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“THE WORLD WAS WIDE ENOUGH”:<sup>†</sup> GRANTING COPYRIGHT PROTECTION TO THEATRICAL COSTUMES IN THE STREAMING ERA

MAGGIE KIEFFER\*

*Viewers have “not throw[n] away [their] shot” to see *Hamilton: An American Musical* since its 2015 Broadway debut. Amidst the COVID-19 pandemic in the summer of 2020, a taped version of the stage musical debuted on Disney+ and was viewed in millions of households. With the show’s growing streaming success, its Tony Award-winning costumes are available just a click and screenshot away and are accessible to more people than ever before. But as United States copyright law currently stands, these iconic costumes are unprotected from the growing threat of garment piracy.*

*This Note implores Congress to create an exception to the utilitarian-article ban that has thus far prohibited theatrical costumes from receiving copyright protection. In creating this bright-line exception, Congress would have to address the United States Copyright Office’s 1991 Policy Pronouncement, which stated that a policy of “nonregisterability” would apply to theatrical costumes. While courts are not required to follow the Office’s policy pronouncements, federal courts have followed this Policy as announced. A move away from this lack of protection through a bright-line exception to the utilitarian-article ban is needed because theatrical costumes fundamentally differ from other clothing. Unlike high-fashion designs, fanciful Halloween costumes, or off-the-rack clothing, theatrical costumes serve an artistic purpose at their core: these costumes allow an actor, on stage in a theatrical work of art, to portray a character. This performative function transforms theatrical costumes into a work of art, differentiating them from utilitarian clothing. As these costumes become more accessible to the public through streaming, costume designers require more protection for their work. An exception to the utilitarian-article ban specifically*

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<sup>†</sup> ALEX LACAMOIRE, LESLIE ODOM, JR., LIN-MANUEL MIRANDA & THE ORIGINAL BROADWAY CAST OF HAMILTON, *The World Was Wide Enough*, on HAMILTON (ORIGINAL BROADWAY CAST RECORDING) (Atlantic Records 2015) (streamed using Spotify).

\* J.D. Candidate, 2023, University of Illinois College of Law; B.A., 2020, Butler University. Many thanks to the members and editors of the *University of Illinois Law Review* for their professionalism and guidance in publishing this Note. Special thanks to Professor Matthew E. Braun and Joe Luzadder for your assistance and feedback throughout this process. I would like to dedicate this Note to my sister, Anna, who introduced me to the *Hamilton* musical; to my brother, Jak; and to my parents, Sam and Libby. Thank you all for your support along the way.

*for theatrical costumes will strike an appropriate balance between artistic expression, protection for designers, fan expression, and future creativity.*

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## I. INTRODUCTION

Accepting on behalf of *Hamilton: An American Musical*, for which she won a Tony Award and originated the role of Angelica Schuyler,<sup>1</sup> actor Renée Elise Goldsberry hinted at what could be the future of collaboration between American theater and television: “This award represents the synergy between the mediums of television and theater . . . . Television became the platform for us to come together to put on a show.”<sup>2</sup> Goldsberry delivered this speech to accept not one of *Hamilton*’s impressive eleven Tony Awards, but rather to accept the 2021 Emmy Award for Outstanding Variety Special<sup>3</sup>—almost six years after the musical’s Broadway debut.<sup>4</sup>

On July 3, 2020, *Hamilton* premiered on the streaming platform Disney+,<sup>5</sup> nearly five years after its Broadway opening at the Richard Rodgers Theatre.<sup>6</sup> The musical was a huge hit for Disney+, raising the application’s download rate 74% during the premiere weekend.<sup>7</sup> Although musical creator Lin-Manuel Miranda and Disney intended to release the film in movie theaters,<sup>8</sup> they agreed to shift the release to streaming amid the ongoing global COVID-19 pandemic and nationwide closures of Broadway and movie theaters.<sup>9</sup> But, unlike the script for the musical or Miranda’s award-winning lyrics,<sup>10</sup> some of the musical’s design elements—including the iconic costume designs—are currently not fully protected under United States copyright law.<sup>11</sup>

As the law currently stands, the lack of copyright protection available to theatrical costumes creates absurd results and does not offer sufficient protection for costume designers during the streaming era. First, although high-fashion designs, everyday clothing, theatrical costumes, and fanciful costumes are not all

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1. Emily St. Martin, *Renée Elise Goldsberry Shares the Secret to Dreaming Big and Rapping Fast*, IN-STYLE (Sept. 3, 2021, 10:00 AM), <https://www.instyle.com/politics-social-issues/badass-women/renee-elise-goldsberry-video> [https://perma.cc/UU2S-DKGW].

2. Michael Ordoña, *‘Hamilton’ Does Not Throw Away Its Shot at the 2021 Emmys*, L.A. TIMES (Sept. 19, 2021, 7:53 PM), <https://www.latimes.com/entertainment-arts/tv/story/2021-09-19/emmys-2021-hamilton-wins> [https://perma.cc/EN3F-55TX].

3. *Id.*

4. Deidre Davis, *Living to See His Glory Days: Why Hamilton’s Lin Manuel Miranda Is Not Liable for Copyright Infringement, but Other Writers and Composers Are*, 17 J. MARSHALL REV. INTELL. PROP. L. 92, 98 (2017).

5. *Hamilton*, DISNEY, <https://disneyplusoriginals.disney.com/movie/hamilton> (last visited Oct. 15, 2022) [https://perma.cc/B874-73P6]; Todd Spangler, *‘Hamilton’ Drives Up Disney Plus App Downloads 74% Over the Weekend in U.S.*, VARIETY (July 6, 2020, 5:26 AM), <https://variety.com/2020/digital/news/hamilton-disney-plus-premiere-app-downloads-72-percent-1234698795/> [https://perma.cc/KL3L-VEG7].

6. Davis, *supra* note 4, at 98.

7. Spangler, *supra* note 5.

8. Andrew R. Chow, *Inside Hamilton’s Four-Year Journey from Stage to Screen*, TIME (July 3, 2020, 7:00 AM), <https://time.com/5861263/hamilton-movie-behind-the-scenes/> [https://perma.cc/SG8P-PK84].

9. See Spangler, *supra* note 5; Mark L. Bailey, *Exit Stage, Enter Streaming: Copyright of the Theatrical Stage Design Elements in a Changing Theater Industry*, 28 J. INTELL. PROP. L. 365, 371–72 (2020).

10. Davis, *supra* note 4, at 95; Rebecca Ishaq Foster, *Protect the Bastard Child of the Arts: Copyright Protection for Theatrical Costumes*, 22 SW. U. L. REV. 431, 431 (1993); see also Jennifer Womack, *Big Shop of Horrors: Ownership in Theatrical Design*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 225, 227 (2007) (“Designers are left to fend for their inventions.”).

11. See Foster, *supra* note 10, at 432.

copyright protected,<sup>12</sup> masks—including masks used in theatrical costumes—are copyright protected.<sup>13</sup> Second, theatrical costumes serve a unique purpose: they help a specific actor, hired to play a specific role and outfitted in a specific set of garments, portray a character on stage in a piece of art,<sup>14</sup> which distinguishes theatrical costumes from their unprotected counterparts.<sup>15</sup> Regardless of their different purposes, however, both costumes and clothing alike face the common threat of garment piracy.<sup>16</sup> But with this piracy issue looming in the background,<sup>17</sup> streaming live theater is on the rise: *Hamilton* had massive success in its 2020 Disney+ release,<sup>18</sup> and a Peacock-streaming production of *Jersey Boys* is currently in production.<sup>19</sup>

Given streaming’s rise in popularity, this Note implores Congress and the United States Copyright Office (“Office”) to reconsider the Office’s policy denying copyright protection to physical theatrical costumes<sup>20</sup> and change that policy, extending copyright protection to theatrical costumes instead of only the sketches of the costumes’ designs. To do so, this Note suggests that the Office create an exception to the utilitarian-article rule for theatrical costumes, thereby protecting these costumes in their clothing form. Such an exception is necessary because of the new challenges and opportunities created by *Hamilton*’s streaming success and the likelihood of streaming theatrical performances in the future.<sup>21</sup>

Part II of this Note provides a history of theatrical costumes and *Hamilton*’s eventual streaming success during the COVID-19 pandemic. Part II also provides legal background on the constitutional basis for copyright law; the United States Copyright Act; and case law pertinent to costume protection and the Office’s response to those cases, culminating in its 1991 *Federal Register* policy announcement regarding costumes and theatrical clothing designs. Part III analyzes why theatrical costumes are different from everyday dress and fanciful costumes, discusses why—unlike these categories of garment—costumes should be granted copyright protection, and concludes by discussing theatrical costumes’ main obstacles to copyright protection: theater’s collaborative nature, the

12. See Victoria R. Watkins, *Copyright and the Fashion Industry*, 3 LANDSLIDE 53, 55 (2011).

13. See Jeffrey M. Dine, *Are the Cats out of the Bag?: Lessons from the Makeup Designer’s Case*, 19 ENT. & SPORTS L. 14, 18–19 (2001).

14. See Foster, *supra* note 10, at 439; Watkins, *supra* note 12, at 56.

15. See Foster, *supra* note 10, at 447. *Contra* U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFF. PRACS. § 911 (3d ed. 2021) [hereinafter Visual Art Works] (describing § 911 characters).

16. Peter K. Schalestock, *Forms of Redress for Design Piracy: How Victims Can Use Existing Copyright Law*, 21 SEATTLE U. L. REV. 113, 115 (1997).

17. See *id.*; Bailey, *supra* note 9, at 367–69.

18. Spangler, *supra* note 5.

19. Roger Friedman, *Nick Jonas Quietly Filming “Jersey Boys” in Cleveland for Peacock, Hoping for a Disney “Hamilton” Type Success*, SHOWBIZ 411 (July 27, 2021, 1:30 PM), <https://www.showbiz411.com/2021/07/27/nick-jonas-quietly-filming-jersey-boys-in-cleveland-for-peacock-hoping-for-a-disney-hamilton-type-success> [https://perma.cc/PA3D-NR39].

20. Registrability of Costume Designs, 56 Fed. Reg. 56530, 56532 (Nov. 5, 1991) (“The general policy of nonregistrability of garment designs will be applied not only to ordinary wearing apparel, but also to period and historical dress, and uniforms. Wearing apparel incorporated into theatrical productions will likewise be treated under the standards applying to garment designs in general.”).

21. Bailey, *supra* note 9, at 371–74 (discussing the new market for streaming live theater and the increased risk of piracy of design elements).

separability doctrine, the *scènes à faire* doctrine, and the work for hire doctrine. Part IV recommends protection for costumes through a bright-line, utilitarian-article exception for theatrical costumes, argues such a rule is necessary because of new complications posed by the growth of streaming theatrical performances, and addresses why granting a special exception for theatrical costumes would not create an over-broad copyright protection and thereby stifle both professional and fan creativity.

## II. BACKGROUND

Costumes play a vital role in theater;<sup>22</sup> however, while some elements of theatrical productions—like song lyrics and the script—are protected by United States copyright law, the physical costumes created by the costume designer and worn by the actors are not.<sup>23</sup> Section A of this Part describes *Hamilton: An American Musical*'s streaming success during the COVID-19 pandemic and provides information on the costume-design process used to create the show's award-winning designs. Next, Section B addresses the constitutional roots and statutory evolution of United States copyright law.<sup>24</sup> Section C then describes the case law surrounding copyright protection for costumes prior to the Office's 1991 Policy Pronouncement (“1991 Policy”) on this subject. Finally, Section D turns to the 1991 Policy in detail, focusing on its language that denies copyright protection to theatrical costumes.

### A. *It “[Blew] Us All Away”*:<sup>25</sup> *Hamilton*'s Award-Winning Costume Design and Streaming Success

*Hamilton: An American Musical* on stage was a hit, and viewers have “not throw[n] away [their] shot”<sup>26</sup> to see the show since its Broadway debut in 2015.<sup>27</sup> While it initially began as a single song,<sup>28</sup> Lin-Manuel Miranda eventually developed the *Hamilton Mixtape* into a full-blown stage musical, with Paul

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22. See Rebeca Sanchez-Roig, *Putting the Show Together and Taking It on the Road: Copyright, the Appropriate Protection for Theatrical Scenic and Costume Designs*, 40 SYRACUSE L. REV. 1089, 1111 (1989).

