

All's Fair in Copyright and Costumes: Fair Use Defense to Copyright Infringement in Cosplay

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Molly Rose Madonia, *All's Fair in Copyright and Costumes: Fair Use Defense to Copyright Infringement in Cosplay*, 20 Marq. Intellectual Property L. Rev. 177 (2016).

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All's Fair in Copyright and Costumes: Fair Use Defense to Copyright Infringement in Cosplay

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I. INTRODUCTION

Thousands of people stand in line for the opening of one of the biggest events of the year. The excitement, camaraderie, and anticipation build as the clock ticks closer to the doors opening. It is August in Chicago and people have travelled from near and far to attend one of the grandest conventions in the Midwest, hosted at one of the largest venues: the Rosemont Donald E. Stephens Convention Center. At just a few minutes to opening, you can see the excited smiles begin and the antsy wiggle of anticipation grip the crowd. Upbeat sayings like, “It’s going to be great in there!” and “I’ve been waiting for this all year!” ripple through the attendees, people of all ages. As the doors open and people fill the many halls, all laughing, pointing, and taking pictures, many of them have something in common—they are dressed up like their favorite video game, television show, or movie character.

Costume play, or “cosplay,” is the art of designing, purchasing, or crafting pieces of a costume or an entire costume to resemble popular characters.¹

1. Melia Robinson, *An Introduction into the Wild World of Cosplay*, BUS. INSIDER (Oct. 9, 2014), <http://www.businessinsider.com/what-is-cosplay-2014-10>.

Cosplay provides its hobbyists with a highly creative outlet of expression shared by thousands of people all over the world. The thought and skill used to replicate popular figures from a static channel to real life sizes is undeniable. As the frequency of comic conventions increases, so does the rise in cosplay among fans. These conventions are essential to the cosplay hobby because they allow the hobbyists to travel from all over the country to a single location to share their craft. However, are cosplayers infringing on the registered copyrights of those characters they know and love? Or, are cosplayers recreating the popular characters in a different medium, transforming the character fairly and legally? This Comment argues that cosplay does not infringe on the registered copyrights of the characters, and even if it did, cosplayers would qualify for the defense of fair use.

This Comment addresses the ambiguity and importance of cosplay within the area of copyright law. Section II discusses the types of cosplay relevant to this topic. Section III gives background of the Copyright Act of 1976 and shapes the statutory discussion of cosplay. Section IV posits that the creative use of the original characters qualifies for a fair use defense. Section V concludes and briefly posits why copyright holders would not likely sue cosplayers for infringement.

II. TYPES OF COSPLAY

Cosplay can be divided broadly into two major categories: professional and casual. This section defines, describes, and illustrates the differences between the two.

The first instance of cosplay can be traced back to 1939, when Forrest J. Ackerman strutted through “the first ever World Science Fiction Convention . . . in futuristicostume.”² While possibly invented by the Americans, the Japanese perfected the trend. Takahashi Nobuyuki was the first to use the term cosplay in 1984 and encouraged his readers to emulate his characters.³ With the rise in popularity of San Diego Comic-Con in the 1990s and early 2000s as a cosplay “Mecca,” coupled with international popularity of cosplay conventions and summits, modern cosplay was born and has since trickled into the mainstream.⁴ The issue of copyright infringement has come to the forefront of this hobby because the pervasiveness and skill of cosplayers has also increased over the years. Cosplayers strive, and many succeed, to

2. Adam K. Raymond, *75 Years of Capes and Face Paint: A History of Cosplay*, YAHOO! MOVIES (July 24, 2014), <https://www.yahoo.com/movies/75-years-of-capes-and-face-paint-a-history-of-cosplay-92666923267.html>.

3. *Id.*

4. *Id.*

completely recreate and embody their characters, which are copyrightable material. It is important to examine the issue of copyright within this area because the heightened skill level and standards also increases the likelihood that cosplayers may be liable for copyright infringement.

It should be noted that there is an extensive range of cosplay between professional and casual. In fact, most cosplayers fall within this in-between range. Both groups have immense passion for their hobby. However, this Comment will examine the differences between the copyright implications of the professional and casual cosplayers' use of characters and designs.

