



# Lecture 4

Law 115  
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# Agenda

## Copyright

- OTW Fair Use Test Suite Discussion
- DMCA
- Two Tales of Copyright

## Trademark

- Purpose of Trademark Law
- What Can Be A Trademark
- Requirements for Protection
- Developing a Strong Mark
- How to Get Protection\*
- TM, SM and ® Symbols\*

In-class Copyright Exercise

# OTW Fair Use Test Suite

OTW Fair Use Test Suite:

<http://transformativeworks.org/projects/vidtestsuite>

1. Explain the fair use case for the vid “The Price.” What is the vidder using the copyrighted works to provide commentary on?
2. The vidder has her own thoughts here:  
<http://thingswithwings.dreamwidth.org/145564.html>.
3. Which of the videos shown on the suite do you think is the best example for fair use of the video clips? Why?
4. Which of the videos shown on the suite do you think is the best example for fair use of the music? Why?

# DMCA: Technical Protection

DRM = digital rights management



1. Criminalizes ***production and dissemination*** of technology, devices, or services intended to circumvent measures that control access to copyrighted works
2. Criminalizes the ***act of circumventing*** an access control, whether or not there is actual infringement of copyright itself

These are new claims DISTINCT from copyright claims (i.e., proof of copyright infringement is NOT prerequisite to claim)

# DMCA: Notice and Takedown

Takedown notices must meet the following requirements→

1. In writing
2. Provided to designated agent
3. Include 7 specific items



# DMCA: Notice and Takedown

DMCA Counter Notice = method by which a user can have content that is wrongfully removed with a DMCA takedown notice put back up

- Critical for fair use situations
- Requires 5 elements
- ISP must replace the material unless the copyright owner takes legal action

# Two Tales of Copyright Online

- YouTube Copyright School: <http://youtu.be/lnzDjH1-9Ns>
- Public Knowledge's Response: <http://youtu.be/sdVWW8qMwfU>



# Trademarks



# Purpose of Trademark Law



What assumptions do you make about the cereal on the left vs. the cereal on the right based on the branding?

# Purpose of Trademark Law

## Consumer Benefits

- Prevent consumer confusion
- Lower search costs
- Guarantee a level of consistency

## Business Incentives

- Recoup investment in the form of goodwill
- Distinguish themselves from competitors

# What Can Be a Trademark

Anything that distinguishes the source of a product or service from the products or services of others.

- Symbols
- Tag lines/slogans
- Colors
- Smells, sounds
- Product shapes



# Requirements for Protection

Federal Trademark Statute: The Lanham Act (15 U.S.C. § 1051)

## Not Confusing

- Cannot be confusingly similar to another mark

## Distinctive

- Inherently distinctive
- Acquired distinctiveness through secondary meaning

## Limitations

- Cannot be functional
- Cannot be generic

# Developing a Strong Mark

**Tip 1:** Select a mark that is not ***confusingly similar*** to another mark. A mark is considered confusingly similar if it's likely to cause deception/confusion as to:

- Source of the goods or services; or
- Affiliation or connection with a company that uses similar mark; or
- Whether the mark is actually sponsored/owned/approved by the company that owns the similar mark.

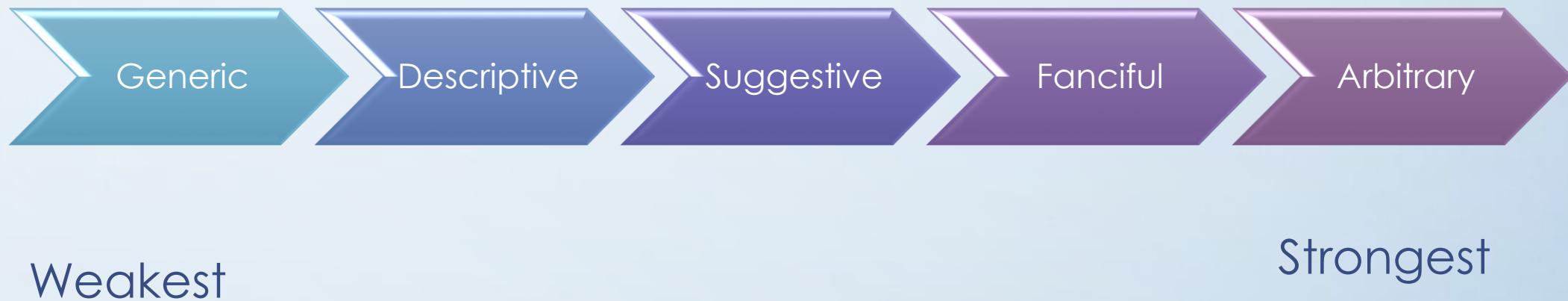
# Developing a Strong Mark

**Tip 2:** Do not use a mark in a manner that **avoids genericide**. A trademark becomes generic when it becomes the generic name that is synonymous with a general class of goods or services.

