

Fandom and Creativity, Including Fan Art, Fan Fiction, and Cosplay

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This article is part of a series of book excerpts [The Pop Culture Business Handbook for Cons and Festivals](#), which provides the business, strategy, and legal reference guide for fan conventions, film festivals, musical festivals, and cultural events.

The Con community owes its existence to the energy and enthusiasm of the genres the Cons celebrate. Science fiction fan clubs and interest groups began to emerge in the 1920s, and by the 1930s they were joined by SF fanzines.¹ The Sherlock Holmes fan club, the Baker Street Irregulars, formed in 1933 in New York. In what has been nearly a century of growth, these communities have grown in importance to the American culture and economy. At the same time, these communities tend to operate with their own rules and within their own expectations.

Fandom has grown into a sufficiently important cultural phenomenon that it has engendered a number of scholarly journals, books, and conferences. As with any academic discipline, there are a multitude of theories and schools of thought on the cultural significance and motivating structure of these communities. These studies tend to focus on the complex relationship between the fan community and the producers of the creative works. While the theoretical understanding of this dynamic tension is worthy of study, the focus of this chapter is primarily on the practical implications of these phenomena and the Con organizer's ability to foster these relationships.

A. Fan Culture

In 1967, Marshall McLuhan noted that societies are shaped more “by the nature of the media by which men communicate than by the content of the communication. . . . It is impossible to understand social and cultural changes without a knowledge of the workings of media.”² Fandom is perhaps the most expressive fulfillment of this observation. Although there are many competing definitions, one working definition of fandom describes it as the community of people who share significant time and resources to participate with each other in experiences related to a particular artistic or literary work or group of works. This definition is overly broad, but from the legal and business perspective, groups that share this characteristic are similar enough to preclude the need for any narrower a definition.

This definition does not address the nature of the relationship between the community and the literary work. Different researchers have posited a variety of assumptions regarding this relationship. Many, such as Henry Jenkins, look at the publisher's ownership of the literary work as an innate

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¹ See CHAD DELL, *THE REVENGE OF HATPIN MARY: WOMEN, PROFESSIONAL WRESTLING AND FAN CULTURE IN THE 1950S*, 88 (PETER LANG INC., INTERNATIONAL ACADEMIC PUBLISHERS, 2006).

² MARSHALL MCLUHAN, *THE MEDIUM IS THE MESSAGE: AN INVENTORY OF EFFECTS* 8 (Gingko Press 2001 ed.) (1967).

conflict with the need of the community to engage with the material as part of the fan's own creative process. In a well-recognized book on the topic, Jenkins explained the relationship between the fan and the literature as follows:

Far from synoptic, fans actively assert their mastery over the mass-produced texts which provide the raw materials for their own cultural productions and the basis for their social interactions. In the process, fans cease to be simply an audience for popular texts; instead, they become active participants in the construction and circulation of textual meanings.³

This is certainly an accurate depiction of the fans' assertion of control over the text, but it ignores the far more pragmatic and interdependent relationship between the content and the audience. Throughout all literary and creative history, there has been a tension between the creator of the work and the audience of the work. One need only consider the audience of the July 25, 1965, Newport Folk Festival booing Bob Dylan for his use of an electric guitar to understand that the audience shapes the performer and the performer shapes the audience.

Fandom has sometimes been characterized as an extreme form of audience participation, but the suggestion that fandom equates with fanatic has been rejected within the studies of fan culture. What the Con organizer must appreciate is that the relationship must be understood as both symbiotic and tension-filled.

The symbiosis between producer and fan is axiomatic: A producer cannot mass-produce a work unless there is a mass of people to consume the work. But there cannot be a mass of people to celebrate a work unless the work is produced and distributed. The relationship is a self-reinforcing circle, requiring presence of both fan and creator in order to remain sustainable. While it is theoretically possible for a fan culture to emerge around an entirely fan-created body of works, such a community has yet to emerge. This may be because an essential element of an effective body of works relies on a canon of literature that remains internally consistent. Indeed, it is the violation of canonical rules that most often triggers battles between the producer of the work and the fan community. A fully fan-created body of works would tend to fork into inconsistent and conflicting strains of the work.

