

## **NAVIGATING THE REALM OF COSPLAY AND COPYRIGHT LAW: EXPLORING INFRINGEMENT AND FAIR USE**

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### **ABSTRACT**

*Fans from all over the world gather at comic conventions and similar events dressed in elaborate costumes, hairstyles that defy gravity, and detailed makeup inspired by their favourite fictional characters. This worldwide phenomenon is known as cosplaying and the ones who take part in it are cosplayers. Anybody who has recently attended a comic convention or seen images of it is aware that the art of cosplaying has progressed considerably from Star Trek Convention days. A growing trend that is being witnessed nowadays in cosplay is that cosplayers are looking for novelty rather than portraying characters like Darth Vader for the 1000th time. Devoted cosplayers have improved their abilities to find a challenging subject to showcase their work. The popularity of cosplay among fans has also risen as comic conventions occur more frequently. These conventions are vital to the cosplay community because they let enthusiasts from across the nation congregate in one place to exhibit their work. As a result of the growing popularity, cosplayers nowadays are making a good deal of money through endorsements and as social media influencers. The Japanese government's decision to amend its copyright laws and regulate cosplay culture has once again raised the question of whether cosplaying amounts to copyright infringement. Given the rapidly increasing popularity of cosplaying and emerging legal problems, this article examines the current state of copyright laws focusing on fictional characters and costumes and evaluates the applicability of the fair use defence with reference to professional cosplay.*

### **I. THE BOOMING BUSINESS OF COSPLAY**

Cosplay, or the art of dressing up as a character from a film, television show, comic book, video game, or other media, has evolved into a burgeoning business. Although the phrase first appeared in the 1980s, this practice has been around for a very long time. It is usually related with comic book or pop culture events such as comic conventions, where throngs of fans gather, dressed up like popular characters from Lord of the Rings, Harry Potter, Doctor Who, Star Wars, Game of Thrones, Witcher, Marvel and DC Comics as well as anime worlds like Pokémon, Naruto, Final

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Fantasy, and more. While the majority of cosplayers just do it as a hobby, donning their costumes for conventions like Comic-Con, and then going back to their regular jobs afterward, a select few have turned it into a career.<sup>1</sup> These are the professional cosplayers who are usually paid to appear at conventions or gatherings like any other regular celebrity. Professional cosplayers are individuals recognised within the convention community as individuals who best represent cosplay as an art and excel in portraying these characters. Their costumes are intricately detailed, carefully crafted and designed.<sup>2</sup>

The global cosplay market was estimated at \$4.62 billion in the year 2020, and it is predicted to reach around \$23 billion by the year 2030.<sup>3</sup> This movement is also rapidly expanding its reach online. These days, one can find a sizable cosplay community on TikTok, Instagram, Twitch, and YouTube.

And this may very well be the reason that the Japanese government is of the opinion that cosplay has moved beyond the realm of being an innocuous hobby to that of amounting to copyright infringement and announced its decision to regulate professional cosplay under the Japanese copyright law. While donning a character's costume by itself does not violate copyright, it may do so if the cosplayer is being paid to do so, for example, to appear on a show or event.<sup>4</sup>

The concept that cosplay and copyright law can be conflicting is actually not that far-fetched. Cosplayers try to accurately imitate and embody the fictional characters, which are protected by copyright, and many of them succeed. So, for instance, suppose a cosplayer wants to successfully cosplay as 'Ciri', the character from the popular fantasy book series 'The Witcher', they would have to recreate and don an iconic costume of 'Ciri' in order for people to recognise them as the character they are cosplaying. Ironically, a cosplayer would therefore have to, in some ways, infringe their favourite copyrighted work. When 2-dimensional characters and costumes from movies, video games and comic books are recreated into 3-dimensional characters and

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<sup>1</sup> Emma Steen, *Things You Only Know When You Are... A Professional Cosplayer*, TIME OUT (2019), <https://www.timeout.com/tokyo/things-to-do/things-you-only-know-if-youre-a-professional-cosplayer>.

