

PAY TO COSPLAY: THE LAW OF CHARACTERS, COSTUMES,
MASKS, AND PROPS

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Abstract

Cosplay, the act of dressing up as a fictional character, has existed for nearly a century but has only recently transformed into a full-fledged career. While very few lawsuits have been filed against cosplayers in the United States and only two countries have considered legislation directly regulating cosplay, lawyers should prepare to represent individuals and businesses on a variety of legal issues as this sector of the entertainment industry grows. This Article provides cosplayers and their lawyers with insights on the types of claims that are most likely to be asserted by rightsholders, the potential defenses that may be raised by cosplayers, and the other legal implications of cosplaying.

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INTRODUCTION

Cosplay is “the activity or practice of dressing up as a character from a work of fiction.”¹ The earliest known instances of cosplay date back to the first World Science Fiction Convention in 1939 and involved general science fiction wardrobe.² In 1974, the San Diego Comic-Con began hosting its own masquerade balls.³ The term cosplay, a portmanteau of the words costume and play,⁴ was coined in Japan in 1984 as costume conventions began to become commonplace across the world.⁵

Nowadays, cosplayers find their inspiration from almost every genre and medium of work, including anime, cartoons, children’s novels, superheroes, horror movies, television shows, video games, and even their own imagination. Cosplay can occur in-person or online and can be

1. *Cosplay*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/cosplay> [<https://perma.cc/V2SW-EDA4>].

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

3. *Id.*

4. Hank Stuever, *What Would Godzilla Say?*, WASH. POST (Feb. 14, 2000, 7:00 PM), <https://www.washingtonpost.com/archive/lifestyle/2000/02/14/what-would-godzilla-say/10151384-d94e-4bc6-b788-3696b026707b/> [<https://perma.cc/4EUR-7VV2>].

5. *Id.*

a mere expression of fandom or a commercial enterprise.⁶ For instance, attendance at a comic book convention in superhero attire is in-person, non-commercial cosplay; while an image taken at that same event and used as an avatar on social media is online, non-commercial cosplay. Moreover, being paid to attend a children's party in costume is in-person, commercialized cosplay; while online, commercialized cosplay can take the form of professional cosplay content creators.

Many examples of commercialized cosplay exist, including manufacturing cosplay fabrics, costumes, and props; cosplay performances; cosplay competitions, trade shows, and conventions; using cosplay in commercials; themed restaurants; cosplay crowdfunding; cosplay fan sites; and a wide variety of cosplay content creation ranging from make-up tutorials to adult entertainment. This list is non-exhaustive, as cosplayers find new ways to profit from their art every day. Any of these commercial cosplayers or the businesses marketed to them could face a lawsuit at any time, and each commercial cosplayer or business has a different risk profile depending on their specific activities.

Despite cosplay's immense popularity and rich history, there have been very few lawsuits filed against cosplayers in the United States. This may be, in part, because no government (besides China and Japan)⁷ has attempted to directly regulate cosplay. Still, a variety of existing federal and state laws may be applied to cosplay.⁸ The application of these laws

6. See Allie Cohen, *An Inside Look at the Anime Cosplay Community*, THE GW LOCAL (Jan. 20, 2022), <https://thegwlocal.com/an-inside-look-at-the-anime-cosplay-community/> [<https://perma.cc/4CE3-2KHR>]; Natasha L. Hill, *Embodying Cosplay: Fandom Communities in the USA*, GA. STATE UNIV. 4 (May 3, 2017), https://scholarworks.gsu.edu/cgi/viewcontent.cgi?article=1121&context=anthro_theses [<https://perma.cc/67J7-UAG7>]; *From Conventions to Commerce: Charting the Rise of Anime Cosplay in Retail Spaces*, RETAIL INSIDER (Feb. 2, 2024), <https://retail-insider.com/articles/2024/02/from-conventions-to-commerce-charting-the-rise-of-anime-cosplay-in-retail-spaces/> [<https://perma.cc/M9JJ-M9SW>].

7. Evan Valentine, *China Reportedly Cracking Down on Anime Cosplayers*, COMICBOOK (Sept. 20, 2023), <https://comicbook.com/anime/news/china-anti-cosplay-laws-report/> [<https://perma.cc/SA23-VVZ7>] (describing a proposal in China to ban Japanese anime attire that “jeopardize[s] Chinese national spirit or hurt the national feelings” in response to “Japan’s recent release of nuclear waste into the sea”); Brian Ashcraft, *The Japanese Government Could Change Cosplay Forever*, KOTAKU (Jan. 25, 2021), <https://kotaku.com/the-japanese-government-could-change-cosplay-forever-1846123799> [<https://perma.cc/VFE6-N585>] (describing an unsuccessful proposed law in Japan to require professional cosplayers to pay for use of the underlying characters).

8. See, e.g., 17 U.S.C. § 102(a) (2010); FLA. STAT. § 827.11 (2023) (regulating live performances of a sexual nature). While this does not directly mention cosplay, at least one cosplay convention in Florida has banned cross-dressing cosplay for fear that such activities may violate Florida’s so-called “anti-drag” law. See Michael Baggs, *Florida Transformers Convention Bans ‘Cross-Dressing Cosplay’ Under State’s Anti-Drag Laws*, THE PINK NEWS (June 9, 2023), <https://www.thepinknews.com/2023/06/09/florida-transformers-convention-tfcon-anti-drag-cross-dressing-cosplay/> [<https://perma.cc/82SQ-Z7FB>]. The author of this article is of the opinion that

to cosplayers is bound to increase as more cosplayers find ways to turn their hobby into successful careers.

While a lucky few are paid to cosplay,⁹ it is important to consider the many ways that cosplayers can be compelled to pay if their cosplaying activities violate third party rights. This Article addresses the most likely claims that may be asserted by rightsholders, the potential defenses that may be raised by cosplayers, and the other legal implications of cosplaying.

I. COPYRIGHTS

A. *Copyrights in Cosplay*

1. Copyrights in Clothing

Federal copyright law protects “original works of authorship fixed in any tangible medium of expression.”¹⁰ The statute lists eight categories of protectable works, including “pictorial, graphic, and sculptural works”¹¹ of two or three dimensions.¹²

Protection extends only to the “artistic craftsmanship” of such works,¹³ and not to any “useful articles” which are defined as (i) anything with “intrinsic utilitarian function” that does more than “merely . . . portray the appearance of the article or . . . convey information” and (ii) anything that “is normally a part of a useful article.”¹⁴ These mechanical or utilitarian aspects may, instead, be protectable under patent law.¹⁵

Ordinary wear, historical dress, and uniforms are not protectable, because such articles are useful, even if the article contains ornamental elements.¹⁶ While useful articles are not protectable themselves, the *design* of a useful article is eligible for protection to the extent that it is

such activities are not banned by Fla. Stat. § 827.11 (2023); however, the chilling effect this law has had on free speech activities protected by the First Amendment is highly concerning.

9. See, e.g., Eric Francisco, *Jessica Nigri Ponders Life After Cosplay*, INVERSE (Jan. 26, 2018), <https://www.inverse.com/article/40586-becoming-jessica-nigri-cosplay-interview> [<https://perma.cc/S3PH-68JL>]; see also, e.g., Jordan Zakaran, *A Cosplay Trailblazer Becomes Big Business Too*, SYFY (May 15, 2019, 3:05 PM), <https://www.syfy.com/syfy-wire/a-cosplay-trailblazer-becomes-big-business-too-ep-85> [<https://perma.cc/UG6P-A7D8>].

10. 17 U.S.C. § 102(a) (2010).

11. 17 U.S.C. § 102(a)(5) (2010).

12. 17 U.S.C. § 101 (2010).

13. *Id.*

14. *Id.*

15. 35 U.S.C. § 101 (2024) (“Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor.”).

16. Registrability of Costume Designs, 56 Fed. Reg. 56530, 56532 (Nov. 5, 1991) [hereinafter *Registrability of Costume Designs*].

separable from and capable of existing independent of any *utilitarian aspects* of the useful article.¹⁷

For example, t-shirts have the intrinsic utilitarian function of covering the torso and shoulders without covering the lower arms. So, the shape of a t-shirt would not be protectable even if it is aesthetically pleasing. On the other hand, a two-dimensional original artwork on a graphic t-shirt is separable from the t-shirt and, thus, eligible for protection.

The United States Copyright Office (the Office) and numerous federal courts have recognized the need to apply a separability analysis when determining whether the design of an article of clothing is eligible for protection.¹⁸ In 2017, the Supreme Court of the United States put forth a test for separating protectable elements of the design from the useful article itself:

[A] feature incorporated into the design of a useful article is eligible for copyright protection only if the feature (1) can be perceived as a two- or three-dimensional work of art separate from the useful article and (2) would qualify as a protectable pictorial, graphic, or sculptural work—either on its own or fixed in some other tangible medium of expression—if it were imagined separately from the useful article into which it is incorporated.

The first requirement—separate identification—is not onerous. The decisionmaker need only be able to look at the useful article and spot some two- or three-dimensional element that appears to have pictorial, graphic, or sculptural qualities.¹⁹

The independent-existence requirement is ordinarily more difficult to satisfy. The decisionmaker must determine that the separately identified feature has the capacity to exist apart from the utilitarian aspects of the article.²⁰ In other words, the feature must be able to exist as its own pictorial, graphic, or sculptural work, as defined in Section 101 of the Copyright Act²¹ once it is imagined apart from the useful article. “If the feature is not capable of existing as a pictorial, graphic, or sculptural work once separated from the useful article, then it [would not be] a pictorial,

17. 17 U.S.C. § 101 (2010).

