

Using the Copyright Act To Protect Cultural Properties: Copyright Protection of Mardi Gras Indian Suits

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I am writing this Article in hope that the reader gains a better understanding of the legal analysis and cultural implications arising in connection with the copyright protection of Mardi Gras Indian suits. I would like to recognize and thank Chief Howard, Mr. John Norris, Mr. Bertrand Butler, Mr. Devin Meyers, Professor Glynn Lunney, Adrienne Barbour, Greg Stein, Dr. Jenny Goolsby, Larry Blumenfeld, Lolis E. Elie, and Gene Meneray for their contributions and support in my preparation of this Article.

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I. INTRODUCTION

One of the major issues debated in the international community today is the threat to the survival of indigenous cultures.¹ The presentation of these minority cultures to the public has sparked international discussion regarding the promotion of mutual respect, understanding, and appreciation among the culture bearers and their audiences, particularly within the confines of cultural traditions, practices, and rituals presented in public forums. Establishing mutual respect, appreciation, and understanding between the culture and the public is paramount to this tradition's viability. This international discussion extends to the City of New Orleans, where the Mardi Gras Indians continue to flourish as an indigenous community.

The Mardi Gras Indians, “an age old” culture, unique to New Orleans, Louisiana, are considered to be “one of the greatest kept secrets in America and even throughout the world today.”² “Some say the first Mardi Gras Indian was a runaway slave who found safe refuge with the Native Americans. [These African slaves] found they had a lot in common with the Native American Indians, like the traditions from various parts of Africa and the Caribbean.”³

Similar to the Native Americans, Mardi Gras Indians have a strong oral tradition, often passing down their history through storytelling. Although in recent years there has been a rise in the number of books and documentaries about the culture, most Mardi Gras Indians learn the customs—sewing, chanting and dancing—by observing and asking their elders.⁴ As Lolis Eric Elie, New Orleans native and story editor for HBO's hit series *Treme*, confirms, “Much information is still passed

1. See *Leaflet No. 12: WIPO and Indigenous Peoples*, OFFICE OF THE UN HIGH COMMISSIONER FOR HUM. RTS. COMMISSION 1 (2001), <http://www.ohchr.org/Documents/Publications/GuideIPleaflet12en.pdf>.

2. Interview with Howard Miller, Mardi Gras Indian Chief of Creole Wild West and president of the Mardi Gras Indian Council, in New Orleans, La. (June 26, 2011) (transcript on file with author).

3. *Id.*

4. See Lolis Eric Elie, *Chief Howard Miller Continues a Tradition*, TREME BLOG (Oct. 19, 2012, 12:30 PM), <http://www.inside-treme-blog.com/home/2012/10/19/chief-howard-miller-continues-a-tradition.html>.

down in that way,”⁵ and consequently, there is little information available to the public in written form that is explicitly authorized by the community. In honor of their oral tradition and out of respect for the culture and its community members, I have refrained from including an in-depth historical narrative of the culture that might serve to speak for the Mardi Gras Indian community and thus undermine its longstanding heritage and practices. However, weaved throughout the text are excerpts from an interview I conducted with Chief Howard Miller, in his own words, which serves to frame the context adequately without overstepping any bounds.

New York Times journalist and cultural critic, Larry Blumenfeld, who has studied and reported extensively on the Mardi Gras Indian Nation, describes the culture as “a complicated braid of traditions and expressions,” which include “chants and drumming, folkloric practices drawn from West African and Native American traditions, sacred processions and assemblies, ‘war’ games, and aspects of brotherhood and community organizing.”⁶ But according to Blumenfeld and many others, “The most central artifact of Mardi Gras culture is the suits.”⁷ Each year, Mardi Gras Indians create elaborate, awe-inspiring “suits”—ornate works of sculptural art featuring brightly colored ostrich feathers, reams of rich velvet, and thousands of glass beads, rhinestones, and sequins sewn into intricate, handmade details and designs.⁸ Weighing between 50 and 150 pounds and often spanning more than ten feet, these suits are made up of several sculpted works, often comprised of a crown (headdress), apron, wings, and vest mostly incorporating beaded patches of various sizes and dimensions.⁹ They are shaped into a form that allows the author to wear the suit over regular clothing as part of cultural rituals during the festival season.¹⁰ The suits are otherwise mounted onto

5. *Id.*

6. E-mail from Larry Blumenfeld, *N.Y. Times* Journalist, to author (Oct. 18, 2012, 16:07 EST) (on file with author).

7. *Id.*

8. Campbell Robertson, *New Orleans ‘Indians’ Look to Copyrights for Protection: Want To Use My Suit? Then Throw Me Something*, *N.Y. TIMES*, Mar. 23, 2010, at A13, available at http://www.nytimes.com/2010/03/24/us/24orleans.html?_r=0; Rick Bragg, *Another Battle of New Orleans: Mardi Gras*, *N.Y. TIMES*, Feb. 19, 1995, available at <http://www.nytimes.com/1995/02/19/us/another-battle-of-new-orleans-mardi-gras.html>.

9. Interview with Howard Miller, *supra* note 2.

10. *All Things Considered: Mardi Gras Indians Seek To Copyright Costumes* (NPR radio broadcast Feb. 8, 2011) [hereinafter *NPR Interview*], available at <http://www.npr.org/2011/02/08/133600362/Mardi-Gras-Indians-Seek-To-Copyright-Costumes>.

hard surfaces and exhibited at museums around the world, including the Smithsonian Museum of Art.¹¹

The author of each suit typically allocates at least thirty hours per week to creating his work, spending even more time in the few months leading up to Mardi Gras. The artistry that results from this laborious and intensive work is an iconic, sculptural tribute that channels the author's ancestors and supporters of the Mardi Gras Indian community during the slave trade. The theme, design, and other elements embodied within the author's creative expression generally vary depending on the neighborhood or tribe to which the Mardi Gras Indian belongs. For instance, there are two overall genres of suits: those from Uptown or Downtown New Orleans.

The Mardi Gras Indian tradition is full of secrecy, and the suits are typically hidden from others until they are first showcased on Mardi Gras morning, when scores of people, including myself, march through various neighborhoods, from the Ninth Ward to Uptown New Orleans at Second Street and Dryades Street, in excited anticipation of finding Indian tribes displaying their new suits for the first time. Although their culture is celebrated by many, the Mardi Gras Indians have been subject to wrongful exploitation by others in various forms and capacities since their culture was established. Too often, images predominantly featuring their suits are used without the culture bearers' authorization in connection with commercial and/or promotional endeavors ranging from sales of fine art photography to broadcasts of television advertisements. For instance, pictures of the Mardi Gras Indians have sold online for as much as \$500, and images of them featured in photography books and on t-shirts are also available for purchase.¹² But rare are the instances where Indians receive any licensing fee or are even asked permission for future use of their images. "It's not about people taking pictures for themselves, but a lot of times people take pictures and sell them," Chief Miller says.¹³ "For years people have been reaping the benefits from the pictures they take of the Mardi Gras Indians."¹⁴ This wrongful exploitation naturally comprises the sometimes guarded relationship between the culture and

11. *E.g.*, *New Orleans Black Mardi Gras Indians: Exploring a Community Tradition from an Insider's View*, SMITHSONIAN, <http://www.si.edu/Exhibitions/Details/New-Orleans-Black-Mardi-Gras-Indians-Exploring-a-Community-Tradition-from-an-Insider's-View-2896> (last visited Nov. 1, 2012).

12. Mary Foster, *Mardi Gras Costumes Inspire Photographers—And a Copyright Claim*, WASH. POST, Feb. 8, 2011, at A16, available at <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/07/AR2011020706635.html>.

13. *Id.*

14. *Id.*

its observers and tends to generate friction between the Mardi Gras Indians and those who capitalize off of the fruits of the culture's labor without so much as thinking to ask for permission, or worse, purposefully refusing to obtain consent from the author. The majority of Mardi Gras Indians with whom I spoke appear less concerned about others collecting revenue in connection with their suits than with the lack of respect shown to their culture.¹⁵ Morally, it is wrong for someone to use their suits without their permission. Legally, it is inequitable for someone to credit and profit from their labor and skill.

A third party's unauthorized commercial use of an image embodying the author's suit would be illegal, provided that the suit qualified for protection under the Copyright Act. When I began representing the Mardi Gras Indian community, my instinct told me that the suits were works of visual art—sculptures—and therefore were subject to protection under the Copyright Act. I believed that if tribe members could successfully register their suits, perhaps these culture bearers would feel and would be less exploited and more empowered.