A. Professional Cosplay

There is no concrete definition of professional cosplay because it is, first and foremost, a hobby. Professional cosplay is differentiated from casual cosplay in that professionals are often paid to make appearances at conventions or events like any regular celebrity.⁵ Professional cosplayers⁶ are people who are known within the convention circuit as people who exemplify cosplay as an art form and have excelled in its expression. Their costumes are often large, elaborate, and expensive, with great detail and care in the creation and implementation.

Professional cosplayers can often spend upwards of 150 hours on a costume.⁷ The cosplayer must first select a character, which can depend on the location of the appearance or convention, the weather, and the cosplayers own body. They must then reimagine what the costume would look like on a human being, as many characters found in manga are demi-human or unconventionally shaped. Then the professional cosplayer begins to sketch the design from head-to-toe, including accessories; to research composition materials; to decide which pieces to build themselves; and, if there is time, or budget, to purchase pieces from commercial manufacturers or other professional cosplayers.

Physically building a costume includes extensive selection of specific starting materials, such as un-dyed cotton or expensive leather, the use of computer-aided design imagining and engineering to design and build a larger than life blueprint, and painting, sculpting, and molding of accessories, weapons, and other final touches that make the character unmistakable. Often,

5. Ryan Porter, *Professional Cosplayers Find Fame and a Bit of Fortune on Convention Circuit*, TORONTO STAR (Aug. 31, 2015), <http://www.thestar.com/entertainment/2015/08/31/professional-cosplayers-find-fame-and-a-bit-of-fortune-on-convention-circuit.html>.

6. For an example of a professional cosplayer, see *Banshee Queen Enira - Lineage 2*, YAYAHAN, <http://www.yayahan.com/portfolio/costumes/banshee-queen-enira> (last visited Oct. 23, 2015).

7. *Banshee Queen Enira - Lineage 2*, YAYAHAN, <http://www.yayahan.com/portfolio/costumes/banshee-queen-enira> (last visited Oct. 23, 2015).

the cosplayers must carry their costumes piecemeal to the site and then be sewn or glued into the costume.

Professional cosplayers are considered professional by the number of appearances made at conventions, word-of-mouth of their abilities, or the quality of their creations. However, their journey to make a living by cosplay is no less difficult than any other professional occupation. For example, professional cosplayer Yaya Han gives similar advice to novice cosplayers as would any business owner give to a student:

Be prepared to work every single day, prepare to starve a lot at the beginning, prepare to make mistakes that will haunt you, prepare for a lot of criticism, and prepare to lie awake at night pondering your life choices often. But really, if it allows you to work for yourself and make a living doing something you love, it's completely worth it.⁸

B. Casual Cosplay

Casual cosplay often involves less creation of each individual piece of the costume, but still involves creative expression. A cosplayer must still see a character and determine how it will look on them individually. They also must transform the character from television or print dimensions into reality using careful planning and preparation. However, the casual cosplayer does not spend as much time and money on the physical preparation of their costume as the professional cosplayer.

Physical creation of a casual cosplay often requires the modification or repurposing of everyday clothing in order to embody a character. Creating the costume usually takes between five to ten hours depending on the complexity of the character, the availability of materials, and the skill of the cosplayer. Casual cosplayers often rely on homemade markers to identify their characters, instead of large, obvious representations.

The casual cosplayer attends the same conventions as professionals, but as a patron and supporter of the "Con," not as a paid guest. They are there to enjoy the Con, the people, and the art, but not to sign autographs or mingle in a professional capacity.

8. *About Yaya*, YAYAHAN, <http://www.yayahan.com/about> (last visited Oct. 23, 2015).

An example of casual cosplay is shown below:⁹



III. GENERAL COPYRIGHT PROVISIONS

A. *The Copyright Act of 1976*

In order to encourage creation and dissemination of works of authorship in all their various forms, the Copyright Act of 1976 (Copyright Act) gave copyright owners control over most, if not all, activities of conceivable commercial value.¹⁰ There are three basic requirements under the Copyright

9. Photo of the Author as Hasbro My Little Pony Pinkie Pie (right), friend of Author as Hasbro My Little Pony Rainbow Dash, (left), and Battlestar Galactica Cylon (center), Wizard World Comic Con Chicago (Aug. 23, 2014) (on file with the author, used with permission).