Fan-created worlds do exist. They tend, however, to be built by overlapping, mixing, or mashing up preexisting popular sources. In this category, there is a relationship to the canon of each source, so that any inconsistencies often serve as intentional commentary rather than mere lack of coherence.

A fan-created world, by definition, is not the creation of an individual author or even a small editorial team. If one person were to write the project, that person would fall into the category of author and those that follow would be the fans. For the work to be fan-created in this sense, the original plot and characters would need to be collectively introduced on a mass scale. This could certainly be done in a hackathon setting, but it would not spontaneously develop. One can also imagine a Wiki-styled, open source literary world managed by volunteer editors but not owned by any commercial producer. These will inevitably develop, but the model will occur only rarely because of the investment necessary by the public.

For fandom to embrace a work without a producer is more likely to occur with a work that has fallen into the public domain, making it free from the constraints of the original producer. Both the fan-created works and the public domain works can serve as the basis for a fan community. The literary character of Sherlock Holmes has recently moved into the public domain. Alice in Wonderland is another excellent example of a work revered within fan communities. The difference between these

³ HENRY JENKINS, *TEXTUAL POACHERS: TELEVISION FANS & PARTICIPATORY CULTURE* 24 (Routledge 1992).

and the *Harry Potter*, *Star Wars*, *Star Trek*, or Marvel universes is the structured support and investment provided by the producer. Fans may bristle at the producer's ownership demands, but they appreciate new movies, licensed products, and top actors participating in the extensions of these works.

With rare exceptions, the fans generally need the producers. Similarly, the producers need the fans.

The tension between the fandom and the producer takes on three aspects. At the simplest, the tension occurs when the producer makes artistic choices that challenge the fandom's understanding of the canon with the works or otherwise challenges the expectations of the fan base. The second area involves the appropriation and exploitation of the legally-protected works by the fans through fan fiction or other creative works. The third category is the use of the legally-protected works to extend, study, or extrapolate the content.

B. *Upsetting the Fans*

Studio executives understand that a small minority of the ticket-buying audience are "whales," or oversized purchasers of the tickets. They generally recognize the influence of opinion makers and the fans who operate as nodes connecting the broader audiences together. Today more than ever, the producers also understand the impact of a social media environment that enables the fans to talk directly to each other and to speak loudly back to the producers about their likes and dislikes over the direction a project takes.

While the relationship is symbiotic, that does not mean it is not without tension. The fans, or vocal segments within a particular fan base, may desire a particular curatorial approach to a body of work that is at odds with the author or producer. Casting choices, script choices, the life and death of particular characters, issues of ethnicity, gender, and culture are often points of contention.

This tension, however, is not unique to the relationship between fans and producers. Similar tensions exist throughout the creative process. Authors fight with editors; producers conflict with directors; actors challenge each other as well as all the craft departments; bands break up; and even illustrators fight with their comic book authors.

The same can be true with music fans. While Bob Dylan's break with acoustic folk music may be the most famous divorce between an artist and his audience, it is certainly not the only one. Band break-ups, choice of touring musicians, genre selection on albums, concerns over cultural appropriation, and even tour locations can lead to tensions between musicians and their fans.

Every creative and commercial element of the literary or musical process is rooted in conflict as ideas challenge one another for ascendancy. In his book *Playing Fans*, Paul Booth recognizes this creative and economic reality. As he notes, "fans are now becoming crucial members of twenty-first-century media."⁴ The fans' cacophony of opinions are omnipresent throughout the creative process.

At the same time, fans are a collective. No individual fan is in a position to apply a veto. As a result, the process remains necessarily messy. Fortunately, this is part of the magic.