<sup>2</sup> Molly Rose Madonia, *All's Fair in Copyright and Costumes: Fair Use Defence to Copyright Infringement in Cosplay*, 20 MARQ. INTELL. PROP. L. REV. 179 (2016).

<sup>3</sup> Aniket K & Roshan D, *Cosplay Costumes Market by End User, Application and Distribution Channel: Global Opportunity Analysis and Industry Forecast (2021-2030)*, ALLIED MARKET RESEARCH <https://www.alliedmarketresearch.com/cosplay-costumes-market-A13135>.

<sup>4</sup> *Japan to Clarify Copyright Rules for Cosplay*, THE JAPAN TIMES (Jan. 31, 2021), <https://www.japantimes.co.jp/news/2021/01/31/national/cosplay-copyright-infringement/#:~:text=While%20wearing%20a%20costume%20of,an%20appearance%20at%20an%20event>.

costumes, it results in the creation of derivative works and therefore it is crucial to look at the copyright issue in this context.

## II. COPYRIGHTABILITY OF CHARACTERS AND COSTUMES

There are two things that need to be considered when evaluating the possibility of infringement in case of cosplay: firstly, the copyrightability of the fictional character and secondly, the copyrightability of the costume of the fictional character. Depending on the cosplayer's chosen subject, the answer can be either 'yes' for both, neither or just one of them.

### A. Characters:

Where a stock character (characters having minor supporting roles and easily recognisable in fictional works such as the snooty cheerleader, the gruff grandpa, the nosy neighbour, etc.)<sup>5</sup> lacks distinctive personal attributes, it is not eligible for copyright protection but on the other hand if this stock character has a distinctive costume, this costume is eligible for copyright protection (for e.g., Stormtrooper from Star Wars). On the other hand, a completely developed character can have a distinctive personality and background that merits copyright protection, but still have an ordinary appearance that does not provide copyright protection for their costume (for e.g., Ethan Hunt from Mission Impossible).

Stock characters fall under 'scenes a faire' doctrine which holds that some literary elements are too commonplace to be eligible for copyright protection. This doctrine is related to the idea-expression dichotomy which provides that only expression of ideas is copyrightable whereas ideas themselves are not. The 2<sup>nd</sup> Circuit has ruled that stock characters are so common and ordinary that they are not distinguishable and hence are not eligible for copyright protection. The court devised the 'Sufficient Delineation Test' which guarantees protection to characters only in case of their sufficient delineation in the underlying work.<sup>6</sup>

Another reason a character might be protected by a copyright is if they play such a crucial role in the narrative that readers are drawn to them. This test was developed in *Warner Brothers v. Columbia*,<sup>7</sup> which provides that a fictional character is copyrightable only if it constitutes the story being told.

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<sup>5</sup> *Stock Characters*, TV TROPES, <https://tvtropes.org/pmwiki/pmwiki.php/Main/StockCharacters>.

<sup>6</sup> *Nichols v. Universal Pictures Corporation*, 45 F.2d 119 (2<sup>nd</sup> Cir. 1930) (U.S).

<sup>7</sup> *Warner Brothers v. Columbia Broadcast System*, 102 F. Supp. 141 (S.D. Cal. 1951) (U.S).

This means that the fictional character must be essential to the story and must take centre stage rather than simply acting as a plot device.<sup>8</sup>

The 9<sup>th</sup> Circuit in *D.C. Comics v. Towle*<sup>9</sup> ruled that ‘Batmobile’ itself is a character eligible for copyright protection and the defendant’s replica cars were infringing the derivative works.

### **B. Costumes:**

Costumes are considered ‘useful articles’ and are not copyrightable unless they have graphical, pictorial, or sculptural features that are distinct from and may exist separately of the functional aspects of the clothing.<sup>10</sup>

In *Star Athletica*<sup>11</sup> the dispute centred on Varsity Brands’ cheerleader outfits. Varsity Brands had several copyright registrations for two-dimensional designs that it later used on its cheer costumes. *Star Athletica* was accused of infringing this copyright by designing identical cheerleader outfits. The Supreme Court ruled that a feature of a useful article is copyrightable if it can be perceived as a 2- or 3-dimensional artwork that is separable from the useful article and if it would be a protectable pictorial, graphical or sculptural work on its own (or if applied to another medium, such as a canvas).