10. See generally JAY DRATLER JR. & STEPHEN M. MCJOHN, INTELLECTUAL PROPERTY LAW:

Act for a work to be copyrightable: originality,¹¹ fixation,¹² and included as category of protectable subject-matter.¹³

IV. DEFENSE OF FAIR USE

The Copyright Act provides several defenses applying to the use of copyrighted material. One such defense is the defense of fair use under Section 107.¹⁴ To determine if the use qualifies for this defense, a test is employed by examining four factors, each found within section 107 of the Copyright Act: (1) the purpose and character of the use of the copyrighted material,¹⁵ (2) the nature of the copyrighted work,¹⁶ (3) the amount and substantiality of the use compared to the work as a whole,¹⁷ and (4) the effect of the use on the market in which the copyrighted material exists.¹⁸ The following section discusses all four factors and the relevance of each within the types of cosplay.

A. Purpose and Character of the Use

The test for determining the purpose and character of the use can be examined through this question: What was the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit, educational purposes?¹⁹ For the fair use defense to apply, the use must be transformative, meaning the use must be productive and must employ the matter in a different manner or for a different purpose from the original.²⁰

COMMERCIAL, CREATIVE AND INDUSTRIAL PROPERTY § 6.01 (2016).

11. Feist Publ'n, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 345 (1991) (concluding that the work must be an independent creation by the author that possesses a modicum of creativity).

12. Copyright Act of 1976, 17 U.S.C. § 101 (1976) (effective Jan. 1, 1978) (stating that “[a] work is ‘fixed’ in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration”).

13. Copyright Act of 1976, 17 U.S.C. § 102 (1976) (effective Jan. 1, 1978) (stating that “copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device”).

14. Copyright Act of 1976, 17 U.S.C. § 107 (1976) (effective Jan. 1, 1978) (stating “the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright”).

15. *Id.* § 107(1).

16. *Id.* § 107(2).

17. *Id.* § 107(3).

18. *Id.* § 107(4).

19. This information comes from the author’s class notes from the course, Copyrights, Spring 2015, Prof. Bruce Boyden, Marquette University Law School.

20. Pierre N. Leval, *Commentary: Toward a Fair Use Standard.*, 103 HARV. L. REV. 1105,

The court in *Bill Graham Archives v. Dorling Kindersley, Ltd.* considered this factor extensively in its fair use analysis.²¹ Dorling Kindersley, Ltd. (DK) published a coffee table book intended to be a cultural history of the Grateful Dead.²² The plaintiff, Bill Graham Archives (BGA), owned copyright to seven images in the book, which were reproduced without permission.²³ The court of appeals found that DK had fairly used the images.²⁴ Upon examining the purpose and character of the use, the court first decided that the manner in which DK displayed the images contributed significantly to the transformative manner of use.²⁵ DK had significantly reduced the size of the images, shrinking them down so the image could still be identified, but the expressive impact of the image was reduced.²⁶ The court decided this was minimally transformative, meaning it possessed the lowest possible amount of creativity to be considered “transformative.”²⁷

Further, DK combined the images with text and original graphics to create a collage in the book.²⁸ The court said that this display “ensures that the images at issue are employed only to enrich the presentation of the cultural history of the Grateful Dead, not to exploit copyrighted artwork.”²⁹

Finally, the court briefly addressed the commercial nature of the book and how the profitability of the book could weigh in a fair use analysis.³⁰ The court quoted *Harper & Row Publishing v. Nation Enterprises* when it said, “[t]he crux of the profit/non-profit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.”³¹ DK did not use any of BGA’s images in the advertising of the book.³² The court concluded, “[b]y design, the use of BGA’s images is incidental to the commercial biographical value of the book.”³³ The court also concluded that the first fair use factor weighed in favor of DK because DK’s use of BGA’s images was

1111 (1990).