23. See Davis, *supra* note 4, at 95; Dine, *supra* note 13, at 18.

24. U.S. CONST. art. I, § 8, cl. 8; *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (“The primary objective of copyright is not to reward the labor of authors, but ‘[t]o promote the Progress of Science and useful Arts.’”); *Copyright Timeline: A History of Copyright in the United States*, ASS'N OF RSCH. LIBRS., <https://www.arl.org/copyright-timeline/#Top> (last visited Oct. 15, 2022) [<https://perma.cc/824Z-ACQD>]; Laura Temme, *To Be, or Not to Be: The Potential Consequences of Granting Copyright Protection for Stage Directions*, 9 CYBARIS INTELL. PROP. L. REV. 1, 5 (2018).

25. ALEX LACAMOIRE ET AL., *Blow Us All Away*, on HAMILTON (ORIGINAL BROADWAY CAST RECORDING) (Atlantic Records 2015) (streamed using Spotify).

26. ALEX LACAMOIRE ET AL., *My Shot*, on HAMILTON (ORIGINAL BROADWAY CAST RECORDING) (Atlantic Records 2015) (streamed using Spotify).

27. Davis, *supra* note 4, at 98.

28. See Obama White House, *Lin-Manuel Miranda Performs at the White House Poetry Jam: (8 of 8)*, YOUTUBE (Nov. 2, 2009), <https://www.youtube.com/watch?v=WNFF7nMIGnE> [<https://perma.cc/PQ45-58XV>].

Tazewell serving as the show’s costume designer.<sup>29</sup> The United Scenic Artists, the national labor organization for theater professionals,<sup>30</sup> describes his role as costume designer as “desig[ing] the costumes” and other related tasks.<sup>31</sup> To do so, the costume designer creates a “costume plot” describing what each character will wear in each scene.<sup>32</sup> In this role, the costume designer is a true artist; for at its core—like a musical’s script and score—“[c]ostume design is a tool to express an art form.”<sup>33</sup>

But the costume designer cannot and does not work alone; the costume design process is collaborative.<sup>34</sup> First, the costume designer—Tazewell, in *Hamilton*’s case—analyzes the script and music and uses this inspiration to create a rough costume plot.<sup>35</sup> Next, the costume designer collaborates with other designers and the director to discuss what direction they want the show to take, ensuring everyone is on the same page.<sup>36</sup> Then, the costume designer conducts further research on the setting, both time and place, of the theatrical piece.<sup>37</sup> At this stage of the design process, the costume designer is also getting to know the characters, hoping to establish each character’s personality through the costume designs.<sup>38</sup> After getting an idea of a character’s personality, the designer begins their drawings and sketches of each costume design for each character.<sup>39</sup> These sketches include information on each costume’s visual design and what fabrics or other materials will be used to construct the costume.<sup>40</sup> Gradually, these sketches become more detailed and specific colors are chosen for each design element.<sup>41</sup> At the end of the design process, the costume designer finalizes the sketches and meets with the director to ensure they reach a final agreement on each design.<sup>42</sup> Once both director and designer agree, the designer produces “renderings,” which are final costume sketches painted in watercolors and acrylic paints

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29. Melissa Singer, *The Hidden (and Very Personal) Meanings Behind Hamilton’s Costumes*, SYDNEY MORNING HERALD (Mar. 20, 2021, 6:00 AM), <https://www.smh.com.au/lifestyle/fashion/the-hidden-and-very-personal-meanings-behind-hamilton-s-costumes-20210317-p57beh.html> [https://perma.cc/Q54T-RGLD].

30. *Introduction*, UNITED SCENIC ARTISTS, <https://www.usa829.org/About-Our-Union/Introduction> (last visited Oct. 15, 2022) [https://perma.cc/5NXY-5JT3].

31. See United Scenic Artists, Local 829 & Broadway League Inc., Agreement 2019-2022, at art. 2, ¶ (B) [hereinafter Agreement]. The costume designer is also responsible for additional tasks such as submitting the costume plot, including costume changes for all cast members; providing color drawings of the costume designs; supplying the company under contract to create the costume with sketches and color samples; designing costume accessories; supervising hair styles and wigs; and being present at dress rehearsals and certain performances. *Id.*; see also Justin Cast, *Costume Design*, THEATRELINKS (Sept. 5, 2021), [https://perma.cc/MB62-EWKC] (describing costume design in the theater industry generally).

32. Bailey, *supra* note 9, at 376.

33. See Cast, *supra* note 31.

34. Catherine Rankin, *Costume Design*, BLACK BOX, <https://www.crankinblackbox.com/costume-design.html> (last visited Oct. 15, 2022) [https://perma.cc/A9RL-936S].

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. See *id.*

showing the final look for each costume for each character.<sup>43</sup> In the case of *Hamilton*, throughout this collaborative process, Tazewell maintained almost full creative license over the characters’ designs—from Eliza’s turquoise gowns to Thomas Jefferson’s Prince-inspired ensemble.<sup>44</sup>

After about four years of development by Miranda, Tazewell, and the rest of the creative team, *Hamilton* opened off-Broadway in early 2015.<sup>45</sup> The show opened its Broadway run at the Richard Rodgers Theatre on July 13 of that year.<sup>46</sup> It earned sixteen Tony nominations and won eleven awards, including one for Tazewell’s costume designs; however, only those patrons who could afford *Hamilton*’s high-priced tickets could see the increasingly famous show.<sup>47</sup>

By late 2016, the show’s original cast was ready to move on.<sup>48</sup> But Miranda and director Thomas Kail decided they wanted to preserve “what it was like to be in the Richard Rodgers Theater in June 2016.”<sup>49</sup> To do so, they decided to film the musical; over the course of three days, the cast filmed two live performances with an audience present and did one twelve-hour day shooting in an empty theater.<sup>50</sup> Kail edited the performances together, and Miranda and he shopped the film’s concept around in Hollywood; however, they ultimately elected not to sell the film right away.<sup>51</sup>

In early 2020, Miranda broke the news on Twitter that *Hamilton* was coming—this time to movie theaters.<sup>52</sup> Disney acquired the rights to release the film for a reported \$75 million, intending to release the film in movie theaters and later on Disney+.<sup>53</sup> But once COVID-19 shut down Broadway and movie theaters worldwide,<sup>54</sup> Disney changed course and decided to release the film straight to streaming.<sup>55</sup> The movie premiered on Disney+ on July 3, 2020 and was an instant hit, streaming in 2.7 million households during its first ten days on the

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43. *Id.*

44. *See generally id.*; Nicole Lyn Pesce & Joe Dziemianowicz, *Prince’s Androgynous Style Lives on in Broadway’s ‘Hamilton’ and Pop Culture*, DAILY NEWS (Apr. 21, 2016, 4:02 PM), <https://www.nydailynews.com/entertainment/prince-androgynous-style-lives-broadway-hamilton-article-1.2610300> [<https://perma.cc/JED3-3GFT>].

45. *See* Davis, *supra* note 4, at 98.

46. *Id.*

47. Singer, *supra* note 29; Chow, *supra* note 8 (noting that *Hamilton* was in fact raking in over \$2 million a week at the Broadway box office in the summer of 2016); Ordoña, *supra* note 2 (noting *Hamilton* won eleven Tony awards).

48. Chow, *supra* note 8.

49. *Id.*

50. *Id.*

51. *Id.*

52. Mike Fleming, Jr., *Disney Paid \$75 Million for Worldwide Movie Rights to Lin-Manuel Miranda’s ‘Hamilton’; Biggest Film Acquisition Deal Ever?*, DEADLINE (Feb. 3, 2020, 10:04 AM), <https://deadline.com/2020/02/disney-paid-75-million-hamilton-movie-deal-lin-manuel-miranda-largest-film-acquisition-ever-1202849929/> [<https://perma.cc/KEY4-LRT4>].

53. *Id.*

54. *See* Alex Ates, *Reports from the Field: How Regional Theaters Are Responding to COVID-19*, BACKSTAGE (Apr. 9, 2020), <https://www.backstage.com/magazine/article/regional-theaters-covid-19-response-70498/> [<https://perma.cc/R8EG-G7B5>] (“Currently, the only sight on American stages is a ghost light . . .”).

55. Bailey, *supra* note 9, at 367.

platform.<sup>56</sup> To date, *Hamilton*’s streaming viewership has already exceeded the total number of people who have seen the show live, meaning the music, costumes, staging, and more have been made accessible to a whole new audience.<sup>57</sup> But, while new audiences can see the movie, such widespread availability also exacerbates the issues that arise due to physical costumes’ lack of copyright protection.<sup>58</sup>

B. “*Chosen for the Constitutional Convention*”:<sup>59</sup> *Constitutional Protection for Creative Expression*

The fact that physical costumes themselves are not copyrightable might be surprising because other parts of musical theater productions can be registered for copyright protection through the Office.<sup>60</sup> For example, the renderings, score, and dialogue can all be copyrighted.<sup>61</sup> But some other elements of theater are not as fixed as the written score and script, and therefore scholars and courts debate whether these less-fixed elements can receive copyright protection.<sup>62</sup> For example, some scholarly debate has surrounded whether a director’s stage directions should be granted protection under the 1976 Copyright Act.<sup>63</sup> Although physical costumes appear to fall closer to the fixed end of the spectrum, they nevertheless lack protection under the United States Constitution and current copyright law.<sup>64</sup>

The Constitution gives Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>65</sup> Congress derives its power to enact federal copyright law from this constitutional clause.<sup>66</sup> Copyright law promotes the progress of the arts by granting authors a “right to their original expression,” while still encouraging other artists to build off ideas and information to create something new.<sup>67</sup> Copyright law thereby assures authors whose works are both original and creative that others cannot profit off

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56. Daniel Frankel, *Disney Plus ‘Hamilton’ Viewership Exceeds Those Who’ve Seen It Live*, *Research Company Says*, NEXTTV (July 20, 2020), <https://www.nexttv.com/news/disney-plus-hamilton-viewership-exceeds-those-who-ve-seen-it-live-research-company-says> [<https://perma.cc/DEN4-EP6N>].

57. *Id.*

58. See Dine, *supra* note 13, at 18.

59. ALEX LACAMOIRE ET AL., *Non-Stop*, on HAMILTON (ORIGINAL BROADWAY CAST RECORDING), at 01:27 (Atlantic Records 2015) (streamed using Spotify).

60. Davis, *supra* note 4, at 95.

61. Bailey, *supra* note 9, at 376, 378–79.

62. *Id.* at 378 (“Theat[er] is by nature unfix[ed].”).

63. See generally Deana S. Stein, “*Every Move That She Makes*”: *Copyright Protection for Stage Directions and the Fictional Character Standard*, 34 CARDOZO L. REV. 1571 (2013) (calling for copyright protection of stage directions); Temme, *supra* note 24, at 19–20. More recently, other scholars have discussed whether set or lighting designs should be granted protection when they are more easily accessible because of streaming theatrical performances. Bailey, *supra* note 9, at 369.

64. See Dine, *supra* note 13, at 18.

65. U.S. CONST. art. I, § 8, cl. 8.

66. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (“The primary objective of copyright is not to reward the labor of authors, but ‘[t]o promote the Progress of Science and useful Arts.’”).

67. *ABS Ent., Inc. v. CBS Corp.*, 908 F.3d 405, 414 (9th Cir. 2018) (quoting *Feist Publ’ns*, 499 U.S. at 349–50).



their creativity without the original creator’s approval.<sup>68</sup> Accordingly, United States copyright law emphasizes the difference between expressive authorship and a work’s underlying idea; only expression—not idea—may be copyrighted.<sup>69</sup>

Congress has passed several iterations of the Copyright Act (“Act”).<sup>70</sup> For example, the First Congress passed the Copyright Act of 1790 soon after the Constitution’s ratification.<sup>71</sup> The first major revision to the Act occurred in 1909, when Congress broadened the scope of works worthy of copyright protection.<sup>72</sup> The next major revision to the Act did not occur until 1976, which included extending the amount of time works are protected and expanding the types of works protected.<sup>73</sup> There have been minor changes to the 1976 Act, but this iteration of Title 17—the provision of the *United States Code* covering copyright—is what still governs costumes today.<sup>74</sup>

The 1976 Act grants protection to “original works of authorship fixed in any tangible medium of expression, not 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.”<sup>75</sup> Works of authorship protected under the 1976 Act include: “(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.”<sup>76</sup>

“A presumption of originality [will] attach[] to a design previously registered by the Copyright Office.”<sup>77</sup> To qualify for protection upon registration, a work must be original to the author and fixed.<sup>78</sup> Courts define original as a work “independently created by the author . . . and [possessing] at least some minimal degree of creativity.”<sup>79</sup> The Constitution requires originality, but it does not require novelty, making originality a low bar.<sup>80</sup> Notably, copyright protection does not extend to ideas, only the expression of ideas.<sup>81</sup> Courts also delineate that a work is created when an author completes either the work or a portion of it.<sup>82</sup>

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68. *Boyd's Collection, Ltd. v. Bearington Collection, Inc.*, 360 F. Supp. 2d 655, 659 (M.D. Pa. 2005).