This strengthens the case for cosplayers who dress up as fictional figures and create a replica of their costumes. They are permitted to create a costume closely resembling the cut, shape, and size of the original item, but they are not allowed to copy any separate designs or decorative elements that would be copyrightable on their own.<sup>12</sup>

### **C. Props and Armour:**

In US cosplay accessories like armour and props have a different connection to copyright law because they are not regarded as functional clothing. Making a replica of a real-life prop that has been used in a film (such as Thor’s hammer), or a replica based on an animation or a drawing (such as the Millennium puzzle) is likely to result in the infringement of rights of the copyright holder.

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<sup>8</sup> Sanjana, *India: Exploring Copyright Protection for Fictional Characters*, MONDAQ (Sept. 17, 2017), <https://www.mondaq.com/india/copyright/1112382/exploring-copyright-protection-for-fictional-characters>.

<sup>9</sup> *D.C. Comics v. Towle*, 802 F.3d 1012 (2015) (U.S.).

<sup>10</sup> 17 U.S.C., §101(2016).

<sup>11</sup> *Star Athletica, L. L. C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002 (2017) (U.S.).

<sup>12</sup> Mary Ellen Tomazic, *Costumes, Characters and Copyright: A Cosplayer’s Guide to Recent Cases*, INTELLECTUAL PROPERTY LAW (Jun. 16, 2017), <https://met-iplaw.com/met-iplaw2012/?p=200> [“Mary Ellen”].

Armour, weapons and jewellery associated with popular fictional characters may be considered sculptural works and, in these cases, fair use would not apply.

However, the situation is quite different in UK. In the case of Lucasfilm<sup>13</sup> case prop designer Andrew Ainsworth was allowed to sell replicas of the original “Star Wars” Stormtrooper helmets, originally designed by him. He won the suit on the grounds that the costumes were functional and not artistic works as a result of which they cannot be subject to full copyright protection. The UK Supreme Court agreed with the lower court’s ruling that the helmet and armour were still identified as and used as helmet and armour in the movie and as such their utilitarian function was of costume and prop.

### III. COSPLAYING -FAIR OR UNFAIR USE?

Fair use is four-factor test which requires that courts should consider the following four aspects of the use and balance these factors before coming to a decision. These are: (1) purpose and character of use, (2) nature of copyrighted work, (3) amount and substantiality of portion taken, and (4) potential effect of use upon the market for original.<sup>14</sup>

#### A. Purpose and Character of the Use:

In deciding whether the use is fair, the first factor has always played a prominent role. The use of the copyrighted work by party who claims fair use, is considered by the court, and non-commercial/non-profit educational uses are considered to be fair use. However, this doesn’t suggest that all non-profit educational/non-commercial uses are fair and all commercial uses are not but that courts will consider use's purpose and character in relation to the other factors of the fair use defence. Furthermore, ‘transformative’ uses are usually considered fair. They don’t replace the original use of the work but rather add something new with a different purpose or character.<sup>15</sup>

##### 1. *Commerciality:*

Commercial motivation does not necessarily result in infringement and this factor should be taken into consideration with the other factors. Overemphasizing the commercial motivation results in restricting the defence because many secondary users desire some level of financial gain from their use. The commercial factor, though, is unquestionably important. The district court in *DC Comics*

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<sup>13</sup> Lucasfilm Ltd. v. Ainsworth, 12 EMLR (2010) (U.K).

<sup>14</sup> U.S. Copyright Office Fair Use Index, COPYRIGHT.GOV, <https://www.copyright.gov/fair-use/>.

<sup>15</sup> *Id.*

*Inc. v. Unlimited Monkey Business*<sup>16</sup> dismissed the fair use defence by relying upon the company's commercial nature.