C. *Media Appropriation, Fan Fiction, and Fan Art*

The terms media appropriation and fan fiction reflect two very different consequential interpretations of the same creative process. Since the origins of the Baker Street Irregulars, fans of

⁴ PAUL BOOTH, *PLAYING FANS: NEGOTIATING FANDOM AND MEDIA IN THE DIGITAL AGE* 24 (Univ. of Iowa Press 2015).

creative works have undertaken to create pastiches, fan-authored new works featuring the characters, settings, tone, and signature elements of the canonical works. Sherlock Holmes is joined by Ellery Queen and Nero Wolf from mystery fiction as characters often featured in works written by fans for other fans. *Star Wars* and *Star Trek* feature prominently in science fiction. Fantasy stories abound with characters and locations from Hogwarts, Middle-earth, Narnia, Dreamlands, Oz, and Wonderland. E. L. James originally wrote the erotic bestseller *Fifty Shades of Grey* as fan fiction for Stephenie Meyer's *Twilight* series, which she posted to FanFiction.net.

Dreamlands, Oz, and Wonderland are from books in the public domain. All writers are free to do anything with them. However, fans currently use Hogwarts and the Harry Potter fantasy world more than any other, according to FanFiction.net, a website devoted to fan-created works. The public domain material is just not as compelling for fans. FanFiction.net is not alone. There are many other sites which also support these works. Among them, DeviantArt is particularly important for visual arts works.

When a fan creates a pastiche of a copyright-protected story, however, the law characterizes that story as an unauthorized adaptation of the source material. From a legal standpoint, the author is committing a copyright infringement of the original material unless the work constitutes a fair use of the original work. Chapter 12 discusses copyright more fully. If instead of being based on a copyrighted work, the work is a fictional exploration of a living person's life, then that work has the potential to be defamatory. As a practical matter, in each of these categories, there are two questions to answer. First, does the copyright owner or celebrity care? If the copyright owner or celebrity cares, then second, is the use by the fan fiction author an infringement of the copyright author's work or a defamatory use of the celebrity's identity?

As a practical matter, copyright infringement of popular works is primarily an economic harm. Copyright owners will typically make an economic assessment of the harms and the costs of enforcement. In contrast, exploitation of a celebrity's life story is a personal injury. In some of these cases, the need to stop the perceived harm will vastly exceed any economic assessment of the costs involved. Fan fiction authors, therefore, should be aware of the very different calculations made by celebrities and copyright owners. Copyrighted works and potentially defaming works are addressed separately.

i. Fair Use for Fan Fiction

As demonstrated by the sheer volume of content on the various fan fiction websites, there are very few copyright owners that are seriously policing the free publishing of these works by fans. Instead, the network of fan fiction continues to grow robustly. In the earlier days of the Internet, greater care was taken by copyright owners to protect characters from highly violent or erotic reimaginings. It is likely that the attitude towards policing these works has evolved as the media marketplace has changed.

Nonetheless, copyright owners are as diverse a group as the fans themselves. Some owners will care much more than others. For example, the owners of a new work will be much more protective than the owners of a work that has been fully exploited in the market. A work five years old will garner much less enforcement than a work that has only been available to the public for a few days.

Similarly, a work which is the subject of new licensing activity will be much more actively protected than a work that is no longer part of new licensing negotiations. Both of these situations assume that the protection is triggered, at least in part, on the owner's fear that the fan fiction will impact the work in the market.

Assuming there is a copyright owner who plans to aggressively protect a copyright interest, the copyright owner can sue to stop or to seek damages from an unauthorized user of the copyrighted work. First, the copyright owner must establish it has valid ownership of a work protected by copyright. Second, the copyright owner must establish the defendant's work was substantially similar to the copyright owner's work and that the similarity is not excused by fair use.