69. Temme, *supra* note 24, at 6.

70. *Copyright Timeline*, *supra* note 24.

71. *Id.*; U.S. Copyright Off., *Copyright Act of 1790*, COPYRIGHT.GOV, <https://copyright.gov/about/1790-copyright-act.html> (last visited Oct. 15, 2022) [<https://perma.cc/GA4U-M5YM>].

72. *Copyright Timeline*, *supra* note 24.

73. *Id.*; Foster, *supra* note 10, at 446.

74. *Copyright Timeline*, *supra* note 24; Temme, *supra* note 24, at 5.

75. 17 U.S.C. § 102(a).

76. *Id.*

77. *Boyd's Collection, Ltd. v. Bearington Collection, Inc.*, 360 F. Supp. 2d 655, 660 (M.D. Pa. 2005); *see* 17 U.S.C. § 101.

78. 17 U.S.C. § 102(a) (protecting “original works of authorship”); *Carell v. Shubert Org., Inc.*, 104 F. Supp. 2d 236, 247 (S.D.N.Y. 2000) (citing 17 U.S.C. § 102(a)).

79. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

80. *See id.*

81. 17 U.S.C. § 102(b).

82. 17 U.S.C. § 101.

That “work is fixed in a tangible medium of expression when” either the item, a copy of the item, or a record of the item “is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”<sup>83</sup> In the theatrical context, a performance itself is inherently unfixed, but recordings of a performance would be copyrightable as fixed in the recorded medium, similar to how a script is fixed in its written form.<sup>84</sup>

Based upon the two requirements of originality and fixation, theatrical costumes would appear to have no issue receiving protection.<sup>85</sup> The 1976 Act does, after all, protect “pictorial, graphic, and structural works.”<sup>86</sup> But the 1976 Act does not protect “utilitarian” works, defined as “an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information.”<sup>87</sup> This utilitarian wrinkle historically has run costumes afoul of the Office.<sup>88</sup>

In the costume context, this utilitarian prohibition leads to uneven protection.<sup>89</sup> For example, in *Hamilton*, Thomas Jefferson’s purple suit itself—the pieces of clothing worn by the actor—would not be copyrightable, but the rendering of the suit would be protected.<sup>90</sup> The costume itself would not be copyrightable because it arguably serves the utilitarian function of clothing the actor’s body.<sup>91</sup> But this interpretation of the Act does not address whether these articles—useful in the sense of clothing the body—are transformed into something more when they are worn on stage to embody a character.<sup>92</sup> Thus far, this question of artistic transformation has not been addressed by the courts.<sup>93</sup>

### C. “What’d I Miss”:<sup>94</sup> Costumes in the Courts

The Constitution and 1976 Act say nothing specific about costumes, but courts and the Office have not been shy about discussing the issue.<sup>95</sup> Some early case law grappled with the copyrightability issue in the costume context,<sup>96</sup> but

83. *Id.*

84. See Womack, *supra* note 10, at 244; Dine, *supra* note 13, at 16.

85. See Bailey, *supra* note 9, at 379–80.

86. 17 U.S.C. §102(a)(5).

87. See 17 U.S.C. § 101; Katherine Mark Thompson, *Unmasking the Copyright Office Policy on Costume Design Registrability*, 9 ENT. & SPORTS L. 1, 4 (1992).

88. See Thompson, *supra* note 87, at 4; Watkins, *supra* note 12, at 55.

89. Bailey, *supra* note 9, at 380.

90. See *id.* at 376, 380.

91. Registrability of Costume Designs, 56 Fed. Reg. 56530, 56532 (Nov. 5, 1991).

92. Bailey, *supra* note 9, at 380.

93. See *id.*

94. ALEX LACAMOIRE, DAVEED DIGGS, LESLIE ODOM, JR., OKIERIETE ONAODOWAN & THE ORIGINAL BROADWAY CAST OF HAMILTON, *What’d I Miss?*, on HAMILTON (ORIGINAL BROADWAY CAST RECORDING) (Atlantic Records 2015) (streamed using Spotify).

95. See Registrability of Costume Designs, 56 Fed. Reg. 56530, 56531–32 (Nov. 5, 1991) (announcing Office policy and describing some court decisions).

96. See generally *Masquerade Novelty, Inc. v. Unique Indus., Inc.*, 912 F.2d 663 (3d Cir. 1990); *Nat’l Theme Prods., Inc., v. Jerry B. Beck, Inc.*, 696 F. Supp. 1348 (S.D. Cal. 1988) (both addressing copyrightability of Halloween costumes).

most courts ultimately found that costumes were utilitarian articles and therefore uncopyrightable.<sup>97</sup> Even if not all early courts were convinced,<sup>98</sup> the 1991 Policy from the Copyright Office announced that theatrical costumes were presumed uncopyrightable.<sup>99</sup> Since then, most cases dealing with costumes and copyrightability have involved whether a part of a costume is copyrightable, not the costume as a whole.<sup>100</sup> Yet, as the case law stands today, costumes in their entirety are still not copyrightable material.<sup>101</sup>

### 1. A Few Early Cases

*Dan Kasoff, Inc. v. Palmer Jewelry Manufacturing Co., Inc.* was one of the earliest cases to address copyrightability of wearable costume items.<sup>102</sup> The Southern District of New York decided the case prior to the 1976 Act and was tasked with deciding whether copyright law protected costume jewelry.<sup>103</sup> The court held that copyright protected the jewelry, finding that the copyrightability of jewelry “[had] been established in recent cases” and noting that just because “the design [was] used in manufacturing cheap jewelry . . . does not deprive an original design of the benefits of a copyright.”<sup>104</sup>

The copyrightability of clothing costumes under the 1976 Act was not addressed until 1988.<sup>105</sup> *National Theme Productions, Inc. v. Jerry B. Beck, Inc.* tasked the Southern District of California with determining Halloween costumes’ copyrightability.<sup>106</sup> The Halloween costumes at issue—The Rabbit in the Hat, Tigress, Magic Dragon, and Pampered Pup—had all been registered for copyright protection with the Office.<sup>107</sup> Despite the fact that the Southern District of California had already held that costumes were not copyrightable as costumes, the costumes’ creator obtained registration by submitting packaging inserts with the Office.<sup>108</sup> Therefore, the court had to determine if those copyright registrations gave the costumes the presumed protection that registration usually provides, regardless of the court’s prior ruling that a costume was not itself copyrightable.<sup>109</sup> The district court in *National Theme* found that the Halloween costumes were “on the margin of utility” yet nevertheless performed a useful

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97. See Foster, *supra* note 10, at 433 (“The Copyright Office and the courts tend to view costumes as clothing, and thus, ‘useful articles,’” requiring successful separability to have an aspect copyrighted.).

98. See *Dan Kasoff, Inc. v. Palmer Jewelry Mfg. Co.*, 171 F. Supp. 603, 606 (S.D.N.Y. 1959); *Masquerade Novelty*, 912 F.2d at 671. *But see, e.g.*, *Whimsicality, Inc. v. Rubie’s Costume Co. (Rubie’s II)*, 891 F.2d 452, 457 (2d Cir. 1989).

99. Registrability of Costume Designs, 56 Fed. Reg. at 56532.

100. See *Silvertop Assocs., Inc. v. Kangaroo Mfg., Inc.*, 931 F.3d 215, 222 (3d Cir. 2019) (holding design elements like lines and colors of banana costume copyrightable).

101. See Registrability of Costume Designs, 56 Fed. Reg. at 56532.

102. See generally *Dan Kasoff, Inc.*, 171 F. Supp..

103. *Id.* at 604–05.

104. *Id.* at 606.

105. *Nat’l Theme Prods., Inc. v. Jerry B. Beck, Inc.*, 696 F. Supp. 1348, 1352 (S.D. Cal. 1988).

106. *Id.* at 1349–51.

107. *Id.* at 1349–52.

108. *Id.* at 1352.

109. *Id.*

function; however, the court also highlighted that the costumes’ designs did not “optimize” that utilitarian function.<sup>110</sup> Therefore, even if the costumes protected the wearer from the elements in some capacity, the costumes’ artistic aspects did not advance their utilitarian purposes.<sup>111</sup> The court therefore granted these costumes copyright protection.<sup>112</sup>

## 2. *Rubie’s Costume Litigation Denies Protection*

*National Theme* remained a leading case on costume copyrightability until the Eastern District of New York took up the costume-copyrightability question in the *Rubie’s* litigation.<sup>113</sup> The *Rubie’s* litigation is a series of five cases (and one related case) decided by the Eastern District of New York, the Second Circuit Court of Appeals, and the Southern District of New York.<sup>114</sup> The first five cases resolved a dispute between Whimsicality and Rubie’s Costume Company; the final case in the saga considered a similar lawsuit between Whimsicality and Battat.<sup>115</sup>

The facts underlying each *Rubie’s Costume* case are the same.<sup>116</sup> Whimsicality designed and created several Halloween costumes and registered these costumes with the Office as soft sculptures.<sup>117</sup> In total, Whimsicality registered sixty-six costumes—including Jack O’Lantern, Hippo, Ballerina, Spider, T-Rex, Bee, and Penguin—which Whimsicality claimed Rubie’s Costume Company infringed.<sup>118</sup> The registration for each costume labeled them as “soft sculpture[s],” and the court was tasked with determining if this registration entitled the costumes to presumed copyright validity.<sup>119</sup> Notably, the Office had previously rejected approval for the “Bee” costume under the label “wearing apparel.”<sup>120</sup> Due to this history, the court emphasized in its initial opinion that Whimsicality considered its items to be costumes, regardless of the soft-sculpture label.<sup>121</sup>

In *Whimsicality, Inc. v. Rubie’s Costumes Co., Inc.* (“*Rubie’s I*”), Judge Dearie of the Eastern District of New York extensively discussed whether these fanciful costumes were copyrightable.<sup>122</sup> The court emphasized that although the

110. *Id.* at 1353.

111. *Id.* at 1353–54.

112. *Id.* at 1354.

113. See Schalestock, *supra* note 16, at 124.

114. See generally *Whimsicality, Inc. v. Rubie’s Costumes Co. (Rubie’s I)*, 721 F. Supp. 1566 (E.D.N.Y. 1989); *Rubie’s II*, 891 F.2d 452 (2d Cir. 1989); *Whimsicality, Inc. v. Rubie’s Costume Co. (Rubie’s III)*, 836 F. Supp. 112 (E.D.N.Y. 1993); *Whimsicality, Inc. v. Rubie’s Costume Co. (Rubie’s IV)*, No. 89-CV-1720, 1993 WL 661161 (E.D.N.Y. Dec. 6, 1993); *Whimsicality, Inc. v. Rubie’s Costume Co. (Rubie’s V)*, CV-89-1720 (RJD), 1998 WL 178856 (E.D.N.Y. Feb. 24, 1998); *Whimsicality, Inc. v. Battat*, 27 F. Supp. 2d 456 (S.D.N.Y. 1998).

115. See generally *Rubie’s I*, 721 F. Supp. 1566; *Whimsicality*, 27 F. Supp. 2d 456.

116. See generally *Rubie’s I*, 721 F. Supp. 1566.

117. *Id.* at 1568.

118. *Id.*

119. *Id.* at 1568–69.

120. *Id.* at 1570.

