What Can We Learn from Japanese Anime Industries? The Differences Between the Domestic and Oversea Copyright Protection Strategies towards Fan Activities

Tianxiang HE, City University of Hong Kong

Available at: https://works.bepress.com/tianxiang-he/1/
What Can We Learn from Japanese Anime Industries? The Differences Between Domestic and Overseas Copyright Protection Strategies Towards Fan Activities

Recently the Japanese government revised its copyright law, and one of the major changes in it is that illegal downloaders in Japan now face up to two years' imprisonment or a fine of ¥2 million (approximately US$19,265), or a combination of the two for downloading certain kinds of copyrighted content. These momentous changes have triggered backlashes around the country from below, as might be expected. Interestingly, the industrial practices of Japanese content industries have developed certain domestic and foreign copyright-related strategies that tolerate some alleged copyright-infringing fan activities.

This paper argues that, although some of these strategies are incompatible with the current copyright law regime, and specifically the aforementioned revision to Japan’s copyright law, they have unconsciously created unexpected positive outcomes. This paper uses an integrative approach that combines market analysis and comparative law methods—to examine these copyright strategies, and proposes an alternative solution to deal with the copyright problems raised by fan-based activities.

INTRODUCTION: THE DILEMMA OF COPYRIGHT LAW

“We are in the middle of a war. A copyright war.”1 This aphorism is a good description of the situation we are facing now in the copy-
right field. The “war”—as Jack Valenti has suggested—is a “terrorist war” raised by large copyright conglomerates against the invisible individual users, namely the “terrorists.”

This battle started simultaneously with the emergence of digital technologies at the end of the 1990s. Although copyright protection standards were rising steadily not long before then, never before had copyright owners so earnestly sought the total enforcement of their rights than they did after entering the digital era. However, as Professor Tim Wu has described, there exists a “giant grey zone” in copyright, in which numerous usages are being considered as copyright infringements but where complete copyright enforcement is impossible. The reason for this is that the economic value of each casual transaction is negligible, thus there is little economic sense in pursuing individuals with lawsuits.

Any new revolution in technologies causes new problems in the law. Copyright law, for example, has confronted similar problems before. With the experience gained from the introduction of the printing press and VHS video recorders, now it is necessary to cater to revolutionary new informational technologies once again. Generally speaking, the main problem we are facing now is public anarchy in utilizing copyrighted materials enabled by the new technologies. During the process of refinement, many remarkable improvements in copyright law have been made in order to restore the balance. However, skeptics who believe that most of these changes are biased towards the copyright owners have continually resurfaced, claiming that the situation is lurching from one extreme to another—from anarchy to total control. Considering the purpose of copyright law, certainly any copyright legislation and reform in this area will have to run the risk of being criticized severely.

The Uniform Computer Information Transactions Act (UCITA) of 1999 was an ambitious plan to establish a licensing system that would have allowed digital content owners to write their own intellectual property law using standard form contracts. However, it received devastating attacks from both the users (consumers) and UCITA’s initial drafting team. We can find more controversy between the users and copyright owners with regard to anti-

4. Id.
circumvention-related matters in the WIPO Copyright Treaty (WCT)\(^7\) and the Digital Millennium Copyright Act (DMCA).\(^8\) The revision of the Japanese Copyright Law (JCL) that entered into force on Oct. 1, 2012 penalizes even first-time unauthorized downloaders with a maximum of two years’ imprisonment or fines of up to ¥2 million (US$19,265).\(^9\) Because of the secretive nature of the revision’s legislative history—the bill had gone through a comparatively brief and aberrant discussion in the Diet of Japan—this set off a wide range of resistance at the grassroots level.\(^10\)

The abovementioned cases indicate only one thing: our legal response in relation to copyright is problematic. Although controversy is unavoidable when new legislation is promulgated, the global backlash suggests that these end results are far from satisfactory. In other words, the delicate balance in copyright law between the right of the authors and public interest has been broken. No doubt a balance needs to be struck again, but in this battle the world is still waiting for a champion of copyright reform. Nevertheless, as long as the purpose of copyright law is to balance public interest with the rights of the individual author or creator, copyright protection should never be a zero-sum game in which cooperation between the two sides is impossible.

How to restore the balance is a delicate question, but it is clear that we are still in a transitional period for the market and technology; therefore, finding solutions should avoid arbitrariness. Rather than instigating radical reform plans for the legal system, it would be better if the industry could accelerate the transition process from its side. The copyright strategies of the Japanese anime industry with regard to some of the unauthorized usages of their copyrighted contents—namely fan-based activities—are the paradigmatic example of an alternative choice.

