clothing the body serves as a useful function, costumes fall within the literal definition of useful article. . . . In accordance with the copyright principles applying to useful articles, fanciful costumes will be registered if they contain separable pictorial or sculptural authorship. The separable authorship may be physically separable, meaning that the work of art can be physically removed from the costume, or conceptually separable, meaning that the pictorial or sculptural work is independently recognizable and capable of existence apart from the overall utilitarian shape of the useful article.”\footnote{Id.}

The Copyright Office’s 1991 policy decision tried to put to rest any contention that costumes are not useful articles, clearly stating that they are useful articles and are subject to the separability test.\footnote{Id.} It also clearly stated that masks could be copyrightable as pictorial/sculptural works, “since masks generally portray their own appearance” and thus fall outside of the definition of a useful article.\footnote{Id.} The policy decision did not really provide a good explanation for the disparate treatment of costumes and masks — both items that merely “portray their own appearance” — other than to state that sometimes costumes serve a useful “clothing” function, while masks do not seem to serve any useful function.\footnote{Id.}

Although the Copyright Office’s policy decision tried to be as clear as it could regarding the copyrightability of costumes, courts continued to grapple with the overall usefulness of costumes. For example, over a decade after the Copyright Office’s policy decision, in Chosun International, Inc. v. Chrisha Creations, the Second Circuit expressed skepticism regarding the contention that all costumes should automatically be considered to be useful articles.\footnote{413 F.3d 324, 330 (2d Cir. 2005). The opinion continued: “Were this the case, masks would necessarily be deemed ‘useful articles.’ But that view has been expressly rejected by both the Copyright Office and by other circuits.” Id.} The Chosun court noted that “the function of a costume is, precisely, to portray the appearance of something,” which puts it
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at odds with the definition of a “useful article.” Nonetheless, the court conceded that for years, articles of clothing have been categorized as useful articles, generally excluded from copyright eligibility, and subject to the separability test in order to determine what, if any aspects of the clothing are eligible for copyright protection.

In 2005, the Fifth Circuit Court of Appeals set aside the question of the usefulness of costumes and instead reopened the question of the conceptual separability test as it applies to costumes. In Galiano v. Harrah’s Operating Co., the Fifth Circuit looked at the copyrightability of fanciful casino uniforms, noting that although “there is little doubt that clothing possess[es] utilitarian and aesthetic value,” the question of “how to conduct the conceptual separation is . . . what continues to flummox federal courts.” The court pointed out that recent case law proposed at least six distinct variations of the conceptual separability test, and tried to determine which approach was the most appropriate to apply to garment design. Pivot Point seemed to offer the most thorough and persuasive analysis of conceptual separability, summarized by the Galiano court as: “Where artistic discretion dominates practical necessity as the driving force behind design choices, a useful article may nonetheless qualify for protection as a [pictorial, graphic, or sculptural] work.” But despite the “elegance” of the Pivot Point test, the Galiano court declined to adopt it, explaining that “sometimes [courts] must favor what might be a sub-optimal prophylactic rule because it is more determinate than the theoretically superior but hopefully subjective one.”

The Galiano court determined that although “the caselaw on costume design is, to say the least, uneven.” it generally “tends to reflect a direct relationship between a costume’s copyrightability and its actual or potential market value as a stand-alone piece of artwork.” The court pointed to the Kieselstein-Cord 1980 decision and Poe in 1984 as two cases in which courts recognized the copyrightability of a useful article of clothing based on “the capacity of the item to moonlight as a piece of marketable artwork.” Ultimately, the Galiano court adopted the Poe decision’s “likelihood-of-marketability standard for garment design only, because it appear[ed] firmly rooted as the implicit standard courts ha[d] been using

106 Id.
107 Id. at 328.
108 416 F.3d 411, 417, 419 (5th Cir. 2005).
109 Id. at 417.
110 Id. at 418.
111 Id. at 421.
112 Id. at 420.
113 Id.
for quite some time.” The court acknowledged that this marketability standard poses some pitfalls, but determined that any problems would be minimal since the standard would only apply to a single type of applied art: garment design.