121. *Id.*

122. *Id.* at 1568–69.

costumes’ registrations entitled them to a presumption of validity, that presumption was rebuttable.<sup>123</sup> Judge Dearie also noted that “reasonable persons may disagree about the copyrightability of costumes.”<sup>124</sup> He reasoned that although the costumes could be considered utilitarian articles, certain wearable items may be copyrightable and some elements of garment design are copyrightable.<sup>125</sup> He also emphasized that no matter how fanciful Whimsicality’s designs were, the costumes were nevertheless useful articles because they clothed the body.<sup>126</sup> Accordingly, even if the costumes were artistic or visually pleasing—and even if the costumes were predominantly used to masquerade—they were utilitarian, wearable items, not soft sculptures.<sup>127</sup> Therefore, the court ultimately held that copyright did not protect the costumes because they were objects that served a utilitarian purpose.<sup>128</sup>

Whimsicality appealed to the Second Circuit (“*Rubie’s II*”).<sup>129</sup> The Second Circuit took a different approach at resolving the dispute than the district court, and it ultimately did not reach the copyright infringement issue because the panel found that Whimsicality defrauded the Office.<sup>130</sup> The circuit court highlighted that all of Whimsicality’s successful copyright applications referred to its products as “soft sculptures” instead of costumes.<sup>131</sup> Yet, the “only practical use for the copyrighted material [was] as costumes.”<sup>132</sup> Finding that the costumes were clearly not sculptural, the Second Circuit affirmed the district court’s holding that the costumes were not copyrightable—even if already registered—and held that this registration constituted fraud of the Office.<sup>133</sup>

On remand, the Eastern District of New York was tasked with determining the impact of the Second Circuit’s holding that Whimsicality defrauded the Office when awarding attorney’s fees (“*Rubie’s III*”).<sup>134</sup> The *Rubie’s III* decision noted that the parties agreed that Whimsicality’s costumes were not copyrightable as costumes, and if the company had identified the items as costumes on their applications, the Office would have denied them.<sup>135</sup> The court acknowledged that “the state of the law in this area where bright lines are hard to come by” meant legal action for infringement by Whimsicality was likely not frivolous.<sup>136</sup> Finding that Whimsicality believed its Halloween costumes could be copyrighted, the court declined to shift attorney’s fees.<sup>137</sup>

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123. *Id.* at 1569.

124. *Id.* at 1570.

125. *Id.* at 1571–72.

126. *Id.* at 1574.

127. *Id.*

128. *Id.* at 1574–75.

129. *See generally Rubie’s II*, 891 F.2d 452 (2d Cir. 1989).

130. *Id.* at 453.

131. *Id.* at 454.

132. *Id.*

133. *Id.* at 456–57.

134. *Rubie’s III*, 836 F. Supp. 112, 115–16 (E.D.N.Y. 1993).

135. *Id.* at 120.

136. *Id.*

137. *Id.* at 118, 120.

The Eastern District of New York revisited this dispute in *Whimsicality, Inc. v. Rubie's Costume Co., Inc.* (“*Rubie's IV*”) in 1993 and again in *Whimsicality, Inc. v. Rubie's Costume Co., Inc.* (“*Rubie's V*”) in 1998.<sup>138</sup> In *Rubie's IV*, the court acknowledged confusion arising from its initial opinion in *Rubie's III* and clarified its holding not to award attorney's fees for fraud of the Office.<sup>139</sup> Five years later, the court was forced to once again revisit the dispute, clarifying its prior decisions after *Whimsicality* contended that the court's prior order in *Rubie's IV* indicated the costumes were copyrightable.<sup>140</sup> But the court again asserted that attorney's fees were not awarded and that “costumes [are] not copyrightable.”<sup>141</sup>

*Whimsicality* also brought an additional lawsuit in 1998 against Battat in the Southern District of New York.<sup>142</sup> *Whimsicality* once again sued over some of its sixty-six previously registered designs—this time Bee, Stegosaurus, Frog, Turtle, Ladybug, Lion, Butterfly, and Shark.<sup>143</sup> The Southern District judge held this cause of action estopped by the prior *Rubie's Costume* litigation.<sup>144</sup> The judge also affirmed that “Judge Dearie's decision holding the [costumes'] copyrights unenforceable [was] final.”<sup>145</sup>

### 3. *Continuing Confusion in the Circuits from 1990 to 2017*

Following the *Rubie's Costume* saga, the Third Circuit took up the costume copyrightability question in *Masquerade Novelty, Inc. v. Unique Industries, Inc.*<sup>146</sup> There, the court was tasked with determining whether animal masks were copyrightable material.<sup>147</sup> *Masquerade Novelty* created masks for a pig, elephant, and parrot.<sup>148</sup> The district court held that the masks were utilitarian articles and therefore not copyrightable, even though the masks had been previously registered with the Office.<sup>149</sup> But the Third Circuit disagreed and reversed, finding that the masks' only utilitarian function was portraying animal noses.<sup>150</sup> The court noted that “[c]ourts have twisted themselves into knots trying to create a test to effectively ascertain whether the artistic aspects of a useful article can be identified separately from and exist independently of [their] utilitarian function,” but it nevertheless granted copyright protection to the masks because they were sculptures that did not serve a utilitarian purpose.<sup>151</sup>

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138. *Rubie's IV*, No. 89-CV-1720, 1993 WL 661161, at \*1 (E.D.N.Y. Dec. 6, 1993); *Rubie's V*, CV-89-1720 (RJD), 1998 WL 178856, at \*1 (E.D.N.Y. Feb. 24, 1998).

139. *Rubie's IV*, 1993 WL 661161, at \*1.

140. *Rubie's V*, 1998 WL 178856, at \*1-2.

141. *Id.* at \*2.

142. *See Whimsicality, Inc. v. Battat*, 27 F. Supp. 2d 456, 460 (S.D.N.Y. 1998).

143. *Id.* at 458-59.

144. *Id.* at 459-60, 463.

145. *Id.* at 460.

146. *See generally Masquerade Novelty, Inc. v. Unique Indus., Inc.*, 912 F.2d 663 (3d Cir. 1990).

147. *Id.* at 666.

148. *Id.* at 664.

149. *Id.* at 664, 667-68.

150. *Id.* at 664, 670.

151. *Id.* at 670-71.

The Ninth Circuit entered the fray in *Entertainment Research Group, Inc. v. Genesis Creative Group, Inc.* in 1997.<sup>152</sup> This case concerned the copyrightability of three-dimensional, inflatable costumes that portrayed two-dimensional cartoon characters.<sup>153</sup> The characters serving as subject matter for the costumes were copyright protected,<sup>154</sup> and therefore the court analyzed the costumes’ copyrightability as derivative works.<sup>155</sup> The court wrote an extensive discussion of different separability tests used in different cases across the federal circuits.<sup>156</sup> Ultimately, it held that parts of the costumes were functional and not copyrightable and emphasized that the costumes could not themselves receive protection; the only way for any part of the costume to be copyrighted would be through a separability analysis.<sup>157</sup> The court held that the costumes at issue were not copyrightable because any differences between the character drawings and the three-dimensional costumes were merely artistic differences.<sup>158</sup>

The Second Circuit revisited the costume issue it first addressed in *Rubie’s II* in *Chosun International, Inc. v. Chrisha Creations, Ltd.*<sup>159</sup> Again, the court’s task was to determine whether copyright law protected Halloween costumes.<sup>160</sup> Both parties created plush animal Halloween costumes, and Chosun sued to raise the question “whether Halloween costumes, in their entirety or in their individual design elements” were copyrightable.<sup>161</sup> The court quickly affirmed the lower court’s holding that the costumes were not copyrightable as a whole because they were useful articles.<sup>162</sup> Conducting a separability analysis, the district court in *Chosun* did acknowledge that individual design elements may separately receive copyright protection.<sup>163</sup> This *Chosun* decision was considered a leading case on costume copyrightability under a separability analysis in the early 2000s<sup>164</sup> until the Supreme Court addressed the separability circuit split in *Star Athletica*.<sup>165</sup>

Finally, the Fifth Circuit took up the issue of uniform copyrightability in *Galiano v. Harrah’s Operating Co., Inc.*<sup>166</sup> Gianna designed uniforms for Harrah’s Operating Company and received copyright registration protection for the sketches used for the designs.<sup>167</sup> At the outset, the court acknowledged that the case law on costume and uniform copyrightability was “uneven.”<sup>168</sup> The panel

152. See generally *Ent. Rsch. Grp., Inc. v. Genesis Creative Grp., Inc.*, 122 F.3d 1211 (9th Cir. 1997).

153. *Id.* at 1214–15, 1218.

154. *Id.* at 1222.

155. *Id.* at 1218–19.

156. See *id.* at 1219–20.

157. *Id.* at 1221.

158. *Id.* at 1223.

159. See generally *Chosun Int’l, Inc. v. Chrisha Creations, Ltd.*, 413 F.3d 324 (2d Cir. 2005).

160. *Id.* at 325.

161. *Id.*

162. *Id.* at 325, 328.

163. *Id.* at 328–29.

164. See *Stagecraft Costuming, Inc. v. HouseHaunters L.L.C.*, No. 1:10-cv-197, 2011 WL 13202911, at \*4 (S.D. Ohio Feb. 2, 2011) (relying on *Chosun*).

165. *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1007 (2017).

166. See *Galiano v. Harrah’s Operating Co., Inc.*, 416 F.3d 411, 416 (5th Cir. 2005).

167. *Id.* at 413.

168. *Id.* at 416, 420.

held that a “design that is intended to be used on clothing is copyrightable only to the extent that its artistic qualities can be separated from the utilitarian nature of the garment.”<sup>169</sup> Finally, the court noted that there was generally a direct correlation between the costume’s copyrightability and its market value, actual or potential, as an independent art piece.<sup>170</sup> Therefore, the court found that Gianna did not show that her designs could be marketed independently from their utilitarian function as uniforms, indicating the uniforms were not copyrightable.<sup>171</sup>

#### 4. *Separability Clarity in Star Athletica*

Facing a growing circuit split, the Supreme Court dove into the clothing-design copyright fray in *Star Athletica, LLC v. Varsity Brands, Inc.*<sup>172</sup> The Court did not directly address whether costumes were copyrightable; instead, the Court resolved a split regarding the appropriate separability test used to determine what—if any—parts of a clothing item can be copyrighted.<sup>173</sup>

To resolve the split, the Court granted certiorari to a Sixth Circuit case deciding a dispute over cheerleading uniforms<sup>174</sup> and defined its task as “determin[ing] whether the arrangements of lines, chevrons, and colorful shapes appearing on the surface of respondents’ cheerleading uniforms are eligible for copyright protection as separate features of the design on those cheerleading uniforms.”<sup>175</sup> The Court’s goal for taking the case was to determine the proper method for conducting a separability analysis for the design elements of the cheerleading uniforms.<sup>176</sup>

The Court noted that statutory interpretation of the 1976 Act indicated it was necessary to determine if the design element could be identified separately and exist independently of the utilitarian article.<sup>177</sup> First, the Court acknowledged that separate identification is not difficult because all a party must show is that the design element appears to have some pictorial, graphic, or sculptural qualities; however, the independent existence part of the test is not as easily ascertained.<sup>178</sup> This second prong of the analysis requires a separability test, which had thus far split the Circuit Courts of Appeals.<sup>179</sup>

The Court defined this separability question as “whether the feature for which copyright protection is claimed would have been eligible for copyright protection as a pictorial, graphic, or sculptural work had it originally been fixed

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169. *Id.* at 419. *But see* *Boyd’s Collection, Ltd. v. Bearington Collection, Inc.*, 365 F. Supp. 2d 612, 616–17 (M.D. Pa. 2005) (“Classification of a design as a ‘useful article’ is not an all-or-nothing proposition; the issue must be addressed on a case-by-case basis.”).

170. *Galiano*, 416 F.3d at 420.

171. *Id.* at 422.

172. *See generally* *Star Athletica, L.L.C. v. Varsity Brands Inc.*, 137 S. Ct. 1002 (2017).

173. *Id.* at 1007.

174. *See id.*

175. *Id.* at 1008–09.

176. *Id.* at 1010.