An author does not need to register with the United States Copyright Office in order to acquire protection under the Copyright Act.¹⁶ If Mardi Gras Indian suits are in fact copyrightable, then the copyright would “take[] effect at the first public showing.”¹⁷ However, there are important advantages to registration, and under some circumstances, it is required. Indeed, for all works created in the United States or by American authors, a certificate of registration is an administrative precondition to filing a copyright infringement suit.¹⁸ And provided that registration was filed within five years of a work's initial publication, a certificate of registration is proof of prima facie evidence of the validity of the copyright and of the facts stated within the certificate.¹⁹ In any future copyright infringement litigation involving a registered Mardi Gras Indian suit, the alleged infringer may still challenge the validity of the suit's copyright, but will ordinarily bear the burden of proof on this point. Therefore, registration of each carnival

15. Robertson, *supra* note 8 (“Indian culture was never, ever meant to make any money [but] we have a beef with anybody who takes us for granted.”).

16. 17 U.S.C. § 408(a) (2006).

17. Foster, *supra* note 12 (citing Ryan Vacca, Assistant Professor of Law at the University of Akron).

18. 17 U.S.C. § 411(a). Except for actions regarding the violation of an author's VARA rights and subject to the provisions of subsection § 411(b), “no civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title.” *Id.*; Reed Elsevier Inc. v. Muchnick, 130 S. Ct. 1237, 1241 (2010).

19. 17 U.S.C. § 410(c).

season's suit provides a Mardi Gras Indian with the requisite standing and leverage to bring a copyright infringement claim and relieves him of an initial evidentiary burden.

In order to register a work, a deposit copy is required.²⁰ Because many Mardi Gras Indians destroy their suits each year after the carnival season, and as a matter of tradition, filing an adequate application with the United States Copyright Office was initially nearly impossible.²¹ Hurricane Katrina only compounded the issue, because many of the Mardi Gras Indian suits were destroyed in the wake of the storm and registering for copyright protection was not necessarily a priority in the post-Katrina New Orleans community. However, after I established a system for securing deposit copies of the suits before they were destroyed, and following a dreadful resurgence in unauthorized usages of these suits in the aftermath of Katrina, I successfully filed an application for registration with the Copyright Office.

This Article focuses on the path to secure copyright protection of Mardi Gras Indian suits as works of visual art in the form of sculpture. Part III.A discusses how copyright protection for Mardi Gras Indian suits empowers the cultural community and furthers public welfare. Part III.B applies the copyrightability test to Mardi Gras Indian suits as original works of authorship fixed in a tangible medium of expression in sculpture. Part III.C distinguishes Mardi Gras Indian suits from useful articles and includes an alternate application of the separability doctrine. Part IV establishes that photographs and other works embodying Mardi Gras Indian suits may qualify as derivative works through an examination of *Gaylord v. United States* in comparison to images featuring Mardi Gras Indian suits. In its conclusion, this Article revisits the empowerment of indigenous communities through the protection of their cultural properties.

II. PREFACE BY AUTHOR

I have been working intimately with the Mardi Gras Indian community, particularly the New Orleans Mardi Gras Indian Council, since my first year out of law school. In 2003, I was first approached by the registered agent for the New Orleans Mardi Gras Indian Council regarding copyright issues and other matters, and I have been representing the Council in various affairs since then. In this capacity, I have been authorized by the New Orleans Mardi Gras Indian Council to

20. *Id.* § 407.

21. Robertson, *supra* note 8.

prepare this Article to the extent I am analyzing the copyright issues related to Mardi Gras Indian suits.

Prior to my legal representation, I was a mere observer of the culture and had an enormous amount of admiration for the Mardi Gras Indians for their artistry and active engagement as culture bearers in the New Orleans community. Since the commencement of my representation, my respect and appreciation for this rich, dynamic culture has grown, and I consider some members of this community to be family and certainly many to be friends.

Included with the Article are some illustrations of Mardi Gras Indian suits courtesy of the New Orleans Mardi Gras Indian Council with special thanks to Mr. Devin Meyers, who approached me after Hurricane Katrina about photographing the Mardi Gras Indians. He subsequently founded an organization called Fotos for Humanity and assigned the copyright of those images to the New Orleans Mardi Gras Indian Council, which then licensed the images back to his organization in consideration of profit sharing. This type of licensing scheme generates revenue for both authors while simultaneously promoting mutual respect of each other's artistry.

III. COPYRIGHT PROTECTION OF A MARDI GRAS INDIAN SUIT

A. *Incentive to Culture Bearers Promotes Public Welfare*

As three-dimensional works of sculptural art, Mardi Gras Indian suits are created and showcased in public settings by an indigenous community of authors as part of cultural tradition, heritage, and practice.²² Indeed, as Chief Howard Miller explains, "The Mardi Gras Indian suit is a spiritual expression of our true selves."²³ The creative content generated and displayed publicly by these culture bearers in homage to their ancestry is subject to the overarching policy set forth in the Copyright and Patent Clause of the United States Constitution, the primary purpose of which is "[t]o promote the Progress of Science and useful Arts, by securing for limited Times for Authors and Inventors the exclusive Right to their respective writings and Discoveries."²⁴ The implication is that by providing authors with this incentive, they will create works to the benefit of the public.

The Copyright Act furthers this constitutional policy of promoting public welfare by extending legal protection as an enticing perk to

22. Interview with Howard Miller, *supra* note 2.

23. *Id.*

24. U.S. CONST. art. I, § 8, cl. 8.

content creators.²⁵ In particular, the Act sets forth a bundle of rights exclusive to copyright holders and prohibits others from compromising those rights without authorization.²⁶ Among the exclusive rights conferred by the Act are the rights to reproduce, distribute, and publicly perform a copyrighted work, and to prepare derivative works.²⁷

The United States Supreme Court has echoed this economic policy of promoting public welfare through the protection of creators' rights: "[E]ncouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'"²⁸ In *Mazer v. Stein*, the Court even asserted, "Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered."²⁹

Extending copyright protection to a Mardi Gras Indian suit only reinforces the policy embodied within the Constitution and supported by the Copyright Act and jurisprudence. A Mardi Gras Indian devotes sacrificial days to his cultural rituals and creative activities. Addressing the intense devotion of the Mardi Gras Indian culture to its creative content, Chief Miller proudly opined, "It usually takes nine months to a year to build a Mardi Gras Indian suit."³⁰ Just like the sculptor in *Mazer*, a Mardi Gras Indian is deserving of the "rewards commensurate with the services rendered" for the benefit of the public.³¹ Indeed, Chief Miller asserts that the Mardi Gras Indians channel the same sentiment: "The sole purpose of the Mardi Gras Indian was to lift the spirit of the people; to bring spiritual joy to the people."³²

While copyright law guarantees "a fair return for an 'author's' creative labor," the Court has suggested, "[T]he ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."³³ The Court has further asserted that copyright protection "encourag[es] authors (broadly defined) to generate new ideas and disclose them to the

25. See 17 U.S.C. §§ 101-1332.

26. *Id.* § 106.

27. *Id.*

28. *Mazer v. Stein*, 347 U.S. 201, 219 (1954); see also *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) ("The monopoly created by copyright thus rewards the individual author in order to benefit the public." (quoting *Sony Corp. of Am. v. Universal Studios, Inc.*, 464 U.S. 417, 477 (1984) (Blackmun, J., dissenting))); *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) ("The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.").

29. 347 U.S. at 219.

30. Interview with Howard Miller, *supra* note 2.

31. *Mazer*, 347 U.S. at 219.

32. Interview with Howard Miller, *supra* note 2.

33. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

public, being free to do so in any uniquely expressed way they may choose.”³⁴

The Mardi Gras Indians celebrate their culture in part by exhibiting their ornate suits in rituals that are open and accessible to audiences. This cultural celebration exposes the public to historic, sacred traditions and practices on an interactive platform within an indigenous community. Each Mardi Gras, Super Sunday (the third Sunday in March), and St. Joseph’s Night—“a tradition that arose out of the affinity between blacks and Sicilians in the city’s working-class precincts”³⁵—Mardi Gras Indian tribes congregate and proudly parade their suits on the streets of New Orleans’ neighborhoods. They draw large crowds of people who stand in awe of the larger-than-life, sculptural masterpieces. The audience members revel in this cultural tradition, waiting in great anticipation for the exhibition of the next suit.

Undoubtedly, the Mardi Gras Indians promote public welfare by providing a forum for education and exposure to their powerfully unique and dynamic cultural traditions. Unfortunately, this open display of these sculptural suits often leaves the Mardi Gras Indians vulnerable to wrongful exploitation of their culture and their individual works of art. In an interview with National Public Radio’s Melissa Block, Chief Miller explained, “For years we had the fear that we have been exploited. They had been taking advantage of us and coming in and snapping pictures. In selling the pictures, we see them everywhere—magazines, even in art galleries being sold and we are not getting anything from it.”³⁶

It should be noted, however, that the Mardi Gras Indians are not and have not sought copyright protection in order to ban spectators from taking photographs of their suits. Generally, “[they] have no problem with people taking pictures for education purposes [or] if you want to take a picture [to] have in your home. There’s no problem with that.”³⁷ Furthermore, in those circumstances where a particular suit has been registered with the Copyright Office, the principle of fair use would permit usage of such imagery provided that it was for the purpose of “criticism, comment, news reporting, teaching . . . , scholarship, or research.”³⁸ Thus, anyone can still photograph the suits, even those that are registered, but they would be prohibited from using these images for

34. *Lotus Dev. Corp. v. Paperback Software Int’l*, 740 F. Supp. 37, 52 (D. Mass. 1990) (citing *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 546 (1985)).