---

I. The Fan-Based Activities and Copyright Strategies of the Japanese Anime Industry

A. The Rise of New Media and Fan Activities

In terms of audiovisual outputs, Japan is most famous for its manga and anime products, as well as other products such as drama and feature films. In the 2000 White Paper of Japanese Government Policies in Education, Science, Sports, and Culture, manga and animation, along with feature films, were described as the “foundation” for “new media arts.” It is estimated that in 2003, domestic market sales for anime (comprising film, television, and video sales) were ¥191.2 billion (US$1.84 billion); when combined with other anime-related merchandizing rights, the entire domestic market for anime content was estimated to be worth about ¥2 trillion (US$19.2 billion). The comparative number for combined Japanese anime and manga sales in the United States in 2010 was calculated to be over $400 million. The animation industry is growing rapidly in China, and the total output value was estimated to be US$12 billion at the end of 2012. However, a survey of Chinese youth about their favorite animation in 2010 showed that sixty percent of the selected works were Japanese anime, suggesting the Japanese potentially owned a large part of that amount. When Osamu Tezuka raised the curtain on modern Japanese anime in 1963 with his Tetsuwan Atomu (also known as Astro Boy in Western countries), these promising

---


12. See Ministry of Education, Culture, Sports, Science and Technology, Japanese Government Policies in Education, Science, Sports and Culture (2000), http://www.mext.go.jp/b_menu/hakusho/html/hpae200001/hpae200001_2_079.html (“Film, animation, and manga (comics) have each established their own respective independent fields. They are also the foundation for new media arts, and as such, it will be necessary to further their promotion.”) (Japan).


figures were completely unimaginable and would remain so until the late 1980s.

As a typical example of a subculture and niche market, the success of the anime-related market is not a coincidence. Apart from the characteristically sophisticated and fascinating narratives of Japanese anime, the copyright strategies of the industry and fan-based activities have also contributed greatly to its success. However, these strategies and activities are split and varied because of national boundaries, creating distinct domestic and foreign fan activities subject to corresponding copyright strategies. These two strategies share one thing in common: for various reasons they agree that to a certain extent some fan activities should be allowed or tolerated for the shared interests of the industry and the public.

Fan communities of a certain kind of object tend to exist long before the general public becomes aware of their existence, and in a content industry this is all the more true. Fandom arises as follows: when a consumer is fond of a certain product, then she may establish an identity based upon what she considers the most attractive "genre" and "medium"; after that, she will discover the community as she meets more fans. Fans within this community will then exchange information on and ideas about the work, spread comments, and even create derivative works based on the original. However, some of these usages are now viewed with suspicion under copyright law in the digital era.

Generally speaking, typical fan works include *fansubs*, fanvids, fanfics, scanlations, and *doujinshi*. The last in this list, *doujinshi*, is probably the most well-known and interesting case in Japan. The authors of these copycat comics take characters and background elements from manga, anime, or video game sources and develop them with a different story line, and then sell these comics for a profit. As a form of derivative works, *doujinshi* undoubtedly cross the line of private use and have been deemed copyright infringement at least in the U.S., China, and Japan.

19. "Fansub" is a term used to describe activities in which people translate and share the subtitles of a certain audiovisual work; sometimes the subtitles are encoded into the video file.
20. "Fanvid" is a term used to describe the practice in which people create music videos using one or more copyrighted visual media sources without permission.
21. "Fanfic" is a broadly defined term used to describe the sequel of a literary work using its settings and characters, written by a fan rather than the original author.
22. "Scanlation" is a word coined to describe activities in which people scan, translate, and edit a manga or comic.
B. Domestic Fan Activities and Copyright Strategies

It is evident that the Japanese anime and manga industries have tolerated these fan-based activities, and sometimes have even provided them with active support and participation. In 2007, the most famous doujinshi market, the Comiket, had more than 35,000 "circles" of authors. More recently, in 2012, approximately 560,000 attendees participated in the three-day semiannual doujinshi market. It is unquestionably an enormous market that is theoretically competing with the market for authentic works, but interestingly, copyright owners and the industry have tolerated these activities, even though they are mostly illegal under Japanese copyright law, simply because their existence benefits the industry as a whole.