**IV. COPYRIGHT PROTECTION FOR THE MARDI GRAS INDIANS’ SUITS**

Currently, the law concerning the copyrightability of costumes is still very much evolving and developing. Some courts continue to question the usefulness of costumes and whether or not they should be categorized as useful articles, while other courts accept that costumes are useful articles, but question which formulation of the conceptual separability test should be applied to them. Should the focus simply be on whether or not the costume’s design aspects can be identified and conceptually separated from its utilitarian aspects? Should the focus be on how functional or impractical the costume is as an item of clothing? Or should the focus be on whether or not the costume has actual or potential market value as a stand-alone piece of artwork?

It seems, then, that whether or not the Mardi Gras Indians can obtain copyright protection for their suits depends on what court hears their cases, and which standard of inquiry that court uses. Interestingly, though, the facts of the Mardi Gras Indians’ particular situation indicate that no matter which standard of inquiry is used, the suits should be afforded copyright protection.

114 Id. at 421.

115 Id. at 421-22. “For example, some have argued that . . . this standard is foreign to copyright . . . We do not find [this argument] to be particularly compelling, because all of the lawmaking with respect to PGS works is interstitial, and most of it strikes us as freewheeling.” Id. at 421. The court also pointed out that it is not unheard of for courts to use a particular standard for a particular type of applied art — for example, courts use a “arrangement” or “merger” standard when analyzing the copyrightability of maps, and this analysis “does not at all resemble the ‘separability’ analysis of the *Pivot Point* cases.” *Id.* at 422.

116 Masquerade Novelty, Inc. v. Unique Indus., 912 F.2d 663, 670 (3d Cir. 1990); Chosun Int’l, Inc. v. Chrisha Creations, Ltd., 413 F.3d 324, 330 (2d Cir. 2005).

117 Galiano v. Harrah’s Operating Co. 416 F.3d 411, 417, 419 (5th Cir. 2005).


120 *Galiano*, 416 F.3d at 420; Poe v. Missing Persons, 745 F.2d 1238, 1243 (9th Cir. 1984).
A. Copyright Protection Because Mardi Gras Indian Suits Do Not Technically Meet the Definition of “Useful Articles”

The Copyright Code’s § 101 defines a “useful article” as something that has “intrinsic utilitarian function that is not merely to portray the appearance of the article.”121 Because a costume’s purpose, arguably, is to portray the appearance of itself, early copyright cases having to do with costume-like articles of clothing questioned whether or not such articles should even be categorized as useful articles, or if they really are more akin to sculptural works.122 The Copyright Office’s 1991 policy decision tried to put this debate to rest, stating, “Costumes serve a dual purpose of clothing the body and portraying their appearance. Since clothing the body serves as a useful function, costumes fall within the literal definition of a useful article.”123 But the issue does not seem to have really been put to rest; as recently as 2005, the Second Circuit Court of Appeals pointed out that “the function of a costume is, precisely, to portray the appearance of something,” which seems to place it outside of the definitional boundaries of a “useful article.”124

In the case of the Mardi Gras Indians’ suits, it is clear that the costume-like suits do not “serve a dual purpose of clothing the body and portraying their appearance[s].”125 The suits, which are worn over regular clothing and can weigh over a hundred pounds each, do not serve any kind of practical “clothing function,” but are artistic creations with the primary function of looking “pretty.”126 In fact, the heavy application of artistic elements such as beads and feathers to the suits actually detracts from their functional wearability.127 Like the costumes in National Theme Productions, the Mardi Gras Indian suits do not “readily permit the wearer to sit, recline, or maneuver easily,” and are intended to “be worn as an outer shell over regular clothing.”128 Ultimately, the suits do not serve any kind of useful “clothing function” — their only purpose is to portray the appearance of themselves. On a spectrum of utility, the suits exist on the end of functional uselessness and aesthetic purpose. In this sense, they are more like the copyrightable masks in Masquerade Novelty than un-

122 See generally Poe, 745 F.2d 1238 (9th Cir. 1984).
123 Copyright Office Policy Decision: Registrability of Costume Designs, supra note 3.
125 Copyright Office Policy Decision: Registrability of Costume Designs, supra note 3.
126 Robertson, supra note 5.
127 Id.
Some would argue that costumes should be categorized as useful articles because they perform a “masquerading function.” But as the Second Circuit Court of Appeals pointed out in the Chosun International v. Chrisha Creations case:

Chrisha’s broad understanding of masquerading as a “useful” function is at odds with the Copyright Act’s very definition of “useful articles.” After all, the Act states that a “useful article” is one ‘having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information.”