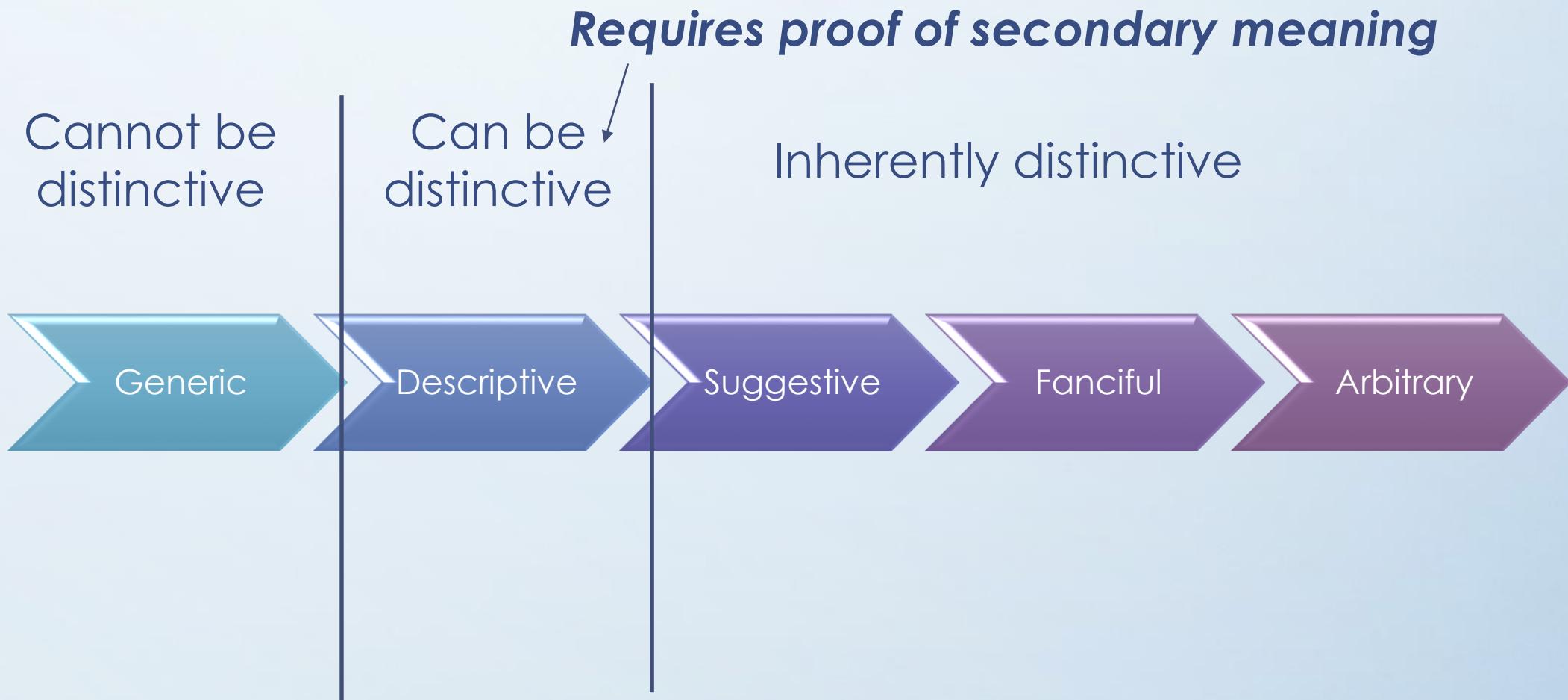


# Developing a Strong Mark

**Tip 3:** Select a mark that is ***distinctive***. Strength of protection and ability to register depend on the mark's distinctiveness. The spectrum of distinctiveness from weakest to strongest...



# The Spectrum of Distinctiveness



# The Spectrum of Distinctiveness

## Inherently Distinctive

- Arbitrary marks
- Fanciful marks
- Suggestive marks
- Some unique eye-catching designs

## Can Be Distinctive

- Descriptive marks
- Geographically descriptive marks
- Surname marks
- Common or simple abstract designs/colors

## Cannot Be Distinctive

- Generic words
- Generic symbols

# Generic Marks

Generic

**Generic:** Common name for a good/service, so cannot distinguish between different sources for that good/service.

- There must be some term for a product that may be used by anyone to identify the product itself, separate from its source.
- No registration permitted; no trademark protection.