18. *Registrability of Costume Designs*, *supra* note 16, at 56530; Nat’l Theme Prods. Inc. v. Jerry B. Beck Inc., 696 F. Supp 1348, 1353–54 (S.D. Cal. 1988) (finding the design of masquerade costumes and accessories were protectable, even though the costumes were useful articles); Chosun Int’l, Inc. v. Chrisha Creations, Ltd., 413 F.3d 324, 329–30 (2d Cir. 2005) (denying motion to dismiss, because it was at least possible that elements of the plush sculpted animal costumes were protectable by copyright if those elements could be separated from the overall design of the costume).

19. *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 580 U.S. 405, 409 (2017).

20. *Id.*

21. 17 U.S.C. 101 (2010).

graphic, or sculptural feature of that article, but rather one of its utilitarian aspects.”²²

2. Copyrights in Costumes

Protection is limited to designs *on* ordinary wear, historical dress, and uniforms,²³ but protection may also extend to the designs *of* costumes, if separable. As the Office explained, “[c]ostumes, by their very nature, exist at the boundary between works of imagination and works of utility. Portions of some costumes will be [protectable] under the separability test, and others will be [ineligible for protection] in all respects.”²⁴

For example, the Third Circuit explained that the functional elements of a banana costume, which are ineligible for protection, include the dimension and location of cutout holes for the wearer’s arms, legs, and face, while the separable elements eligible for protection include the artistic features of the costume like the “combination of colors, lines, shape, and length.”²⁵ “[O]ne can still imagine the banana apart from the costume as an original sculpture. That sculpted banana, once split from the costume, is not intrinsically utilitarian and does not merely replicate the costume, so it may be copyrighted.”²⁶

3. Copyrights in Masks

The Office and multiple federal courts have recognized that costume masks fall into a unique category of sculptural works that do not require a separability analysis to be eligible for protection because costume masks do not have utilitarian functions beyond merely portraying the appearance of the character.²⁷ For example, the Third Circuit held that costume “masks configured to resemble the noses of a pig, elephant, and a parrot” had no utility “unrelated to their appearance,”²⁸ and the Office

22. *Star Athletica*, 580 U.S. at 414–15 (2017).

23. *See id.* at 418.

24. *Registrability of Costume Designs*, *supra* note 16, at 56532.

25. *Silvertop Assocs. Inc. v. Kangaroo Mfg. Inc.*, 931 F.3d 215, 221 (3d Cir. 2019).

26. *Id.* at 221.

27. *Registrability of Costume Designs*, *supra* note 16; *see generally* *Masquerade Novelty v. Unique Industries*, 912 F.2d 663 (3rd Cir. 1990); *Pasillas v. McDonald’s Corp.*, 927 F.2d 440 (9th Cir. 1991) (conceding that man in the moon mask was protectable by copyright, but denying infringement claim due to lack of substantial similarity). Although no known case has reviewed the issue, it is likely a court would hold this general exception applies only to costume masks and not other types of masks with a clear utilitarian function, such as a filtration masks (which protects the wearer from inhaling viruses and particles), medical masks (which are used to treat diseases like sleep apnea), or a ski mask (which keeps the wearer warm).

28. *Masquerade Novelty*, 912 F.2d at 664–66.

has issued registrations on the Ghost Face mask from the *Scream* series as a sculpture.²⁹

4. Copyrights in Characters

Characters are not one of the eight categories of protectable works listed in the federal copyright statute.³⁰ However, protection extends to a character or sequence of incidents within an original work, so long as such claims are not limited to stock characters or elements.³¹ Thus, protection can extend to original cosplay characters or be used to prevent cosplayers from dressing up as their favorite fictional characters. The “precise legal standard” for “determining when a character may be afforded copyright protection is fraught with uncertainty.”³²

Some courts grant protection if the character is developed with enough specificity to constitute protectable expression.³³ This is sometimes referred to as the character delineation test and may require “constant traits” over multiple works.³⁴

Other courts impose a more rigorous test that requires the character to “constitute[] the story being told,”³⁵ rather than being a “mere chessman in the game for storytelling” or a “mere vehicle” for carrying the story forward.³⁶ As such, “the less developed the characters, the less they can

29. See U.S. Copyright Office Registration No. VA0000983747 (1999) (Supplement to VA 0000552798 (1993)), <https://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi?v1=5&ti=1,5&Search%5FArg=ghost%20face&Search%5FCode=TALL&CNT=25&PID=D4FejCBAPcK8VVy-AJ9vJFFLZAA1G&SEQ=20221028113130&SID=3> [<https://perma.cc/M4FY-WSHU>].

30. 17 U.S.C. § 102(a)(5)(1)-(8) (1990).

31. See, e.g., *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (recognizing the possibility that a literary character could be sufficiently delineated to support a claim of infringement by a second comer, but denying copyright infringement claim where similarities were limited to stock characters); *Gaiman v. McFarlane*, 360 F.3d 644, 659 (7th Cir. 2004) (extending the doctrine of scenes a faire to protection on characters); see also *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 683 F.2d 610, 621 (2d Cir. 1982) (Tarzan); *Detective Comics, Inc. v. Bruns Publications, Inc.*, 111 F.2d 432 (2d Cir. 1940) (Superman); *Anderson v. Stallone*, No. 87-0592 WDKGX, 1989 WL 206431, at *6 (C.D. Cal. 1989) (Rocky); *Toho Co., Ltd. v. William, Morrow Co., Inc.*, 33 F. Supp. 2d 1206, 1215–16 (C.D. Cal. 1998) (Godzilla); *Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Co.*, 900 F. Supp. 1287, 1296–97 (C.D. Cal. 1995) (James Bond).

32. *Anderson*, No. 87-0592 WDKGX, 1989 WL 206431, at *6.

33. See *Nichols*, 45 F.2d at 121 (explaining that the less a character is developed with specific characteristics or designs, then the less that character can be copyrighted).

34. *Toho Co.*, 33 F. Supp. 2d at 1215–16.

35. *Warner Bros. v. Columbia Broad. Sys.*, 216 F.2d 945, 950 (9th Cir. 1954) (denying protection for Sam Spade of the Maltese Falcon detective novel).

36. *Id.*

be copyrighted.”³⁷ This is sometimes referred to as the Story Being Told Test.³⁸

For the sake of safety, some courts consider both tests.³⁹ For example, one court found that the famous E.T. character was protectable by copyright because the alien was both a “distinctive and well developed character” and “central to the story.”⁴⁰

Protection is easier to obtain for characters in a comic book or a film than for literary characters because such visually-depicted characters have conceptual *and physical qualities* that contain some unique elements of expression.⁴¹ For example, Disney was able to protect its Mickey Mouse, Minnie Mouse, Donald Duck, and Goofy characters using a registration on a book and several cartoon panels.⁴² “The fact that its characters are not the separate subject of a copyright [registration] does not preclude their protection.”⁴³ Another court found that two companies that rented Barney costumes infringed nearly one hundred copyrights on works depicting the Barney character in visual media.⁴⁴ On the other hand, that same court found that those costumes did not infringe twenty-five copyrights for audio tapes and over fifty copyrights for radio programs because those works did not visually depict Barney.⁴⁵

5. Copyrights in Props

Separable elements of props are eligible for protection if the prop “display[s] consistent, widely identifiable traits” and is “especially distinctive.”⁴⁶ For example, protection has been extended to the glove worn by Freddy in *A Nightmare on Elm Street* because the glove “significantly aid[ed] in identifying the character.”⁴⁷ Copyright protection was also extended to the famous Batmobile because it had a

37. *Nichols*, 45 F.2d at 121.

38. See generally Jasmina Zecevic, *Distinctly Delineated Fictional Characters That Constitute the Story Being Told: Who Are They and Do They Deserve Independent Copyright Protection?*, 8 VAND. J. ENT. & TECH. L. 365 (2006).

39. *Anderson v. Stallone*, No. 87-0592 WDKGX, 1989 WL 206431, at *6 (C.D. Cal. 1989); *M.G.M. v. Am. Honda Motor Corp.*, 900 F. Supp. 1287, 1296–97 (C.D. Cal. 1995).

40. *Universal City Studios, Inc. v. Kamar Indus., Inc.*, No. H-82-2377, 1982 WL 1278, at *4 (S.D. Tex. 1982).

41. *Walt Disney Productions v. Air Pirates*, 581 F.2d 751, 755 (9th Cir. 1978).

42. *Id.* at 754.

43. *Id.*

44. See *Lyons P’ship, L.P. v. AAA Ent. Inc.*, No. 98CIV.0475DABMHD, 1999 WL 1095608, at *8, *11 (S.D.N.Y. 1999).

45. See *id.* at *8.

46. *Halicki Films v. Sanderson Sales and Mktg.*, 547 F.3d 1213, 1224 (9th Cir. 2008) (protecting the “Eleanor” car from *Gone in 60 Seconds*).

47. *New Line Cinema v. Russ Berrie*, 161 F. Supp. 2d 293, 302 (S.D.N.Y. 2001).

set of distinct traits that could be separated from the utilitarian functions of the car.⁴⁸

6. Merger as a Limitation on Copyright Protection

Protection does not “extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery.”⁴⁹ Protection will be denied under the “merger” doctrine if the underlying idea of a work can be effectively expressed in only one way.⁵⁰ In other words, a registration on a banana costume cannot be used as a monopoly to prevent other people from making their own *unique* banana costumes.

Instead, a registration on a banana costume can be used only to prevent exact, strikingly similar, or substantially similar copies of the registered banana costume. The separable, original elements of each unique banana costume are eligible for protection because bananas can be effectively expressed in shades of green, yellow, brown, and black; with or without bruises; with a tip cut clean or frayed from being manually ripped from the bunch; and with a peel that is wholly intact, partially open from top end, partially open from the bottom end, or completely removed.⁵¹

7. Scenes a Faire as a Limitation on Copyright Protection

Under the related doctrine of *scenes a faire*, elements that are “standard, stock, or common to a particular topic or that necessarily follow from a common theme or setting” are not eligible for protection.⁵² For example, a registration on a vampire costume cannot be used as a monopoly to prevent others from making any costume with the stock elements of a vampire, such as a cape, fake blood and fangs, makeup for pale skin, and a widow’s peak hair line.