The ownership of the copyright is very easy to establish for modern works. Either the author or the current, exclusive licensee of the work has the right to bring the suit. For older materials, the question is much more complex. Ownership of H.P. Lovecraft's Cthulhu storylines, for example, is quite unclear. Some of the works have fallen into the public domain, while other works are within the timeframe for continued copyright protection. Works published prior to 1964 were required to be renewed or else the copyright lapsed. Short stories published in magazines should generally have been renewed by the authors who retained the renewal rights rather than the magazines which only acquired first-publication rights. But the actual contracts used may have varied from publisher to publisher or from year to year. Finally, the ownership in the copyright may have been transferred by sale or devised by inheritance or will, so there can be ambiguity in the present ownership of the copyright.

An owner of a valid copyright must establish that the defendant's work is substantially similar to the copyright owner's work. Where characters, settings, dialog, and other elements are copied, this test can easily be met. If instead, more abstract aspects of the work are copied, then it is harder to meet this test. For fan fiction, there tends to be ample evidence of this copying.

The third step is to determine whether the copying is nonetheless outside of copyright infringement because the copying amounts to fair use. Fan fiction is not a category of use that is presumptively protected by fair use. Instead, fair use is generally limited to comment, criticism, or educational uses. (In Chapter 12, this book also addresses a second group of fair use situations involving consumer protection, but those cases do not apply to fan fiction.)

Parody has long been recognized as a form of comment or criticism. Fan fiction often takes on a parody-like tone, so the fair use test is reasonably applicable to fan fiction. In a lawsuit over fair use, the focus of the litigation would be how transformative the fan fiction is regarding the source materials, how much is copied, and what is the impact for the source materials on the marketplace. For example, a work that is set in a fictional world but that uses original characters and dialogue to tell a new story is much more transformative than a retelling of a scene from the book retold from the perspective of another character. Even in the latter case, however, the material may be sufficiently transformative. These are questions of fact that a judge or jury must decide.

The impact on the market also strongly favors a finding of fair use. The volume of fan fiction on the Internet suggests that an additional fan fiction work posted to a free online site is likely to have a negligible impact. Given the thousands of Harry Potter stories, one more is unlikely to impact the marketplace. On the other hand, if a fan fiction work is suddenly being shipped through Barnes & Noble, then there is a greater likelihood of market harm to the copyright owner.

ii. Defamation and Invasion of Privacy in Fan Fiction

There is a different legal analysis for fan fiction based on living celebrities than for works protected by copyright. As discussed in Chapter 11, such works have the potential to be defamatory if they harm the reputation of the celebrities through false statements of fact embedded in the work. A novel or movie "based on a true story" often blurs truth and fiction. When living persons are featured in these works, they can create the public impression that the identified living persons committed crimes or

immoral acts. If these works fictionalized the objectionable conduct, then this may give rise to claims of defamation.

While these stories tend to focus on celebrities, the protection applies to all living persons, so there is the potential to defame individuals who are not famous, merely supporting characters in the story. The lawyer, accountant, masseuse, nanny, doctor, driver, roadie, hair dresser, Little League coach, and receptionist for any given celebrity is each real person. If a work claims to be based on a true story and has one or more of these individuals committing immoral acts, then the story has sufficiently identified that person and falsely painted the person as acting unprofessionally or immorally in a way that will be defamatory. The individual need not be named. It is sufficient that a reasonable person would be able to identify that the character refers to the victim of the defamation.

For a public figure, such as a celebrity, to win a lawsuit for defamation, the celebrity will need to prove the falsity was published intentionally or with reckless disregard of the truth. The non-public figure, in contrast, will merely need to show that the publication was negligent. In this case, negligent means the publication was made without the reasonable care expected of an author writing about a real person.

To the extent the fan fiction is entirely speculative fiction that makes clear there is no intention to identify any living persons, that helps negate the implied assertions of fact essential for defamation. Avoiding any statements that the work is based on a true story and disclaiming any similarity to living persons can help reduce the likelihood of defamation, but these steps will not provide immunity for such claims.