Cosplayers make money through social media platforms as well as by making guest appearances at conventions (Top cosplayers reportedly make around \$50k per appearance), charging fans for clicking photographs, selling their photographs and the costume patterns. This amounts to commercial use and weighs in favour of the copyright holder. Cosplayers who are proficient in costume design, prop creation, or wig style also create these products for other people on a commission basis.<sup>17</sup> The commercial gain from the sale of unlicensed costumes and props, amounts to commercial use weighing in favour of the copyright holder.

However, the main purpose of a professional cosplayer in attending comic conventions is not to earn profit. The purpose to attend the convention is to share their craft with other like-minded fans in an environment where doing so is encouraged. Cosplay is a way of showing affection for certain characters and paying tribute as these characters mean something special to cosplayers. This is the way through which cosplayers honour these characters. Being paid is just an added bonus which helps in recouping the cost associated with attending the convention and creating the costume. Here, use of character being incidental to the main purpose and motivation of attending convention, cosplay would amount as fair use.

Also, the court in *Campbell*,<sup>18</sup> has noted that if a work is of transformative nature, such transformation can mitigate the effect of commerciality.

## 2. *Transformative Use:*

In order to override the commerciality of the work, transformation should be of such a nature that it adds something new and has a different purpose and character, thereby altering the original work through new expression and message. Based on the balancing test between commerciality and transformation laid down in the *Campbell* case,<sup>19</sup> the transformative nature of the costume of the cosplayer ought to support the finding of defence of fair use. Even if cosplaying is

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<sup>16</sup> DC Comics Inc. v. Unlimited Monkey, 598 F. Supp. 110, 118 (N.D. GA 1984) (U.S).

<sup>17</sup> Deena ElGenaidi, *Cosplayers are dressing up and cashing in*, LINKTREE, <https://linktr.ee/blog/how-professional-cosplayers-make-money-social-media/>.

<sup>18</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569.

<sup>19</sup> *Id.*

commercialized, the cosplayer's ingenuity supports the notion that there has been a notable transformation.<sup>20</sup>

Considering the creativity and skill that goes into creating a cosplay, it can easily fall into the category of transformative use. The transformational nature of creating a costume might weigh in favour of professional cosplayer. Through cosplay, a 2-dimensional image/character or a fantasy taken from a page of manga or anime is transformed into a 3-dimensional living character in real time. The animated body is brought to life by detaching the character from the narrative of the text.

Modifying the size of a costume constitutes only a minimal transformation. All parts of costume and accessories—several of which are constructed of magical elements on the original character—must be completely reimagined and then created from scratch by the cosplayer. To achieve this, the cosplayer must begin with picture of the costume and then bring it to life with their own movements. Cosplayer must make assumptions about how the character's accessories would work and use realistic techniques to replicate such effects. Cosplayers through their genius thus transform the costume of the character into real life.

However, a 3-dimensional representation of a 2-dimensional work would probably not be considered sufficiently transformative by courts to escape accountability. Still there can be instances where cosplay could be considered transformative use. The fair use provision is more likely to apply to crossover, gender-bent or gijinka cosplay. Crossover cosplay involves blending characters from two distinct genres into a completely new idea. For example, combining Disney with anime, Marvel with DC, etc.<sup>21</sup> In case of gender-bent cosplay, the perceived gender of the character being portrayed is changed wherein a female version of a male character is being portrayed and vice versa. There is a lot of imagination used in the creation of gender-bent cosplay. The exact details of a costume need not be replicated by a cosplayer. Instead, using the original design as a base, they make certain modifications so that it can work for the opposing gender. The same is true with gijinka cosplay, which is the practise of dressing up as humanised versions of

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<sup>20</sup> Christina Chung, *Holy Fandom, Batman! Commercial Fan Works, Fair Use, and the Economics of Complements and Market Failure*, 19 B.U. J. SCI. & TECH. L. 381 (2013).