35. Robertson, *supra* note 8.

36. *NPR Interview*, *supra* note 10.

37. *Id.*

38. 17 U.S.C. § 107 (2006).

any unauthorized commercial purpose.³⁹ Summarizing the general sentiment of tribe members, Chief Howard expressed his hope that should the Mardi Gras Indians be exploited, they would be sufficiently compensated, because “a lot goes into the suits—time, hour, blood, sweat, tears, [and] money [So] if you want to take [a picture] to make money, then that’s where we say we should also be compensated. And I think that’s fair.”⁴⁰

Pursuant to the Copyright Act, the author of a Mardi Gras Indian suit is protected from the unauthorized copying of his suit to the extent that he has legal recourse against a party in violation of one of the exclusive rights set forth in the Act.⁴¹ The copyright protection extended to Mardi Gras Indians suits empowers the culture bearers to combat wrongful exploitation of their works and thereby serves as an incentive for the authors to create more content that will ultimately promote public welfare.

B. Copyrightability of a Mardi Gras Indian Suit

Copyright protection for a given “work of authorship” automatically attaches provided that the material is original, fixed in some tangible form of expression, and owes its origin to an author.⁴² Thus, the three factors stemming from this statutory definition, which determine whether material is copyrightable subject matter and the scope of the allocated copyright protection, are (1) originality; (2) authorship; and (3) fixation. The “Supreme Court has repeatedly construed all three terms in relation to one another and perhaps has collapsed them into a single concept”; therefore, “[works] are what authors create, but for one to be an author, the [work] has to be original.”⁴³ Thus, whether a Mardi Gras Indian suit, as a particular Mardi Gras Indian’s physical expression of his spiritual homage to his ancestors warrants copyright protection depends initially upon finding the suit sufficiently original.

39. Any photograph of a Mardi Gras Indian suit is a derivative work, and as such requires that the photographer acquire a license from the copyright-holding tribe member. *See supra* Part IV.

40. *NPR Interview*, *supra* note 10.

41. *See* 17 U.S.C. § 106.

42. *Id.* § 102(a) (“Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”).

43. 2 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 3:20 (2010) (footnote omitted).

1. The Originality of the “Prettiest” Suit

Under § 102(a) of the Copyright Act only those “works of authorship” that are “original” are eligible for copyright protection. But long before this terminology entered the statutory lexicon, courts considered “originality” a prerequisite for copyright protection, pursuant to the Copyright and Patent Clause of the Constitution, which authorizes Congress to “secur[e] for limited Times to Author . . . the exclusive Right to their respective Writings.” In two late-nineteenth-century cases—*The Trade-Mark Cases*⁴⁴ and *Burrow-Giles Lithographic Co. v. Sarony*⁴⁵—the Supreme Court “made it unmistakably clear [the terms “authors” and “writings”] presuppose a degree of originality.”⁴⁶ As the bedrock principle of copyright law, originality is thus “an implicit constitutional and explicit statutory requirement.”⁴⁷

Despite its significance in copyright law, the threshold for originality is quite low.⁴⁸ A work is considered sufficiently original if it is “independently created by the author (as opposed to copied from other works), and . . . it possesses at least some minimal degree of creativity.”⁴⁹ Originality thus dictates mutual creativity: an author must exhibit creativity in developing a work and the final product must display “minimal creativity” in the sense that it is at least slightly distinct from any preexisting material.

The independent creation requirement bars an author from copying a preexisting source and claiming it as their own. Thus, the work must “owe its origin” to an author, who must have engaged in some intellectual endeavor in developing the work.⁵⁰ This condition does not necessitate novelty or that the author create a work unique and wholly different from preceding works. In order for the completed piece to qualify as an original independent creation, an author—in making the work—need only contribute his “personal reaction . . . upon nature,”⁵¹ since “[p]ersonality always contains something unique,” and it “expresses

44. 100 U.S. 82, 94 (1879) (holding that copyright was reserved for works that are “original . . . and are founded in the creative powers of the mind”); U.S. CONST. art. I, § 8, cl. 8.

45. 111 U.S. 53 (1884).

46. Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 346-47 (1991) (citing *The Trade-Mark Cases* and *Burrow-Giles* in holding that originality is required not just by the Copyright Act but by the Constitution).

47. Kelley v. Chi. Park Dist., 635 F.3d 290, 302 (7th Cir. 2011).

48. See *Feist*, 499 U.S. at 345.

49. *Id.* (citing 1 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 2.01[A]-[B] (1990)).

50. See *id.* at 346 (quoting *Burrow-Giles*, 111 U.S. at 58).

51. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 250 (1903).

its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone."⁵² Upholding the copyright of a sculpture of an animal, the United States Court of Appeals for the First Circuit, in *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, stated that the "something irreducible" which was the creator's alone was the particular shape of the sculpture.⁵³ The court thus reinforced the notion that an author's decision-making process in building a sculpture implies originality—the author dictates the shape of the sculpture in choosing its "proportion, form, contour, configuration, and conformation."⁵⁴

Similarly, a Mardi Gras Indian observes his individual autonomy in exercising exclusive discretion over the choices reflected in his final expression in his suit. Although Mardi Gras Indian suits "relate to traditions found in other cultures, these suits have evolved during more than a century into a tradition wholly its own and not found in this form anywhere else."⁵⁵ "[J]oin[ing] together elements of the art of Africa, the Caribbean, and New Orleans itself," the "intricate beading, geometric designs, and resplendent colors found in the suits of New Orleans' Mardi Gras Indians"⁵⁶ thus merge into three-dimensional, unique sculptures. As Blumenfeld confirms, "Each suit is an individualized artistic piece, within a culture that prizes originality as well as extensions of longstanding aesthetic traditions."⁵⁷ Acting as vessels of their personal spiritual expression, Chief Miller explains: "A Mardi Gras Indian suit is about artistic control. Suits vary in different styles. It is what you feel that . . . is best for you, what suits you, to bring out that spiritual expression of freedom."⁵⁸

In addition to independent creation, the originality requirement demands that an author's final product contain some amount of creativity. However, the "requisite level of creativity is extremely low; even a slight amount will suffice."⁵⁹ A work does not need to be innovative or surprising; however, it must be more than "so mechanical or routine as to require no creativity whatsoever."⁶⁰ Thus, originality will be found in all

52. *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 193 F.2d 162, 164 (1st Cir. 1951), *aff'd*, 344 U.S. 228 (1952).

53. *Id.*

54. *Id.*

55. E-mail from Larry Blumenfeld to author, *supra* note 6.

56. E-mail from Gene Meneray, Director of Arts Business Program, Arts Council of New Orleans, to author (Oct. 19, 2012, 22:45 CST) (on file with author).

57. E-mail from Larry Blumenfeld, *supra* note 6.

58. Interview with Howard Miller, *supra* note 2.

59. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1990).

60. *Id.* at 362.

but a “narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent.”⁶¹ Mardi Gras Indian suits are no exception. Although these suits indeed require a great deal of mechanical skill, they also require an even greater degree of artistic ingenuity. But for the creative process inherent within the suit-making process, the final expression would not include the very elements that render each sculptural work so ornate and striking to the eye.

There is however, a distinction between an idea and an artist’s particular physical expression of that idea. Courts have been clear that ideas are not copyrightable, but rather an expression of an author’s idea is subject to copyright protection: “It is well settled that there can be no copyright on an ‘idea’ itself but only on the tangible ‘expression’ of the idea.”⁶² Holding a sculpture to be an original work of authorship, the United States District Court for the Eastern District of Pennsylvania in *Pellegrini v. Allegrini* made this principle of copyright eligibility clear.⁶³ The district court reasoned that only “something upon which the labors of an artist as such had been employed” could receive copyright protection.⁶⁴

In like fashion, a Mardi Gras Indian commits many hours daily to creating, designing, and developing the parts of his suit that will ultimately be combined to form a grandiose sculptural expression of his own individuality. Each Mardi Gras Indian suit is a one-of-a-kind ensemble of artistic elements combined to represent the author’s own imaginative spark in the design process and resulting tangible expression. In Chief Miller’s words: “The Expression of the artwork is the way you visualize something. Each suit is different because of the way each person sees their suit differently. This is why they are all beautiful in their own right.”⁶⁵ As the ultimate physical expression of the spirit embodied in the individual, the very nature of this cultural ritual demonstrates and surpasses copyright law’s minimum standard of originality.