Imagine a theoretical scenario where Stephenie Meyer’s publisher directs an employee to design an Edward Cullen mask to promote the release of *Midnight Sun*, the recent spin-off novel based on the original *Twilight* series. In that scenario, a registration could be obtained on the Edward Cullen mask as a work made for hire. That registration could only be used to prevent someone from cosplaying as a vampire with sparkly skin and honey-gold eyes (as those elements are original to the vampires in the *Twilight* series) and not against all vampire cosplayers generally.

48. *See generally* DC Comics v. Towle, 989 F. Supp. 2d 948 (C.D. Cal. 2013).

49. 17 U.S.C. § 102(b) (1990).

50. Silvertop Assocs., Inc. v. Kangaroo Mfg. Inc., 931 F.3d 215, 222 (3d Cir. 2019).

51. *Id.* at 223.

52. *Id.*

8. Works Made for Hire, Assignments, and Licensing Agreements

Determining the rightful owner of a copyright can be tricky, especially where one party is paid by another party to create the work, as in the theoretical example above. Federal copyright law has special rules where (a) the work is created by an employee within the scope of his employment, or (b) the parties sign a written agreement that the work is considered a “work made for hire” and the work is either a (i) contribution to a collective work, (ii) part of an audiovisual work, (iii) translation, (iv) supplementary work, (v) compilation, (vi) instructional text, or (vii) test or answer material for a test.⁵³

The work for hire scenario “isn’t limited to formal employment because a functionally identical relationship can be created by skillful drafting of contracts that purport to treat the (de facto) employee as an independent contractor.”⁵⁴ As such, courts will determine the existence of an employment relationship for the purpose of determining copyright ownership “using the principles of agency law to prevent evasion of the statutory purpose.”⁵⁵ In the absence of a work made for hire agreement, ownership in a work that the artist was paid to create can only be obtained by a copyright assignment in writing.⁵⁶

Work for hire issues could arise in the cosplay context in countless ways. In the theoretical example above, Summit Entertainment (the owner of the rights in the *Twilight* movies) could attempt to file an infringement claim against Little, Brown and Company (the owner of the rights in the *Twilight* books) by arguing that it is the creator of the visual depiction of Edward Cullen on which the mask is based. Ultimately, the licensing agreement that Little, Brown and Company granted Summit Entertainment the right to make the movies could be the deciding factor.

Alternatively, ownership of the copyright in a character could be challenged by a cosplayer who is sued by the author of a comic when the cosplayer believes that she rightfully obtained a license to use the character from the publisher of the comic. In that instance, the publishing agreement between the comic’s author and publisher would hold the answer as to rightful ownership.

Ownership could also be the central issue in a scenario where an advertiser pays a cosplayer to create an original character for a series of television commercials but eventually recasts a new actor in the cosplayer’s role as a cost saving measure. In that instance, a court would scrutinize the grant of rights in the influencer agreement.

53. 17 U.S.C. § 101 (2010).

54. *Gaiman v. McFarlane*, 360 F.3d 644, 650 (7th Cir. 2004) (denying ownership in character where story writer was hired to rewrite a comic book script but had no written agreement nor other evidence that he had ever become a de facto employee).

55. *Id.*

56. 17 U.S.C. § 204(a) (1976).

B. Cosplay as Copyright Infringement

1. Copyright Infringement of Costumes, Masks, and Props

A copyright owner cannot prevail on a copyright infringement claim without first proving it owns a valid copyright on the underlying work.⁵⁷ A registration is prima facie evidence of copyright ownership and validity if registered within five years of the work being published.⁵⁸

Once the first element—a valid copyright in the character, costume, mask, or prop—is established, a copyright owner must then show that the cosplayer copied protectable elements of the underlying work.⁵⁹ In the absence of evidence of direct copying, the second element can be proven through circumstantial evidence of (i) striking similarity or (ii) substantial similarity where the cosplayer had access to the underlying work.⁶⁰ The similar elements must be separable, not merged, and not *scenes a faire*.

Access exists if the alleged infringer had a reasonable opportunity to view or copy the underlying work beyond a bare possibility, mere speculation, or conjecture.⁶¹ Access may be presumed where the underlying work has “sheer worldwide popularity and distribution.”⁶² Once both elements are established, the burden shifts to the alleged infringer to prove independent creation.⁶³

The test for substantial similarity has two parts. First, the “extrinsic test” calls for an objective analysis of the similarity of the underlying work and the cosplay.⁶⁴ Second, the “intrinsic test” “asks whether the ordinary reasonable person would find ‘the total concept and feel of the works’ to be substantially similar.”⁶⁵ Substantial similarity is generally a question of fact for jury resolution, but courts may determine the issue of non-infringement as a matter of law, if the similarities are merged or *scenes a faire*, or if no reasonable jury properly instructed could find the two works substantially similar.⁶⁶

57. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (U.S. 1991) (“To establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.”).

58. 17 U.S.C. § 410(c) (2018).

59. *Feist Publ'ns*, 499 U.S. at 361.

60. *Anderson v. Stallone*, No. 87-0592 WDKGX, 1989 WL 206431, at *8, *24 (C.D. Cal 1989) (finding no need to consider substantial similarity where “it is uncontroverted that the characters were lifted lock, stock, and barrel”).

61. *M.G.M. v. Am. Honda Motor Co.*, 900 F. Supp. 1287, 1297 (C.D. Cal 1955).

62. *Id.*

63. *Id.* at 1299.

64. *Pasillas v. McDonald's Corp.*, 927 F.2d 440, 442 (9th Cir. 1991).

65. *Pasillas*, 927 F.2d at 442; *DC Comics v. Towle*, 989 F. Supp. 948, 961 (C.D. Cal. 2013).

66. *Warner Bros. v. Am. Broad. Companies*, 720 F.2d 231, 239–40 (2d Cir. 1983).

For example, in *Pasillas*, two masks objectively depicted a man on the moon.⁶⁷ However, the court determined that the two masks did not express that idea in a substantially similar manner because the “total concept and feel” of the two masks were different.⁶⁸ Although both masks had a crescent moon shape depicting a white human face, one mask was “stylish, youthful, and carefree” while the other was “a careworn, fatherly character.”⁶⁹

In another real-life example, the Pokémon Company International filed seeking damages and an injunction against the host of a Pokémon cosplay party that charged thirty attendees two dollars for a ticket.⁷⁰ In that lawsuit, Pokémon claimed a convention operator infringed the copyright registrations on two trading cards that depicted Pikachu and Snivy by incorporating those characters into promotional materials for the event, even though the depictions of those characters in the promotional materials were not exact copies of the characters as they were depicted in the trading cards.⁷¹

2. Copyright Infringement of Books, Movies, and Related Works

Federal law grants the owner of a copyright the exclusive right to produce copies of the work and to prepare derivative works based upon the copyrighted work.⁷² In other words, a claim that a cosplayer infringes the copyright in an underlying work does not have to be based on a registration for a costume, mask, or prop. A rightsholder can claim that a costume, mask, or prop infringes upon his exclusive rights to prepare a derivative work based upon a book, movie, or related work.⁷³

Courts have recognized that masks based on movies are derivative works.⁷⁴ In 1986, the owners of the 1978 movie, *Halloween*, hired a company to make a Michael Myers mask.⁷⁵ In 1999, the owners of the movie signed a non-exclusive license with a second mask maker.⁷⁶ The

67. *Pasillas*, 927 F.2d at 442.

68. *Id.*

69. *Id.* at 443.

70. Jacob Demmitt, *Pokémon Sues Fan to Block Pokémon Party on Eve of PAX Game Convention in Seattle*, GEEKWIRE (Aug. 27, 2015, 5:00 PM), <https://www.geekwire.com/2015/pokemon-sues-fans-to-block-pokemon-party-on-eve-of-pax-game-convention-in-seattle/> [https://perma.cc/A7EH-6B2P].

71. *Id.*

72. 17 U.S.C. § 106(a)-(b) (2002).

73. *See, e.g.*, DC Comics v. Towle, 989 F. Supp. 2d 948, 964 (C.D. Cal. 2013) (finding reproductions of the Batmobile violated DC Comics’ copyright registrations on the Batman comics and films).

74. *See* Don Post Studios, Inc. v. Cinema Secrets, Inc., 124 F. Supp. 2d 311, 318 (E.D. Pa. 2000).

75. *Id.* at 312–13.

76. *Id.* at 313.

maker of the first mask claimed the maker of the second mask copied its mask in violation of copyright law.⁷⁷ However, the maker of the second mask claimed it merely made a copy of the mask worn by the character in the movie and that the first mask lacked any original elements protectable by copyright law.⁷⁸ The court found that the first mask was not protectable by copyright because it was a copy of the original prototype worn in the movie.⁷⁹

In the context of cosplaying, a costume based on an underlying work is a derivative work. Thus, in the absence of a fair use defense or a license to incorporate the underlying copyrights in a costume, the creation or use of any costume based on an underlying work is copyright infringement of the exclusive right to prepare derivative works of the underlying work.