<sup>21</sup> Tiffani Daniel, *10 Creative Spider-Verse Cosplays That Still Look Just Like The Characters*, SCREENRANT (Dec. 17, 2019), <https://screenrant.com/spider-verse-creative-crossover-cosplays/#deku-spider-man>.

fictional non-human characters. A gijinka cosplay involves a lot of imagination because it requires one to come up with new ideas.<sup>22</sup>

Nonetheless, the cosplayer's unique facial features, physique, and personalities as opposed to those of the fictional character would probably be transformative. Not all cosplays are exactly alike of the existing characters as cosplayers try to add their own unique touch to their favourite characters. For instance, cosplayers try to combine an iconic face from one fandom and try to place it within another fandom where this character has never made an appearance. For instance, making a character fit within a well-known series, like Star Wars or into a particular era of history, like feudal Japan.<sup>23</sup>

Even though accuracy is valued in cosplay, no single cosplay and cosplayer is ever exactly like the fictional character that is being portrayed. Because of this, every cosplayer takes a character and develops it. Cosplayers personalize the characters by adding their own unique interpretation to them. For example, cosplayer Yalda's unique and innovative take on the Sailor Moon character at the 2021 Anime NYC convention. The left half of the costume depicted the character of Usagi Tsukino as the defender of justice known as Sailor Moon, adorned with flowering ribbons and ethereal pink tone, while the right half shows her in her regular school uniform.<sup>24</sup>

Furthermore, the setting in which the cosplay takes place is also quite different when compared to the fictional world from where the character belongs. Professional cosplayers portray characters that are no longer in their habitat and are now sharing space with perhaps hundreds of other fans, significantly minimizing the expressive value of the character.

The fascinating thing about cosplay is that the creative aspect is really the only thing that is duplicated, as most of the additions that are made to turn a 2-dimensional fictional character into a reality would be considered useful article. So as long as cosplayers make original and creative additions to their costumes and character, cosplaying could fall under the fair use.

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<sup>22</sup> Kayree Lee, *Cosplay: Gijinka Cosplay*, THE MAGIC RAIN (Oct. 18, 2017), <https://themagicrain.com/2017/10/cosplay-gijinka-cosplay/>.

<sup>23</sup> Jason Alpert-Wisnia, *New York Comic Con and the art of cosplay*, WASHINGTON SQUARE NEWS (Oct. 17, 2022), <https://nyunews.com/2022/10/16/new-york-comic-con-and-the-art-of-cosplay/>.

<sup>24</sup> Michael Lacerna, *Sailor Moon Cosplay Recreates Iconic Transformation Sequence*, CBR.COM (Dec. 8, 2021), <https://www.cbr.com/sailor-moon-cosplay-tranformation-sequence/>.



### **B. Nature of the Copyrighted Work**

Second factor deals with the type of the work that is covered by the copyright. Using this criterion, courts have determined that works that are more closely aligned with the intended copyright protection should be more strictly protected. This aspect favours the author of the original work more when the original work has stronger copyright protection. Due to this, courts frequently give fictional works a stronger level of protection than factual or works in public domain.

When it comes to cosplay, the character that is being portrayed is usually from a movie, comic book, tv show, video game, etc., and has a distinctive persona or costume. As the author of these works has gone to considerable lengths to develop such a character and the fantastical world wherein, they exist, these works are of a nature that deserve copyright protection. The court in the case of *Kelly v. Arriba Soft Corp.*,<sup>25</sup> has ruled that using characters that have been published, more likely constitutes fair use because of their widespread circulation. But with respect to unpublished works, there is narrower scope of fair use as the author has the right to control the first public appearance of his or her expression.<sup>26</sup> Thus, as the character that is being portrayed by a cosplayer is widely disseminated over the movies, comic books, tv, etc., this factor weighs to a small extent in favour of the copyright holder.

Moreover, in the Bill Grahams case,<sup>27</sup> the court was of the view that in determining the fair use, the second factor has less weightage than the factor involving transformative use. In case the professional cosplay is transformative, this factor would not significantly affect the cosplayer.