61. *Id.* at 359.

62. *Uneeda Doll Co. v. P&M Doll Co.*, 353 F.2d 788, 789 (2d Cir. 1965) (per curiam) (citing *Baker v. Selden*, 101 U.S. 99 (1879)); *see also* *Arthur v. Am. Broad. Cos.*, 633 F. Supp. 146, 148 (S.D.N.Y. 1985) (making a distinction between the copyrightability of a sculpture and the preliminary sketches used to design the sculptural work, explaining that the sketches in that particular case “contain[ed] no more than the bare idea or concept of superimposing” the subject matter; but the embodiment of the subject matter or idea within a sculptural expression was subject to copyright protection).

63. 2 F.2d 610, 611 (E.D. Pa. 1924).

64. *Id.*

65. Interview with Howard Miller, *supra* note 2.

2. Mardi Gras Indian Suits as Sculptural Works of Authorship

Copyright applies only to original “works of authorship,” the scope of which is quite broad. The Copyright Act of 1976 provides that such works include the following: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.⁶⁶ This list is not exclusive, and a work can fall into more than one of the categories.⁶⁷ However, § 102(a)’s categories are illustrative, so the fact that a work appears to fall into one of the categories may determine if the work is subject to any other copyright rules.

Included under the “[p]ictorial, graphic and sculptural” category of works of authorship are “two-dimensional and three-dimensional works of fine, graphic, and applied art,” which § 101 defines as including, “works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned.”⁶⁸ Because copyright protection applies without regard to artistic merit, pictorial, graphic, and sculptural works do not have to achieve a certain level of aesthetic value to qualify as a work of authorship.⁶⁹ Nor do works of authorship have to conform to typical societal notions of art. In *Thomas Wilson & Co. v. Irving J. Dorfman Co.*, the United States Court of Appeals for the Second Circuit affirmed this statutory premise, suggesting that while the lingerie lace designs are not what ordinarily comes to mind with respect to works of art, the configuration of the design and the details embodied within the lace, such as petals and leaves, demonstrated an “appreciable amount of creative skill and judgment” and possessed “more than a faint trace of originality.”⁷⁰ Similarly, “The suits of Mardi Gras Indians exemplify a kind of artistic discipline and sophistication that you do not usually associate with art intended to be consumed on the street,” as Lolis Elie explains, and through the public’s exposure to the artistry of this indigenous culture, the Mardi Gras Indians have effectively created a

66. 17 U.S.C. § 102(a) (2006).

67. See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903) (holding that chromolithographs containing a portrait were copyrightable).

68. 17 U.S.C. § 101.

69. H.R. REP. NO. 94-1476, at 54 (1976).

70. 433 F.2d 409, 411 (2d Cir. 1970) (internal quotation marks omitted).

specific set of local learned critics who evaluate the requisite “prettiness” of each new suit.⁷¹

3. Sew, Sew, Sew Until Fixed in a Sculptural Form of Expression

A work of authorship only qualifies for protection if it is fixed in a tangible form.⁷² The Copyright Act provides that a creative work is “fixed” in a tangible medium of expression, “when its embodiment in a copy . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”⁷³ In the House Committee of the Judiciary’s report regarding the 1976 Amendment to the Copyright Act, the legislature clarified § 101’s definitional requirements of “fixed,” stating, “The two essential elements [of copyrightability]—original work and tangible object—must merge through fixation in order to produce subject matter copyrightable under the statute.”⁷⁴ The Committee considered form, manner, or medium of fixation irrelevant, asserting that fixation could occur in “words, numbers, notes, sounds, pictures, or any graphic or symbolic indicia, whether embodied in a physical object in written, printed, photographic, sculptural, punched, magnetic, or any other stable form.”⁷⁵

The Supreme Court has maintained that sculptures are subject to copyright protection as a tangible form of expression. In *Mazer v. Stein*, the Court addressed the historical context and evolution of the Copyright Act, acknowledging that, over the years, Congress had broadened the scope of the Act to include sculptural works and that therefore the term “author” must include the creator of a sculptural work.⁷⁶ The Court also looked at the language of the statutes, the legislative history, and agency practice of the Copyright Office. Given the Copyright Office’s “contemporaneous and long continued construction of the statutes,” and because the Copyright Office “would allow the registration of such a statuette as is in question here,” the Court concluded that a “work of art”

71. E-mail from Lolis Eric Elie, Story Writer for *Treme*, to author (Oct. 22, 2012, 9:00 CST) (on file with author).

72. 17 U.S.C. § 102(a).

73. *Id.* § 101.

74. H.R. REP. NO. 94-1476, at 53.

75. *Id.*

76. 347 U.S. 201, 207-10 (1954).

includes sculpture.⁷⁷ Other courts have followed the holding set forth in *Mazer* that sculptures are copyrightable expressions.⁷⁸

Sculpture is undoubtedly a means of fixing an author's original expression into a tangible medium—whether it includes any of an infinite array of materials ranging from hard metals to soft textiles. “Consist[ing] of canvas, beads, feathers, marabou, lace sequins rhinestones, cardboard, ribbon, other found objects,”⁷⁹ a Mardi Gras Indian suit is fixed in a tangible medium of expression when the author completes the process of piecing together the various elements of the sculpture. A completed Mardi Gras Indian suit is the ultimate, physical expression of the culture bearer's unique, creative authorship. It is an original work of creative authorship fixed in a tangible, physical medium of sculptural expression and thus subject to copyright protection.

C. *Distinguishing a Mardi Gras Indian Suit from a Useful Article*

Although a sculpture is clearly copyrightable subject matter as a three-dimensional work of art, pursuant to the Copyright Act this protection only extends to the part of the sculpture that is not considered to be mechanical or utilitarian.⁸⁰ Accordingly, copyright law does not grant protection to “useful articles,” which § 101 classifies as those things with an “intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information.”⁸¹ However, removing copyright protection from all articles that are capable of serving a useful purpose would cause works of art otherwise subject to protection to be exposed to infringement. In sum, this exclusion would undermine the purpose set forth in the Copyright Act of promoting public welfare by withdrawing the very incentive the statute was designed to provide. Therefore, following precedence set forth in

77. *Id.* at 212-13.

78. *See, e.g.,* *Prestige Floral, Societe Anonyme v. Cal. Artificial Flower Co.*, 201 F. Supp. 287, 290 (S.D.N.Y. 1962) (reasoning that sculpture was “a likeness of a thing and therefore a copyrightable expression”); *First Am. Artificial Flowers, Inc. v. Joseph Markovits, Inc.*, 342 F. Supp. 178, 181 (S.D.N.Y. 1982) (finding that the copyrightability of tea roses made with wire and plastic could not be challenged); *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 193 F.2d 162, 164 (1st Cir. 1951) (upholding the copyrightability of an animal sculpture, reasoning that the shape of the author's work was an “irreducible” copyrightable expression); *Trifari, Krussman & Fishel, Inc. v. Charel Co.*, 134 F. Supp. 551 (S.D.N.Y. 1955) (stating that “[a]rtistic expression may take innumerable forms,” from fine art to commonplace fashion accessories, and noting the irrelevance of classism in the copyrightability determination).

79. Interview with Howard Miller, *supra* note 2.

80. *See* 17 U.S.C. § 101 (2006) (defining “[p]ictorial, graphic, and sculptural works”).

81. *Id.* Rather, patent law provides protection for “useful articles.” 35 U.S.C. §§ 101-376 (2006).

Mazer—that utility and art are not mutually exclusive⁸²—the Copyright Act places a condition on the sweeping prohibition of copyright protection for works with the capacity to serve a functional use. The design of a useful article will be considered copyrightable subject matter, as a pictorial, graphic, or sculptural work “only if, and only to the extent that, such design incorporate[d] pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.”⁸³ In short, although the general rule is that a useful article is not copyrightable in its entirety, “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.”⁸⁴

In determining whether sculpture is a useful article, the first step is to determine whether a work has an intrinsic utilitarian function.⁸⁵ An object that merely portrays its appearance has an intrinsic aesthetic function and is subject to copyright protection.⁸⁶ In contrast, an object that does more than portray its appearance may have an intrinsic utilitarian function and thus is barred from copyright protection as a useful article.⁸⁷ The courts have adopted a case-by-case analysis in determining whether a work is a useful article, reasoning that to categorize a work as a useful article automatically without any scrutiny does not serve to promote public welfare.⁸⁸ Assuming a work of art has an intrinsic utilitarian function and thus is a “useful article,” the second step in determining the copyrightability of the work is an examination into whether the design elements of the useful article can be separated and exist independently from its utilitarian features.⁸⁹ If the aesthetic “sculptural features and utilitarian aspects are not separable, the work is not copyrightable, although it may be protectable on a more limited basis with a design patent.”⁹⁰

82. *Mazer v. Stein*, 347 U.S. 201, 217 (1954).