However, their tolerance is not without limits, and some cases have crossed the boundary of that tolerance. In 1999, a doujinshi author used the characters from a famous media franchise—Pokemon—to create pornographic doujinshi work. After the publication of his work, he was arrested and prosecuted for copyright infringement. Nintendo, the copyright owner of that child-oriented title, claimed that the doujinshi of the original work "were 'destructive' of the Pokemon image." Similarly, in 2006, the copyright owner of the famous anime and manga series Doraemon became displeased with one of its fan authors: Doraemon has no official ending because its two authors separated in 1987, and one of them died in 1996 before any decisions regarding how to conclude the storyline were reached. The fan author had drawn a spurious final ending and put it for sale as a doujinshi, soon after which he received a warning from the owner because of a strong resemblance between his work and the original Doraemon manga. The representative of the copyright owner claimed that the fan work was "so similar to the original one that some people mistakenly thought it was genuine." They believed that even though this fan's works were "over the mark", doujinshi "in general as a base of manga culture" could be acceptable to the cop-

31. Id.
right owner as long as the works “remain[ed] within reasonable bounds.” Another research study also suggests that the survival of *doujinshi* depends on the work that is being lifted, and for some the practice is allowable as long as it is not pornographic.

Another related example might better describe this strategy. “Hatsune Miku,” a major virtual female character of a very popular Japanese singing synthesizer game, has inexplicably gained huge fan support and thus spawned many derivative products, including *doujinshi* and a top selling music album. A devoted fan of Hatsune Miku named Ryo composed a song for a similar female character, the “Black Rock Shooter,” but used the voice of Hatsune Miku from the original game. Ryo then collaborated with the author of the Black Rock Shooter to create a music video and posted it on Nico Nico Douga, a Japanese platform similar to YouTube; this has propelled the new virtual idol to a similar level of popularity as Hatsune Miku. All of this happened without any authorization from the owner of Hatsune Miku, and whether or not the Black Rock Shooter can be considered an original character is ambiguous. However, the industry has tolerated this kind of “creation” and even let the “creators” have their own franchise, ranging from toys to anime series and a shared fan base.

Nonetheless, the Japanese industry is also wary of fansub activities, concerned that the backwash that the fansubs produce abroad might damage and compete with their homeland products. For instance, the Japanese Society for Rights of Authors, Composers and Publishers (JASRAC) continually tracks YouTube and in the past has sent notices and takedown letters to posters, asking them to delete fansubs to which domestic Japanese viewers could gain access. In 2008, the Copyright Network for Comic Authors in the 21st Century, the Association of Japanese Animations, and the Japan Video Software Association, with cooperation from relevant Japanese government ministries, established a countermeasure council to address the issue of Internet piracy, with particular attention paid to fansubs. However, apart from occasionally sending warning letters to

32. Id.
35. Id.
36. Id.
fansub groups, no litigation against fansub groups has ever been raised by the Japanese owners for various reasons. It is also worth noting that the anime industry structure has ensured its profitability through secondary uses, such as sales of DVDs and toys, on the premise that most TV animation could not profit from broadcast revenue alone due to the high production costs.

C. The Foreign Fan Activities and Copyright Strategies

Fan communities outside Japan are more active and unregulated than their domestic counterparts, especially in those developing countries with burgeoning content industries, such as China and Brazil. Some economists call these two countries "the frontiers of free," in which they believe brand new business models that utilize rather than eliminate all unauthorized usages could arise; others, however, still consider those usages to be pure theft. The fan activities of foreign titles in these countries are deemed piracy, like other unauthorized usages. However, they have survived and flourished for multiple reasons.

In many countries, such as China, Brazil, and even the United States, all manner of fan communities have been established and the fans within them are engaged in various fan activities. Fansubbing, owing to its very nature, is one of the most remarkable fan activities, and Japanese anime is one of the most typical subjects in fansub production. Japanese anime are famous not only in their homeland but also in many other countries, especially the United States and China. As a previous study revealed, fan communities of Japanese anime were formed in the United States between 1976 and 1993 and since 1990 numerous fan groups have been engaged in producing and exchanging fansubs of anime. It is believed that most unauthorized fan distribution of anime from the 1970s through the 1990s, which was tolerated by the Japanese owners, promoted the development of a nascent domestic industry for anime in the United States. The fan production and distribution of anime in China, meanwhile, started in 2001 with the exponential spread of broadband connection services and the development of fast file transferring tools such as Peer-to-Peer (P2P) file sharing software.