If the Mardi Gras Indian suits are not considered to be “useful articles,” they would be protected by copyright as sculptural works, without having to meet any kind of physical or conceptual separability test.

B. Copyright Protection Because Mardi Gras Indian Suits Satisfy the Physical Separability Test

Section 101 of the 1976 Copyright Codes states that the design of a useful article “shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.” Before Kieselstein-Cord validated conceptual separability in 1980, the Copyright Code’s language could be interpreted as calling for physical separability in instances where a useful article’s copyrightability was in question.

The Mardi Gras Indian suits are renowned not for their wearability as clothing, but for their bright colors, lush feather arrangements, and elaborate bead and rhinestone designs. These are all artistic elements, which have been affixed to the suits’ canvas frames in particular arrangements, designs, and patches. These decorative elements could be removed

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130 Chosun, 414 F.3d at 329.
131 Id. “We express skepticism regarding [the] claim that Halloween costumes are, as such, copyright ineligible because they permit the wearer to masquerade. Were this the case, masks would necessarily be deemed ‘useful articles.’ But that view has been expressly rejected by both the Copyright Office and by other circuits.” Id.
132 See generally Superior Form Builders v. Dan Chase Taxidermy, 74 F.3d 488, 492, 494 (4th Cir. 1996).
134 SMITH, supra note 5, at 122.
135 Id.
from the suits’ canvas frames and are physically separable from the clothing-like frames of the suits. While this physical separability is not as straightforward as the physical separability that could be achieved in Mazer — where the lamps’ statuette bases could be easily separated from their lighting mechanisms — it can nonetheless be achieved. One can imagine that if the ornamental designs affixed to the canvas frames of the Mardi Gras Indian suits were to be removed and instead affixed to stretched canvas frames that could be hung on walls, they would readily be copyrightable as pictorial, graphic, or sculptural works. In fact, beaded patches are frequently removed from suits after Mardi Gras festivities are over, and these patches are displayed in tribe members’ homes like artwork. Ultimately, even if the Mardi Gras Indian suits are deemed to be “useful articles,” they should still be eligible for copyright protection because their artistic elements are physically separable from whatever debatable clothing function they serve.

C. Copyright Protection Because Mardi Gras Indian Suits Satisfy the Conceptual Separability Test

In 1980, the Second Circuit validated conceptual separability in the Kieselstein-Cord case. In the decades following Kieselstein-Cord, courts put forth numerous formulations of the conceptual separability test, such that the precise criteria that constitute the test are still unclear.

The conceptual separability test, as put forth by Denicola and later adopted by the Second Circuit in Brandir International, the Seventh Circuit in Pivot Point, and the Fourth Circuit in Collezione, puts a strong emphasis on “the extent to which the work reflects artistic expression uninhibited by functional considerations.” In this formulation of the test, conceptual separability exists when “design elements can be identi-

136 Id.
138 SMITH, supra note 5, at 122.
139 Kieselstein-Cord v. Accessories by Pearl, Inc., 632 F.2d 989, 993 (2d Cir. 1980).
140 Galiano v. Harrah’s Operating Co., 416 F.3d 411, 417 (5th Cir. 2005). It is worth noting that the court in the Kieselstein-Cord case determined that the belt buckles in question were entitled to copyright protection to some extent because their “primary ornamental aspect . . . [was] conceptually separable from their subsidiary utilitarian function.” 632 F.2d at 993. Courts today do not seem to concern themselves with what the primary function and subsidiary function of an article are; this “primary function” test was long ago deemed to be too subjective and problematic to be practical. See Denicola supra note 67, at 733-34.
141 Denicola supra note 67, at 741; Brandir Int’l v. Cascade Pacific Lumber, 834 F.2d 1142, 1145, 1147 (2d Cir. 1987); Pivot Point Int’l, Inc. v. Charlene Prods., 372 F.3d 913, 931 (7th Cir. 2004); and Universal Furniture Int’l, Inc. v. Collezione, 618 F.3d 417, 432-34 (4th Cir. 2010).
fied as reflecting the designer's artistic judgment exercised independently of functional influences.142