83. 17 U.S.C. § 101 (citing *Mazer*, 347 U.S. 201) (defining “[p]ictorial, graphic, and sculptural works”).

84. H.R. REP. NO. 94-1476, at 50 (1976).

85. 17 U.S.C. § 101 (defining “[p]ictorial, graphic, and sculptural works”).

86. *Masquerade Novelty, Inc. v. Unique Indus., Inc.*, 912 F.2d 663, 670-71 (3d Cir. 1990) (holding that masks meet the definition of “useful articles” and are copyrightable as sculptural works because “masks have no utility that does not derive from their appearance”).

87. *See Poe v. Missing Persons*, 745 F.2d 1238, 1242-43 (9th Cir. 1984); *see also Brandir Int’l, Inc. v. Cascade Pacific Lumber Co.*, 834 F.2d 1142 (2d Cir. 1987).

88. *See, e.g., Brandir*, 834 F.2d 1142.

89. *See id.*

90. *Superior Form Builders, Inc. v. Dan Chase Taxidermy (Superior Form II)*, 74 F.3d 488, 493 (4th Cir. 1996).

As it pertains to Mardi Gras Indian suits, this analysis is further complicated by varied notions of what overarching classification they should fall under: clothing or costume. Identifying a suit as either clothing or costume has heavy and divergent legal ramifications, particularly as to copyrightability. Indeed the Supreme Court and circuit courts have long held that clothing is a useful article and thus is per se not copyrightable;⁹¹ while fanciful costumes, also considered useful articles, are subject to the separability test and can be registered if they have separately identifiable pictorial and/or sculptural authorship.⁹² However, my assertion is that these suits are sculptural works of art and are neither clothing nor costume. If classified as sculptures, Mardi Gras Indian suits would avoid any “useful article” analysis and would receive copyright protection without having to meet any kind of physical or conceptual separability test.⁹³ In support of this argument, David Carson, former General Counsel of the United States Copyright Office, has stated: “I am not so sure [that] the Mardi Gras [suits] are really articles of clothing. There is a case that they are really works of art. In any event, I certainly understand the argument that they are not just articles of clothing, that there is something unique about them.”⁹⁴

Without the knowledge and context of the creation behind any given Mardi Gras Indian suit, a layperson may reasonably mistake one of these dynamic works of art as a mere garment. If they are not considered sculptural works of art, but rather “useful articles,” then they could be barred from protection. However, should a court deem the suits useful articles, a separability analysis will still prove that the suits are primarily sculptural works and entitled to copyright protection.

1. A Mardi Gras Indian Suit Is Not Inherently Utilitarian

Some critics might argue that a Mardi Gras Indian suit is analogous to a garment with an inherently functional purpose and thus intrinsically utilitarian as a useful article of clothing. Others agree that Mardi Gras

91. Fashion Originators Guild of Am., Inc. v. FTC, 114 F.2d 80, 84 (2d Cir. 1940), *aff'd*, 312 U.S. 457 (1941); Cheney Bros. v. Doris Silk Corp., 35 F.2d 279, 279 (2d Cir. 1929).

92. Registrability of Costume Designs, 56 Fed. Reg. 56,531 (Nov. 5, 1991).

93. Masquerade Novelty, Inc. v. Unique Indus. Inc., 912 F.2d 663, 670 (3d Cir. 1990). The Third Circuit in *Masquerade* reasoned that “[i]f a sculptural work is not a ‘useful article’ because its sole ‘utilitarian function . . . is . . . to portray the appearance of the article,’ then it remains copyrightable.” *Id.* Therefore, the court concluded that a separability analysis “is only required where an article is first determined to be a ‘useful one,’” and thus if an article is not useful, any question of separability between artistic and functional aspects of the article is irrelevant. *Id.*

94. David Carson, *Conversations with Renowned Professors and Practitioners on the Future of Copyright (Part VII)*, 14 TUL. J. TECH. & INTELL. PROP. 69, 75 (2011).

Indian suits “are pretty wild and not functional in the ordinary sense of the word,” but continue to classify these sculptural works as clothing or at best a mere costume; reasoning, “lots of runway fashion is also way out there and not likely to fit anyone’s ordinary idea of usefulness, yet it doesn’t receive copyright protection.”⁹⁵ This divide is representative of both the evolution of case law and the continued frustration of circuit courts as they grapple with finding a proper standard.

Early copyright litigation involving wearable art and costume-like garments struggled with ascertaining whether such items should be categorized as useful articles or as works of sculpture.⁹⁶ Prior to general acceptance of the separability test, the United States Court of Appeals for the Ninth Circuit in *Poe v. Missing Persons*, was asked to determine the copyrightability of a swimsuit made of vinyl objects and covered with a collection of clear plastic and crushed rock.⁹⁷ While the circuit court ultimately remanded the case for future review without ruling on the garment’s copyrightability, it made a concerted effort to lay out the factual issue of whether the sculptural work in question fell under the legal category of “useful article.”⁹⁸ Highlighting the impractical nature of the article, the Ninth Circuit wrestled with whether the garment could even feasibly be worn or have any other utilitarian purpose, finding instead that “the only reason for existence of [the work] was as a work of art.”⁹⁹

A few years later, a comparable issue arose, but this time in relation to the copyrightability of a mask. In *Masquerade Novelty, Inc. v. Unique Industries, Inc.*, the United States Court of Appeals for the Third Circuit held that nose masks were copyrightable because “masks have no utility that does not derive from their appearance”; their sole function is to portray the appearance of the work.¹⁰⁰ In analyzing whether they qualified as useful articles, the court in *Masquerade* rejected the argument that the nose masks served a utilitarian function by allowing wearers to disguise themselves, concluding that the masks were not useful articles.¹⁰¹ Accordingly, the Third Circuit ruled that the district court erred in classifying the nose masks as useful and found that the lower court’s rationale—that the nose masks were not entitled to

95. *E.g.*, Robertson, *supra* note 8 (quoting Kal Raustiala, Law Professor, University of California, Los Angeles).

96. *See generally* *Poe v. Missing Persons*, 745 F.2d 1238 (9th Cir. 1984).

97. *Id.* at 1239.

98. *Id.* at 1241.

99. *Id.* at 1242.

100. 912 F.2d 663, 670-71 (3d Cir. 1990).

101. *Id.* at 670.

copyright protection because their utility of evoking humor could not be separated from their sculptural elements—was flawed.¹⁰² In holding that masks do not even meet the definition of a “useful article” and that there was no need to assess the separability of their artistic and utilitarian qualities, the *Masquerade* court ruled that the masks in question were copyrightable as sculptural works.¹⁰³

Furthermore, the appellate court in *Masquerade* emphasized the relevance of the range of emotions evoked by various works of art.¹⁰⁴ The court specifically compared the laughter evoked by the nose masks to emotions stimulated by paintings in its reasoning that nose masks are not intrinsically utilitarian and therefore not useful articles:

That nose masks are meant to be worn by humans to evoke laughter does not distinguish them from clearly copyrightable works of art like paintings. When worn by a human being, a nose mask may evoke chuckles and guffaws from onlookers. When hung on a wall, a painting may evoke a myriad of human emotions, but we would not say that the painting is not copyrightable because its artistic elements could not be separated from the emotional effect its creator hoped it would have on persons viewing it.¹⁰⁵

Relative to this culture-generated, emotion-driven view of art, Lolis Elie has commented that the Mardi Gras Indians “have created a sophistication in their audience.”¹⁰⁶ In fact, the public themselves have evolved into experts of this cultural artistry: “When a man or woman on the street tells an Indian ‘You pretty,’ that compliment comes from someone who knows the tradition, has probably been evaluating Mardi Gras Indian suits for years and has an educated perspective from which to draw this conclusion.”¹⁰⁷

Given the verity of the circuit courts’ application of the useful article analysis, the Copyright Office, shortly after the decision in *Masquerade*, issued a Policy Decision aimed at clarifying the issue of the copyrightability of costumes and masks.¹⁰⁸ Although the Copyright Office acknowledged “[c]ostumes, by their very nature, exist at the

102. *Id.* at 670-71 (“Unlike a design incorporated in a belt, which holds up the wearer’s pants, or even a costume, which may serve, aside from its appearance, to clothe the wearer, nose masks have no utility that does not derive from their appearance.” (citation omitted)).

103. *Id.* at 671.

104. *Id.* (“The utilitarian nature of an animal nose mask or a painting of the crucifixion of Jesus Christ inheres solely in its appearance, regardless of the fact that the nose mask’s appearance is intended to evoke mirth and the painting’s appearance a feeling of religious reverence.”)