21. See *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006).

22. *Id.* at 607.

23. *Id.*

24. *Id.*

25. *Id.* at 608.

26. *Id.* at 611.

27. *Id.* at 612.

28. *Id.* at 611.

29. *Id.*

30. *Id.* at 612–13.

31. *Id.* at 612 (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985)).

32. *Id.*

33. *Id.* at 612–13.

transformative, different from the images' original expressive purpose, and DK did not seek to exploit the images expressive value for commercial gain.³⁴

Within professional cosplay, the transformative nature of building a costume weighs in favor of fair use. The manipulation of the size of the costume itself is minimally transformative. The professional cosplayer must reimagine and then create from scratch all the pieces of the costume and the accessories, many of which are made of fantasy materials on the original character. To do so, the cosplayer must start with the image of the costume and make it come to life through his or her own body movements. The cosplayer must speculate how the character's accessories would function and must often implement practical methods to recreate those effects, such as light-emitting diode lighting, water squirt guns, or even live fire. While the original character may have been two dimensional, the cosplayer greatly alters the size of the costume, and, through their own ingenuity, brings the static character to life.

Secondly, the court in *Bill Graham Archives* stated that the environment in which they were laid out in the book minimized the expressive value of the copyrighted images.³⁵ The professional cosplayer at a convention is part of a "collage" of the convention, acting as a vital piece of the environment for visitors to enjoy. The professional cosplayer at a convention is a piece of the convention, which is combined with fandom merchants, famous speakers, panels from television shows, other caliber cosplayers, and most importantly, visitors who are not in costume at all. The professional cosplayer, while possibly receiving compensation for participating in a selective appearance, cannot be considered the focal point of any one convention. This is especially true considering that visitors attend conventions for a variety of reasons, and any number of visitors may not even be familiar with the professional cosplayer's character of choice. The professional cosplayer represents a character that is no longer in its primary environment and now co-exists with potentially thousands of other fans, greatly minimizing the expressive value of the character. As the court in *Bill Graham Archives* concluded on this argument, the professional cosplayer is there "only to enrich the cultural history" of the convention, "not to exploit copyrighted artwork for commercial gain."³⁶

Finally, when considering the commercial nature of professional cosplayer weighing against a finding of fair use, courts must determine "not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary

34. *Id.*

35. *Id.* at 613.

36. *Id.* at 611.

price.”³⁷ The professional cosplayer may indeed receive compensation for their appearance at a convention. This definitely helps to offset the costs of traveling to the convention, constructing the lifelike costume, or outsourcing pieces created by other cosplayers. However, the sole motive of the professional cosplayer is not monetary gain. The purpose of attending the convention is still to create and share his or her craft with likeminded enthusiasts in one of the only environments where it is encouraged to do so. Therefore, the professional cosplayer is not a candidate at risk for exploiting the copyright for commercial gain. Just as the court in *Bill Graham Archives* concluded, the use of the character is incidental to the main purpose and motivation of attending the convention.³⁸

Within casual cosplay, the transformative nature of the use is often more obvious than within professional cosplay. First, manga cartoons and other popular cosplay characters often wear materials that would be uncomfortable or otherwise undesirable to wear in public. Casual cosplayers have the ability to take the character’s clothing and accessories and transform it into a costume able to be worn comfortably for long periods of time. For example, instead of plate armor, they may wear a gray t-shirt or instead of carrying a heavy, expensive weapon, they may spray paint a NERF Gun. This greatly alters the essence of the copyrighted image by making it practical.

Just as in professional cosplay, the casual cosplayer alters the physical size of the image, making it life-size instead of TV- or print-size. According to *Bill Graham Archives*, this is minimally transformative. Just as in professional cosplay, the sizing alterations by casual cosplayers minimize the expressive nature of the character while still allowing it to be identified by the visitors to the convention. They have utilized a minimal level of recognizability in order to create their character.