177. *Id.*

178. *Id.*

179. *See id.*



in some tangible medium other than a useful article before being applied to a useful article.”<sup>180</sup> The Court held that a useful article may be eligible for copyright protection only if the element can be perceived as an artwork separate from the useful article and would qualify for protection when separated from that useful article.<sup>181</sup> Accordingly, the Court abandoned the distinction between “physical” and “conceptual” separability, holding that “separability is a conceptual undertaking.”<sup>182</sup>

The Court applied this test to the decorations on the cheerleading uniforms and ultimately held that they were separable and eligible for protection.<sup>183</sup> But the Court emphasized that the only thing copyrightable about each uniform was the two-dimensional artwork affixed to it, not the uniform itself.<sup>184</sup>

##### 5. *Lack of Costume Protection After Star Athletica*

In one of the first post-*Star Athletica* decisions to address costume copyrightability, *Diamond Collection, LLC v. Underwraps Costume Corp.*, the Eastern District of New York once again assessed a copyright infringement claim over Halloween costume design.<sup>185</sup> Both parties sold Halloween costumes at a trade show, at which Diamond Collection distributed a catalogue that Underwraps claimed included similar costumes.<sup>186</sup> The court emphasized that the parties agreed that the costumes themselves could not be copyrighted and therefore did not address the merits of copyrighting the physical costumes themselves, focusing instead on separability.<sup>187</sup> Applying *Star Athletica*, the district court held that elements of the costumes were conceptually separable and copyrightable.<sup>188</sup>

In 2019, the Third Circuit also addressed costume copyrightability in *Silvertop Associates, Inc. v. Kangaroo Manufacturing Inc.*, holding that an entire banana costume was not copyrightable.<sup>189</sup> But, conducting a post-*Star Athletica* separability analysis, the court held that “the banana costume’s combination of colors, lines, shape, and length (*i.e.*, its artistic features) are both separable and capable of independent existence, and thus are copyrightable.”<sup>190</sup>

Although *Star Athletica* did not outright state that costumes could never be copyrighted,<sup>191</sup> a particularly notable part of these post-2017 decisions is that all parties involved agreed the costumes themselves were not copyrightable

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180. *Id.* at 1011.

181. *Id.* at 1007, 1012.

182. *Id.* at 1014.

183. *See id.* at 1012, 1016.

184. *Id.* at 1013 (“To be clear, the only feature of the cheerleading uniform eligible for a copyright in this case is the two-dimensional work of art fixed in the tangible medium of the uniform fabric.”).

185. *See* *Diamond Collection, LLC v. Underwraps Costume Corp.*, 17-CV-0061(JS)(SIL), 2019 WL 347503, at \*1 (E.D.N.Y. Jan. 22, 2019).

186. *Id.*

187. *Id.* at \*4.

188. *Id.*

189. *Silvertop Assocs., Inc. v. Kangaroo Mfg. Inc.*, 931 F.3d 215, 219–22 (3d Cir. 2019).

190. *Id.*

191. *See* *Star Athletica, L.L.C. v. Varsity Brands Inc.*, 137 S. Ct. 1002, 1012 (2017).

material.<sup>192</sup> The parties’ tacit acceptance contrasts sharply with the detailed analysis required by the courts in *Rubie’s I*, *National Theme*, and *Masquerade Novelty*.<sup>193</sup> This shift occurred because of the Office’s 1991 Policy regarding costume copyrightability<sup>194</sup> that seemingly slammed the door on copyright protection for costumes that neither the Supreme Court nor the Circuit Courts of Appeals have ever reopened.

*D. “It’s Full of Contradictions”:<sup>195</sup> The Office’s 1991 Policy Against Costume Protection*

On November 5, 1991, the Office issued a policy decision on the copyrightability of costumes and clothing<sup>196</sup> that most courts have applied as promulgated even though they are not automatically required to follow the Office’s policy decisions.<sup>197</sup> This 1991 Policy affirmed that masks and costumes fall under the pictorial, graphic, and sculptural works category of Title 17.<sup>198</sup> In making its copyrightability determinations under this category, the Office relied on—and attempted to reconcile—the decisions in *Rubie’s I* and *II*, *National Theme*, and *Masquerade Novelty*.<sup>199</sup> The Office found that under these courts’ reading of Title 17, masks were registerable articles as sculptural works because they are not useful articles.<sup>200</sup> Fanciful costumes, however, are useful articles and not registerable without finding “separable artistic authorship.”<sup>201</sup> Finally, the 1991 Policy also stated that “[t]he general policy of nonregistrability of garment designs will be applied not only to ordinary wearing apparel, but also to period and historical dress, and uniforms.”<sup>202</sup> Notably, the Office extended this 1991 Policy to theatrical costumes, stating, “[w]earing apparel incorporated into theatrical productions will likewise be treated under the standards applying to garment designs in general.”<sup>203</sup>

The Office has not officially altered this 1991 Policy in any later publications regarding the visual and performing arts; in fact, these later publications have barely discussed costumes.<sup>204</sup> In the Office’s *Works of Performing Arts*

192. See *Diamond Collection, LLC v. Underwraps Costume Corp.*, 17-CV-0061(JS)(SIL), 2019 WL 347503, at \*4 (E.D.N.Y. Jan. 22, 2019); *Silvertop Assocs.*, 931 F.3d at 219–22.

193. See *Nat’l Theme Prods., Inc., v. Jerry B. Beck, Inc.*, 696 F. Supp. 1348, 1352–53 (S.D. Cal. 1988); *Rubie’s I*, 721 F. Supp. 1566, 1074–75 (E.D.N.Y. 1989); *Masquerade Novelty, Inc. v. Unique Indus., Inc.*, 912 F.2d 663, 666, 669–70 (3d Cir. 1990).

194. See generally *Registrability of Costume Designs*, 56 Fed. Reg. 56530 (Nov. 5, 1991).

195. ALEX LACAMOIRE ET AL., *Non-Stop*, *supra* note 59, at 02:41.

196. See generally *Registrability of Costume Designs*, 56 Fed. Reg. 56530.

197. Malla Pollack, *A Rose Is a Rose Is a Rose—But Is a Costume a Dress?: An Alternative Solution in Whimsicality, Inc. v. Rubie’s Costume Co.*, 41 J. COPYRIGHT SOC’Y U.S.A. 1, 14 (1993) (noting courts generally only have to give such policy decisions deference).

198. 17 U.S.C. § 102(a)(5); *Registrability of Costume Designs*, 56 Fed. Reg. at 56531.

199. *Registrability of Costume Designs*, 56 Fed. Reg. at 56531–32.

200. *Id.* at 56531.

201. *Id.* at 56530.

202. *Id.* at 56532.

203. *Id.*

204. See generally U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFF. PRACS. (Works of the Performing Arts) (2021) [hereinafter *Performing Arts*]; *Visual Art Works*, *supra* note 15.

*Compendium*, the only reference to costumes is in Chapter 8, stating that “items used in set design, scenery, props, and costumes, are regarded as useful articles” and that “copyright law does not protect the design of useful articles.”<sup>205</sup> This section also indicates that “[t]hese types of works often raise special issues that generally are handled by the Visual Arts Division.”<sup>206</sup>

The Visual Arts Division oversees visual artworks’ registration—including pictorial, graphic, and sculptural works—under which costumes are classified.<sup>207</sup> Unfortunately, the Office’s *Visual Arts Works* publication does not offer the clarity promised in the *Works of Performing Arts Compendium*.<sup>208</sup> Section 924.3 announces the different separability tests for costumes.<sup>209</sup> The only other reference to costumes comes in Section 911 when discussing characters, stating that “[f]anciful costumes that depict a character may be considered useful articles for registration [because] [a]lthough they portray the appearance of the character, [t]hey also may serve the intrinsic useful function of clothing the human body.”<sup>210</sup> These specialized publications and the Office’s 1991 Policy grant physical theatrical costumes no protection, indicating that costume designers have not been receiving adequate protection for their artistic endeavors.

### III. ANALYSIS

This Part will discuss why the Office’s 1991 Policy is faulty and why an alternative solution is needed. Specifically, Section A first describes the anomaly created by granting copyright protection to masks in theatrical costumes but not to the clothing portions of that same costume, and it next describes why costumes are distinguishable from everyday clothing and mass-produced costumes and can therefore be granted protection without creating further incongruity in copyright law or stretching the law too thin. Section B then discusses the obstacles costumes would face if they would be granted copyright protection and why—despite these obstacles—the benefits of protection outweigh any downsides.

#### A. “Is This a Legal Matter?.”<sup>211</sup> *Costumes, Clothes, and Copyright Law*

The Subsections to follow describe some of the anomalies created in theatrical costume design by not granting clothing costumes protection, discuss how costumes are different from traditional, copyright-unprotected clothing, and explain why physical theatrical costumes can be protected without stretching the law too thin.

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205. Performing Arts, *supra* note 204, at 116 (describing costumes in § 808.11(D)).

206. *Id.* (describing costumes in § 808.11).

207. Visual Art Works, *supra* note 15, at 5 (describing §§ 902–03).

208. *Contra* Performing Arts, *supra* note 204, at 116 (describing costumes in § 808.11).

209. Visual Art Works, *supra* note 15, at 45–46 (describing § 924.3 separability test).

210. *Id.* at 27 (describing § 911 characters).

211. ALEX LACAMOIRE ET AL., *Non-Stop*, *supra* note 59, at 02:12.

### 1. *Protecting Masks and Not Costumes Creates Odd Results*

Unlike costumes, masks have been granted copyright protection because they are not utilitarian articles.<sup>212</sup> In its 1991 Policy, the Office insinuated that the only useful purpose a mask served was covering the wearer’s face, and it therefore was not utilitarian enough to lose protection.<sup>213</sup> The Office draws this fine line on the logic that masks cover only a person’s face, while costumes and clothing cover an individual’s entire body.<sup>214</sup>

This distinction based on the amount of flesh covered may be true, but both masks and costumes serve a masquerading function.<sup>215</sup> They let the wearer embody something or someone else.<sup>216</sup> For example, Professor William Patry in *Patry on Copyright* argues that costumes “should be treated like masks [because] their sole purpose is imaginative and only to convey their appearance.”<sup>217</sup> Therefore, as Professor Patry argues, the playacting function and hidden-identity creation indicate that masks and costumes are much more alike than different.<sup>218</sup>

Likewise, immediately after the 1991 Policy’s publication in the *Federal Register*, one scholar called the distinction drawn between masks and costumes “arbitrary” and noted that the decision’s “most problematic” part “concern[ed] uniforms, period dress, and theatrical costumes.”<sup>219</sup> For example, the masks for the musical production of *The Lion King* are subject to copyright protection, while the rest of the costume the actor wears is not.<sup>220</sup> Such anomalous results would not occur if both the costumes and the masks in a theatrical production were protected through a utilitarian-article exception for theatrical costumes as a whole.

### 2. *How Costumes Are Different from Traditional Clothing, High-Fashion, and Mass-Produced Costumes*

As the Office’s 1991 Policy announced, theatrical costumes are treated as wearing apparel for determining copyrightability.<sup>221</sup> One scholar, however, has critiqued the 1991 Policy as specifically applied to theatrical costumes, emphasizing theatrical costumes’ playacting purpose as opposed to their other utilitarian functions.<sup>222</sup> As this scholar and others have indicated, the 1991 Policy as

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212. Thompson, *supra* note 87, at 2.

213. Registrability of Costume Designs, 56 Fed. Reg. 56530, 56531–32 (Nov. 5, 1991); Thompson, *supra* note 87, at 2–3.

214. Registrability of Costume Designs, 56 Fed. Reg. at 56531–32.

215. Pollack, *supra* note 197, at 15–16.

216. *See id.* at 17–18.

217. 2 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 3:153 (2021). Professor Patry also noted that most full-body costumes are worn over other clothing, reducing their utilitarian purpose in providing body protection and preserving modesty. *Id.*

218. *See* Pollack, *supra* note 197, at 15–16.

219. *Id.* at 16–17 (giving various possibilities for a more disciplined rule than the Office’s policy decision).