105. *Id.*

106. E-mail from Elie to author, *supra* note 71.

107. *Id.*

108. Registrability of Costume Designs, 56 Fed. Reg. 56,531 (Nov. 5, 1991).

boundary between works of imagination and works of utility,”¹⁰⁹ the decision went on to explicitly state, “For purposes of copyright registration, fanciful costumes will be treated as useful articles.”¹¹⁰ These costumes were not found to be wholly uncopyrightable, the decision providing that as useful articles, “fanciful costumes will be registered if they contain separable pictorial or sculptural authorship.”¹¹¹ Interestingly, the decision created a distinction between costumes and masks, reasoning that “since masks general portray their own appearance . . . and fall outside the definition of a useful article,” they could be copyrightable as pictorial/sculptural works.¹¹² Because both costumes and masks merely “portray their own appearance,” an adequate explanation for this disparate treatment seems warranted. However, the Copyright Office failed to provide any justification for this discrepancy other than to state that costumes can serve a useful “clothing” function, while masks rarely serve any useful function.¹¹³

While a Mardi Gras Indian suit may not be classified by many as a mask, the tribe members in fact refer to these sculptural works as masks: “The suit itself is not the sole purpose of the Indian. It’s just part of it. It’s the mask. It’s what is behind the mask that I always look for in an Indian.”¹¹⁴ Thus there is a plausible alternative argument to support the suits’ copyrightability: they are not “suits” but, per the culture’s lingo, “masks” and under the Copyright Office’s 1991 Policy Decision “fall outside of the definition of a useful article.”¹¹⁵

For over a decade following the decision, circuit courts wrestled with the Copyright Office’s sincere but failed attempt to articulate a standard for the copyrightability of costumes, struggling in particular with identifying the overall usefulness of costumes. And it is clear that the issue is far from resolved as seen in a recent Second Circuit case. In *Chosun International, Inc. v. Chrisha Creations, Ltd.*, the United States Court of Appeals for the Second Circuit expressed skepticism regarding the contention that all costumes should automatically be considered to be useful articles, pointing out that “[t]he function of a costume is, precisely, to portray the appearance of something,” which is in direct contradiction

109. *Id.* at 56,532.

110. *Id.* The Copyright Office’s espoused rationale was, “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.” *Id.*

111. *Id.*

112. *Id.* at 56,531.

113. *Id.* at 56,531-32.

114. Interview with Howard Miller, *supra* note 2.

115. See Registrability of Costume Designs, 56 Fed. Reg. at 56,531.

with the statutory definition of a “useful article.”¹¹⁶ Nevertheless, the Second Circuit refrained from upsetting deeply held Supreme Court jurisprudence that articles of clothing are useful articles, generally not copyrightable, and subject to the separability test in order to determine what, if any, aspects of the clothing are eligible for copyright protection.¹¹⁷

Unlike those who think that Mardi Gras Indian suits are stuck in the legal gray area of clothing and fanciful costumes, I and the entire Mardi Gras Indian community assert that these suits do not serve any kind of practical clothing function.¹¹⁸ Indeed, when a suit is displayed over the author’s body, it is adorned over the culture bearer’s existing clothing and therefore does not “serve a dual purpose of clothing the body and portraying [its] appearance.”¹¹⁹ Rather, due to the enormous dimensions and weight of the intricate beading and feathers of any given suit, it is anything but functional. The act of exhibiting a Mardi Gras Indian suit can be so burdensome that Indians must take several breaks during cultural rituals.¹²⁰ Too often, a Mardi Gras Indian will have a heat stroke or experience other health problems while displaying a suit even during the coldest of carnival seasons. Thus, most “masking” Indians generally have a crew of other tribe members and supporters to help them remove these sculptures from their bodies to avoid health risks. As Chief Miller makes clear, “The suit is not to be worn for protection but for ceremony as the expression of spiritual levels.”¹²¹

Ultimately, the suits do not serve any kind of useful “clothing function”—any alleged usefulness of a Mardi Gras Indian suit’s sculptural form is its portrayal of the appearance of the actual suit. As clothing, the suits are functionally useless and are rather intrinsically aesthetic. Thus, a Mardi Gras Indian suit is more analogous to the copyrightable masks in *Masquerade* and should not be considered useful articles.

116. 413 F.3d 324, 329 n.3 (2d Cir. 2005) (“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.”).

117. *Id.* at 328.

118. Robertson, *supra* note 8.

119. Registrability of Costume Designs, 56 Fed. Reg. at 56,532.

120. Interview with Howard Miller, *supra* note 2 (“Mardi Gras Indians have plenty of stops to remove the suits, because Indians run most of the day, and we get tired, because the suits get heavy. The canvas gets wet and heavier when it rains or when we sweat.”).

121. *Id.*

2. For the Sake of Argument: Applying the Separability Doctrine to a Mardi Gras Indian Suit

Taking the position that a Mardi Gras Indian suit does have an intrinsic utilitarian function of covering the author (yet subjecting the author to heat stroke and other health risks) or masquerading, a Mardi Gras Indian suit is nevertheless subject to copyright protection, because its sculptural features can be separated and exist independently from the utilitarian features of the suit.

If an article is found to be useful, the next step is to determine whether it passes the conceptual separability test.¹²² In *Brandir International v. Cascade Pacific Lumber Co.*, the court examined the separability of the work's art from its functional aspects in examining the copyrightability of a metal bicycle rack entitled *Ribbon Rack*, which was designed and developed based on preexisting metal sculptural works shaped as bicycles using a singular strand of metal.¹²³ The *Ribbon Rack* was an industrial product that was mass-marketed and commercially produced.¹²⁴ In determining whether the bicycle rack was copyrightable, the court in *Brandir* maintained that unless the shape of an article "contains some element that, physically or conceptually, can be identified as separable from the utilitarian aspects of that article, the design would not be copyrighted under the [Copyright Act amendments of 1976]."¹²⁵ The court acknowledged that "the line Congress attempted to draw between copyrightable art and noncopyrightable design was neither clear nor new."¹²⁶

Significantly, in analyzing whether the artistic elements of the bicycle rack were capable of existing independently of the utilitarian features, the court adopted the conceptual separability doctrine, which provides that an article is copyrightable if it "stimulate[s] in the mind of the beholder a concept that is separate from the concept evoked by its utilitarian function."¹²⁷ The court noted that the conceptual separability doctrine was "alive and well" and emphasized the significance of the court's prior ruling in *Kieselstein-Cord v. Accessories by Pearl, Inc.*, the landmark case on the conceptual separability doctrine, where it found conceptual separation with respect to ornate belt buckles that doubled as

122. *Brandir Int'l v. Cascade Pac. Lumber Co.*, 834 F.2d 1142, 1142-43 (2d Cir. 1987).

123. *Id.*

124. *Id.* at 1146.

125. *Id.* at 1143 (quoting H.R. REP. NO. 94-1476 (1976)).

126. *Id.* (internal quotation marks omitted).

127. *Id.* at 1144 (citing *Carol Barnhart Inc. v. Econ. Cover Corp.*, 773 F.2d 411, 422 (2d Cir. 1985)).

jewelry.¹²⁸ The court in *Brandir* justified applying the conceptual separability test because doing so was consistent with its holding in *Kieselstein-Cord* and the test was relatively easy to administer in practice.¹²⁹

The court noted some possible elements for testing conceptual separability, including but not limited to ascertaining whether the article's primary use is utilitarian or artistic; whether the aesthetic aspects of the article are primary; and whether the article is marketable as art.¹³⁰ Ultimately, the court gave the most weight to "whether the aesthetic design elements are significantly influenced by functional considerations."¹³¹ The court concluded that "if design elements reflect a merger of aesthetic and functional considerations, the artistic aspects of a work cannot be said to be conceptually separable from the utilitarian elements. Conversely, where design elements can be identified as reflecting the designer's artistic judgment exercised independently of functional influences, conceptual separability exists."¹³²

Accordingly, the United States Court of Appeals for the Second Circuit in *Kieselstein-Cord* held to be copyrightable "the artistic aspects of the belt buckles [that] reflected purely aesthetic choices, independent of the buckles' function," whereas in *Carol Barnhart Inc. v. Economic Cover Corp.*, it denied copyright protection to four life-sized, anatomically correct, human torso forms.¹³³ The court distinguished *Carol Barnhart* from *Kieselstein-Cord* without overruling it, reasoning that whereas in *Kieselstein-Cord* the ornate belt buckle surfaces "were not in any respect required by their utilitarian functions," the artistic features in the *Carol Barnhart* forms were "inextricably intertwined with the utilitarian feature, the display of clothes."¹³⁴

Applying the conceptually separability doctrine, the Second Circuit in *Brandir* held that the bicycle rack in question was not copyrightable.¹³⁵ Although the original design of the *Ribbon Rack* stemmed from wire sculptures created by the artist, the court found that the resulting *Ribbon Rack* was an industrial article, mass-produced for commercial sale to be used for a utilitarian purpose. The court reasoned:

128. *Id.*; *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989, 993 (2d Cir. 1980).