In addition to claims of defamation, there are a variety of related claims to invasion of privacy and infliction of emotional distress that turn more on the unwelcome nature of the attention than on the falsity of the content. In this area of law, state laws vary considerably. What these claims share in common is a claim by the celebrity that the published work is highly objectionable, intrusive and emotionally harmful. As one important summary explained, “liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.”⁵ Works that are particularly vulgar, sexually deviant, or violent are more likely to fall into this category, but the definition is not limited to these categories.

In the social media age, the law has the potential to look at the cumulative effect of fan fiction as well as the content of individual stories to find the outrageousness and extreme nature of the material. Both the nature of the fictional works and the cumulative volume of such works could be part of such a claim.

D. Fan Enthusiasm – Extending, Studying, or Marketing Works

Until the moment Warner Bros. Entertainment sued RDR Books for preparing to publish *The Harry Potter Lexicon*, J.K. Rowling was a tremendous fan of Steven Vander Ark’s “The Harry Potter Lexicon” website. She is quoted in the court proceeding as writing “[t]his is such a great site that I have been known to sneak into an internet café while out writing and check a fact rather than go into a bookshop and buy a copy of *Harry Potter* (which is embarrassing). A website for the dangerously obsessive; my natural home.”⁶ The litigation highlights the tension between the engagement and

⁵ RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (AM. LAW INST. 1965).

⁶ Warner Bros. Entertainment Inc. v. RDR Books, 575 F. Supp.2d 513, 521 (S.D.N.Y. 2008).

support provided by fans and the economic and creative control demanded by publisher and producers.

Far from either a David-and-Goliath story or a Bambi-meets-Godzilla story, the lawsuit highlights the evolving relationship between producers and their fans. This was not a case of fan fiction. Instead, *The Harry Potter Lexicon* website was a heavily trafficked, advertising-supported undertaking. Importantly, the existence of the website and its advertising did not trigger the lawsuit. Instead, the lawsuit occurred because RDR Books sought to publish a print edition of the book. In moving from website to print edition, the publisher significantly changed the impact on the potential market. Warner Bros. Entertainment was very interested in utilizing the print publishing marketplace and had already created two short companion works to complement the seven *Harry Potter* novels. Warner Bros. sued only to stop the print edition of the book.

The lawsuit had a mixed outcome for the parties. Ultimately, the court determined that parts of the lexicon copied too much content directly from the *Harry Potter* novels. But the nature of the lexicon, as a traditional form of commentary and education, was found to be a fair use mode of publishing. The book had to be revised to reduce its reliance on J.K. Rowling's own writing, but was otherwise allowed to proceed.

A similar situation occurred with a claim made by 20th Century Fox regarding the raggedy yellow-and-orange hat worn by the character Jayne Cobb (portrayed by Adam Baldwin) in the fan favorite television series, *Firefly*. *Firefly* has a tremendous fan following which continues to grow despite the short lifespan of the original series. Fans began to sell homemade versions of the hats on Etsy and other sites. Fox eventually began to license the *Firefly* name and other aspects of the show to manufacturer Ripple Junction. Once Fox had a trademark license in place, it likely had a legal obligation to police the marketplace from unauthorized uses of its trademarks. In furtherance of this obligation, Fox sent cease and desist letters to Etsy sellers of the hats.

Confusing the situation was the nature of the rights at stake. Fox's letter was reported to be very vague regarding the basis of its ownership claims. The distinction between copyright and trademark is important to the assertion of rights because copyright law does not apply to clothing and the "Jayne Hat" is a simple design that should not be protected by copyright law. Instead, Fox was likely relying on its ownership in the trademarks for the television show name *Firefly* and the character name, Jayne, along with similar marks. Making and selling the hats depicted in the series is entirely without legal restrictions. But marketing them as Jayne Hats arguably exploits the trademark asserted by Fox.