3. Copyright Infringement of Characters

Some cosplayers create their own characters from scratch. Doing so largely limits the legal ramifications that may arise from cosplay. Direct copying does not occur when the cosplay is an original work of art, so the rightsholder would likely need to show access and substantial similarity to those elements that are original, not merged, and not *scenes a faire*. For these reasons, one of the world's most famous cosplayers wears only original costumes when appearing on television or at paid events.⁸⁰

The Second Circuit held that creating a “Wonderman” character who “conceals his strength beneath ordinary clothing but after removing his cloak stand revealed in full panoply in a skintight acrobatic costume” would infringe upon the rights in the Superman character, even if there are color differences in the costume.⁸¹ On the other hand, a copyright infringement claim based on an original cosplay character would fail if all the similarities to the existing fictional character amount to “general types and ideas” rather than “pictorial and literary details.”⁸²

When analyzing copyright infringement claims related to original cosplay characters, a court would consider the visual resemblance between the character and the cosplay, the totality of the character's

77. *Id.*

78. *Id.*

79. *Id.*

80. Enako (@enako_cos), Twitter (Jan. 24, 2021, 12:37 AM), https://twitter.com/enako_cos/status/1353215360456003590 [<https://perma.cc/82BT-NNTV>] (“By the way, I have told you several times. . . . When I am involved in commercial projects such as television and events, I basically perform in my original costume, not copyrighted cosplay, considering the copyright protection this time. When cosplaying copyrighted material, we have received permission from the publisher each time.”) (translated from Japanese).

81. *Detective Comics, Inc. v. Bruns Publ'ns.*, 111 F.2d 432, 433 (2d Cir. 1940) (involving a comic book that copied the Superman character).

82. *See id.*

attributes and traits, and the differences between the character and the cosplay.⁸³

4. Copyright Infringement Online

A rightsholder seeking to pursue a potential case of online infringement, such as a porn parody or a how-to video explaining the construction of a costume, faces additional hurdles. The Digital Millennium Copyright Act (DMCA) provides a quick, cheap, easy, and efficient means to request removal of infringing material posted by a user of an online service.⁸⁴ The DMCA does not provide a safe harbor to the user who posted the content or to the service provider for any content it posts itself.⁸⁵ However, the DMCA provides a safe harbor to those service providers that comply with the law by removing user-generated content that is reported as infringing.⁸⁶

Beyond removal of the infringing material, there is typically little recourse to meaningfully collect damages from past online copyright infringement. Often, the pirate user lacks the financial resources from which a rightsholder may collect a judgment against, and the financially-successful service provider, who operates the website where the pirated material was posted, has safe harbor from such claims, provided that the service provider complied with the DMCA. Pursuing claims against other parties indirectly involved in online copyright infringement is exceedingly difficult, as the elements of secondary liability for copyright infringement are onerous to prove.⁸⁷

5. Fair Use of Copyrights in Cosplay

Federal copyright law provides that “the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or

83. See, e.g., *Warner Bros., Inc. v. Am. Broad. Cos.*, 720 F.2d 231, 240–42 (2d Cir. 1983) (“Ultimately, care must be taken to draw the elusive distinction between a substantially similar character that infringes a copyrighted character despite slight differences in appearance, behavior, or traits, and a somewhat similar though non-infringing character whose appearance, behavior, or traits, and especially their combination, significantly differ from those of a copyrighted character, even though the second character is reminiscent of the first one. Stirring one’s memory of a copyrighted character is not the same as appearing to be substantially similar to that character, and only the latter is infringement.”).

84. 17 U.S.C. § 512(c) (2010).

85. *Id.*

86. *Id.*

87. See generally Michael McCue, *Secondary Liability for Trademark and Copyright Infringement*, LEWIS AND ROCA LLP, <https://www.lewisroca.com/assets/htmldocuments/M.%20McCue%20Utah%20Cyber%20Symposium%20SECONDARY%20LIABILITY%20Sept%202023.pdf> [<https://perma.cc/PMH3-ZW8Q>] (arguing that the elements of secondary liability for copyright infringement are onerous to prove).

research, is not an infringement of copyright.”⁸⁸ This defense may be assertable by many cosplayers.⁸⁹

The statute lays out four factors for determining whether a use is fair:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.⁹⁰

Cosplayers will almost always have an uphill battle in proving a fair use defense because the second and third prongs will almost certainly weigh against them.

Generally, the second prong will weigh against a cosplayer’s assertion of a fair use defense because the nature of the underlying work (whether a book, movie, or related work) is highly creative and close to the core of protection.⁹¹ An exception may apply to cosplayers who dress as real people, as factual representations are less deserving of protection.⁹²

Typically, the third prong will weigh against a cosplayer’s assertion of a fair use defense because the cosplayer’s ultimate goal is to be a mirror image of the character. Fair use is a difficult defense to assert if the costume or other allegedly infringing work takes a greater amount of the underlying work than is “necessary to recall or conjure up the original.”⁹³ A fair use defense will be denied where the copying has no other purpose than to track the underlying work as closely as possible.⁹⁴

The issue with this defense is common in the case of parodies where “the constraints of the existing precedent do not permit [defendants] to take as much of a component part as they need to make the ‘best parody.’ Instead, their desire to make the ‘best parody’ is balanced against the rights of the copyright owner in his original expressions.”⁹⁵ Further, any

88. 17 U.S.C. § 107 (1976).

89. See generally Molly Rose Madonia, *All’s Fair in Copyright and Costumes: Fair Use to Copyright Infringement in Cosplay*, 20 MARQ. INTELL. PROP. L. REV. 177 (2016) (arguing that cosplay does not infringe on the registered copyrights of the characters).

90. 17 U.S.C. § 107 (1976).

91. *M.G.M. v. Am. Honda Motor Co.*, 900 F. Supp. 1287, 1300 (C.D. Cal 1955); *Easter Unlimited, Inc. v. Rozier*, 18-CV-06637, 2021 WL 4409729, at *15 (E.D.N.Y. 2021).

92. *M.G.M.*, 900 F. Supp. at 1300; *Easter Unlimited, Inc.*, 18-CV-06637, at *15.

93. *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 758 (9th Cir. 1978).

94. *Id.* (noting, however, that such a fact is not fatal).

95. *Id.*

defendant claiming a parody-based fair use defense must show that the parody comments on the underlying work rather than merely using the underlying work “to get attention or to avoid the drudgery in working up something fresh.”⁹⁶

For example, in *Giannoulas*, the United States District Court for the Northern District of Texas found fair use for a parody of Barney that did not duplicate the real costume, use any related characters, or take any words, phrases, music, or songs from the Barney universe.⁹⁷ Rather, the defendants used only “enough of the original Barney to make the audience recognize the character.”⁹⁸

Because fair use always requires a case-by-case analysis, the first and second prongs must be weighed as well.

In almost all instances of cosplay, there is a strong argument that the act of cosplaying is free advertising that positively impacts the market for the value of the underlying work. Conversely, the fourth prong will likely favor the rightsholder if the cosplay causes a depreciation of value of the underlying work.⁹⁹ For example, the underlying work may become less valuable if the cosplay is seen as an alternative or replacement for the underlying work.

In many cases, there is also a strong argument that the purpose and character of the use is transformative. Recent Supreme Court precedent has highlighted that the central question of whether an alleged infringement is transformative focuses on whether the *use* of the work was sufficiently transformed, not whether the *work itself* was sufficiently transformed.¹⁰⁰ Generally, cosplay is not a replacement for the underlying work. In the context of most cosplay, the alleged infringement will likely be considered transformative, because dressing as a fictional character is not the same *use* as the underlying book, movie, or related work itself.

For example, Terry Rozier, a professional basketball player, successfully asserted a fair use defense for t-shirts he sold bearing a cartoon version of himself in the Ghost Face mask from the *Scream* series under the words “Scary Terry.”¹⁰¹ The United States District Court for the Eastern District of New York found that the use of the mask was transformative because it altered the underlying work with new expression, meaning, or message by (i) commenting on Rozier’s “Scary Terry” persona; (ii) satirizing the familiar trope of professional athletes

96. *M.G.M.*, 900 F. Supp. at 1300.

97. *Lyons P’ship v. Giannoulas*, 14 F. Supp. 2d 947, 955 (N.D. Tex. 1998), *aff’d*, 179 F.3d 384 (5th Cir. 1999).

98. *Id.*

99. *Pillsbury Co. v. Milky Way Prod., Inc.*, No. C78-679A, 1981 WL 1402, at *6 (N.D. Ga. 1981).

100. *Andy Warhol Found., Inc. v. Goldsmith*, 598 U.S. 508, 528 (2023).

101. *Easter Unlimited, Inc. v. Rozier*, No. 18-CV-06637, 2021 WL 4409729, at *17 (E.D.N.Y. Sept. 27, 2021).

as remorseless “killers;” and (iii) marking anyone wearing the shirt as a Rozier fan.¹⁰²

However, the question of whether an alleged infringement is transformative would weigh in favor of the rightsholder where the use of the cosplay is the same as the use of the underlying work. For example, a hypothetical Spiderman cosplayer who releases a series of original YouTube videos marketed as “a new alternate universe in the Spiderverse” would likely be considered infringing because a web-series is not a sufficiently transformative use compared to a series of movies. In such a scenario, Marvel could argue that the unauthorized YouTube series is an infringing alternative to the various official Spiderman movies.

The first prong must also consider whether the cosplayer has commercialized their activities or whether the rightsholder suffers commercial harms. As is evident by the lack of case law in this area, rightsholders are unlikely to pursue cosplayers, unless their activities take away from the company’s profits. The lack of past litigation is likely due, in part, to the fact that (i) rightsholders appreciate the free advertising; (ii) rightsholders do not want to anger their most ardent fans; (iii) the lack of existing case law makes it difficult to support a claim and prove damages; (iv) many cosplayers lack the resources to pay any damages that rightsholders may seek; and (v) there is always at least some risk that the cosplayer could succeed in a fair use defense.