129. *Brandir*, 834 F.2d at 1145.

130. *Id.* at 1144.

131. *Id.* at 1146-47.

132. *Id.* at 1145.

133. *Id.*; *Carol Barnhart Inc. v. Econ. Cover Corp.*, 773 F.2d 411, 419 (2d Cir. 1985).

134. *Brandir*, 834 F.2d at 1144; *Barnhart*, 773 F.2d at 419.

135. *Brandir*, 634 F.2d at 1146.

The form of the rack is influenced in significant measure by utilitarian concerns and thus any aesthetic elements cannot be said to be conceptually separable from the utilitarian elements. This is true even though the sculptures which inspired the *Ribbon Rack* may well have been the issue of originality aside-copyrightable.¹³⁶

The Second Circuit agreed that although a copyrightable work of art does not lose protection merely because it is subsequently put to functional use, the artist's metal sculptures were clearly distinguishable from the ultimate industrial design of the bicycle rack.¹³⁷ The court explained:

Had [the artist] merely adopted one of the existing sculptures as a bicycle rack, neither the application to a utilitarian end nor commercialization of that use would have caused the object to forfeit its copyrighted status. Comparison of the RIBBON Rack with the earlier sculptures, however, reveals that while the rack may have been derived in part from one of more "works of art," it is in its final form essentially a product of industrial design. In creating the Ribbon Rack, the designer has clearly adapted the original aesthetic elements to accommodate and further a utilitarian purpose.¹³⁸

The court held that the *Ribbon Rack* did not contain artistic elements that were separate and capable of existing independently from the utilitarian aspects of the bicycle rack, and therefore, the *Ribbon Rack* was not copyrightable.¹³⁹

In *Whimsicality Inc. v. Rubies Costume Co.*, the Second Circuit analyzed copyrightability of costumes and deduced that "clothes are particularly unlikely to meet that test—the very decorative elements that stand out being intrinsic to the decorative function of the clothing."¹⁴⁰ The court in *Whimsicality* concluded that although the costumes could be adapted for wall decoration or other uses, the artistic elements were influenced by utilitarian purposes of enabling people to wear clothing to masquerade, and determined that any artistic judgment exercised in the design process was ultimately inseparable from and dependent upon functional considerations.¹⁴¹

In *Whimsicality*, the court stressed in dicta that costumes are per se uncopyrightable because clothing is a useful article.¹⁴² The court noted with significance that although the costumes were registered as soft

136. *Id.* at 1147.

137. *Id.*

138. *Id.* at 1148.

139. *Id.* at 1147-48.

140. *Whimsicality, Inc. v. Rubie's Costume Co.*, 891 F.2d 452, 455 (2d Cir. 1989).

141. *Id.* at 456.

142. *Id.* at 455.

sculptures,¹⁴³ the deposit copies included within its application to the Copyright Office showcased human models wearing the costumes as clothing.¹⁴⁴ The court suggested that the applicant could have requested a declaratory judgment from the courts to compel the Copyright Office to amend its designation of costumes as per se uncopyrightable or separated the utilitarian from aesthetic features in its application to retain copyrightability.¹⁴⁵ Although these options existed for *Whimsicality*, the Second Circuit found that the applicant took a less forthright approach and sought to “classify its creations as soft sculptures with no useful function as wearable articles.”¹⁴⁶ The court saw through the charade and held the costumes to be clothing and not subject to copyright protection.¹⁴⁷

The United States Court of Appeals for the Fifth Circuit—the court most likely to hear an appeal involving a claim by a Mardi Gras Indian for copyright infringement—recently determined in *Galiano v. Harrah's Operating Co.* that garment designs may be copyrightable under the conceptual separability doctrine if the plaintiff can show a likelihood of marketability of the design independent of the garment itself.¹⁴⁸ The court defined the likelihood of marketability test as proving that “the piece of applied art could fetch a return functioning purely as an artistic commodity.”¹⁴⁹ The court also explicitly declined to recognize a per se rule that garment design is not copyrightable.¹⁵⁰ As noted *supra*, the suits themselves are often displayed in museums and art galleries without being worn by a person or placed on a mannequin. Therefore, even if Mardi Gras Indian suits are considered functional as clothing, there is a strong probability that the Fifth Circuit would find the suits also to have value as purely “artistic commodit[ies]” and hold the suits to be copyrightable as garment design.

A costume may also be copyrightable if its aesthetic elements are physically separable from its utilitarian features. For example, the court in *Express, LLC v. Fetish Group, Inc.*, examined a tunic incorporating lace and embroidery accents and determined that while the tunic itself

143. *Id.*

144. *Id.* at 457.

145. *Id.* at 455. As an example, the court cited *National Theme Productions v. Jerry B. Beck, Inc.*, in which an application was submitted to the Copyright Office stating, “[N]o claim is made on functional designs of clothing but only on the allegedly separable elements.” *Nat'l Theme Prods., Inc. v. Jerry B. Beck, Inc.*, 696 F. Supp. 1348, 1352 (S.D. Cal. 1988).

146. *Whimsicality*, 891 F.2d at 455.

147. *Id.* at 456.

148. 416 F.3d 411, 421-22 (5th Cir. 2005).

149. *Id.* at 421.

150. *Id.* at 419 n.17.

was not copyrightable for being clothing, the lace and embroidery aspects were copyrightable because the “placement, arrangement, and look of the lace trim on the GH 268 Tunic are copyrightable” and that the “whole the look of the GH 268 Tunic, as separated from its utilitarian elements, is copyrightable.”¹⁵¹

With respect to a Mardi Gras Indian suit, assuming it is intrinsically utilitarian, its aesthetic aspects can be conceptually and physically separated from its functional elements as clothing or costume. The ornate, artistic components of a Mardi Gras Indian suit are conceptually separable from the functional clothing elements of the suit. As explained *supra*, a Mardi Gras Indian suit is not worn but displayed over the culture bearer’s human body only to the extent that the exhibition is part of cultural ritual. When a Mardi Gras Indian suit is removed from the culture bearer’s direct proximity, the culture bearer is not exposed; rather, the author is wearing clothing underneath the Mardi Gras Indian suit to protect him from the sculpture’s impediment to the author’s health.

Furthermore, a Mardi Gras Indian suit stands on its own with or without someone wearing it. When a Mardi Gras Indian suit is not displayed over its culture bearer in rituals, it is mounted on hard surfaces. Chief Howard Miller explains, “When we’re not masking, the suits are placed on a mannequin or a cool spot in the house, get it up off the floor if you can, so we can continue to build it or preserve it until it’s to be destroyed for the next suit.”¹⁵²

Incidentally, in contrast to the costumes in *Whimsicality*, a Mardi Gras Indian suit is registered with the Copyright Office as a sculptural work, and a deposit copy does not require an image of the human author, absent circumstances when the only image of the suit is of the author displaying it amidst cultural rituals. Because a Mardi Gras Indian suit is capable of existing independently from the wearer as sculpture rather than clothing, a suit can be captured within an image excluding the culture bearer, and that image can be sent to the Copyright Office as a deposit copy. Thus, a Mardi Gras Indian suit can be registered as a sculpture without any deceit to the Copyright Office.

A Mardi Gras Indian suit’s individual, sculptural artistic elements are also physically separable from the “suit” itself. Because a Mardi Gras Indian suit incorporates many patches, the patches can be removed one-by-one and exist independently without any compromise to the artistry embodied in the hand-sewn beadwork. Therefore, a Mardi Gras

151. 424 F. Supp. 2d 1211, 1225 (C.D. Cal. 2006).

152. Interview with Howard Miller, *supra* note 2.

Indian suit is copyrightable even if it is considered to be intrinsically utilitarian, because the artistic components of the sculpture are physically separable and capable of existing independently from the functional aspects of the Mardi Gras Indian suit.¹⁵³

Alternatively, the Mardi Gras Indian suit is only “useful” in “portraying [its] appearance,” which is to say it is only useful as art and has no functional utilitarian purpose.¹⁵⁴ The United States Court of Appeals for the Fourth Circuit in *Superior Form Builders, Inc. v. Dan Chase Taxidermy Supply Co. (Superior Form II)* declared, “[A]n animal sculpture, even if realistic, is copyrightable as long as the work represents the author’s creative effort.”¹⁵⁵ Thus, the Fourth Circuit in *Superior Form II* reasoned that the author’s objective in the creation of the work was an important consideration.¹⁵⁶ The court distinguished between the design of a chair and the design of a dancer statue to illustrate the distinction between designing a utilitarian object and creating a copyrightable expression.¹⁵⁷ The court elaborated:

[T]he industrial design of a unique, aesthetically pleasing chair cannot be separated from the chair’s utilitarian function and, therefore, is not subject to copyright protection. But the design of a statue portraying a dancer, created merely for its expressive form, continues to be copyrightable even when it has been included as the base of a lamp which is utilitarian. The objective in designing a chair is to create a utilitarian object, albeit an aesthetically pleasing one; the objective in creating a statue of a dancer is to express the idea of a dancer.¹⁵⁸

Examining the utilitarian features of the animal forms, the court in *Superior Form II* found that the “the usefulness of the forms is their portrayal of the appearance of animals.”¹⁵⁹ The court reasoned:

Even though covered with a skin, the mannequin is not invisible but conspicuous in the final display. The angle of the animal’s head, the juxtaposition of its body parts, and the shape of the body parts in the final display is little more than the portrayal of the underlying mannequin. Indeed, the mannequin can even portray the intensity of flexed body parts, or it can reveal the grace of relaxed ones. None of these expressive aspects of a mannequin is lost by covering the mannequin with a skin. Thus, any

153. *See Express*, 424 F. Supp. at 1225.