# Descriptive Marks

Descriptive

**Descriptive:** A descriptive mark is a term with a specific meaning that is used in connection with products or services directly related to that meaning.

- An example might be “tasty” used in connection with snack cakes or other foods.
- Such terms are not registrable unless it can be shown that the mark has become distinctive through extensive use in the marketplace.



# Suggestive Marks

Suggestive

**Suggestive:** A suggestive mark points to/suggests the nature, quality, or a characteristic of a product, but does not describe the characteristic.

- Rather, it requires imagination on the part of the consumer to identify the characteristic. It provides clues about the product but doesn't specifically describe it.
- Suggestive marks may be registered immediately, without proof of distinctiveness.



# Fanciful Marks

Fanciful

**Fanciful:** A fanciful trademark employs an entirely invented or "fanciful" word as a mark.

- A fanciful mark had no meaning before it was adopted and used as a trademark in relation to goods.
- Fanciful marks are also immediately eligible for registration.



# Arbitrary Marks

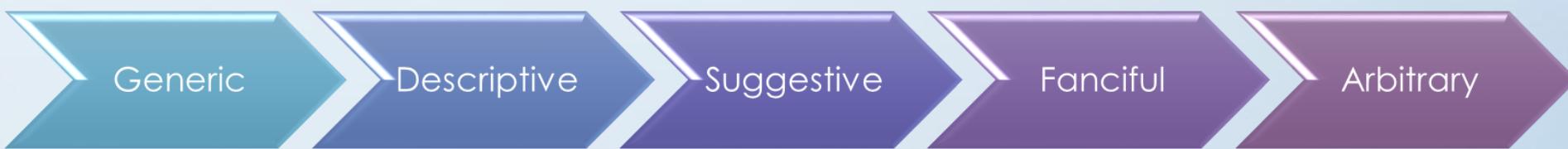
Arbitrary

**Arbitrary:** An arbitrary mark usually employs a common word or words that are used in a meaningless context.

- Have some standard dictionary definition, but are used in connection with products or services unrelated to that dictionary meaning.
- Arbitrary marks are also immediately eligible for registration (without showing proof of distinctiveness).



# Example



Weakest

Strongest

# Example



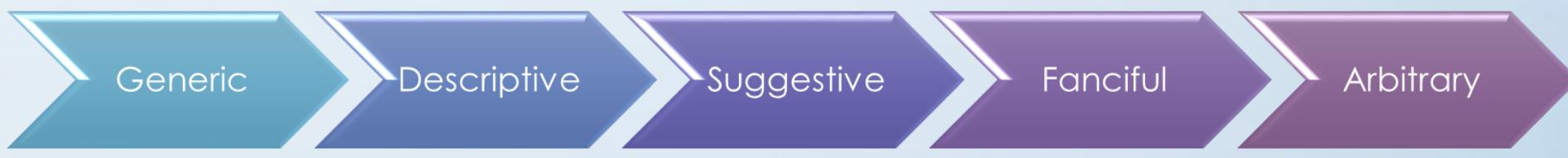
# Example



Weakest

Strongest

# Example



Weakest

Strongest

# How to Get Protection

1. **Use:** use your mark in commerce to secure state (common law) or federal protection
2. **Register:** register your mark with the USPTO with the “intent to use” it in commerce at a later time



# How to Get Protection

If you acquire rights through **use**, you must:

1. Use the mark in a commercial context; AND
2. Display the mark so that it is physically associated with the product or service

If you register with an **intent to use**, you must file a “statement of use”(describing the actual use in commerce) within 6 months after allowance (can be extended for up to 36 months)

# TM, SM and ® Symbols



TM or SM is used to identify a common law trademark or service mark, and puts the public on notice that your use of the mark is a common law trademark.

® is used to identify trademarks or service marks that have been registered with the USPTO. Use of the symbol puts the public on notice that the mark is a registered trademark.