For example, the craft store Joann partnered with famous cosplayer Yaya Han to release a line of cosplay fabrics.¹⁰³ Disney could potentially bring a claim against Joann or Yaya Han if any of the fabrics were substantially similar in design (but not in function) to the fabric used in a costume worn by a superhero in the Avengers franchise. If such an issue was to arise, Disney would have a strong incentive to seek an injunction and/or seek damages against Joann, since (i) Joann has considerable resources; (ii) Joann profits off the infringement in a manner that is relatively easy to prove; and (iii) any fair use defense by Joann would be unlikely to succeed given the negative impact on the marketplace. While many of these factors would apply to Yaya Han as well, Disney may choose not to name the cosplayer in the lawsuit directly in order to avoid the negative press generated in the cosplay community by suing a famous cosplayer with an army of international fans.

The same or a very similar analysis would apply to a rightsholder considering a claim against a costume and prop manufacturer, a

102. *Id.* at *11.

103. *Calling All Cosplayers: The Yaya Han Cosplay Fabric Collection Exclusively Available at Jo-Ann Stores and Joann.com*, BUS. WIRE (Mar. 16, 2016, 11:44 AM), <https://www.businesswire.com/news/home/20160316006011/en/Calling-All-Cosplayers-The-Yaya-Han-Cosplay-Fabric-Collection-Exclusively-Available-at-Jo-Ann-Stores-and-Joann.com> [<https://perma.cc/P2JA-JJJW>].

character-for-hire company, a company that uses a character to falsely endorse the company's goods or services, or a chain of cosplay-themed restaurants. While individual cosplayers generally have a lower risk profile, their specific activities and their level of popularity and profitability are factors that are likely to increase their chances of receiving a demand letter or being sued by a rightsholder.

II. TRADEMARKS

A. *Trademark Registrations in Cosplay*

Individuals and companies in the cosplay industry have registered trademarks for a large variety of goods and services across numerous classes.

The most frequently registered cosplay goods are costumes in International Class 25.¹⁰⁴ Some specific costume-related goods may be registered in other classes, such as “foam sheeting for use in cosplay” in International Class 17¹⁰⁵ and “wearable tail toys . . . for use in cosplay” in International Class 28.¹⁰⁶

Not all trademarks on cosplay-related goods are for costume materials. For example, there are registrations on downloadable cosplay videos¹⁰⁷ and downloadable cosplay guides in International Class 9¹⁰⁸ as well as books about cosplay in International Class 16¹⁰⁹ and prints of cosplay art in International Class 16.¹¹⁰

Many registrations also exist on cosplay-related services. The most frequently registered cosplay services are cosplay conventions, trade shows, and related events which may be registered in International Class 35¹¹¹ or International Class 41.¹¹²

Individual cosplayers often obtain registrations on cosplay services such as appearances and performances,¹¹³ live streams,¹¹⁴ and video blogs¹¹⁵ in International Class 41. International Class 41 can also be used by companies that provide services to or about those individual cosplayers, such as cosplay-related photography and videography

104. *See, e.g.*, SFXCL, Registration No. 6889317.

105. *See, e.g.*, REFOAMATION, Registration No. 6721582.

106. *See, e.g.*, MITAIL, Registration No. 6762175.

107. *See, e.g.*, MEG TURNEY, Registration No. 5878109.

108. *See, e.g.*, The mark consists of a wedge-shaped icon within a circle, Registration No. 6774893.

109. *See, e.g.*, IMMORTAL CONCEPTS STUDIOS, Registration No. 6452518.

110. *See, e.g.*, MARAJADE SITH, Registration No. 6636169.

111. *See, e.g.*, PEORACON, Registration No. 5881643.

112. *See, e.g.*, ECCHI EXPO, Registration No. 6861392.

113. *See, e.g.*, ARIELJADE, Registration No. 6815283.

114. *See, e.g.*, DANIELLE DENICOLA, Registration No. 6387512.

115. *See, e.g.*, TAYAMILLERR, Registration No. 6579445.

services,¹¹⁶ podcasts about cosplaying,¹¹⁷ cosplay competitions,¹¹⁸ and even classes on cosplay and special effects fabrications.¹¹⁹

B. Trademark Infringement

Trademark infringement requires a showing that the defendant used the plaintiff's marks in commerce, without consent, in a way that was likely to cause confusion, mistake, or deceit.¹²⁰ As with copyright, trademark registrations are prima facie evidence that the plaintiff has the exclusive right to use the marks in commerce.¹²¹ A likelihood of confusion analysis considers a number of factors, including the type of mark, similarity of the marks, similarity of the goods or services, similarity of the trade channels and customers, similarity of advertising media, actual confusion, and the defendant's intent.¹²² An analysis of the similarities of the marks considers the sight, sound, and meaning of the two marks.¹²³

As with copyright claims, it is unlikely—though not impossible—that an original cosplay character will infringe upon the trademarks of an existing fictional character, since original cosplay characters are likely to have original names, traits, dress, and slogans. However, creating original cosplay characters that are similar to existing fictional characters or real people may give rise to a trademark infringement claim.

For example, the owner of the SUPERMAN and WONDERWOMAN marks was able to obtain an injunction under federal trademark law against a company that sold singing telegrams by performers dressed as “Super Stud” and “Wonder Wench.”¹²⁴ There, the performers “cull[ed] the most characteristic and most memorable portions of the Superman plots, and the core of the Superman stories.”¹²⁵

Trademark infringement is not limited to names and may extend to other words (such as slogans or catch phrases), symbols (such as logos), devices (such as props), sounds, scents, colors, and other source identifiers.¹²⁶

116. *See, e.g.*, APPEAL PHOTOGRAPHY, Registration No. 6877086.

117. *See, e.g.*, THE BROWN GEEK PRESENCE, Registration No. 6489480.

118. *See, e.g.*, YY.COM design mark, Registration No. 6138445.

119. *See, e.g.*, MATERIALS SPOTLIGHT, Registration No. 5942008.

120. 15 U.S.C. § 1114(1)(a) (2024).

121. 15 U.S.C. § 1057(b) (2024), 1115(a) (2024).

122. *Roto-Rooter Corp. v. O’Neal*, 513 F.2d 44, 45 (5th Cir. 1975).

123. *One Indus., LLC v. Jim O’Neal Distrib., Inc.*, 578 F.3d 1154, 1162 & 1165 (9th Cir. 2009) (denying trademark infringement claim where comparison of marks used by competing motocross apparel companies “plainly demonstrates that they are not at all similar in sight, sound, or meaning.”).

124. *DC Comics v. Unlimited Monkey Bus.*, 598 F. Supp. 110, 116 (N.D. Ga. 1984).

125. *Id.* at 117.

126. 15 U.S.C. § 1127 (2024); *Qualitex v. Jacobson Products*, 514 U.S. 159, 162 (1995).

Trademark infringement should be a significant concern for companies that produce cosplay costumes, masks, props, and other replicas and derivative works. In *DC Comics v. Towle*, the Gotham Garage produced custom cars and sold car kits to allow others to customize their cars to look like vehicles from various television shows and movies.¹²⁷ In many instances, the Gotham Garage “manufactured and distributed various automobile parts and accessories featuring the Batman trademarks.”¹²⁸ The United States District Court for the Central District of California found that DC Comics owned design marks in the various Bat emblems as well as word marks in BATMAN and BATMOBILE.¹²⁹ The court rejected the Gotham Garage’s arguments that no trademark infringement had occurred merely because DC Comics did not own a registration in Class 12 for automobiles, since the marks at issue were identical or substantially similar, and because the goods offered by both parties were the same.¹³⁰ That is, DC Comics also sold cars and car accessories with the Batmobile trademarks.¹³¹ Further, there was evidence of actual confusion because many of the Gotham Garage’s customers asked whether there was an affiliation with the movie makers.¹³² Finally, the defendant’s intent was clearly shown by his admission of knowledge about the franchise and knowingly copying the marks.¹³³ However, the court admitted that the degree of care exercised by a reasonable consumer in purchasing the defendant’s expensive replicas would weigh in the defendant’s favor.¹³⁴ In total, the court found no triable issue of fact and granted DC Comics’ motion for partial summary judgement on the issue of trademark infringement.¹³⁵

Cosplayers may have a defense to trademark infringement claims where the cosplayer does not compete with the trademark owner. For example, Rozier was able to defend against a trademark infringement claim related to his use of the Ghost Face mask on his Scary Terry shirt by demonstrating, in part, that his use was limited to a “niche market” for “basketball fans” and showing that he had no plans to move into the Halloween costume market occupied by the trademark owner.¹³⁶

In practice, this defense may be difficult for cosplayers to assert. Take a theoretical cosplayer who sells personalized birthday videos of herself

127. 989 F. Supp. 2d 948, 953 (2013).

128. *Id.* at 953.

129. *Id.* at 956.

130. *Id.* at 956–59.

131. *Id.* at 953.

132. *Id.* at 959.

133. *Id.* at 960.

134. *Id.* at 959–60.

135. *Id.* at 960.

136. *Easter Unlimited Inc., v. Rozier*, No. 18-CV-06637, 2021 WL 4409729, at *70–71 (E.D.N.Y. 2021).

dressed as a manga character on Cameo as an example. The cosplayer could argue that her mobile videos do not compete with the trademark owner's physical comics that are sold in brick-and-mortar bookstores. The trademark owner would likely argue that competition still occurs, since the cosplayer's clientele are exclusively comprised of the trademark owner's fans. Rozier, on the other hand, has fans that have never seen *Scream*. This type of defense is best applied where the good or service being offered by the cosplayer is a parodical or satirical take on the underlying character or source work.