From a trademark law analysis, Fox was well within its rights to police its trademarks on Etsy. Trademark owners have an affirmative duty to police their marks and protect the public from unauthorized users. Fox would have been smarter to send an educational letter that explained to Etsy crafters how to sell the hats without violating the trademark. This is particularly true because it is not clear that Fox had undertaken the steps needed to acquire a trademark interest in the name of the Jayne Hats or to establish that there was any likelihood of confusion between the Etsy hats and products licensed by Fox.

In this regard, it is the ability of the intellectual property owner to assert rights and use economic clout to win disputes that often upsets fans. Fox never had to prove its trademark rights were violated. The assertion was sufficient to trigger a take-down by Etsy. This tension is unlikely to be resolved.

Today, the point of greatest conflict may be the much larger fan-based projects. Paramount Pictures and CBS successfully brought a lawsuit to block Axanar Productions Inc. from creating a feature length motion picture entitled *Axanar* that is set in the *Star Trek* universe. The film had a

budget of \$1.1 million but the Kickstarter crowdfunding enables the movie to be released for free as a noncommercial project. The work is also based on a character only briefly mentioned in the original *Star Trek* television series, so the use of the characters is minor.

The filmmakers initially asserted the movie should be fair use. Following a preliminary ruling on fair use by the judge in case, however, the producers were forced to concede. Axanar Production acknowledged that they “were not approved by Paramount or CBS, and that both works crossed boundaries acceptable to CBS and Paramount relating to copyright law.”⁷ The hedging in the language of the statement highlights the ongoing tension over fair use between production companies and fan-created works. Nonetheless, the economic stakes are high for both parties. As often occurs, this litigation was ultimately settled before the jury trial could start. The production company claimed victory as well, in part because it was not economically devastated by the outcome and, in part, because Paramount was somewhat more generous to Axanar Productions than it provides in the general fan film guidelines.

A number of concerns make this a much harder case to establish fair use. First, although the character use is minor, a film uses many more protected elements than a book. Axanar Productions has released the trailer for the film. Based on this preliminary work, *Axanar* does an excellent job of replicating locations, craft, logos, and other aspects of the *Star Trek* franchise. Paramount also asserts copyright in the fictional Klingon language, which was used in Axanar’s films. The court here seemed to go further than necessary, suggesting that everything about the Klingon and Vulcan race fell within copyright protection. But even without this generous interpretation, there was a great deal of copyright-protected material at use in the film.

Second, the scale of the project and its budget may also impact the market for the work. Since the company raised the \$1.1 million based on the promise to exploit the copyrighted works of Paramount, the company had a much more difficult establishing the fan film has had no impact on the potential market for authorized films.

Third, and likely most important, was the ability to promote and distribute the film. In the ruling on the question of fair use, the district court highlighted that the movie was made with a professional crew including cast members that had appeared in Paramount’s *Star Trek* productions, and promoted the movie as “the best *Star Trek* movie script ever!,” and was seeking to place the movie on Netflix. These aggressive steps make the fan-based move much more a market substitute for Paramount’s productions and greatly undermined the claim of fair use.

Since YouTube and other online distributors often serve as a platform for both commercial and noncommercial content, the separation between professional productions and fan fiction continues to blur. The fair use test’s fourth factor—effect on the marketplace—remains the litmus test for most fair use cases. If the fan fiction can substitute for the copyright holder’s work or satisfy the desire for a sequel or similar work, then it is much likely to be fair use.

These three examples all emphasize the fundamental limit that the producers of content seek to place on fandom, namely the need to retain the for-profit, commercial aspects of the marketplace. In the case of *The Harry Potter Lexicon*, the commercial publication of a book challenged Warner Bros. to restrain the publication. Warner Bros. was only partially successful because copyright law favors

⁷ Andrew Liptak, *Axanar has settled its lawsuit with Paramount over its Star Trek fan film*, THE VERGE, Jan. 20, 2017 4:03 p.m, <http://www.theverge.com/2017/1/20/14340666/axanar-productions-settled-lawsuit-paramount-star-trek-fanfilm>.

comment and criticism, but Warner Bros.' willingness to bring the lawsuit highlights the line-drawing at the heart of the case.