# Copyright Exercise

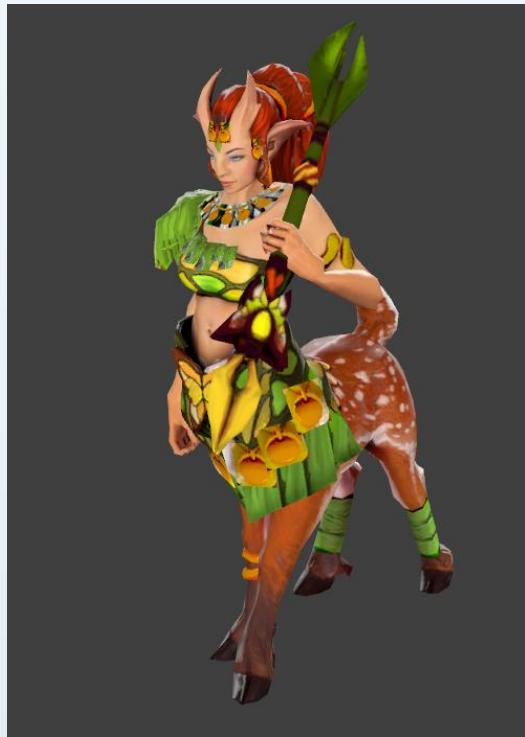


# In Class Exercise: Original Work

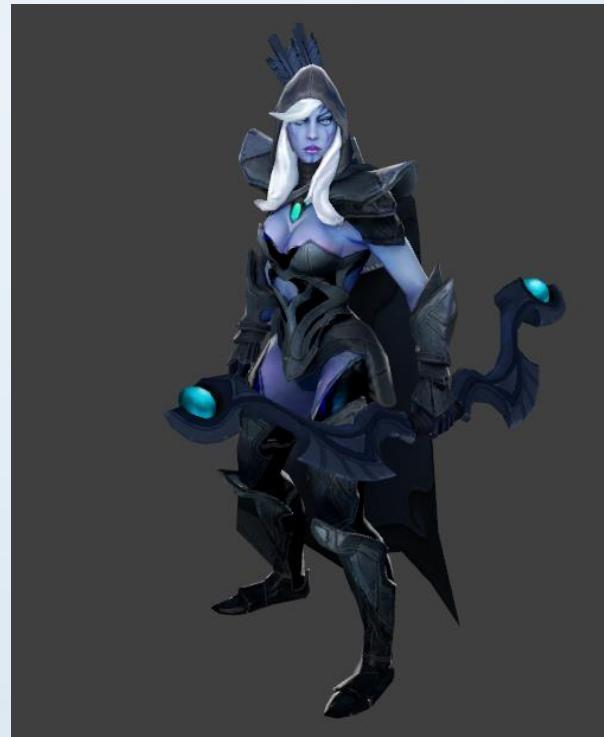


Trailer: <http://www.dota2.com/trailer>

# In Class Exercise: Original Work



Enchantress

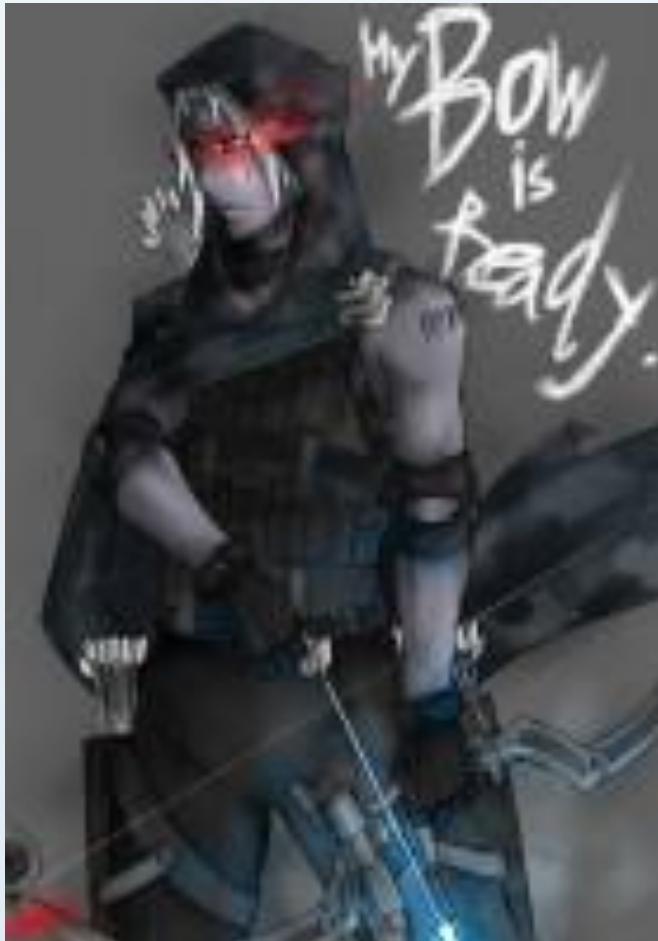


Drow Ranger

# Instructions

- Divide into groups of 5-6
- Analyze your hypothetical and discuss with your group
- Turn in your written assignment sheet for a full grade on the assignment by the next class (