As with copyright claims against websites for content posted by their users, the rightsholder will face the additional difficulty of bringing a trademark infringement claim under a theory of secondary liability against any such website.¹³⁷ Here, however, the DMCA does not provide a safe harbor for trademark infringement. Alternatively, a trademark may also be used to support a cyber-squatting claim against a cosplayer under the Consumer Protection Act¹³⁸ or in a domain dispute under the Uniform Domain Name Dispute Resolution Policy.¹³⁹

For example, the United States District Court for the Central District of California denied a preliminary injunction for a cyber-squatting claim related to ex-travel-collection.com, where the owner of the EZ TRAVEL sold RV, camping, and other outdoor related products, while the defendant was involved in manufacturing, importing, and exporting cosplay outfits, props, and accessories.¹⁴⁰

Remedies for trademark infringement may include injunctions, transfer or cancellation of an infringing domain name, destruction of the infringing articles, disgorgement of the defendant's profits, and collection of damages sustained by the plaintiff and costs.¹⁴¹ Recovery of damages for trademark infringement requires (i) actual confusion or (ii) willful deception or bad faith.¹⁴²

For example, the owner of the Barney character was successful in disgorging over \$40,000 in profits from two companies that rented Barney costumes without authorization.¹⁴³ There, the United States District Court for the Southern District of New York found that "it is reasonable to infer that individuals engaged in the business of renting or

137. McCue, *supra* note 88, at 7.

138. 15 U.S.C. § 1125(d) (2012).

139. *Uniform Domain Name Dispute Resolution Policy*, ICANN, <https://www.icann.org/resources/pages/policy-2012-02-25-en> [<https://perma.cc/KPS6-EVRL>].

140. *EZ Travel Distrib., Inc. v. Doremo Glob. Corp.*, No. SACV2001183JVSJDEX, 2020 WL 6205701, at *4 (C.D. Cal. Sept. 16, 2020).

141. 15 U.S.C. §§ 1116, 1117, 1118 (2024).

142. *New Line Cinema v. Russ Berrie*, 161 F. Supp. 2d 292, 304 (S.D.N.Y. 2001) (denying damages for trademark infringement where the defendant lacked actual knowledge of the *Nightmare on Elm Street* movies, and there was no evidence of consumer confusion or bad faith).

143. *Lyons P'ship L.P. v. AAA Ent. Inc.*, 1999 WL 1095608, at *3-7 (S.D.N.Y. 1999).

otherwise commercially utilizing costumes would have reason to know, or at least strongly suspect, that the rights to the use of such a famous figure were owned by someone else.”¹⁴⁴

C. Trademark Dilution

The owner of a famous¹⁴⁵ trademark can also bring a claim for dilution by blurring or tarnishment.¹⁴⁶ While a likelihood of confusion is required to show trademark infringement, a trademark dilution claim requires a showing of an “improper association” between the trademark and a different good or service.¹⁴⁷ This type of claim protects against “an appropriation of or free riding on the investment [the trademark holder] has made in its [trademark].”¹⁴⁸

Dilution by blurring occurs where the similarities between the trademark and other good or service “impair” the distinctiveness of the famous mark.¹⁴⁹ In determining whether dilution by blurring has occurred, courts may consider the following factors: the degree of similarity, the degree of distinctiveness, the extent of substantially exclusive use, the degree of recognition, the defendant’s intent, and the actual association.¹⁵⁰

Such claims may also exist under state law. For example, the owner of the SUPERMAN and WONDERWOMAN marks was able to obtain an injunction of the singing telegram services provided by “Super Stud” and “Wonder Wench” under Georgia state law for trademark dilution.¹⁵¹

Dilution by tarnishment occurs when the similarities between the trademark and other good or service harm the reputation of the famous mark.¹⁵² Tarnishment claims generally arise if the mark “is linked to products of shoddy quality.”¹⁵³ For example, a court determined that a jury could reasonably find that Disney’s marks were tarnished by a character-for-hire company that had a bad reputation (including

144. *Id.* at 4.

145. 15 U.S.C. § 1125I(2)(A) (2012) (“[A] mark is famous if it is widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark’s owner,” considering “(i) The duration, extent, and geographic reach of advertising and publicity of the mark, whether advertised or publicized by the owner or third parties; (ii) The amount, volume, and geographic extent of sales of goods or services offered under the mark; (iii) The extent of actual recognition of the mark; and (iv) Whether the mark was registered under the Act of March 3, 1881, or the Act of February 20, 1905, or on the principal register.”).

146. 15 U.S.C. § 1125(c) (2012).

147. *Playboy Enters., Inc. v. Welles*, 279 F.3d 796, 806 (9th Cir. 2002) (citing *I.P. Lund Trading APS v. Kohler Co.*, 163 F.3d 27, 50 (1st Cir. 1998)).

148. *Id.* at 805.

149. 15 U.S.C. § 1125(c)(2)(B) (2012).

150. *Id.*

151. *DC Comics v. Unlimited Monkey Bus.*, 598 F. Supp. 110, 115 (N.D. Ga. 1984).

152. 15 U.S.C. § 1125(c)(2)(C) (2024).

153. *Deere & Co. v. MTD Prods., Inc.*, 41 F.3d 39, 43 (2d Cir. 1994).

complaints filed with the Better Business Bureau and negative social media reviews) compared to Disney's "stellar reputation for customer care."¹⁵⁴ Similarly, a tarnishment claim may be brought against a manufacturer of ill-fitting or poorly designed costumes, masks, or props or against an online retailer offering poor quality cosplay makeup that is associated with a particular character or franchise.

Tarnishment claims may also arise if the mark "is portrayed in an unwholesome or unsavory context likely to evoke unflattering thoughts about the owner's product."¹⁵⁵ Tarnishment may occur where a mark is "placed in the context of sexual activity, obscenity, or illegal activity."¹⁵⁶

As with blurring claims, tarnishment claims may also be brought under state laws. Disney pursued a successful trade disparagement claim against the creators of a comic that placed Disney characters in "a rather bawdy depiction . . . of a free thinking, promiscuous, drug ingesting counterculture."¹⁵⁷ The Dallas Cowboys were able to enjoin further distribution of a pornographic film that used the cheerleader's uniform under New York's anti-dilution law.¹⁵⁸

A tarnishment claim could also be brought against a cosplayer that commits fraud while attempting to crowdfund for costume materials or convention tickets or against a cosplayer who sells monthly subscriptions to pornographic cosplay content through a platform like OnlyFans.

Cosplay has been sexualized extensively throughout its history. In the 1996 episode of the hit television show *Friends* titled "The One with the Princess Leia Fantasy," Rachel adorns her hair in side-buns and dresses in the famous gold bikini to fulfill Ross's fantasies.¹⁵⁹

However, the sexualization of cosplay is not limited to television. Attendees have been appearing nude at science fiction and cosplay conventions since 1952.¹⁶⁰ In fact, some conventions now expressly reserve the right to ask attendees to leave or change their costume if deemed inappropriate to a family-friendly environment.¹⁶¹ As such,

154. *Disney Enters., Inc. v. Sarelli*, 322 F. Supp. 3d 413, 441 (S.D.N.Y. 2018).

155. *Deere & Co.*, 41 F.3d at 43.

156. *Hormel Foods Corp. v. Jim Henson Prods., Inc.*, 73 F.3d 497, 507 (2d Cir. 1996); *see also Eastman Kodak Co. v. Rakow*, 739 F. Supp. 116, 118 (S.D.N.Y. 1989) (enjoining use of KODAK as a stage name by a comedian whose material included crude sex jokes); *Pillsbury Co. v. Milky Way Prods.*, No. C78-679A, 1981 U.S. Dist. LEXIS 17722, at *1 (N.D. Ga. 1981) (involving pictures of the Pillsbury Doughboy engaged in sexual activity under Georgia state law).

157. *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 753 (9th Cir. 1978).

158. *Dall. Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 467 F. Supp. 366 (S.D.N.Y.), *aff'd*, 604 F.2d 200 (2d Cir. 1979).

159. *Friends*, Season 3, Episode 1, *The One With the Princess Leia Fantasy* (NBC Television broadcast Sept. 19, 1996).

160. MIKE RESNICK, *ALWAYS A FAN: TRUE STORIES FROM A LIFE IN SCIENCE FICTION* 108 (2015).

161. *See, e.g., Costume and Prop Rules*, PHOENIX FAN FUSION, <https://www.phoenixfanfusion.com/attend> [<https://perma.cc/K2ZF-V3E6>].

cosplayers that sexualize characters (especially those from children's stories) are more likely to encounter a tarnishment claim.

D. *False Designations and Endorsements*

Federal trademark law prohibits using a false designation of origin and other misleading description or representation of fact (i) that is likely to cause confusion, mistake, or deceit as to the origin, sponsorship, or approval of third-party goods or services,¹⁶² or (ii) in commercial advertising or promotion of third-party goods or services.¹⁶³

The test for these claims is that the copied features must (i) be non-functional; (ii) either (A) have secondary meaning (that is, they act as a source identifier for the goods or services), or (B) are inherently distinctive; and (iii) create a likelihood of confusion among prospective purchasers as to source of the goods or services.¹⁶⁴ A feature is functional if it is important to the commercial success of the product, whereas non-functional features are mere arbitrary embellishments.¹⁶⁵

For example, the United States District Court for the Southern District of New York denied Mars's motion to dismiss a false endorsement claim related to a commercial where an M&M character was dressed as The Naked Cowboy and created the false impression that the famous street performer had endorsed the chocolate candies.¹⁶⁶

E. *Fair Use of Trademarks*

The federal trademark statute explicitly states that fair use is a defense to a trademark dilution claim,¹⁶⁷ and the courts have held that fair use applies to other trademark claims as well.¹⁶⁸

Cosplayers may attempt to assert a "nominative fair use defense" to trademark infringement claims.¹⁶⁹ To succeed, the cosplayer must show (i) the rightsholder's underlying character or work was not readily identifiable without using the mark; (ii) the cosplayer only uses the mark as much as is reasonably necessary to identify the rightsholder, character,

162. 15 U.S.C. 1125(a)(1)(A) (2012).

