

Cosplay, Copyright and Fair Use

by [Hsing Tseng](#) - January 21, 2016



Could cosplay become copyrightable? (Original Photo: [Gordon Tarpley/Flickr](#))

WASHINGTON — Don't panic, cosplayers. A claim you may have seen on social media, that cosplay is going before the Supreme Court and could become copyright infringement, isn't what it seems.

With a sensational headline — "[Cosplay Goes to the Supreme Court](#)" — the original blog post claiming this was published by non-profit Washington, D.C.-based public interest group Public Knowledge on Tuesday as part of their "Copyright Week" series of discussions around copyright policy.

The article claims, "Yes, you read that right: the Supreme Court of the United States may get to decide the legal status of all those Jedi robes you've got squirreled away. The Supreme Court is considering a case that will set the standard for when clothing and costume designs can be covered by copyright—and when people who mimic them ([such as costumers](#)) can be sued for potentially enormous damages."

Immediately, cosplayers started panicking. But calm down: There's no reason to start hiding all your cosplays and start lawyering up against Disney, and here's why.

Are cheerleading uniforms copyrightable?

The original case the article cites as going up for consideration by the Supreme Court is not even about cosplay. It involves two designers of cheerleading uniforms — Star Athletica, LLC. and Varsity Brands, Inc. — went to court over whether cheerleading uniforms were eligible for federal copyright protection.

Varsity claimed that Star violated its copyright by designing a uniform too similar to its own. Star argued in defense that the designs were for “useful articles,” which are not copyrightable, and that the elements copied were not physically or conceptually separable from the uniforms.



(Photo: U.S. Sixth Circuit Court of Appeals)

After making it all the way up to the Sixth Circuit Court of Appeals, [the Sixth Circuit ruling](#) eventually came in favor of Varsity, with the court deciding that uniform designs are like fabric patterns, which can be protected by copyright.

“The district court concluded that a cheerleading uniform is not a cheerleading uniform without stripes, chevrons, zigzags, and colorblocks, and therefore Varsity’s copyrights are invalid,” said Sixth Circuit Judge Karen Nelson Moore in her opinion on Aug. 19, 2015.

[Star Athletica intends to fight the ruling](#) and has prepared a petition for a writ of certiorari to have the case heard by the Supreme Court this year.

But could it affect cosplay? The Public Knowledge article thinks so: “Cosplayers are going to feel the brunt of this decision, one way or the other. The Supreme Court is quite literally deciding the test by which the legal status of cosplay will be judged.”

Public Knowledge says they will be filing in support of Star Athletica, claiming that a vast amount of hobbyists and consumers will be impacted by this decision.

Cosplay: Cease-and-Desist

This isn't the first time that the legal implications of cosplay as possible copyright infringement has come under scrutiny.

In 2013, well-known replica and prop creator Volpin Props faced legal action in the form of a cease-and-desist order after he cosplayed the infamously distinctive carpet of the Marriott Marquis Atlanta, one of the hotels that hosts DragonCon every year.

The cease-and-desist came from Courtisan Inc., the company responsible for designing the hotel carpet, and only pursued Volpin after he offered the design on [Spoonflower](#), an on-demand custom printing company.

<https://www.facebook.com/VolpinProps/photos/a.113042158715817.12891.112981562055210/636520186368009/?type=3&theater>

Volpin writes about the “absurdity” of receiving a C-and-D over a costume made in good fun, compared to all the other potential violations of copyright he's made over the years, including his extremely screen-accurate prop replicas. Though, he clarified that that the absurdity came from the C-and-D being from a carpet company of all things, as opposed to a video game company.

“Courtisan, the copyright holder for the design of the pattern, is fully within their rights to issue a C&D and I absolutely support that action. I wouldn't want anyone recasting my props and they should take similar actions to protect their designs,” Volpin [writes](#).

Is cosplay copyrightable®?

Copyright law is extremely confusing and hard to nail down — the [example the U.S. Copyright Office](#) provides on “useful articles” says the design of a chair cannot be copyrighted but the carving on the back of it can be. Even though a drawing or photograph of a dress design is copyrightable, the artist doesn't have the exclusive right to make dresses of that design.

Yeah, thanks for that enlightening description, U.S. Copyright Office.

EDIT: It was brought to our attention that one company, Broccoli, known for creating Uta no Prince Sama among other series, says they [intend to persecute the sale of goods](#) that derive from their properties, including “goods, figure, cosplay, etc.” However, any cases of Broccoli suing anyone for selling cosplays of their characters have yet to come to light and the clarification on Broccoli's website is moreso directed at the sale of fanart and *doujinshi* (fan-made comics).

What it all means is that costume designs are still in muddy waters. They've always been. But there's too much conflict on what is and isn't copyrightable right now for companies to feasibly pursue copyright violations in the form of cosplayers.