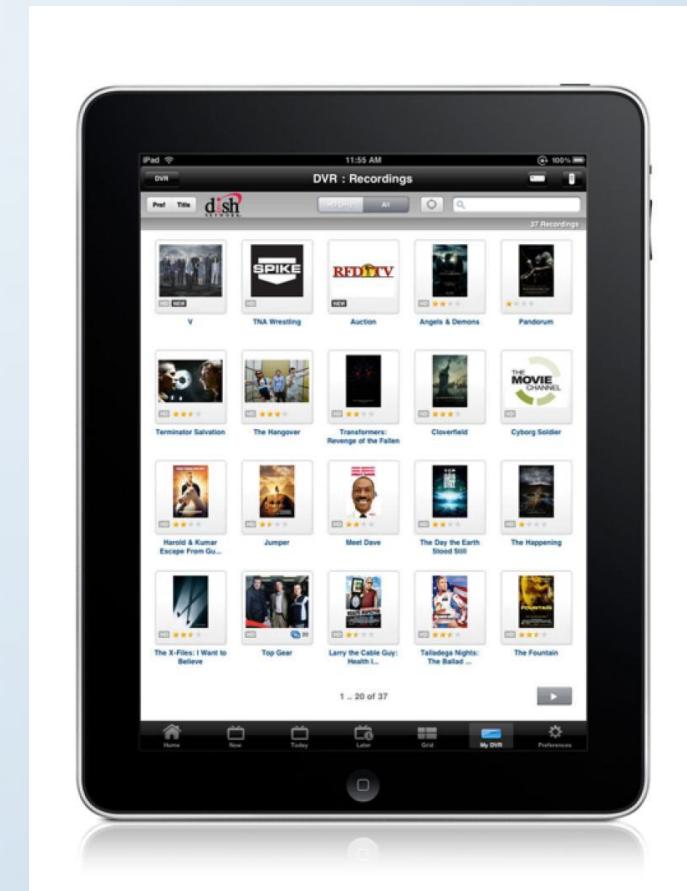
# In Class Exercise: Group 1



Arnie Artist creates an image of a male Drow Ranger and posts it on his Deviant Art page. The image is distributed via free downloads and Arnie makes no money from distribution or display of his art. Next week Arnie's art will be displayed in a local gallery as part of a fanart collection, which is accessible to the public free of charge.

# In Class Exercise: Group 2

Darin Developer creates an iPad application called “Battle Babes” which is a game that allows players to select Enchantress, Drow Ranger, and other female video game heroes to battle each other Mortal Combat style. The game is based on original code, but uses some of the images and music from Dota 2 as well as the Drow and Enchantress character designs. iPad users can buy the for \$2.99 at the app store.



# In Class Exercise: Group 3



Cara Cosplayer (right) sews her own Drow Ranger outfit and attends large conventions such as Comic Con and Dragon Con in full makeup and costume. She also posts pictures of her cosplay on her personal web site. Although Cara makes no money from her cosplay she accepts donations via PayPal to help cover the cost of her materials.

# In Class Exercise: Group 4

Tamara T-Shirt creates a t-shirt featuring an image she created of Enchantress as well as a catchphrase inspired by Enchantress's "sproink" sound effect. She has arranged a deal with Teefury where her garment will be distributed for \$9.99.



# In Class Exercise: Group 5



Wanda Writer writes a novel length fan fiction about an alternative universe in which the Enchantress and Drow Ranger are American female soldiers fighting together in Afghanistan. Although the Enchantress is not a centaur, she has the ability to speak to animals in the story. Wanda's fic (available on fanfiction.net and a few smaller Dota 2 fanwork archives) has over 500,000 views, but she derives no income from its display or distribution.

# In Class Exercise: Questions

1. Does the original work qualify for copyright protection? If so, which aspects are protected?
2. Has there been a copyright infringement? If so, which actions from the alleged infringer constitute infringement?
3. How might a court analyze the facts based on the four fair use factors?
4. Based on the above analysis, does the alleged infringer have a fair use defense?
5. Assuming there is no fair use defense, how should the copyright owner go about having the allegedly infringing work removed from the internet?