If the Mardi Gras Indians' suits are to be examined for conceptual separability under this standard, they surely are entitled to copyright protection. When a spectator at a Mardi Gras Indian procession takes a photograph of a Mardi Gras Indian suit, the spectator is not simply taking a photograph of an article of clothing — he or she is taking a photograph of an amalgamation of countless artistic elements, the product of countless artistic decisions that have been made independently of functional considerations. The reason spectators are even interested in taking photographs of the suits is that, in aggregation, these artistic elements are visually stunning. The arrangement of these artistic elements on each suit's canvas frame is dictated by its creator's artistic vision and represents its creator’s “arbitrary conceptions responsive to [his or her] aesthetic sensibilities.”143

Like the decorative elements that adorned the furniture in Collezione, the decorative elements that adorn the Mardi Gras Indian suits are “superfluous nonfunctional adornments” for which the shape of the suit “serves as the vehicle.”144

Some courts have indicated that a costume’s high level of impracticability as functional apparel lends itself to conceptual separability.145 If this is the case, the Mardi Gras Indian suits likely achieve conceptual separability, since they embody a classic case of trading functionality for form; the suits are unwieldy, bulky with feather arrangements, and can weigh over a hundred pounds each.146 The suits are renowned not for their wearability, but for their bright colors, lush feather arrangements, and elaborate bead and rhinestone designs — all aesthetic features that are conceptually separable from the suits’ debatable “clothing functions.” Like the footwear in Animal Fair, the Mardi Gras Indian suits’ impractical shapes, artwork designs, and combinations of colors are “all sculptural features which comprise the artistic design and which are wholly unrelated to function.”147

It is worth noting here that, according to the legislative history, the objective of the separability test was “to draw as clear a line as possible between copyrightable works of applied art and uncopyrightable works of

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142 Brandir Int'l, 834 F.2d at 1145; Pivot Point, 372 F.3d at 931.
144 Collezione, 618 F.3d at 434.
145 Nat’l Theme Prods., 696 F. Supp. at 1354. “Given the minimal functional considerations [that] went into the design of the costumes, . . . they should be afforded protection as applied art under the copyright law.” Id.
146 Robertson, supra note 5.
industrial design.” Professor Denicola argued that this “statutory directive requires a distinction between works of industrial design and works whose origins lie outside the design process, despite the utilitarian environment in which they appear.” The Mardi Gras Indians’ suits are just such works — they are works of art whose aesthetic origins lie outside the design process. Despite the utilitarian environment in which they appear (the environment of a costume or article of clothing), they are not functional or utilitarian articles, and they certainly are not works of industrial design.

D. Copyright Protection Because Mardi Gras Indian Suits Have Potential Market Value as Stand-Alone Pieces of Artwork

In the 2005 Galiano case, the Fifth Circuit adopted a “likelihood-of-marketability” standard for garment designs, based on the contention that recent caselaw on the issue “tends to reflect a direct relationship between a costume’s copyrightability and its actual or potential market value as a stand-alone piece of artwork.” The court’s decision cited Poe and Kieselstein-Cord as two cases in which the courts’ “willingness to recognize the copyrightability of a useful item seem[ed], at some elemental level, to turn on the capacity of the item to moonlight as a piece of marketable artwork.” The court adopted the “likelihood-of-marketability” standard for garment designs only, and indicated that the burden is on the garment designer to show that its designs are marketable independently of their utilitarian function as clothing.

If the Mardi Grad Indian suits are assessed using this “likelihood-of-marketability” standard for garment designs, they will likely be deemed to be copyrightable. Like the non-functional “swimsuit” in Poe, a Mardi Gras Indian suit’s only reason for existence is as a work of art. And unlike the plaintiff in Galiano, who was unable to show that her designs were marketable independently of their utilitarian function as casino uniforms, the Mardi Gras Indians would certainly be able to show that their suits are marketable and have artistic value independent of whatever utilitarian function they may have.

148 H.R. REP. NO. 94-1476, at 55 (1976). Professor Denicola argues that, in truth, “there is no line, but merely a spectrum of forms and shapes responsive in varying degrees to utilitarian concerns.” Denicola supra note 67, at 741.