The collage effect of the professional cosplayer within the convention is echoed within their casual counterparts. In fact, the casual cosplayer often highlights the transformative nature of the professional cosplayers’ costume. When the professional and casual cosplayer are compared side by side at a convention, which happens frequently and is often enjoyed by both parties, it is clear to see the range of changes made in order to create a recognizable character. The transformative nature of the casual costume is starkly obvious when comparing the casual and professional costumes.

Finally, there is no financial gain for the casual cosplayer. While it is flattering to have a child tug on your shirt and ask for a picture, your use of the copyrighted logo that attracted the child is hardly of a commercial nature.

37. *Id.* at 612 (quoting *Harper & Row Publishers, Inc.*, 471 U.S. at 562).

38. *Id.*

Taking this one step further, the expense of making a casual costume may be minimal, but some casual cosplayers may spend up to \$100 between transportation to conventions, repurposing or modifying existing clothing, or purchasing accessories. The casual cosplayer often loses money to express him or herself at the convention. The productivity of the use is for fun and personal entertainment, not the financial gain of the creator.

B. Nature of the Copyrighted Work

In this prong, the test examines the value of the materials used.³⁹ The court in *Campbell v. Acuff-Rose Music, Inc.* stated, “This factor calls for recognition that some works are closer to the core of intended copyright protection than others”⁴⁰ The characters in manga and on television enjoy rich copyright protection, but both professional and casual cosplayers do not infringe on the rights granted to the copyright holders.

The court in *Kelly v. Arriba Soft Corp.* considered this factor in its fair use analysis.⁴¹ In that case, defendant Arriba created a search database that used “web crawler” algorithms to find relevant material for its users and then attached a thumbnail image to the search to describe the result.⁴² At one time, thirty-five of the thumbnail images were copyrighted images created by Kelly.⁴³ When considering the nature of the copyrighted work in that case, the court noted, “[p]ublished works are more likely to qualify as fair use because the first appearance of the artist’s expression has already occurred.”⁴⁴ Since Kelly’s images were already published, the court decided that this second factor weighed only slightly in Kelly’s favor.⁴⁵

The court in *Bill Graham Archives* also considered this factor in its analysis. While the court noted that the “creative nature of the artistic images typically weighs in favor of the copyright holder,”⁴⁶ it also stated that this factor is “of limited usefulness where the creative work of art is being used for a transformative purpose.”⁴⁷ Therefore, even if there was a finding that the second factor weighs in favor of the copyright holder, it is less important to the

39. *Folsom v. Marsh*, 9 F. Cas. 322, 348 (C.C.D. Mass. 1841).

40. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994).

41. *See generally Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003).

42. *Id.* at 815–16.

43. *Id.* at 816.

44. *Id.* at 820 (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564 (1985)).

45. *Id.*

46. *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 612 (2d Cir. 2006).

47. *Id.*

overall analysis than the factor considering transformative use.⁴⁸

In cosplay, the copyrighted material is often a comic book or movie character with distinctive coloring, clothing, or personality. Since the amount of creativity inherent in these characters is heavy and the creator has often gone to great pains to create a character and a world that exists in fantasy, these copyrights are inherently of a nature to be eligible for copyright. However, the characters are not only already published, they are widely disseminated over television, comic books, and movies. The mass popularity of the characters is what draws the cosplayer to choose a particular persona to embody. The court in *Kelly* decided that the use of published characters was more likely to be fair use because of the wide circulation.⁴⁹ Therefore, the sheer widespread circulation of the characters weighs only slightly in favor of the copyright holders.

Further, in *Bill Graham Archives*, the court decided that this prong weighed less in the fair use analysis than the factor proving transformative use.⁵⁰ As shown in the extensive analysis above, both professional and casual cosplays are transformative in purpose and execution. This negates, or at least minimizes, the usefulness of this prong to the overall analysis and does not weigh heavily against the cosplayer. Therefore, this prong is likely not a great hindrance on a finding of fair use under *Bill Graham Archives*.⁵¹

C. Amount and Substantiality of the Portion Used in Relation to the Copyrighted Work as a Whole

This prong undertakes an analysis of two considerations: first, the overall quantity and value of the material used and secondly, if the taking of the copyrightable material is reasonable in relation to the purpose of the copying.⁵² It would seem at first glance that the more copying that has taken place, the greater the case for infringement without fair use. However, we must always note how the purpose of the use compares to the infringement. What was the purpose of copying the portion of the material that was copied?