220. Dine, *supra* note 13, at 18–19.

221. Registrability of Costume Designs, 56 Fed. Reg. 56530, 56532 (Nov. 5, 1991).

222. *See* Sanchez-Roig, *supra* note 22, at 1111–13.

announced and interpreted by the courts clearly does not protect clothing design, but the line between clothing and costume is difficultly delineated.<sup>223</sup>

First and foremost, while a costume is clothing, it goes beyond the traditional utilitarian-clothing function and does something additional: costumes help portray a character.<sup>224</sup> For example, each Schuyler sister’s dress in *Hamilton* serves the important function of describing each sister’s respective personality: Angelica wears burnt orange to portray her vibrant and outgoing personality; Eliza wears turquoise blue to reflect her thoughtful, smart, and sympathetic personality; and Peggy wears “an innocent butter yellow.”<sup>225</sup> The colors in each sister’s costume express her personality to the audience and help the actor embody that sister’s spirit, thereby doing a lot more than the usual covering up that makes clothing a utilitarian object.<sup>226</sup>

It might be tempting, however, to compare high-fashion to costumes—they are both clothing after all.<sup>227</sup> Unlike regular, off-the-rack clothing, high-fashion and costumes are not copied as often.<sup>228</sup> And, like costumes, fashion designs—in their physical form—are not protected by the 1976 Act.<sup>229</sup> But costumes are different from fashion, too.<sup>230</sup> Most notably, theatrical costumes are a particular type of clothing that serve a particular purpose; namely, costumes allow an actor to alter their appearance for the sake of playing a character.<sup>231</sup> In fact, theatrical costumes are worn solely for creating expressive art on stage.<sup>232</sup> Accordingly, this playacting purpose is fundamentally different and completely separable from the costume’s body-clothing, modesty-promoting function.<sup>233</sup> This separate purpose makes costumes distinct from other types of garments—including high-fashion—because even a high-fashion piece is not intended to transform its wearer into someone or something else; rather, the wearer is still the wearer, performing as oneself and displaying the fashion designer’s art.<sup>234</sup>

And, unlike off-the-rack clothing and even some high-fashion pieces, theatrical costumes are created for the one purpose of wearing on stage, are made to portray only one character, and are made to fit one actor.<sup>235</sup> The costumes are not marketed for sale as useful, body-protecting items to the public.<sup>236</sup> In fact, most

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223. *See id.*; Pollack, *supra* note 197, at 17. *Contra* Registrability of Costume Designs, 56 Fed. Reg. at 56532.

224. Foster, *supra* note 10, at 434; Dine, *supra* note 13, at 18.

225. Singer, *supra* note 29.

226. *See* Foster, *supra* note 10, at 434.

227. *See* Watkins, *supra* note 12, at 54.

228. *Id.* at 55.

229. *Id.* at 54. Fashion design is defined as “art dedicated to the design of clothing and lifestyle accessories, created with the cultural and social influences of a specific time.” *Id.*

230. *See id.* at 56.

231. *Id.* at 55; *see* Foster, *supra* note 10, at 434.

232. *See* Watkins, *supra* note 12, at 56.

233. Pollack, *supra* note 197, at 16. *Contra* Visual Art Works, *supra* note 15, at 27 (describing § 911 characters).

234. *See* Watkins, *supra* note 12, at 56.

235. *See id.*

236. Foster, *supra* note 10, at 441; Watkins, *supra* note 12, at 56 (“[C]ostumes can be worn without the need for clothing the body and solely for the purpose of art, as is often the case in theater productions.”).

costumes are worn over various layers of undergarments.<sup>237</sup> As the top layer, these costumes do not meet the minimum body-clothing function and therefore do not serve that utilitarian purpose because the undergarments worn by the actors under the visible costume already check that box, fundamentally distinguishing theatrical costumes from the clothes worn by an individual—whether that be everyday wear or a display of high-fashion on the runway.<sup>238</sup>

Finally, theatrical costumes are also fundamentally different from fanciful Halloween costumes.<sup>239</sup> Unlike mass-produced Halloween costumes intended to be worn by whomever buys them, theatrical costumes are made for one person: the actor portraying that character.<sup>240</sup> Although costumes may not change much from production to production, elements of the costume may be changed to suit the actor and the locale.<sup>241</sup> For example, *Hamilton* costume designer Paul Tazewell is working on costuming the show’s Australian productions.<sup>242</sup> Although the costumes will remain fundamentally the same, changes are being made to suit the actors in the Australian company and to incorporate Australian materials.<sup>243</sup> Therefore, several policy concerns that keep mass-produced fanciful costumes from being protected—like not wanting to limit items marketed to the mass public—do not apply to theatrical costumes.<sup>244</sup>

Likewise, other policy concerns that keep these other types of clothing from gaining copyright protection do not apply to theatrical costumes.<sup>245</sup> First, as addressed above, unlike stock Halloween costumes which—if copyrighted—would stifle creativity and the Halloween industry, theatrical costumes are made for a specific actor to portray a specific character at a specific time.<sup>246</sup> Accordingly, a theatrical costume is not the typical mass-produced utilitarian article, fanciful or otherwise.<sup>247</sup> This same logic applies to mass-produced, everyday clothing items.<sup>248</sup> Second, costumes are made to portray one character;<sup>249</sup> accordingly, granting protection will not keep other designers from being inspired by that look because presumably each designer creates work for an independent, unique character for a completely different theatrical piece.<sup>250</sup> Therefore, the fashion industry’s concerns about wanting to be able to follow trends—generating fears that copyright protection would stifle creativity—do not apply to theatrical costumes because theatrical costumes are created to represent a single character at a single point in time.<sup>251</sup> Third, granting protection to theatrical costumes specifically

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237. See Foster, *supra* note 10, at 439.

238. See *id.*

239. *Id.* at 436–37.

240. *Id.* at 441.

241. Singer, *supra* note 29.

242. *Id.*

243. *Id.*

244. Foster, *supra* note 10, at 454–56.

245. See *id.*

246. *Id.* at 435–36.

247. *Id.* at 439.

248. *Id.*

249. See *id.*

250. Watkins, *supra* note 12, at 53, 55.

251. Foster, *supra* note 10, at 454.

would not further complicate copyright law, particularly in the realm of costume protection; instead, it could give new clarity.<sup>252</sup> Therefore, copyright protection can be granted to theatrical costumes without granting protection to other types of clothing or mass-produced fanciful costumes.<sup>253</sup>

### 3. *A Common Threat: Garment Piracy*

But high-fashion, off-the-rack clothes, fanciful Halloween costumes, and theatrical costumes alike all face a common threat: garment piracy.<sup>254</sup> The clothing industry, for example, has seen a continuous growth in knockoffs and counterfeit items available on the market.<sup>255</sup> Yet despite the undeniable creative work that goes into fashion design, because high-fashion designs are not copyright protected, the fashion industry has had to resort to self-policing in the face of the growing counterfeit market.<sup>256</sup> Fashion industry members prefer this practice because it allows existing works to inspire the fashion designer without fear of litigation.<sup>257</sup> If designers must resort to litigation, they bring their actions under trade dress or trademark infringement, not copyright.<sup>258</sup> This practice may work for fashion designers, but theatrical costume design is fundamentally different.<sup>259</sup> If theatrical costumes are not granted copyright protection, they can and will be subjected to the same garment-piracy threat, particularly as costumes become more widely available through streaming and the Internet.<sup>260</sup>

#### B. *“What They’re Up Against”:<sup>261</sup> Obstacles to Protection*

Even if their physical costumes received protection, costume designers taking advantage of that protection through an infringement lawsuit would face several challenges including joint authorship, the works for hire doctrine, the *scènes à faire* doctrine, and separability.<sup>262</sup> But none of these obstacles would preclude protection, and most issues raised by these obstacles can be alleviated through royalty payments for creators or allowing for copyright protection and utilizing the respective doctrine to limit overly broad costume protection.<sup>263</sup>

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252. *Id.* at 447, 455.

253. *See id.* at 447 (calling for protection for theatrical costumes based on their character-portraying function).

254. Schalestock, *supra* note 16, at 113, 116.

255. *Id.*

256. Watkins, *supra* note 12, at 53.

257. *Id.* at 53, 55.

258. *Id.* at 53 (“[C]opyright protection could do more harm than good in an industry that continues to build and reinvent itself largely through recycling.”).

259. *Id.* at 56; *see* discussion *supra* Subsections III.A.1–2.

260. Foster, *supra* note 10, at 456; *see also* Schalestock, *supra* note 16, at 116 (discussing piracy in the fashion world).

261. ALEX LACAMOIRE, DAVEED DIGGS, LESLIE ODOM, JR., OKIERIETE ONAODOWAN & THE ORIGINAL BROADWAY CAST OF HAMILTON, *Washington on Your Side, on HAMILTON (ORIGINAL BROADWAY CAST RECORDING)*, at 02:12 (Atlantic Records 2015) (streamed using Spotify).

262. *See infra* Subsections III.B.1–4.

263. *See* 17 U.S.C. § 107 (fair use); *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1013, 1015–16 (2017) (separability) Dine, *supra* note 13, at 17–19 (“The *scènes à faire* doctrine is not an attack on the

### 1. *Joint Authorship*

Theater creation involves a collaborative process, and this collaborative nature leads to joint authorship concerns in any copyright action.<sup>264</sup> An author, according to the Supreme Court, is the “origin[,] originator[,] [and] maker” of a thing.<sup>265</sup> Taking into account that not every item is just made by one person, the 1976 Act allows for joint authorship, defining a “joint work” as “a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.”<sup>266</sup>

Some courts have already considered the collaboration and joint authorship issues in the Broadway musical context.<sup>267</sup> But given theater’s collaborative nature, even if copyright protected physical costumes, the costume designer would not reap the production’s benefits.<sup>268</sup> For example, while Paul Tazewell designed the costumes in *Hamilton* with relative freedom, show-creator Lin-Manuel Miranda gave his input that Hamilton should wear green at the beginning of Act II at Hamilton’s height of political power as Secretary of the Treasury.<sup>269</sup> Under joint authorship, it would be unclear if Tazewell, Miranda, or both would benefit from protection for that costume.<sup>270</sup>

One potential solution to this problem would be to create a royalty program through which all individuals who collaborate on the project—here, the specific costume—can claim dividends from an infringement lawsuit.<sup>271</sup> Such a royalty solution has been utilized in the theater context already: *Hamilton*’s off-Broadway cast wrote a letter to one of the show’s creators asking for royalty payments from the show’s box office to compensate for their collaborative input during the off-Broadway workshopping process.<sup>272</sup> This method could be applied to theatrical costumes, allowing for royalty payments to everyone with input during the design process—from actors to the director to the costume designer to the individual sewing the costume—when the licenses to use the costumes are sold to other productions or when the court enters judgment in an infringement lawsuit.<sup>273</sup>

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copyright protection in a work, but a defense to a charge of infringement of the work.”); Pollack, *supra* note 197, at 17 (noting the merger doctrine and the *scènes à faire* doctrine); Davis, *supra* note 4, at 105–07 (elements of fair use defense); Stein, *supra* note 63, at 1591 (discussing joint authorship); Temme, *supra* note 24, at 13 (works for hire).

264. See Womack, *supra* note 10, at 226; Stein, *supra* note 63, at 1591.

265. Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 346 (1991).

266. 17 U.S.C. § 101.

267. See Carell v. Shubert Org., Inc., 104 F. Supp. 2d 236, 256 (S.D.N.Y. 2000).

268. Temme, *supra* note 24, at 11.

269. Singer, *supra* note 29.

270. Temme, *supra* note 24, at 11.

271. See *id.* at 18–19.

272. Letter from Daveed Diggs et al., Cast of *Hamilton* to Jeffrey Seller (Aug. 31, 2015) (requesting royalty recognition for *Hamilton* actors for their contributions to the production during workshops).

273. See Temme, *supra* note 24, at 19 (noting that people who could claim royalties include producers, actors, directors, and seamstresses, among others).



## 2. *Works for Hire*

A similar authorship concern arising due to theater’s collaborative nature is the works for hire doctrine.<sup>274</sup> This doctrine comes from the common law of agency.<sup>275</sup> The 1976 Act recognizes works for hire,<sup>276</sup> which can be conceptualized as a “work prepared by an employee in the scope of his or her employment . . . .”<sup>277</sup> Under this doctrine, the work and later protection would belong to the employer, not the designer, because the designer created the item in an agency relationship.<sup>278</sup>

In theater, each designer is hired to create their design for the specific production; once the production and design are finished, the work is done.<sup>279</sup> Although not extensively covered in the costume context, scholars have discussed the works for hire issues in other parts of theater.<sup>280</sup> Here, the costume designer could be considered an employee; if so, the designer would not receive ownership of the costumes made in the scope of employment, and instead the costume and its copyright protection would belong to whomever hired the designer for the production.<sup>281</sup> Like the problems created by joint authorship, a system of royalty payments for costume designers’ work when licenses are sold or an infringement judgment is entered may solve the works for hire conundrum.<sup>282</sup>

## 3. *Scènes à Faire*

The *scènes à faire* doctrine also poses a problem for costume protection.<sup>283</sup> This doctrine relates to the idea that certain literary elements are too commonplace to be protectable.<sup>284</sup> The doctrine arises in copyright law because expression of ideas, not an idea itself, is copyrightable.<sup>285</sup> For example, a stock character like a princess, a pirate, or a moody teenager would all not be copyrightable under this doctrine because they are too common.<sup>286</sup>

The *scènes à faire* doctrine poses a concern for costume protection because courts have repeatedly done a *scènes à faire* analysis when discussing costumes post-*Star Athletica*.<sup>287</sup> Scholars, too, have noted that if copyright protected

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274. Bailey, *supra* note 9, at 384.