149 Denicola supra note 67, at 741.


151 Id. at 420.

152 Id. at 422.

153 Id. at 421.

154 Id. at 422.
First, the suits are widely acknowledged to be valuable pieces of African-American folk art, worthy of being displayed in exhibits and museums.\footnote{See note 34 \textit{supra} (regarding the Backstreet Cultural Museum).} For example, the Backstreet Cultural Museum in New Orleans houses an extensive collection of Mardi Gras Indian suits from past years.\footnote{\textit{Id.}} Additionally, the Louisiana Division of the Arts features an online exhibit entitled “Louisiana’s Living Traditions: The Creole State Exhibit,” which includes Mardi Gras Indian suits, regalia, and photographs.\footnote{See \texttt{LOUISIANA LIVING TRADITIONS, http://www.louisianafolklife.org/FOLK\_LIFEmagebase/FLImagesList.asp} (last visited Oct. 23, 2012).} The suits are featured in these exhibits not because they are uncommonly functional articles of clothing, but because they are stunning works of art and valuable contributions to African American folk art.

Second, and perhaps more importantly, the very fact that a market for derivative works featuring the suits exists is an excellent indication of the suits’ artistic value; people would not be interested in purchasing coffee-table books or expensive photographic prints featuring the Mardi Gras Indians’ suits if the suits had no artistic value.\footnote{See \textit{supra} note 38 (regarding Christopher Porché West).} The market for these derivative works currently exists and is being exploited, which is a strong indicator of the suits’ “value as . . . stand-alone piece[s] of artwork.”\footnote{\textit{Galiano v. Harrah’s Operating Co., Inc.}, 416 F.3d 411, 420 (5th Cir. 2005).} Indeed, the high marketability of the suits and derivative works based on the suits is the very reason that the Mardi Gras Indians are seeking copyright protection for them. The Mardi Gras Indians would readily be able to satisfy the Fifth Circuit’s “likelihood-of-marketability” test and obtain copyright protection for their suits.

It is worth noting that the Mardi Gras Indians’ legal issues are most likely to be litigated in the federal courts of Louisiana. If the question of their suits’ copyrightability reaches the court of appeals, it will be heard by the Fifth Circuit Court of Appeals — the very court that issued the \textit{Galiano} decision, and therefore would apply the “likelihood-of-marketability” test.

\section*{V. Conclusion}

In recent years, several members of the Mardi Gras Indian tribes have begun registering their suits for copyright protection under the category of “sculptural works of art,” operating under the assumption that if they tried to register them as “costumes,” they would be unprotected by copyright law. However, an examination of recent case law reveals that the Mardi Gras Indians’ suits should qualify for copyright protection even if they are categorized as costumes; whether the standard used is that of physical sep-
arability, traditional conceptual separability, or likelihood-of-marketability, the ornate, hand-made Mardi Gras Indian suits satisfy the tests for copyright protection.

All things being equal, however, there may be several reasons why the Mardi Gras Indians would prefer to register their suits as “sculptural works” rather than “costumes.” First, Mardi Gras Indian tribe members spend thousands of dollars and hundreds of hours on their hand-crafted suits, so a trivial term like “costume” does not and cannot adequately encapsulate the suits’ monetary and artistic values. Secondly, it seems a bit disingenuous to call the suits mere “clothing” or “costumes,” in light of the fact that they have been exhibited in museums and have been acknowledged to be important examples of African American folk art. Third, the Mardi Gras Indians have existed at the margins of society for decades, and as a matter of principle, they deserve to have their artistic and cultural contributions to society properly acknowledged. For years, tribe members have produced valuable works of art and engaged in their traditional activities without any official recognition or encouragement; copyright protection for their sculptural works of art would be an important step in recognizing the Mardi Gras Indians as the legitimate artists that they truly are.

In 2010, Chief Howard Miller became one of the first Mardi Gras Indian tribe members to secure a copyright registration for his suit under the category of “sculptural work.” Since then, several other tribe members have also applied to copyright their suits under this category. It seems that it is only a matter of time before these copyright registrations will lead to suit-related litigation, but tribe members like Chief Miller feel that no matter the outcome of future litigation, there is a great value to their copyright registrations. In his words, “It’s a wonderful thing to know that we’re considered to be in the art class and to be recognized . . . as artists. It means a lot to the Mardi Gras Indians.”

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160 See note 35 regarding the Backstreet Cultural Museum and note 158 for discussion about the Louisiana Division of the Arts.

161 SMITH, supra note 5, at 150. “They continue their traditional activities without any official recognition or encouragement, and despite adverse regulations imposed from outside by authorities, which suppress the traditional context and meaning of their culture.” Id.


163 Id.