What if cosplay does become copyright infringement?

Let's consider for a moment the possibility of cosplay becoming copyright infringement.

Copyright is intended to protect exclusive rights for intellectual property and art. If cosplay were to infringe on a company's exclusive rights to a costume design, cosplayers could theoretically claim fair use.

Fair use permits limited use of copyrighted material without acquiring permission from the rights holders, if certain conditions are met.

Here's the four main factors used in determining fair use:

1. **Purpose/Character:** What's the purpose of the use? Is it commercial or for nonprofit educational or research purposes? Has value been added to the original work by adding new expression or meaning, adding new aesthetics, insights and understandings?
2. **Nature of the copyrighted work:** Is the work fictional or factual? If factual, there's more leeway to copy.
3. **Amount/Substantiality:** How much was copied? Have you copied the "heart" of the work? If it's a parody, there's more leeway because parody can copy the heart of the work to evoke the original work as a parody.
4. **Effect upon the original work's value:** Does the use deprive the copyright owner of income or undermine a new or potential market for the copyrighted work?

During journalism school, we were drilled on the different factors of fair use, in case we as journalists ran into any form of copyright legal troubles. Even still, fair use is determined on a **case-by-case basis** and those factors can only favor or oppose fair use as a defense against copyright infringement.

In one case ([Rogers v. Koons](#)), an artist copying a copyrighted photograph without permission as the basis for his wood sculptures, which he then sold, was found to be violating copyright via the substantial similarity of his sculptures to the photo, and that it did not matter whether the photographer had considered making sculptures; what mattered was that a potential market for sculptures of the photograph existed.

Similarly, in theory, if a company were ever to go gung-ho on any cosplayers selling costume or prop replicas from their intellectual property, they could potentially win, even if they had never made those costume or prop replicas themselves.



Even if cosplay comes really close to the original, can it ever devalue the original work?

Cosplayer: [KAL Cosplay](#)

Photo: [WeNeals Photography and Retouching](#)

However, when it comes down to it, the average cosplayer, who replicates costume designs from scratch with whatever they can get their hands on, is not in danger of copyright infringement. Let's look again at fair use:

1. **Purpose/Character:** The purpose of cosplay is generally nonprofit/research and adds new aesthetics to the original costume design.
2. **Nature of the copyrighted work:** Works cosplays are derived from are usually fictional. (This works against us)
3. **Amount/Substantiality:** Unless your cosplay is a 100% copy of the thing you're cosplaying and is 100% screen-accurate, the substantiality of the cosplay as a copy is arguable.
4. **Effect upon the original work's value:** This is the most important part of the claim. If you are making a cosplay for yourself, there is no effect on the original work's value, in my opinion. Even though there are Princess Leia costumes available for purchase commercially, a Princess Leia costume you crafted yourself is different from one you could buy in the store, and therefore you're not depriving the costume designer of any value.

Nevertheless, what is and what isn't fair use is up to the courts to decide; which means you would have to be sued and taken to court by the copyright holder to see whether or not you were protected under fair use. The chances of that happening to the everyday cosplayer? Pretty close to none.

Conclusion: Just Keep Cosplaying

Let's look at the cases cited here — with both the cheerleading uniforms and the carpet costumes — there's been one similarity: the violation was claimed in the form of the designs. Star Athletica got snarled in a legal battle for its uniforms taking away the market from Varsity because of the extreme similarity in designs. Volpin received a C-and-D mainly for his placing the design he'd created (which copied Courtisan's) on Spoonflower for potential mass production.

In both cases, Varsity and Courtisan were protecting their businesses and their market.

With cosplay, there is no such market.

Despite Public Knowledge's attempt to have cosplayers believe otherwise (and support them and Star Athletica), cosplayers are not going to feel the brunt of any decision the Supreme Court makes on the designs of cheerleading uniforms. The highest court of the land is **not** "quite literally deciding the test by which the legal status of cosplay will be judged."

And even if it were true, there's no lawyer or Public Relations specialist who could look at the average cosplayer and reasonably give their client the advice: "Ah yes, this is a legal battle I want to fight. I want to spend thousands of dollars potentially suing this cosplayer for copyright infringement and deal with the fallout on social media from that action."

More than likely, even in the case of a cosplayer making money off of costume replicas, it would be much more beneficial for a company to take the free press or to approach that cosplayer with a joint proposition idea.

And as we've seen with companies pairing up with the likes of Viz Media and American Cosplay Paradise to have official cosplayers staff their booths, cosplayers are capable of doing much more good than harm to a brand's image.

Your cosplays are safe. Don't squirrel away your Jedi robes. Disney's got bigger fish to fry.

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