Both *Kelly* and *Bill Graham Archives* concur that copyrighted material that is copyrighted in its entirety does not fail a fair use analysis.⁵³ First, the court in *Kelly* concluded that although Arriba did copy each of Kelly's images as a whole, it was reasonable to do so in light of the purpose of the image listed on

48. *Id.*

49. *Kelly*, 336 F.3d at 822.

50. *Bill Graham Archives*, 448 F.3d at 615.

51. *Id.* at 614.

52. *Folsom v. Marsh*, 9 F. Cas. 322, 348 (C.C.D. Mass. 1841).

53. *See Kelly*, 336 F.3d at 820–21; *see also Bill Graham Archives*, 448 F.3d at 613.

the search engine webpage, namely to allow users to see the image and decide whether to pursue that search result.⁵⁴ If Arriba had only copied part of the image, it would have reduced the purpose of the visual search engine.⁵⁵ The court in *Bill Graham Archives* stated that even though the copyrighted images were copied in their entirety, “the visual impact of their artistic expression is significantly limited because of their reduced size.”⁵⁶ While Arriba did use the whole image, the purpose of the use on the webpage was to entice the user to click on the images, not to display art.⁵⁷ This purpose was evident in Arriba’s resizing of the image.⁵⁸ In that case, this third factor did not weigh against a finding of fair use because “the image size and quality were necessary to ensure the reader’s recognition of the images.”⁵⁹

Within this copyright infringement analysis, the copyrighted “whole work” is the character the cosplayer attempts to embody. The key aspects of the character include costume, personality, super power or other signature characteristic within their franchise, or other background information that make that character interesting or important to fans.

Under *Kelly*, it is reasonable for both professional and casual cosplayers to copy the whole work.⁶⁰ If the cosplayer only copied a portion of the character, the purpose of recreating the character would be defeated. When cosplayers select a character, they choose the character based on the key pieces of costume, personality, and other elements that make that character unique. They also choose a character that they find fun and interesting to read about, to view on their screens, or are otherwise interested in. This sheer interest in the character is what makes the hobby fun for the cosplayer. For one day, that cosplayer completely becomes the character. They take on their character’s super powers (through homemade means) and adopt their background. The purpose of the cosplay is to create a character and to have fun while doing so. To embody a segment of the character, instead of the entire persona, would be detrimental to the image the cosplayer is attempting to project and would greatly diminish the purpose of the cosplay.

The court in *Bill Graham Archives* discussed the complete use of the copyrighted images as necessary to ensure the recognition of the historical events of the Grateful Dead.⁶¹ Similarly, both professional and casual

54. *Kelly*, 336 F.3d at 821.

55. *Id.*

56. *Bill Graham Archives*, 448 F.3d at 613.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Kelly*, 336 F.3d at 821.

61. *Bill Graham Archives*, 448 F.3d at 613.

cosplayers work hard to ensure the audience's recognition of the characters they have chosen. However, the professional cosplayer, due to increased resources, may have the ability to change the character enough in order to be recognizable, but still unique.

One benefit of professionally reimagining a copyrighted costume or design is the freedom of the cosplayer to put his or her own "spin" on the design. That said, the amount and substantiality of the copyrighted material used differs by cosplayer. Often, the cosplayer will change the character's environment or personality. For example, one might wish to make an elaborate Ariel costume from Disney's "The Little Mermaid," but also want to put personal ingenuity into the cosplay. They may then decide to do a zombie version of Ariel. They have used the Disney copyrighted version of Ariel, perhaps with her iconic long red hair and mermaid tail, but have taken the character out of the children's book and into the horror genre. The purpose of the use of Ariel was to embody a Disney princess through costume. But after the cosplayer's reimagining of the hair and tail, coupled with zombie eyes, gait, or blood, the character is no longer the classic Disney princess. The cosplayer did use the most recognizable portions of Ariel in their costume. However, the use of the key features of classic Ariel was reasonable use because the cosplayer took no more than was necessary to portray the character. The cosplayer would identify as Ariel, but the public would not see the character as the classic Disney princess; they would see a completely different version of the princess. For this reason, this prong weighs in favor of a finding of fair use within professional cosplay.