### **C. Amount and Substantiality of the Portion Used:**

The third factor is the amount and substantiality. This indicates that cosplay is more likely to qualify for the fair use defence when only a small portion of the original work is borrowed. While the extent to which this aspect applies, varies greatly from fan work to fan work, the majority simply borrow very little amounts of the original work.<sup>28</sup> In the case of cosplay, cosplayers usually use the costumes and characters from the work. Even though cosplayers clearly take the heart of the original work into their creations this is done so that viewers are able to identify the character. If viewers are not able to identify the fictional character on which the costume is based,

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<sup>25</sup> *Kelly v. Arriba Soft Corp.*, 280 F.3d 934 (9<sup>th</sup> Cir. 2002) (U.S.).

<sup>26</sup> Rich Stim, *Measuring Fair Use: The Four Factors*, STANFORD LIBRARIES, <https://fairuse.stanford.edu/overview/fair-use/four-factors/>.

<sup>27</sup> *Bill Graham Archives v. Dorling Kindersley*, 448 F.3d 605 (2006) (U.S.).

<sup>28</sup> *Fanworks, Fair Use, and Fair Dealing*, ORGANIZATION FOR TRANSFORMATIVE WORKS, <https://www.transformativeworks.org/fanworks-fair-use-and-fair-dealing/>.

it defeats the cosplayer's purpose of accurately portraying the character. This factor then would probably weigh against the professional cosplayer due to the amount taken.

However, copying only a small part of the character will defeat the cosplayer's purpose of portraying the character. Cosplayers choose a character based on the essential aspects of the character's costume, his/her personality, and any additional characteristics that set the character apart. In case the cosplayer is parodying the original work, this factor might be in favour of the cosplayer.

#### **D. Potential Effect on the Market for Original:**

The potential effect on the market is the primary consideration when implementing the fair use requirement. This is because the impact on the market touches most closely on the author's capacity to enjoy the rewards of his labour and, consequently, his drive to produce. Without the capacity to capitalise on the market for one's copyrighted products, the incentive system for copyright would be limited and its utilitarian objectives would be compromised. So, it is detrimental to the determination of fair use if an alleged fair use displaces the market for the original material.<sup>29</sup>

Courts maintain that when examining the market effect of a challenged use on a market, only reasonable, conventional or markets that are likely to exist should be considered. In addition, courts also consider markets for the sale of derivative works in addition to the primary market for the original work when resolving this problem. Therefore, when examining derivative markets, only an effect on possible licencing revenues for conventional, reasonable, or potential markets should be considered. Courts typically consider whether a specific market exists or will do so in the future when considering if a market is conventional, reasonable, or likely to come into existence.<sup>30</sup>

Cosplayers draw their inspiration from the market of comic books, video games, manga, movies, and television programmes. There would be no impact on these markets if a cosplayer cosplays a character from these mediums. The potential impact on the original marketplace is reduced when the cosplay is transformational in nature. Just because someone is cosplaying a character at a convention doesn't mean that a consumer in the original market won't be buying a comic book or

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<sup>29</sup> W. Michael Schuster, *Fair Use and Licensing of Derivative Fiction: A Discussion of Possible Latent Effects of the Commercialization of Fan Fiction*, 55 SOUTH TEXAS L. REV. 540 (2014).

<sup>30</sup> *Id.*

a film based on that character. In fact, cosplaying is free publicity for the copyright holder and like any other fan work, drives up the demand for the original.

However, cosplay might affect the copyright holders' market when it comes to costumes and props which are based on their characters. There are cosplayers who have made cosplaying a lucrative career by selling costumes and props on sites such as Etsy. This is violative of the rights of the copyright holder and does not fall within the fair use defence. When it comes to the costume and prop business, one-offs are permitted but the moment there is mass production, it can no longer be considered fair use. In order to be able to sell these costumes and props, cosplayers will need to obtain license from the copyright holder.