275. Temme, *supra* note 24, at 13.

276. 17 U.S.C. § 101.

277. Stein, *supra* note 63, at 1579.

278. See Temme, *supra* note 24, at 13.

279. Bailey, *supra* note 9, at 384.

280. See Temme, *supra* note 24, at 12.

281. *Id.*

282. See *id.* at 20.

283. Dine, *supra* note 13, at 17–18.

284. Christina R. Evola Nowakowski, The Next Generation of Costumes and Conventions: Is Cosplay Copyright Infringement? 9 (May 5, 2010) (unpublished paper) (available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2200348](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2200348)) [<https://perma.cc/Q9HC-SJJK>].

285. *Id.*

286. *Id.*

287. *Silvertop Assocs., Inc. v. Kangaroo Mfg. Inc.*, 931 F.3d 215, 219, 223 (3d Cir. 2019).

costumes, the *scènes à faire* doctrine could pose a big problem.<sup>288</sup> Notably, however, the *scènes à faire* doctrine is not an attack on costumes’ copyrightability; rather, the doctrine provides a defense that someone who owns a valid copyright may need to overcome to bring a successful infringement lawsuit.<sup>289</sup>

Therefore, the *scènes à faire* doctrine does not preclude the possibility of protection for costumes but is instead a hurdle a designer would need to overcome in an infringement lawsuit.<sup>290</sup> For people concerned that granting copyright protection to costumes might stifle creativity, this doctrine may serve as a potential check on ensuring that outcome does not occur.<sup>291</sup> For example, a background ensemble character’s more generic costume would be useable as a stock character and not copyrightable, but a more iconic look—for example, Thomas Jefferson’s purple costume from Act II of *Hamilton*—could potentially be protected.<sup>292</sup> This doctrine could therefore balance protection for costume designers’ work and the ability to create original costumes.

#### 4. Separability

Separability may pose the biggest threat to costume copyrightability because costumes are, according to courts and the Office, utilitarian articles.<sup>293</sup> Over the years courts applied several different tests to determine separability, and scholars suggested even more.<sup>294</sup> Although the Supreme Court resolved the circuit split on the separability issue in *Star Athletica*, favoring conceptual separability,<sup>295</sup> courts after this decision have routinely held that costumes are not themselves copyrightable.<sup>296</sup>

Yet *Star Athletica* did not completely slam the door shut on copyright protection for costumes.<sup>297</sup> The Court did make clear that the only feature of the cheerleading uniforms at issue in that case was the chevron pattern, not the uniform itself.<sup>298</sup> But a theatrical costume fundamentally differs from a cheerleading uniform: cheerleading uniforms provide a body-clothing function and signal the cheerleader’s school affiliation, but theatrical costumes are an artistic expression and allow an actor to portray a character, moving the costume beyond a utilitarian function.<sup>299</sup> The use of portraying a character makes the actor into someone or something else, whereas the school identifier of a cheerleading uniform only

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288. Pollack, *supra* note 197, at 17 (“The court should proceed to the next step [after granting protection], deciding how much copyrightable subject matter survives other copyright limitations, such as the *scènes à faire* [doctrine].”).

289. Dine, *supra* note 13, at 17–19.

290. *Id.*

291. See Foster, *supra* note 10, at 440–44.

292. See Evola Nowakowski, *supra* note 284, at 9; Pesce & Dziemianowicz, *supra* note 44.

293. Foster, *supra* note 10, at 446.

294. *Id.* at 442–45 (discussing three tests for separability).

295. See *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1014 (2017); *Silvertop Assocs., Inc. v. Kangaroo Mfg., Inc.*, 931 F.3d 215, 219 (3d Cir. 2019).

296. *Silvertop Assocs.*, 931 F.3d at 220–23.

297. See *Star Athletica*, 137 S. Ct. at 1013, 1015–16.

298. See *id.*

299. See Dine, *supra* note 13, at 18–19.

demonstrates the affiliation of the person wearing the uniform. Therefore, a cheerleading uniform is more like a t-shirt demonstrating a sports team affiliation than a theatrical costume that the actor wears to embody a character. Finally, some scholars contend that a theatrical costume can already pass the separability test by its nature.<sup>300</sup> Therefore, separability may be a hurdle for costumes’ copyright protection, but it is certainly not insurmountable.

#### IV. RECOMMENDATION

The United States Copyright Office must reconsider its 1991 Policy on costumes,<sup>301</sup> and Congress must make an exception to the utilitarian-article rule for theatrical costumes. This protection should be an explicit, bright-line rule that theatrical costumes are, themselves, protected under the 1976 Act.<sup>302</sup> Such protection is warranted because theatrical costumes go beyond the traditional utilitarian function of clothing the human body: these costumes portray a character, playing a central role in narrative expression.<sup>303</sup> Section A of this Part first describes what the utilitarian-article exception for theatrical costumes would look like. Section B discusses the continuation of streaming live theater and the ways to strike a balance between appropriate protection and creative expression.

##### A. *Costumes Shouldn’t Be “Helpless”*.<sup>304</sup> *The Utilitarian-Article Exception and Why Costumes Deserve Protection in the Streaming Era*

To accomplish full protection, the physical costume itself must be copyrightable.<sup>305</sup> This Note therefore implores Congress to create an explicit, bright-line, utilitarian-article exception for theatrical costumes. To solidify this protection, it is also necessary for the courts to reevaluate their interpretation of this 1991 Policy and for the Office to reconfigure and revoke the Policy.

Such protection is warranted because costumes go beyond the simple utilitarian functions that keep ordinary clothing from receiving copyright protection.<sup>306</sup> Fanciful Halloween costumes allow the wearer to masquerade, but theatrical costumes engage in a deeper, more artistic type of expression; namely, theatrical costumes allow an actor on stage to embody a character in a narrative.<sup>307</sup> These costumes are just one tool the actor uses to effectively portray that character and tell that story. These material differences indicate that physical

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300. Foster, *supra* note 10, at 442.

301. See generally Registrability of Costume Designs, 56 Fed. Reg. 56530 (Nov. 5, 1991).

302. Foster, *supra* note 10, at 447.

303. See *id.* at 437, 447.

304. ALEX LACAMOIRE, PHILLIPA SOO & THE ORIGINAL BROADWAY CAST OF HAMILTON, *Helpless, on HAMILTON (ORIGINAL BROADWAY CAST RECORDING)* (Atlantic Records 2015) (streamed using Spotify).

305. See Bailey, *supra* note 9, at 391.

306. Dine, *supra* note 13, at 18.

307. Foster, *supra* note 10, at 436–37.

costumes should be protected, particularly considering the new infringement dangers that streaming poses.<sup>308</sup>

Granting this protection would not harm fan engagement with these shows and their streamed counterparts, nor would it prohibit costume homages to shows that grow in popularity.<sup>309</sup> In fact, fears of overprotection or the stifling of fan expression can be assuaged through the *scènes à faire* doctrine and fair use defense.<sup>310</sup> Issues that could arise from theater’s collaborative nature for costume protection,<sup>311</sup> like joint authorship and the works for hire doctrine,<sup>312</sup> can potentially be alleviated through a royalty payment system to contributors similar to the deal negotiated by the *Hamilton* cast for their contributions to the show and script.<sup>313</sup> Ideally, costume designers would receive protection for their physical costumes and then could receive royalty payments through licensing and payments from infringement judgments in a lawsuit.

With this protection granted, there also needs to be a way for costume designers of streamed performances to claim infringement, not the streaming platform itself.<sup>314</sup> One potential way to deal with this problem would be contractual.<sup>315</sup> To ensure that designers get protection, there must be a method for costume and other designs to be registered and recognized to get the protection they deserve.<sup>316</sup> One way to accomplish this protection is to see where television and theater could work together by applying the types of protection for television contracts to theatrical costume designers.<sup>317</sup> For example, a current trend exists toward including copyright protection for certain parts of the theatrical work in standard theater bargaining agreements for designers whose work is streamed, but the United Scenic Artists’ standard agreement does not include such protection.<sup>318</sup> As its standard contract stands, the United Scenic Artists treats theater and film/television contracts separately.<sup>319</sup> Another potential contractual solution is to create an addendum to the traditional United Scenic Artists contract that would create copyright protection for streaming of theater performances specifically.<sup>320</sup> A similar argument has been recently offered by Mark Bailey in the scenic design context<sup>321</sup> and can be adapted to suit costume designers’ needs as well. Regardless of the method chosen to give costume designers an avenue to bring suit, the first—and most vital—step to protecting their works is to create a

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308. *Id.* at 438.

309. *See* discussion *infra* Subsections IV.B.2–3.

310. 17 U.S.C. § 107 (defining fair use defense); Evola Nowakowski, *supra* note 284, at 9, 18.

311. Dine, *supra* note 13, at 14.

312. Bailey, *supra* note 9, at 391.

313. Letter from Daveed Diggs et al., Cast of *Hamilton* to Jeffrey Seller, *supra* note 272.

314. Bailey, *supra* note 9, at 392–93.

315. *Id.* at 393–94.

316. *Id.* at 394.

317. *Id.* at 393–94.

318. *Id.* at 393.

319. *Id.*

320. *Id.* at 394.

321. *Id.*

utilitarian-article exception for theatrical costumes, making it possible for those artworks to be fully protected in the first instance.

B. “*What Comes Next?*”:<sup>322</sup> *Theater in the Streaming Age*

Full protection is needed even more given the trend of streaming theatrical performances begun by the *Hamilton* film on Disney+.<sup>323</sup> Streaming as a mode of entertainment has been growing in popularity for years, and it does not appear to be slowing down, particularly given the pandemic’s ongoing nature.<sup>324</sup> And with Broadway slowly reopening after its eighteen-month closure for the COVID-19 pandemic,<sup>325</sup> *Hamilton*’s success on both stage and screen indicates that streaming theater is here to stay.<sup>326</sup> These Subsections discuss balancing the concerns of the theater industry created by streaming live theater with ideals of creative expression.

1. *No Pictures, Please: Streaming, Video, and Photo Make Garment Piracy Too Easy*

Historically, theaters vastly discouraged recordings of shows because theater professionals feared that mass-availability of performances would hurt ticket sales.<sup>327</sup> But even with 2.7 million households streaming the film on Disney+ during its opening weekend, *Hamilton*’s success on the stage persists.<sup>328</sup> In fact, contrary to the fear that streaming and live performances could not coexist,<sup>329</sup> *Hamilton* creator Lin-Manuel Miranda has since revealed that rather than hurting ticket sales, since Broadway reopened following its COVID-19-induced closure—and following *Hamilton*’s Disney+ release—demand for tickets to the live show have in fact increased as opposed to decreased.<sup>330</sup> With *Hamilton* showing

322. ALEX LACAMOIRE & JONATHAN GROFF, *What Comes Next?*, on HAMILTON (ORIGINAL BROADWAY CAST RECORDING) (Atlantic Records 2015) (streamed using Spotify).

323. Overall, the trend of filming staged productions for streaming seems to be growing; for example, Peacock is developing and recording a Nick Jonas-led *Jersey Boys* production for its streaming platform. Friedman, *supra* note 19.

324. Liyin Yeo, *Streaming Services Sales Up 50 Percent During the COVID-19 Era*, BLOOMBERG SECOND MEASURE (July 8, 2020), <https://secondmeasure.com/datapoints/streaming-services-grow-fifty-percent-covid-19/> [<https://perma.cc/GA5V-SNVY>].