As for casual cosplay, this prong is also met. Casual cosplayers rarely take the time and effort to construct a verbatim replica of the copyrighted image. Their use of the copyrighted material often extends only to distinctive insignia, color scheme, or persona. Continually, they often utilize their own clothing or a wig to contribute to the costume. Use of these basic costuming materials can hardly be deemed to violate a copyright to a specific character. Therefore, this prong weighs in favor of a finding of fair use within casual cosplay.

D. The Effect of the Use upon the Potential Market for or Market Value of the Copyrighted Work

This final prong requires courts to consider if the extent of the market harm caused by the particular widespread conduct engaged in by the defendant would result in a substantially adverse impact on the potential market for the original.⁶² The court in *Kelly* noted, "[a] transformative work is less likely to have an adverse impact on the market of the original than a work that merely supersedes

62. *Campbell v. Acuff-Rose*, 510 U.S. 569, 590 (1994).

the copyrighted work.”⁶³

The analysis here for both professional and casual cosplay is the same. The market in which cosplayers draw their inspiration is primarily comic books, video games, manga, movies, and television shows. To create a costume based on a character in any of those mediums would have no effect on the comic book, video game, manga, television, or movie markets. Continually, any cosplay is transformative in nature, thereby lessening the potential impact on the original markets. A consumer within the original market is not losing any opportunity to purchase a comic book or film based on the character merely because the character appeared at their favorite convention.

To be sure, some professional cosplayers have stores in which consumers may buy products. However, these products are items fashioned or designed by the cosplayer and not based on any copyrightable design. The items are labeled generically and could be used for any similar costume, much like an online Halloween costume store.⁶⁴ While the casual cosplayer may purchase items for their costume, they still have to integrate the items into an outfit that portrays the character they want to embody. In the more advanced cosplaying arena, it is looked down upon to purchase pieces for a costume instead of crafting them. The costumes that involve creativity and skill with particular crafting material are considered the best. It is for this reason that this prong of the test is likely to be satisfied by both professional and casual cosplayers.

Cosplay, both professional and casual, does not affect any potential markets, and the widespread conduct of the cosplayers does not catalyze any future copyright infringement. The closest potential markets to the copyrightable material would be costume sales and character appearances. The costumes worn by cosplayers are of their own construction, design, and creation. While they are based on copyrighted characters, the costumes themselves are made from scratch, or in the case of the casual cosplayer, from mostly recycled items already in the cosplayer’s possession. Therefore, costume designers (that pay the licensing fees) manufacturing and selling the copyrightable characters in costume are not impacted by the independent creation of a costume. To assert so would be to claim that any homemade, hand-sewn Halloween costume is a violation of copyright infringement.

Similarly, there is no impact on the potential market for character appearances by the prevalence of cosplayers. Character appearances occur for a variety of events for children and adults. However, the closest potential market to cosplay appearances would likely be children’s parties or themed

63. *Kelly*, 336 F.3d at 821.

64. *See e.g.*, YAYAHAN, http://yayahan.com/index.php?option=com_content&view=article&id=185&Itemid=69 (last visited Oct. 23, 2015).

events. The convention circuit is the environment in which cosplayers share their craft and hobby. While children do attend these events, cosplayers do not attend for the purpose of entertaining the children. In fact, both children and cosplayers can be said to attend conventions for the same purpose—to enjoy themselves and experience the sights and excitement of the day. They would likely be enjoying the convention together, not separately. Characters at a children's party are hired to entertain the guests. The characters at a convention are not. Therefore, the market for children's entertainments is untouched and unharmed by the prevalence of cosplayers at a convention.