43. Id. at 192.
44. Id.
The abovementioned facts reflect the foreign copyright strategies of the Japanese industries: they have tolerated most of these fan activities in China and the United States for different reasons.\textsuperscript{45} Furthermore, if we consider domestic copyright strategies towards fan activities as an outcome of deliberate choice, then by contrast most of the foreign copyright strategies towards fan activities abroad appear more of a reaction, more of a last-ditch move.

D. Summarizing the Copyright Strategies

The domestic and foreign copyright strategies taken by the Japanese anime industry in response to most fan activities could be described as tacit tolerance or strategic ignorance,\textsuperscript{46} as previous research has concluded. Correspondingly, the fan-based activities within that category have been deemed tolerated use.\textsuperscript{47} The divergence between the domestic and foreign copyright strategies illustrates how the Japanese anime industry has been forced to take its own steps beyond the law, in order to protect its properties and prosper in the digital age.

The answer to why the “Japanese experience” in copyright protection in this regard is unique is that, compared with the “American experience,” which advocates high copyright protection standards, Japan appears to give more space to those usages in the “giant grey zone,” and succeeds with that model. Furthermore, it is crucial to run the fan activities through the current legal frame of the countries in question to determine what problems are encompassed here and to see how the aforementioned strategies have been developed.

II. The Law, the Problems and the Reasons

A. The Law

Although supported by numerous fans and many scholars, fan-based activities such as the creation of fansubs and doujinshi are undeniably copyright infringement activities in most countries.

Theoretically speaking, since China, the United States, and Japan are all members of the Universal Copyright Convention (UCC)\textsuperscript{48} and the Berne Convention for the Protection of Literary and Artistic Works,\textsuperscript{49} both of which explicitly prescribe the principle of national

\textsuperscript{45} See infra Part II.C.
\textsuperscript{46} Sean Leonard, Progress Against the Law: Anime and Fandom, with the Key to the Globalization of Culture, 8 Int’l J. Of Cultural Stud. 281, 287 (2005).
\textsuperscript{47} Wu, supra note 3, at 619.
treatment, Japanese copyrighted audiovisual products are all under protection within these countries. In the following discussion, I will take doujinshi, fansubs, fanfics, and fanvids as examples to examine their legality under the copyright-related legislation of Japan, China, and the United States.

1. **Doujinshi**

In Japan, creating doujinshi is clearly a violation of the law. Judgments of past cases in Japan have made clear that comic book characters are copyright protected, and Article 20 of the JCL gives authors a right to preserve their integrity, a provision which enables them to protect their characters from inappropriate utilizations. As a kind of derivative work, the exploitation of doujinshi is not permitted to encroach upon the rights of the original authors, even though “the adapter's copyright persists irrespective of whether it was created with (the) authorization of the original author or not.” Moreover, if we run through the “laundry list” of rights that an author may refer to, from Article 18 to Article 28 of the JCL, it is evident that most doujinshi do actually infringe the right of translation, the right of preserving the integrity, and the right of the original author in the exploitation of a derivative work, unless they could be remitted by the statutory exceptions. However, it could be inferred that none of those exceptions perfectly justify doujinshi, as most such fan works are not for the purpose of criticism and are of a commercial nature.

---

50. UCC art. II (1); Berne Convention art. 5(1).
52. See Tokimeki Memorial Case, Japanese Name of the Court [Sup. Ct., 3d Petit Bench] Feb. 13, 2001, 1999 (RECEIPT) No.955, translated at http://www.softic.or.jp/en/cases/Tokimemo_Sup.html. In this case, the court claimed that the defendant's memory card, which could help players of the copyrighted game steal game credits and directly jump to the end, had infringed the author's "right to preserve the identity of the Game Software."
53. Ganea, supra note 51, at 28.
55. Id., art. 20.
56. Id., art. 28.
57. Id., arts. 30–47.
According to the 2010 Copyright Law of the People’s Republic of China (CCL), it seems that Japanese anime, by virtue of being “cinematographic works and works created by a process analogous to cinematography,” are under copyright protection in China. The question of whether an anime character is under copyright protection or not is crucial in the case of *doujinshi*, since most of them use the original characters of copyrighted works. Previous cases in China have shown that animated characters are under copyright protection there, thus it would seem that *doujinshi* constitute copyright infringement, as the original author’s right of distribution, right of adaptation and right of translation are all protected by Chinese copyright law. As the law explicitly states that the copyright of these derivatives “may not infringe the copyright in the preexisting work,” *doujinshi* will clearly be found to be copyright infringements as long as they use the original characters without the permission of the copyright owner; furthermore, if scan-copy and online distribution is involved, they might also infringe the author’s right of