163. 15 U.S.C. 1125(a)(1)(B) (2012).

164. *See* Truck Equip. Serv. Co. v. Fruehauf Corp., 536 F.2d 1210, 1217 (8th Cir.), *cert. denied*, 429 U.S. 861, 97 S. Ct. 164 (1976).

165. Pagliero v. Wallace China Co., 198 F.2d 339, 343 (9th Cir. 1952).

166. Burck v. Mars, Inc., 571 F. Supp. 2d 446, 454–56 (S.D.N.Y. 2008).

167. 15 U.S.C. § 1125(c)(3) (2024).

168. Harley Davidson, Inc. v. Grottanelli, 164 F.3d 806, 813 (2d Cir. 1999) ("The Supreme Court's parody explication as to copyrights . . . is relevant to trademarks").

169. Toho Co. v. William Morrow & Co., 33 F. Supp. 2d 1206, 1210–12 (C.D. Cal. 1998).

or work; and (iii) the cosplayer's use did not suggest sponsorship or endorsement by the rightsholder.¹⁷⁰

Fulfilling any of these elements would be difficult for a cosplayer, let alone all three. First, the costumes of skilled cosplayers are typically sufficient to identify the character without any use of the associated word marks. However, the use of design marks may be necessary where, for example, a logo is incorporated as an element of the character's costume, such as the S logo on Superman's chest. Second, cosplayers seek to become the character as closely as possible. This inherently involves extensive use of the associated trademarks in a manner that is unlikely to be considered nominative. Finally, extensive use of the associated trademarks is likely to imply an affiliation with or sponsorship by the rightsholder, even if the cosplayer includes a visible disclaimer.

Most trademark infringement and dilution cases view parodies not as a separate defense, but as a way of showing that customers would not be "confused as to source, sponsorship, or approval"¹⁷¹ or as a way of showing that customers would not associate the lack of quality or prestige in the parody with the trademark owner's unrelated goods or services.¹⁷²

For example, in *Mars*, the court denied Mars's motion to dismiss because "[t]he complaint plausibly argue[d] that consumers would believe that the M&M Cowboy characters were promoting a product rather than merely parodying The Naked Cowboy, and that viewers would believe that The Naked Cowboy had endorsed M&Ms."¹⁷³ The court elaborated that some "consumers may mistakenly believe that The Naked Cowboy himself endorsed the copying" of his likeness and that a factfinder could determine that the parody was "too weak to negate the potential for consumer confusion."¹⁷⁴

Similarly, in *Giannoulas*, the court denied trademark infringement and dilution claims where a performer parodied Barney's "wholesome, good character" by acting as "an evil alter ego."¹⁷⁵ The court explained that the defendant did "not seek to ridicule Barney to sell more of their own competitive products," but rather did so to sell the parody itself.¹⁷⁶ In that case, "the clarity of defendants' parodic intent, the widespread

170. *Id.* (finding a compendium book about the Godzilla films was not a fair use, even though the Godzilla character was not readily identifiable without using the mark, because the use of the mark exceeded legitimate referential purposes, and the disclaimers of affiliation and sponsorship were ineffective).

171. *See, e.g.*, *Tommy Hilfiger Licensing, Inc. v. Nature Labs, LLC*, 221 F. Supp. 2d 410, 416 (S.D.N.Y. 2002).

172. *See, e.g.*, *Lyons P'ship v. Giannoulas*, 14 F. Supp. 2d 947, 953–54 (N.D. Tex. 1998), *aff'd*, 179 F.3d 384 (5th Cir. 1999).

173. *Burck v. Mars, Inc.*, 571 F. Supp. 2d 446, 456 (S.D.N.Y. 2008).

174. *Id.*

175. *Giannoulas*, 14 F. Supp. 2d at 954.

176. *Id.*

familiarity with their parodies, and the strength of plaintiff's mark all weigh[ed] strongly against the likelihood of confusion."¹⁷⁷

As with a fair use defense of a copyright infringement claim, a defendant asserting a fair use right to use a trademark for a parody must target the character himself, the genre of art to which the character belongs, or society as a whole—rather than just using the character in a humorous fashion.¹⁷⁸

III. MISAPPROPRIATION OF LICENSING RIGHTS

Some states, including Texas, recognize tort claims where a defendant misappropriates a unique pecuniary interest created by the plaintiff's labor, skill, or money, such as an interest in product licensing agreements.¹⁷⁹ This is a particularly important concern for any cosplayer who intends to sell merchandise depicting an image of the cosplayer in a costume derivative of an underlying work. For example, the United States District Court for the Southern District of Texas found that Universal was likely to prevail on the merits of a misappropriation claim where a manufacturer used images of the famous E.T. character and quotes from *E.T. the Extra-Terrestrial* without permission because such "arrangements in the entertainment industry often are more profitable than the original work itself."¹⁸⁰

Interestingly, although no such case exists in the context of cosplay, a cosplayer could likely defend against a misappropriation claim related to licensing rights under state law by arguing that such claims are preempted under federal copyright law.¹⁸¹

IV. RIGHT OF PUBLICITY

A. *Right of Publicity Claims for a Celebrity's Likeness*

Half of the states have a right of publicity law that prohibits commercial misappropriation of a celebrity's name, image, or likeness.¹⁸² The indicia of identity that may be protected varies from state to state and may include other personal attributes and traits such as a celebrity's voice, signature, gestures, or mannerism. A celebrity's right of publicity may be infringed if a cosplayer dresses as the celebrity or as a character similar to the celebrity or if a cosplayer otherwise evokes the celebrity's

177. *Id.* at 952.

178. *Id.* at 953–54.

179. *Universal City Studios, Inc. v. Kamar Industries, Inc.*, No. H-82-2377, 1982 WL 1278, at *7 (S.D. Tex. 1982).

180. *Id.*

181. *See* 17 U.S.C. § 301(a) (2012).

182. *Right of Publicity Statutes & Interactive Map*, RIGHT OF PUBLICITY, <https://rightofpublicity.com/statutes> [<https://perma.cc/MD3L-SSGD>].

persona. Theoretically, a cosplayer with a popular political parody channel on YouTube could be sued by Donald Trump if the YouTuber was paid to do an impersonation of the former president in a radio ad for a car dealership's Memorial Day sale in one of these states. Right of publicity is typically an inappropriate claim for an original cosplay character because there would likely be no use of a celebrity's name, image, or likeness.

Claims have been brought by celebrities (or, in some cases, their heirs) seeking injunctions against celebrity impersonators. For example, the heirs of Elvis Presley asserted a right of publicity claim against an Elvis impersonator.¹⁸³ The heirs were able to show a likelihood of success on the merits of their right of publicity claim, but the heirs failed to sufficiently show proper grounds for an injunction.¹⁸⁴ Instead, the impersonation may have stimulated the public's interest in buying Elvis merchandise, music, and films from the heirs.¹⁸⁵

Conversely, right of publicity claims will be denied where the similarities are insufficient. For example, the Third Circuit denied football-player-turned-wrestler Hard Rock Hamilton's claim that a video game used his likeness by including a character that wore a similar costume and had similar skin color, hairstyle, build, voice, and facial features.¹⁸⁶ Yet, the likeness was "so transformed" by the facts that, unlike Hamilton, the character fought fantastical creatures and served in the military, that the character had "become primarily the defendant's own expression."¹⁸⁷

B. *Right of Publicity Claims for Characters Played by a Celebrity*

Right of publicity claims generally do not extend to characters played by an actor.¹⁸⁸ A right of publicity claim regarding a production where the celebrity was paid to appear as the character will be preempted by federal copyright law.¹⁸⁹ However, an actor may succeed in a right of publicity claim where a derivative work is created without the actor's consent (such as an action figure of a character played by the actor in a movie), if the derivative work evokes the inchoate idea of the actor's

183. *See Presley's Est. v. Russen*, 513 F. Supp. 1339, 1378–80 (D.N.J. 1981).

184. *See id.* (explaining that the heirs failed to show immediate, irreparable harm to the commercial value of that right as would be necessary to support an injunction because no evidence was provided to show that their profits were diminished or that they now had difficulty licensing Elvis's name or likeness due to the defendant's impersonation).

185. *Id.* at 1379.

186. *Hamilton v. Speight*, 827 F. App'x 238, 239–41 (3d Cir. 2020), *cert. denied*, 141 S. Ct. 2796 (2021).

187. *Id.*

188. *Stanford v. Caesars Ent., Inc.*, 430 F. Supp. 2d 749, 756–57 (W.D. Tenn. 2006).

189. *See generally Fleet v. CBS, Inc.*, 50 Cal. App. 4th 1911 (1996).

persona or personal identity (as distinct from the fictional character played by the actor) to the actor's emotional and financial detriment.¹⁹⁰

An actor could succeed in a right of publicity claim related to a mask or makeup design based on a character played by an actor if the mask or makeup design resembles the actor's likeness and evokes the actor's personal identity. Take the earlier theoretical example of the Edward Cullen mask. In that instance, Robert Pattinson may have a right of publicity claim related to that mask, since it would almost certainly resemble his likeness and evokes his personal identity. A similar claim could be brought against a cosplayer that uses prosthetic makeup to evoke the likeness of a character played by a celebrity with notable facial features that are not inherent to the character.

