§ 3:153. Costumes

References

West's Key Number Digest
- West's Key Number Digest, Copyrights and Intellectual Property 4-4

Costumes, including those for mascots, should be treated like masks; their sole purpose is imaginative and only to convey their appearance. Even in the case of full body costumes, such costumes can easily be worn over actual clothing. Any rule of law that is based on the mere possibility that one may flit around naked with a costume functioning as the “real” clothing is so silly it should not be seriously entertained but for the fact that the Copyright Office and most, but not all courts, have adopted it. The pictorial, graphic, or sculptural elements on such costumes have nothing to do with the clothing aspects and are designed instead merely to portray their appearance. One can only hope the courts will finally come to their senses and reject what is, in effect, a “Scottish Kilt” theory of costume utility.

Such common sense is unlikely to prevail in the Ninth Circuit, though; despite the fanciful nature of full body costumes based upon two-dimensional characters such as “Toucan Sam,” “Dino,” “Dough Boy,” and “Little Sprout,” the Ninth Circuit incorrectly found these costumes to be useful articles in Entertainment Research Group, Inc. v. Genesis Creative Group, Inc. The Court first determined that the costumes were “sculptural works” as defined in Section 101. The Court then held, though, that “any differences in appearance between a derivative work and the preexisting work which are not conceptually separable from any utilitarian, functional or mechanical purposes should not be considered by a court in determining whether sufficient artistic differences exist to constitute ‘originality.’” Applying this test to the facts, the Court found that even though the costumes were not exact replicas of the two-dimensional drawings, the differences in form, texture, and proportionality all stemmed from functional considerations. Even though the facial expressions of the costumes were different from those in the underlying
drawings, since the costumes were "instantly identifiable embodiments of the underlying copyrighted characters in 'yet another form,' no reasonable juror could conclude that there are any 'nontrivial artistic differences between the underlying cartoon characters and the immediately recognizable costumes.'" While the result on the issue of derivative copyrightability is at least arguable, the perplexing aspect of this case is why the court thought that any of the full-body costumes were utilitarian. How is an oversized "Dino" useful? A tea kettle is useful, but it is difficult to imagine what purpose a giant "Dough Boy" could have other than to portray a giant Dough Boy.

Footnotes


4 Entertainment Research Group, Inc. v. Genesis Creative Group, Inc., 122 F.3d 1211, 1221 (9th Cir. 1997).

5 123 F.3d at 1222.

6 123 F.3d at 1223.