59. Id., art. 2, art. 3(6).

60. See Meiguo Woerte Disini Gongsi su Beijing Chubanshe Deng Qinfan Zhuzuo Quan Jiufen An (美国沃尔特·迪士尼公司诉北京出版社等侵犯著作权纠纷案) [Walt Disney Co. v. Beijing Publ’n], SUP. PEOPLE’S CT. GAZ., 1996, at 136 (Beijing Higher People’s Ct. Dec. 19, 1995) (China) (explicitly stating that characters owned by Disney such as Mickey Mouse are all under copyright protection in China). See also Yuang Zhuzuo Zhushi Huishe Su Shanghai Yuyuan Guoji Shangcheng Gongwu Zhongxin Youxian Gongsi (圆谷株式会社诉上海豫园公司案) [Suburaya Productions v. Shanghai Yuangu Co.], SELECTED CASES OF THE PEOPLE’S COURT, 2003, at 333 (Shanghai Higher People’s Ct. Sep. 11, 2000) (上海市高级人民法院民事判决书沪高知终字第49号) (China) (clearly indicating that the anime characters of *Ultraman* are protected in accordance with the Berne Convention, supra note 49, and the CCL, as the series could be deemed a “painting”).


62. Id., art. 10 (14).

63. Id., art. 10 (15).

64. Id., art. 12.

65. Id., art. 47:

Anyone who commits any of the following acts of infringement shall, depending on the circumstances, bear civil liabilities such as ceasing the infringement, eliminating the bad effects of the act, making an apology or paying compensation for damages:

(6) exploiting a work for exhibition or film-making or in a manner analogous to film-making, or for adaptation, translation, annotation, or for other purposes, without permission of the copyright owner, except where otherwise provided for in this Law.

*(Translation from WIPO.)*
reproduction\textsuperscript{66} and right of information network dissemination.\textsuperscript{67} Moreover, any further utilization of the derivative works, such as publication, performance, and audiovisual production, requires a license from both the copyright owner of the derivative work and the copyright owner of the original work, or it would constitute copyright infringement as well.\textsuperscript{68} Considering its purpose and commercial nature, no exceptions prescribed by Chapter 4 of the CCL could be applied.

Although animated characters are under copyright protection in the United States,\textsuperscript{69} some of the case law shows that copyright in doujinshi-like works, which have the potential of jeopardizing the original sources, is not viewed favorably by the U.S. courts.\textsuperscript{70} However, this follows more of a case-by-case analysis in respect of doujinshi, where it is clear that as derivative works under U.S. copyright law,\textsuperscript{71} their copyrightability will be denied in the United States if the “preexisting material has been used unlawfully,”\textsuperscript{72} which is fundamentally different than the regulations of China and Japan mentioned above. As to a potential fair use claim, although the fair use doctrine in U.S. copyright law is comparatively flexible, the commercial nature of doujinshi and the fact that the fair use claim relies heavily on parody in the United States together mean that such a claim is less likely to survive there; most doujinshi offer no criticism of the original works, but rather emphasize plot development. Correspondingly, copyright holders in the United States are much stricter regarding any appropriation of their animated characters compared with in Japan, regardless of whether these usages are commercial or not. For example, fan sites of The Simpsons were shut down because the copyright owners of The Simpsons claimed that they owned all images of the program, and thus to post any images of The Simpsons on the Internet was not permitted by copyright law.\textsuperscript{73} More of these cases could easily be found in the United States,\textsuperscript{74} and Professor

\textsuperscript{66} Id., art. 10 (5).
\textsuperscript{67} Id., art. 10 (12).
\textsuperscript{68} Id., arts. 35, 37, 40.
\textsuperscript{69} See, e.g., Walt Disney Productions v. Air Pirates, 581 F.2d 751, 755. (9th Cir. 1978) (noting that “it is difficult to delineate distinctively a literary character” but that “when the author can add a visual image, however, the difficulty is reduced”).
\textsuperscript{70} Id. at 753–58. See also Dr. Seuss Enters. v. Penguin Books USA, Inc., 109 F.3d 1394, 1400 (9th Cir. 1997).
\textsuperscript{72} 17 U.S.C. § 103(a).
\textsuperscript{74} In 2011, a U.S. comic author drew and printed 200 sketchbooks using the characters of comic works owned by Marvel. Most of these copies were handed out for free, while forty copies were sold. He even gave some to people working in Marvel. Marvel called and asked for ownership of the sketchbooks. They reached a settlement
Mehra has thus opined that there is no “significant American commerce in unlicensed use of the cartoon characters of others.”