Copyright holders usually encourage fan-works but the moment there is commercialization of derivative works, they do not hold back in enforcing their rights. Paramount Pictures, the company that holds the rights to the Star Trek series, filed a lawsuit against Axanar Production for copyright infringement. This legal action was initiated after Axanar successfully gathered over \$1 million through crowdfunding campaigns, with the intention of creating a professional fan film. The court ruling in the Axanar<sup>31</sup> case determined that a Star Trek fan film did not sufficiently exhibit "a further purpose or different character" that would transform the copyrighted Star Trek works with new expression, meaning, or message. As a result, the fan film failed to meet the requirements of the first factor for fair use. The court also considered the commercial aspects of the project, considering non-monetary benefits such as potential job opportunities. Even though the fan film was distributed for free, the court concluded that the defendants indirectly benefited commercially from Star Trek's popularity, including through their successful fundraising campaign. Furthermore, the court identified the significant impact on the market, as the distribution of the free online film Prelude could potentially lead fans to choose free content over paid features, thus undermining the fair use argument.<sup>32</sup>

In the legal dispute over Prelude to Axanar, the owners of Star Trek Franchise introduced strict guidelines with respect to fan films set in the Star Trek universe. The updated regulations for Star Trek fan films impose several restrictions. Productions are now limited to 15-minute segments, allowing for a complete original story, with a maximum of two episodes totalling 30 minutes. Further episodes, parts, sequels, seasons, or remakes are no longer permitted. Fans are also

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<sup>31</sup> Paramount Pictures Corp. v. Axanar Prods., Inc. No. 2:15-cv-09938-RGK-E (C.D. Cal. Jan. 3, 2017) (U.S).

<sup>32</sup> Tomazic, *supra* note 12.

prohibited from creating their own props, uniforms, and costumes. Instead, they must use “official merchandise” if it is commercially available. The fan film’s title cannot include the term “Star Trek”. Additionally, filmmakers must be amateurs and cannot receive payment or be employed by any Star Trek or CBS/Paramount licensee. Fundraising is limited to \$50,000, and physical distribution of the film, such as on DVD or Blu-ray, is not allowed. Selling or giving away merchandise related to the fan film is prohibited, and fan-created production sets, props, or costumes cannot be licensed.<sup>33</sup> In one instance, 20<sup>th</sup> Century Fox sent a cease-and-desist letter to vendors on the website Etsy as a direct response to the copyright holder’s request. The items being sold were knitted wool hats that had been featured in a single, unaired episode of the cancelled TV show Firefly. This hat had been embraced by the Firefly fandom as their unofficial symbol. After the show was cancelled, fans started making their own merch because there were no official products available. The Company also sent letters of cease and desist to anyone “illegally” selling handmade replicas of the hat. Since the hat being sold were exact replicas of the hat worn in the show, 20<sup>th</sup> Century Fox was within its rights to protect its copyright against products that affected its market. Fair use probably would not have protected these vendors. Similarly, the market for 20<sup>th</sup> Century Fox was being threatened by competition from sales made by Etsy sellers. However, when 20<sup>th</sup> Century Fox came to know about this fanbase, it granted an official licence for the replica of Jayne’s Hat.<sup>34</sup>

In many cases cosplayers do not find the costume which they want to cosplay or the costumes that are available in the market are of poor quality. Unable to find a good quality costume, fans resort to making the costumes themselves or commission it from someone else. Although many copyright holders do not offer high-quality costumes for sale, they do sell high quality props and accessories. To complete their looks and to complement their costumes, cosplayers willingly buy these props and accessories from copyright holders (such as Star Wars lightsabers).

Copyright holders typically encourage cosplay at the Conventions while discouraging the commercial replication of their content, as was seen in the case of the Jayne Hat and Axanar fan-film. A lot of costumes are either trademarked, copyrighted, or both. Copyright holders enforce these rights with lightning speed in case there is commercialisation. Yet, cosplay is actively

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<sup>33</sup> *Id.*

<sup>34</sup> Melissa Anne Agnetti, *When the Needs of the Many Outweigh the Needs of the Few: How Logic Clearly Dictates the First Amendment’s Use as A Defence to Copyright Infringement Claims in Fan-Made Work*, 45 SOUTHWESTERN L. REV. 143-144 (2015).

encouraged at comic conventions and ‘Best Recreations’ are awarded prizes at masquerade competitions.