Similarly, adults may want to have costumed characters at a private event; for example, to enhance a brand or product or provide marketability for a cause. The presence of the cosplayers at the convention does not accomplish this type of promotion. Most cosplayers attend conventions for entertainment. Indeed, some cosplayers visit the "Con" one day in costume and then a second time in plainclothes so they are able to experience the convention in its entirety. There is no commercial or product-centered motivation for this behavior, and this practice clearly does not enhance or endorse any product or image. Therefore, the market for character appearances at adult functions is not harmed through the existence of cosplayers at conventions.

Overall, the child will still want to enjoy the character's iconic personality at their birthday and adults will still want to have the character appear at a private event. The presence of cosplay in the convention environment does not risk the potential market for character appearances. For these reasons, this factor weighs in favor of a finding of fair use.

V. CONCLUSION

In conclusion, the defense of fair use does apply to copyright infringement through cosplay. The first prong of the analysis weighs heavily in favor of a finding of fair use because the nature of cosplay is inherently transformative of the original copyrightable material. The second prong weighs slightly against a finding of fair use, but is barely applicable in cases where the use is so overtly transformative. The third prong is met because the use of the copyrightable material is not unreasonable and does not take more than is necessary to make the character recognizable. Finally, the fourth prong is met because cosplay has no impact on any current or potential markets.

It is interesting to note that comic book companies and video game manufacturers generally do not enforce the infringement rights granted to them by the copyright laws. Simply put, they do not want to do so. Russia hosted its

first Comic-Con in 2014, with an attendance of over 157,000 people.⁶⁵ StarWars.com proudly posted coverage of the Con and commended several of their favorite and most intricate cosplayers on their site.⁶⁶ The 2014 Toronto Fan Expo took place in August. Again, StarWars.com proudly covered the Expo and showed pictures of their favorite droids, Stormtroopers, and Leias all dressed up and excited about Star Wars.⁶⁷ And finally, Atlanta, Georgia hosted the 2014 Dragon Con, praised as being a Con “by fans, for fans,” in which virtually all of the convention events and programming were set up by volunteers.⁶⁸ In the coverage on StarWars.com, Lawrence Greene wrote of the Con’s costumers:

A special feature of the Legions and larger costuming community not usually seen by non-costumers, is the tight bond fans develop with each other, often reaching across fan groups. As with most conventions, Legion members came together at Dragon Con for the annual group photos, but this year’s photo took on special significance with a heartfelt tribute to 501st [Stormtrooper Division] member Lance Starmer, who recently passed away.⁶⁹

Dragon Con even hosts a parade for costumers. Greene continues his coverage of the Con by noting the significance of the costumers to the parade: “Now its 13th year, the parade by tradition and highest honor, saves the best for last, with members of the *Star Wars* costuming community constituting the final entry in the parade, demonstrating to parade attendees their love of all characters across the *Star Wars* universe and incredible creativity.”⁷⁰

In summary, the rise in prevalence of cosplaying has not equated to a quantifiable rise in copyright infringement. Copyright holders within comic books, movies, or television should not expect to see multitudes of people flagrantly infringing upon validly held copyrights. The companies and manufacturers that output official character merchandise host a positive attitude toward cosplayers, both professional and casual. As ease of access to

65. *Land Interactive Entertainment*, IGROMIR, <http://www.igromir-expo.ru/> (last visited Oct. 23, 2015).

66. Mary Franklin, *Star Wars at the First-Ever Comic Con Russia*, STARWARS.COM (Nov. 5, 2014), <http://www.starwars.com/news/star-wars-at-the-first-ever-comic-con-russia>.

67. Mary Franklin, *Fans, Rebels, and Imperials Invade Toronto Fan Expo 2014*, STARWARS.COM (Sept. 17, 2014), <http://www.starwars.com/news/fans-rebels-and-imperials-toronto-fan-expo-2014>.

68. Lawrence Green, *Dragon Con 2014: Rebel and Troopers Unleashed!*, STARWARS.COM (Sept. 16, 2014), <http://www.starwars.com/news/dragon-con-2014-rebels-troopers-unleashed>.

69. *Id.*

70. *Id.*

copyrighted material increases and the ability to copy it becomes easier, cosplayers should breathe a sigh of relief that their beloved costumes apply for the defense of fair use.

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