325. Bailey, *supra* note 9, at 371, 373 (“The success of *Hamilton* on Disney+ provides evidence that there is an established market exists for theat[er] performances online and that the theat[er] industry can engage with the digital marketplace. This success suggests that theatrical content can compete with other streaming content . . .”).

326. See Andrea Wurzbarger, *Broadway Is Back! Scenes from Re-Opening of ‘Wicked, Hamilton, Chicago,’ and More*, PEOPLE (Sept. 15, 2021, 1:59 PM), <https://people.com/theater/broadway-re-opening-after-covid-photos/#92ea2d05-2ed0-434e-8807-32557b061423> [<https://perma.cc/JP35-HRFX>].

327. See Chow, *supra* note 8. For example, such a fear kept the *Hamilton* film from hitting screens immediately after its recording in 2016. *Id.*

328. Frankel, *supra* note 56.

329. See Chow, *supra* note 8.

330. Broadway World (@BroadwayWorld), TWITTER (Nov. 29, 2021, 1:03 PM), <https://twitter.com/BroadwayWorld/status/1465395976579989516> [<https://perma.cc/PB97-YDVB>]; Playbill (@Playbill), TWITTER (Nov. 29, 2021, 12:30 PM), <https://twitter.com/playbill/status/1465387601691615232> [<https://perma.cc/GZE6-7WSH>].

that streaming and live theater can coexist, the theater industry is realizing that the ability to stream performances is possible and maybe even necessary.<sup>331</sup>

In fact, if *Hamilton* serves as any indication, streaming has created a whole new avenue for creative expression and economic growth for the theater industry, while simultaneously gaining viewers for the streaming service.<sup>332</sup> For example, if theatrical performances are uploaded to streaming services, these streaming services could gain more viewers and subscribers, shown by the massive increase in Disney+ downloads when *Hamilton* dropped.<sup>333</sup> Likewise, streaming benefits the theater industry because it makes shows more accessible to audiences and encourages people to patron live theater when they are able.<sup>334</sup> *Hamilton* serves as evidence that a show can win awards for its streaming performance while still thriving on stages across the globe.<sup>335</sup>

Yet professional practice surrounding theatrical design, including costume design, indicates that professionals “do not think their work will be protected if it is widely distributed.”<sup>336</sup> Therefore, up until now, they have relied on professional custom to protect their designs.<sup>337</sup> But this self-policed protection is not nearly as strong in the digital era,<sup>338</sup> and without widening copyright protection from only the renderings to the physical costume itself, costume piracy will only be easier during the theater-streaming age.<sup>339</sup> For example, to raise a copyright infringement suit, the copyright owner needs to show that the person allegedly infringing an item had access to that item.<sup>340</sup> In the context of costume design and copyright law, the designer’s currently copyright-protected work is the rendering, not the costume itself.<sup>341</sup> The designer claiming design infringement therefore must show access to the costume plot renderings, not the costume itself; this requirement makes it nearly impossible for a costume designer to bring an infringement lawsuit because the infringer likely did not even use those sketches to copy the costume since the design—in the form of the costume itself—is just a few clicks away.<sup>342</sup>

A streaming performance—with all the costume designs placed within the show’s full context—is available to anyone willing to pay for the streaming

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331. Bailey, *supra* note 9, at 371.

332. *Id.* at 374; Dan Meyer, *Digital Streaming Platforms Emerge as Live Theatre Shifts Online*, PLAYBILL (Aug. 4, 2020), <https://www.playbill.com/article/digital-streaming-platforms-emerge-as-live-theatre-shifts-online> [https://perma.cc/3FJP-8LYR] (discussing steps the industry is taking to expand streaming of performances during the pandemic).

333. Spangler, *supra* note 5.

334. Frankel, *supra* note 56; Bailey, *supra* note 9, at 367.

335. Ordoña, *supra* note 2.

336. Bailey, *supra* note 9, at 369.

337. *Id.*

338. *Id.*

339. Schalestock, *supra* note 16, at 113, 115 (discussing design piracy); Bailey, *supra* note 9, at 369–71; Foster, *supra* note 10, at 455.

340. Foster, *supra* note 10, at 448.

341. *Id.*

342. Bailey, *supra* note 9, at 38; Robert Simonson, *Ask Playbill.com: Why Can't I Take Photos in a Broadway Theatre?*, PLAYBILL (June 27, 2011), <https://www.playbill.com/article/ask-playbillcom-why-cant-i-take-photos-in-a-broadway-theatre-com-180456> [https://perma.cc/MK2Y-FKSJ].

service’s fee.<sup>343</sup> Once the viewer pays the streaming fee, the viewer has unlimited viewing access to the show; the viewer can pause it, screenshot it, and go back again and again to look at the costumes.<sup>344</sup> Here, the costume itself serves as the source providing the ability to copy, not the renderings.<sup>345</sup> This mass exposure increases the plagiarism risk,<sup>346</sup> and no money gained from this plagiarism would go to the costumes’ original designer.<sup>347</sup> Accordingly, protection only for the renderings and not the costume itself is inadequate in the streaming age.<sup>348</sup>

## 2. *Hamilfans No Fear: Protecting Costumes Will Not Stifle Fan Expression*

Granting theatrical costumes protection would not, however, stifle good-natured fan expression.<sup>349</sup> It has become increasingly common, particularly since *Hamilton*’s release on Disney+, for fans to recreate their favorite characters’ costumes to express their fandom. Shows like *Hamilton* want to encourage fan expression<sup>350</sup> and have done so through social media postings like #HAMILKIDS, which show *Hamilton*’s young fans in homemade versions of their favorite characters’ costumes.<sup>351</sup>

Indeed, a fan’s cosplaying as their favorite *Hamilton* character would not be greatly limited by costume copyright protection. First, copyright lawsuits are expensive, and it would not be practical for a costume designer to bring a lawsuit against every cosplayer.<sup>352</sup> Second, if such a lawsuit would be brought, the cosplayer could likely raise a fair use defense.<sup>353</sup> Costumes made for cosplay are generally created for personal, not commercial, purposes.<sup>354</sup> Unless the creator wins a costume contest, most of which are often sponsored by the source material’s creators at cosplay conventions, cosplayers rarely receive monetary gain from their creative expression.<sup>355</sup> In fact, most cosplayers create costumes because versions of the costume are not available for purchase from a sanctioned source.<sup>356</sup> Therefore, cosplayers could likely overcome the rare infringement suit with a fair use defense, but productions or other sources that copy the costume designer’s original costumes for profits would not be able to mount such a

343. Bailey, *supra* note 9, at 369.

344. *Id.* at 389–90.

345. *Id.* at 388.

346. *Id.*

347. This is particularly concerning because—since theatrical costume designers do not usually have extensive bargaining power or the capital available to launch several expensive lawsuits—costume pirates are becoming even more bold. *Id.* at 388–90; Womack, *supra* note 10, at 237.

348. Foster, *supra* note 10, at 448.

349. See Evola Nowakowski, *supra* note 284, at 25.

350. See *id.* at 3 (“‘Cosplay’ (short for ‘costume play’) is a type of performance art where avid fans adorn themselves in the garb of their favorite fictional characters.”).

351. See Hamilton Musical (@hamiltonmusical), INSTAGRAM (Oct. 30, 2021, 3:00 PM), <https://www.instagram.com/p/CVq7FyRPV7B/> [<https://perma.cc/DT38-89GD>].

352. Womack, *supra* note 10, at 237; Evola Nowakowski, *supra* note 284, at 6–7.

353. 17 U.S.C. § 107; Evola Nowakowski, *supra* note 284, at 16–24.

354. Evola Nowakowski, *supra* note 284, at 20–21.

355. *Id.*

356. *Id.* at 25.

defense and the costume designers could successfully win a judgment against them.<sup>357</sup>

3. *Easter Egg Hunts Continue: Costume Homages Would Not Infringe Protected Costumes*

Granting protection to the physical costume itself would also not provide too strict a limit on later commercial works that want to pay homage to a show without exactly copying the original costumes. So long as the costume homages are not too direct a copy, copyrighting the original physical costumes would not stifle creativity or future costume design. For example, as discussed previously, the colors of the Schuyler sisters’ dresses throughout the *Hamilton* musical both portray each sister’s respective personality and have become associated with each sister as a character.<sup>358</sup> This color-signaling for the sisters has carried over into other works paying homage to *Hamilton* and provided easter eggs for the musical’s fans.<sup>359</sup> For instance, in Lin-Manuel Miranda’s feature film directorial debut, *Tick, Tick . . . Boom!*—a Netflix film-adaptation of Jonathan Larson’s semiautobiographical musical—the “*Sunday*” diner scene includes several cameos by notable Broadway legends.<sup>360</sup> Among these cameos are *Hamilton* actors Phillipa Soo and Renée Elise Goldsberry.<sup>361</sup> Although brief appearances, *Hamilton* fans immediately caught the homage to the two famous Schuyler sisters from their costumes: Soo—who originated turquoise-clad Eliza in *Hamilton*—wears similar turquoise tones in the film, while Goldsberry once again dons Angelica’s burnt-orange hues.<sup>362</sup> *Hamilton* fans quickly picked up on the allusions to these famous characters, but any copyright afforded to the physical Eliza and Angelica costumes would likely not be violated because the simple use of colors to signify each sister—without directly recreating the costumes—would likely fall out as too loose a copy.

Accordingly, granting copyright protection by creating a utilitarian-article exception for theatrical costumes would strike the appropriate balance between costume designers’ interests in their works and any concerns about overly broadening copyright law or stifling creative expression of both future designers and fans. Such protection is immediately necessary to combat threats of design piracy exacerbated by the increasing mass-accessibility to costume designs in the streaming age.

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357. *See id.* at 21.

358. Singer, *supra* note 29.

359. Nora Dominick, 37 “*Tick, Tick . . . Boom!*” Details and Broadway Cameos You Might’ve Missed the First Time Around, BUZZFEED (Nov. 22, 2021), <https://www.buzzfeed.com/noradominick/tick-tick-boom-easter-eggs> [<https://perma.cc/VN29-GZZZ>].

360. *Id.*; *Tick, Tick . . . Boom!* (Netflix 2021); Jordan Williams, *Tick Tick Boom True Story: The Real Jonathan Larson, Rent & How Much Happened*, SCREENRANT (Nov. 23, 2021), <https://screenrant.com/tick-tick-boom-movie-true-story-jonathan-larson/> [<https://perma.cc/3NNY-PMHA>].

361. Dominick, *supra* note 359.

362. *Id.*



## V. CONCLUSION

Because streaming makes the costumes more readily available to the public, and more vulnerable to piracy, the federal courts, Congress, and the Office must “rise up”<sup>363</sup> and “not throw[] away [their] shot”<sup>364</sup> to reconsider costume protection. This Note argues that such protection should come in the form of an exception to the utilitarian-article rule on copyright protection that has historically prevented theatrical costumes from receiving protection.

The courts, Congress, and the Office all will play a vital role in developing this exception and granting costumes copyright protection. For example, Congress must reevaluate Title 17, creating an official utilitarian article exception for theatrical costumes, officially and explicitly overruling the suggestion created by the Office’s 1991 Policy. Meanwhile, the federal courts can determine whether to continue following that Policy. For further clarity, the Office can revoke and rework this 1991 Policy, suggest protection for theatrical costumes, and clarify its publications on the performing and visual arts to match this distinction. Working together, these entities can clarify and reshape copyright law in a way that would provide much-needed protection to theatrical professionals, particularly costume designers.

The exception is needed, now more than ever. Given *Hamilton*’s success, it appears streaming theater is here to stay.<sup>365</sup> This new method for putting on theater performances will make Broadway shows more accessible to more people than ever before, but it poses many challenges for protecting the designers’ work. The fact that many theatrical designers—like costume designers—do not have their works fully protected under the 1976 Act only exacerbates these challenges.<sup>366</sup> Now is the time for Congress, courts, and the Office to treat theatrical costumes differently so theatrical design professionals will have the full fruits of their labor protected in a world that rapidly makes their work widely available through streaming.<sup>367</sup>

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363. ALEX LACAMOIRE ET AL., *My Shot*, *supra* note 26.

364. *Id.*

365. Bailey, *supra* note 9, at 373, 389; Yeo, *supra* note 324.

366. Foster, *supra* note 10, at 432.

367. Bailey, *supra* note 9, at 373–74.