The actions by Fox and Paramount follow similar analysis. Use of trademarks or copyrights in a commercial marketplace will receive a much stronger reaction than use of creative content in a noncommercial setting. Etsy may be the commercial site for homemade products, but it remains a commercial site. A feature film with a professional cast and seven-figure budget will be considered commercial by anyone in the motion picture industry and the free distribution model is unlikely to change that perception. In the case of the Jayne Hats, no litigation occurred. Sophisticated sellers could have avoided the Fox trademark claims and continue to sell the public domain hats.

In the case of *Paramount v. Axanar*, the case highlighted the challenges of commercial exploitation in the context of crowdfunding. The settlement likely emboldened the studios to defend their intellectual property aggressively. The guidelines limit the fundraising to \$50,000 and the length to 30-minutes in total.

Paramount's guidelines for productions are narrow and appear to highlight an internal frustration with the professional cast members who worked with Axanar. The new guidelines specifically prohibit former crewmembers with the following limitation:

5. The fan production must be a real "fan" production, i.e., creators, actors and all other participants must be amateurs, cannot be compensated for their services, and cannot be currently or previously employed on any Star Trek series, films, production of DVDs or with any of CBS or Paramount Pictures' licensees.⁸

Fan authors should recognize that the self-published guidelines are not coextensive with fair use. A court may provide much greater flexibility than the terms provided in the guidelines, so they serve as a floor on acceptable appropriation. Indeed, Paramount recognizes this by describing the list as "Guidelines for Avoiding Objections."⁹ The phrasing by Paramount is a healthy indication that the company understands the benefits of fan fiction even as it has clearly demonstrated that some types of fan fiction will not be tolerated.

Despite these examples, the limits on fandom are tenuous and the growth of fandom continues largely unabated. Against the backdrop of millions of participants in fan communities and an untold body of works, websites, and products in the marketplace, these limitations serve merely as border posts in a wide-open landscape.

E. Cosplay

The ultimate expression of fandom can often be captured in the process of creating and displaying an originally-crafted costume that replicates the original designs from the literary work. The term cosplay is a contraction for "costume play," highlighting the steps of the fan's interaction. A cosplayer is expected to create the costume and props rather than purchase the products commercially and then to wear the costume at the Con, often in character. Many Cons have extensive competitions for the best costume or costume grouping.

As with the example of the Jayne Hat, producers generally promote cosplay at the Cons while discouraging the commercial reproduction of such items. Many costumes are protected by copyright,

⁸ Star Trek Fan Films, <http://www.startrek.com/fan-films#sthash.ybf6EIZS.dpuf> (last visited May 1, 2017).

⁹ *Id.*

trademark, or both. The producers are very quick to enforce these rights. At the same time, cosplay is strongly supported within the Cons.

Despite the cultural expectation that costumes should be crafted by the participant, there are a number of retail outlets for costumes that extends the Halloween market into a year-round enterprise. Some of these are retailers providing licensed costume and prop products, while others are marketplaces enabling individual fans to sell their own creations. Still other sellers are exploiting unlicensed knock-off and bootleg versions of the costumes. Producers focus their efforts to stop unauthorized sales on the unlicensed knock-offs, particularly the sellers that produce their products in volume. As with the Jayne Hats, however, these efforts sometimes impact the homemade craft markets as well.

From a legal perspective, fair use provides a generous protection to the individual cosplay costume and prop. It may be, however, that fair use is not even necessary. The partnership between the producers and the Cons have created a permissive, implied license to create and publicly display these works in the context of the Cons and the social media websites that publish the images from these events.

Ultimately, by moving from fair use to licensed partnership, the relationship between the producers and the fans will continue to transition to a more explicit symbiosis rather than one filled with tension. For both fans and producers, this reality has helped grow Cons to the economic heights it now reaches.