154. 74 F.3d 488, 492 (4th Cir 1996).

155. *Id.*

156. *Id.* at 493.

157. *Id.*

158. *Id.* (citations omitted).

159. *Id.* at 494.

utilitarian aspect of the mannequin exists “merely to portray the appearance of the animal.”¹⁶⁰

Analogous to the nose masks in *Masquerade* and the animal sculptures in *Superior Form II*, a Mardi Gras Indian suit is created by an author with the objective to merely portray the appearance of the suit as a sculpture, and even if realistic in its form, a suit is copyrightable because it represents the culture bearer’s creative effort. The intent of the author of a Mardi Gras Indian suit is to portray his sculptural expression of freedom of his individual spirit. The angle of a Mardi Gras Indian suit, the juxtaposition of its individual parts, the shape of the final display, etc., “portrays the intensity” and “reveals the grace” of the suit’s sculptural features.¹⁶¹

Whether adorned atop clothing or mounted to a hard surface in a museum, the suit’s sculptural elements remain and are not lost by virtue of differential mounting. During Mardi Gras Indian cultural rituals where a suit is displayed over the author, the human body serves as a catalyst for that transformation, a mere vehicle for portraying the “spirit” of the Mardi Gras Indian suit and the cultural tradition it channels. Chief Miller explains:

If you ever made an Indian suit or know anyone who sews his suit himself, he will tell you the feeling that comes over you the morning that you put on that suit. Something comes over you and just takes you. And, that is positive. I believe that is what takes you to where you are being transformed as a Mardi Gras Indian.¹⁶²

Thus displaying the sculpture over the author’s body does not make it useful and noncopyrightable. Rather, any utilitarian aspect of displaying a Mardi Gras Indian suit on a human body is merely to portray the appearance of the Mardi Gras Indian suit.

IV. THE MARDI GRAS INDIAN SUIT AS A PREEXISTING WORK IN PHOTOGRAPHS CLASSIFIED AS DERIVATIVE WORKS

A photograph of a Mardi Gras Indian suit may qualify as a derivative work per the Copyright Act. The Supreme Court has held that a photograph is subject to copyright protection.¹⁶³ A “derivative work” is

a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture

160. *Id.*

161. *Id.*

162. Interview with Howard Miller, *supra* note 2.

163. *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a “derivative work.”¹⁶⁴

A derivative work is subject to the same originality requirements as the preexisting work from which it is derived.¹⁶⁵ Therefore, any addition made to the initial work requires only a minimal amount of originality and creativity.¹⁶⁶ Pursuant to the Copyright Act, a photograph is a work of art subject to copyright protection.¹⁶⁷ Thus, a photograph of a Mardi Gras Indian suit is capable of qualifying as a derivative work. The Copyright Act provides that a copyright owner has the exclusive right to prepare a derivative work.¹⁶⁸ Therefore, a party seeking to prepare a derivative work must seek permission from the owner of the preexisting work.¹⁶⁹

In *Gaylord v. United States (Gaylord I)*, the United States Court of Appeals for the Federal Circuit affirmed that the U.S. government committed copyright infringement by violating a sculptor’s right to prepare a derivative work and concluded that the author was entitled to monetary damages.¹⁷⁰ In that case, the U.S. government created a postage stamp embodying a photograph of a sculpture without seeking the sculptor’s permission.¹⁷¹ The court examined the sculpture, which the artist created to portray soldier statues as part of a Korean War Veterans Memorial.¹⁷² The court explained that the sculpture at issue was artistic expression and intended to convey a message and that it qualified for protection under the Copyright Act.¹⁷³

Significantly, the author of the sculpture did not authorize the use of the sculpture within the photograph or the stamp.¹⁷⁴ Concluding that the government infringed upon the author’s exclusive rights to copy the original elements of the Memorial, the Federal Circuit Court found that the photograph qualified as a derivative work.¹⁷⁵ The Federal Circuit Court of Appeals found that the U.S. government owed damages to the

164. 17 U.S.C. § 101 (2006).

165. *See* Gracen v. Bradford Exch., 698 F.2d 300, 305 (7th Cir. 1983).

166. *See* 17 U.S.C. §§ 101-102.

167. *See id.* § 102.

168. *Id.* § 106.

169. *Id.*

170. 595 F.3d 1364, 1381 (Fed. Cir. 2010).

171. *Gaylord v. United States (Gaylord II)*, 678 F.3d 1339, 1341 (Fed. Cir. 2012).

172. *Id.*

173. *Gaylord I*, 595 F.3d at 1380-81.

174. *Gaylord II*, 678 F.3d at 1341.

175. *Gaylord I*, 595 F.3d at 1385.

sculptor, and the court proffered various schemes for their assessment.¹⁷⁶ The court acknowledged that the Copyright Act provides a mechanism for assessing damages and reinforced that “[r]easonable and entire compensation’ entitles copyright owners to compensatory damages,” in its conclusion that “the methods used to determine ‘actual damages’ under the copyright damages statute, are appropriate for measuring the copyright owner’s loss.”¹⁷⁷ The Circuit Court went on to suggest that that courts have discretion to award damages based on lost sales, lost opportunities to license, diminution in copyright value, and also actual damages based on the “fair market value of a license covering the defendant’s use.”¹⁷⁸

Similarly, photographs depicting images of the Mardi Gras Indian suits are derivative works, because the author of a suit is entitled to protection of his suit as a sculpture. Therefore, unauthorized photography of Mardi Gras Indian suits constitutes a violation of the exclusive rights of the copyright holder to create derivative works, and the copyright holder is likewise afforded an array of means for calculating damages when the culture bearer’s sculpture is used without authorization.¹⁷⁹ Conversely, if the author of a Mardi Gras Indian suit authorizes the preparation of a derivative work, particularly in the context of a photograph of a suit, both the author of the suit and photograph are protected by the Act. Either way, the copyright protection extended to a Mardi Gras Indian suit promotes public welfare by advancing the arts in a way that provides the culture bearer with redressability against wrongful exploitation, in addition to an incentive for forming mutually beneficial relationships with authors seeking to create derivative works.

V. CONCLUSION

A Mardi Gras Indian suit is prepared as part of a unique and dynamic cultural ritual that has thrived for hundreds of years within the indigenous culture found only in New Orleans, Louisiana. A Mardi Gras Indian suit is an ornate, highly creative work of sculptural art that is reflective of the author’s unique expression of his individuality. A Mardi Gras Indian suit is therefore copyrightable as sculpture. A Mardi Gras Indian suit is not a costume or other useful article because it is not intrinsically utilitarian. Rather, the sculptural expression resulting from the Mardi Gras Indian tradition, heritage, and practice is an aesthetic

176. *Gaylord II*, 678 F.3d at 1342-46.

177. *Id.* at 1343 (citing 17 U.S.C. § 504 (2006)).

178. *Gaylord II*, 678 F.3d at 1343.

179. 17 U.S.C. § 106.

masterpiece that is representative of each author's individual spirit within the cultural landscape.

The brilliance expressed in each culture bearer's Mardi Gras Indian suit is striking and compelling, and other parties often benefit from the wrongful exploitation of these sculptural masterpieces. For decades, Mardi Gras Indians have been subject to unauthorized copying of their suits. The copyright protection extended to each Mardi Gras Indian suit furthers the policy set forth in the Constitution of promoting public welfare. The author of a Mardi Gras Indian suit is afforded a claim against a party violating the exclusive rights conferred upon a copyright holder per § 106 of the Copyright Act. This protection provides an incentive for the culture bearers to continue to showcase their amazing works of art via sacred rituals and practice that can only be experienced in the streets and neighborhoods where this indigenous community proudly resides. The Mardi Gras Indians can be found only in New Orleans, and only in New Orleans will this indigenous community continue to thrive and serve the public by offering a glimpse into the past echoed in the present day through the Mardi Gras Indian suit.

Chief Montana of Yellow Pocahontas displays his sculpture.
Photo courtesy of Jim McAlister.