In contrast, right of publicity laws are unhelpful for cosplayers who seek to prohibit unauthorized use of their original characters. A right of publicity claim "does not extend to fictitious characters adopted or created by celebrities" because such laws "were not intended to protect a trademarked, costumed character publicly performed by a person."¹⁹¹

In the *Mars* case above, Burck's right of publicity claim was denied under New York law because the advertisement included an M&M character dressed as a cowboy and did not use Burck's actual photograph, picture, voice, or any "recognizable likeness or representation of him."¹⁹² Rather, Mars "copied The Naked Cowboy's costume."¹⁹³ There, the court explained that "[m]erely evoking certain aspects of another's character or role does not violate [the right of publicity]."¹⁹⁴ Such claims by cosplayers against those who infringe their original characters are better framed as copyright or trademark infringement.

Burck would likewise face an uphill battle bringing a right of publicity claim against a costume manufacturer who sells a costume based on The Naked Cowboy given that the costume alone is unlikely to contain any of his indicia of identity and would, instead, only evoke the identity of The Naked Cowboy as a character.

190. See *Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619, 623 (6th Cir. 2000) (finding that a derivative work that evokes an actor's personal identity—an inchoate "idea" which is not amenable to copyright protection—to his emotional and financial detriment, is a distinct right of publicity claim not preempted by the Copyright Act).

191. *Burck v. Mars, Inc.*, 571 F. Supp. 2d 446, 452 (S.D.N.Y. 2008); see also *Stanford*, 430 F. Supp. 2d at 756–57; *Fleet*, 50 Cal. App. 4th at 1911.

192. *Burck*, 571 F. Supp. 2d at 452; see also *Stanford*, 430 F. Supp. 2d at 756–57; *Fleet*, 50 Cal. App. 4th at 1911.

193. *Burck*, 571 F. Supp. 2d at 452; see also *Stanford*, 430 F. Supp. 2d at 756–57; *Fleet*, 50 Cal. App. 4th at 1911.

194. *Burck*, 571 F. Supp. 2d at 452; see also *Stanford*, 430 F. Supp. 2d at 756–57; *Fleet*, 50 Cal. App. 4th at 1911.

V. BREACH OF CONTRACT

A. *Grant of Rights and License Agreements*

In certain limited instances where a cosplayer has been hired by a rightsholder to perform or produce content as a character or where the cosplayer has sought a license to do so, a cosplayer may face a breach of contract claim under state law if the cosplayer fails to comply with the terms of the license.

Although there are no known cases involving licensing agreements for the purposes of cosplay, there are cases involving licenses to produce adaptations and derivative works based on an underlying work or character that shed light on the potential licensing implications for cosplayers.

For example, a breach of contract claim brought by the heirs of Edgar Rice Burroughs, the author of *Tarzan of the Apes*, against MGM for allegedly violating the license agreement it entered to create the 1981 film adaptation was denied because (i) the heirs' attempted termination of the license agreement was ineffective and (ii) the film complied with the terms of the license agreement.¹⁹⁵ On the other hand, copyright infringement claims by the heir of the producer of the original *Gone with the Wind* movie were successful against a Disney subsidiary which had licensed the right to produce a remake, but had not licensed the right to manufacture, sell, and distribute merchandise related to the film's famous car known as "Eleanor."¹⁹⁶

As is evident from the two examples above, disputes over licensing agreements could result in claims based on a breach of contract and/or claims of copyright infringement. A rightsholder or an exclusive licensee can assert both types of claims.¹⁹⁷ However, a non-exclusive licensee would be limited to a breach of contract claim against the rightsholder.¹⁹⁸ For example, if Joann obtained an exclusive license from Disney to create and sell fabrics based on the superhero costumes worn in the Avengers franchise, Joann could pursue a breach of contract claim against Disney if Disney subsequently licensed the same rights to Michael's. Joann could also pursue a copyright infringement claim against Michael's. However, if Joann obtained a non-exclusive license, Joann would only be able to sue Disney for breach of contract for any obligations that Disney failed to fulfill, such as providing access to the original costumes for inspection and inspiration.

195. *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 683 F.2d 610, 611 (2d Cir. 1982).

196. *Halicki Films v. Sanderson Sales and Mktg.*, 547 F.3d 1213, 1220 (9th Cir. 2008).

197. 17 U.S.C. § 501(b) (2019) (only to the "legal or beneficial owner of an exclusive right who is entitled . . . to institute an action for any infringement . . . while he or she is the owner of it").

198. *Id.*

Licensing agreements may also grant or limit the ability of a licensee to register rights in the derivative works. For example, the heir of the producer of *Gone in 60 Seconds* obtained trademark registrations in the GONE IN 60 SECONDS mark for toy cars based on the film's famous "Elanor" automobile,¹⁹⁹ and she asserted common law trademark rights against Disney for its use of the ELANOR mark.²⁰⁰ This is particularly important to cosplay businesses that obtain exclusive licenses from rightsholders because a contract that permits the licensee to obtain a registration on the mark related to the licensed goods or services provides the licensee with the ability to assert trademark infringement claims against unlicensed competitors.

B. Influencer Agreements

Famous cosplayers who are hired by companies to advertise their goods and services could face a similar breach of contract claim under state law if the cosplayers fail to comply with the terms of the influencer agreement. For example, a cosplayer may face a breach of contract claim if the influencer agreement requires compliance with all federal laws, rules, and regulations, and the cosplayer fails to make adequate disclosures as required by the Federal Trade Commission's (FTC) various guidelines that apply to paid endorsements.²⁰¹ Cosplay influencers should take the FTC's rule seriously, as enforcement has been ramping up since the FTC began sending letters and filing complaints against non-compliant influencers in 2017.²⁰²

On the other hand, the advertiser could face copyright and trademark infringement claims from a rightsholder if the cosplayer acts as one of the rightsholder's characters in an advertisement. For example, MGM successfully enjoined Honda for using the James Bond character without authorization.²⁰³ As such, professional cosplayers should be sure that any

199. See, e.g., GONE IN 60 SECONDS, Registration No. 76410107.

200. *Halicki Films*, 547 F.3d at 1226.

201. FED. TRADE COMM'N, 16 CFR Part 255, *Guides Concerning the Use of Endorsements and Testimonials in Advertising*, <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-publishes-final-guides-governing-endorsements-testimonials/091005revisedendorsementguides.pdf> [<https://perma.cc/KUN3-L7R9>]; FED. TRADE COMM'N, *Disclosures 101 for Social Media Influencers*, https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508_1.pdf [<https://perma.cc/LER9-YCD9>]; *FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationships*, FED. TRADE COMM'N (Apr. 19, 2017), <https://www.ftc.gov/news-events/news/press-releases/2017/04/ftc-staff-reminds-influencers-brands-clearly-disclose-relationship> [<https://perma.cc/7DWB-L8LY>].

202. *CSGO Lotto Owners Settle FTC's First-Ever Complaint Against Individual Social Media Influencers*, FED. TRADE COMM'N (Sept. 7, 2017), <https://www.ftc.gov/news-events/news/press-releases/2017/09/csgo-lotto-owners-settle-ftcs-first-ever-complaint-against-individual-social-media-influencers> [<https://perma.cc/X337-VLFM>].

203. *M.G.M. v. Am. Honda Motor Co.*, 900 F. Supp. 1287, 1291 (C.D. Cal 1995).

company who hires them to cosplay a specific character has a valid license to do so. Cosplayers can protect themselves by including a sufficient indemnification clause in their influencer agreements that would guarantee the manufacturer that the promoted good or service will be financially responsible for all claims arising from the cosplayer's participation in the advertisement.

VI. OTHER LEGAL CONSIDERATIONS RELATED TO COSPLAY

As with all developing areas of commerce, the applicability of certain laws to that area of commerce may be difficult to predict. Though it will take some time and clever-minded lawyers to cite other laws against cosplayers, lawsuits against cosplayers for claims wholly unrelated to intellectual property laws should be expected in the near future. For example, the quickest growing body of case law that explicitly refers to cosplaying activities involves disability determination cases that use evidence of a claimant's participation in cosplay to disprove disability and deny eligibility for disability benefits.²⁰⁴

CONCLUSION

Cosplay law is not a single body of law, but rather a plethora of statutes and case law that may be applied to cosplayers. Unlike lawyers who represent a variety of individuals and business in a single practice area, entertainment lawyers represent a single sector of the economy on a variety of legal issues. As such, cosplayers and the entertainment lawyers who represent them must become familiar with a wide range of rules and regulations including intellectual property law, marketing law, employment law, contract law, and more.

Given the adequacy of existing laws and the potential protest by members of the cosplay community in response to any proposal, future legislation directly regulating cosplay seems unlikely (or, at the very least, unnecessary).

However, there is a growing likelihood that rightsholders will begin to seriously pursue claims against those cosplayers who profit off the underlying works that provided the inspiration for their costumes, masks,

204. *See, e.g.*, *Reichsfeld v. Comm'r of Soc. Sec. Admin.*, No. CV-20-01067-PHX-JAT, 2021 WL 1610215, at *5 (D. Ariz. 2021) ("The ALJ additionally found that Plaintiff's "activities of daily living are not consistent with a finding of disability." Plaintiff's activities included [...] cosplay [and] attending renaissance festivals") (internal citations omitted); *Brynildsen v. Comm'r of Soc. Sec. Admin.*, No. 3:19-CV-538-J-MCR, 2020 WL 6618764, at *4 (M.D. Fla. 2020) ("On multiple occasions in July 2017, the claimant reported that [he] was excited to be attending the COSPLAY (costume convention) in Tampa with [his] best friend"); *Brittany F. v. Comm'r of Soc. Sec. Admin.*, No. 1:18-CV-1365 (ATB), 2020 WL 838076, at *3 (N.D.N.Y. 2020) ("Plaintiff socialized with friends primarily through a shared interest of making costumes and attending cosplay conventions.").

and props. In some cases, cosplayers may have a fair use defense to continue their hobby without financial ruin, but this defense becomes harder to support as cosplay becomes a bona fide profession.