#### IV. COSPLAY: THE INDIAN SCENARIO

With the inaugural Comic Con India in 2011, cosplay has gained increasing popularity and recognition in India. It is clear that cosplay, which began as a hobby, has evolved into a profitable profession for cosplayers who earn a respectable income by participating in national and international conventions. There is little doubt that cosplayers from India will continue to prosper in this industry as more people become aware of their talent. The future of cosplay culture in India must therefore be discussed in light of intellectual property laws.

Under the Copyright Act, 1957 [“**1957 Act**”], the scope of Section 13 can be extended to provide copyright protection to fictional characters. Over the years, the courts in India have pronounced a number of judgments pertaining to the copyrightability of fictional characters. For instance, in the case of *Malayala Manorama v. VT Thomas*,<sup>35</sup> and *Star India v. Leo Burnett*,<sup>36</sup> the courts have ruled that fictional characters are subject to copyright protection.

In India, costume designs are primarily protected by the 1957 Act, and the Designs Act, 2000 [“**2000 Act**”]. A design or any other work, however, cannot be protected under both acts at the same time, according to numerous legal rulings. In the case of *Rajesh Masrani v. Tahiliani Design Pvt. Ltd.*,<sup>37</sup> it was ruled that once a work has been deemed artistic, it cannot be protected under the 2000 Act and is only covered by the 1957 Act. When costume designs qualify as original artistic work as per Section 13 of the 1957 Act, they may be granted copyright protection.

The Copyright Act, under Section 52 provides for the fair dealing exception to infringement with respect to the unauthorised use of copyrighted work for private or personal use. In *Civic Chandran v. C. Ammini Amma*<sup>38</sup>, the Kerala High Court laid down the following factors that have to be considered when determining fair dealing:

- i. the quantum and value of the matter taken in relation to the comments or criticism;*
- ii. the purpose for which it is taken;*

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<sup>35</sup> *Malayala Manorama v. VT Thomas*, AIR 1989 Ker 49.

<sup>36</sup> *Star India v. Leo Burnett*, 2003 (27) PTC 81 Bom (Ind.).

<sup>37</sup> *Rajesh Masrani v. Tahiliani Design Pvt. Ltd.*, AIR 2009 Del 44.

<sup>38</sup> *Civic Chandran v. C. Ammini Amma*, 1966 1 K.L.T. 608 (Ind.).

*iii. the likelihood of competition between the two works.*

These factors correspond with the four fair use factors laid down in Section 107 of the US Copyright Act, 1976. Thus, cosplaying as a hobby won't be an issue. However, the factor of commercialisation of cosplay would need to be considered in case of copyright infringement.

## V. CONCLUSION

In conclusion, when it comes to the copyrightability of characters and costumes, not all characters and costumes will be subject to copyright protection. A cosplayer's employment of the fair use defence may not be sufficient to defend their activity if a character and/or their costume are subject to copyright protection. Also, there is uncertainty regarding the application of fair use defence in cosplay. So even though the first factor may be favouring the finding of fair use in instances where there has been transformative use with respect to characters and costumes, there are other factors which also need to be considered. Given that most original material is within the core of copyright protection, the second factor may weigh against the cosplayer. The same goes with the third and the fourth factor. There being no judicial rulings or precedents providing solution to this issue, there is an uncertainty as to the application of fair use defence to professional cosplay.

Cosplayers take great satisfaction in creating their costumes as accurate and identical to the originals, and contests and competitions prize that exactness. To overcome the challenges of the particularly distinctive character and copyrightable designs on costumes, it might be required for them to use greater creativity. The fan-made costume, after all, does not aim to be the original work; rather, it aims to encapsulate it and demonstrate appreciation of the work, by a fan who wishes to mimic the aesthetics in order to express their love for it. Cosplayers are free to continue these "acts of association through attire" as long as they infuse them with a little more creativity and originality.

Thus, even though their activity probably constitutes a fair use, it becomes economically sensible for a professional cosplayer to obtain a licence to the copyrighted content given that a market has been established through commercialization. By shifting from fair use to licensed partnership, the relationship between the copyright holders and the professional cosplayers will become more symbiotic rather than being characterized by friction