2. Fansubs

If the case of doujinshi is somewhat ambiguous, then in that of fansubs, the original author's copyright has been encroached upon more clearly. Starting from only Japanese anime, fansubbing activity has now spread to almost each and every type of audiovisual work. Fansubbing has been described as “a particular type of non-commercial translation and subtitling process of foreign mass media products.” Due to the fact that online distribution of the unauthorized copies of the original works is deeply entwined with most fansubs, the resulting copyright problem is thus foreseeable. If we consider the elements of a fansub work individually, the only thing that could be regarded as “transformative” is the translation of the subtitles.

As one of the derivative works that is clearly provided for in the law, translation is also subject to the permission of or license from the original author, according to the copyright law in China, Japan, and the United States. For almost the same reasons as in the case of doujinshi, the translation of movie subtitles is deemed to be derivative work in Japan, China, and the United States, and apparently the only difference between them is that the copyrightability of fansubs will be denied in the United States if the usage of the copyrighted material is found to be unlawful. Admittedly online distribution of the original work with added-in fan-translated subtitles does constitute copyright infringement. Moreover, fansubbing is ostensibly illegal, since although their non-commercial claims seem fair, there is still no exception made for fansubs in the law on the grounds of the online publicity they generate and their free accessibility. As previous studies have indicated, attempts to claim fair use will not succeed because most fansubs clearly fail to pass the four-factor fair use test under U.S. copyright law, and apparently they will fall short of the

whereby he would remove all infringing works from his site and stop making any sketchbooks of Marvel-owned characters. See Sean Gordon Murphy, Grays, DEViantART BLOG (Feb. 18, 2012, 10:57:22 PM), http://seangordonmurphy.deviantart.com/journal/Grays-285895348.

75. Mehra, supra note 29, at 171.


77. 17 U.S.C § 103(a).

78. Many researchers have come to a negative result when they run the fansubs through the four-factor fair-use test. The four factors that U.S. judges will consider are: (1) the purpose and character of the derivative work’s use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion taken; and (4) the effect of the use upon the potential market. See Leonard, supra note 42, at 248. See
copyright exceptions listed in the copyright laws of China and Japan.  

3. Fanfics and Fanvids

Considering the wholesale “transformative” nature of fanfics and fanvids, their status is more a matter of subtle judgment than cognizable fact. Based on the percentages of the appropriation, the court will have to determine whether the work is a new original or a derivative. According to a 2002 interpretation of the Chinese Supreme People’s Court (SPC), if the expressions of the work are on “the same theme” but are “creative and independently completed,” then they are different works and thus could all enjoy “independent copyright.” However, in the case of fanfics and fanvids, it is a fact that most of them do borrow some elements from other works. In determining whether fanfics constitute copyright infringement or not, two aspects are crucial. The first is “originality,” which is the requirement of an adaptation. It is very difficult to say that fanfics are without originality, as most of them have developed divergent storylines from the original works. In light of the causal link between them, a “relevancy” examination is crucial as well, yet to demarcate borders between proper use and copyright infringement is extremely difficult. Generally speaking, the more a fanfic departs from the original, the less likely it is that it would be found to be a derivative work. For instance, in 2001, a famous work of Chinese fanfiction, Ci Jian de Shao Nian (此间的少年), started to collect its own followers around


the names of famous characters from the works of another reputable writer. As an “Alternative Universe” fanfiction, the facts of the historical background and story setting were all deliberately altered. It was published in 2002, reprinted in 2004, and even spawned its own movie in 2011.

If fanfics are deemed to be derivative, then according to the CCL, they can claim their own copyright, as long as “the exercise of such copyright does not prejudice the copyright in the preexisting work.” If there is prima facie infringement, then the court will determine whether it can be qualified as copyright exception such as private study. In the United States, existing case law holds that fanfic-like works do infringe copyright, because these unauthorized derivative works exhibit “literal similarity” and would probably meet the requirements of substantial similarity. It is believed that most fanfics are “most likely substantially similar to the original works.” This is also the case for fanvids, because no matter how many segments of other copyrighted video works are appropriated to build a single fanvid work, if a whole track of musical work is lifted, it is surely copyright infringement. However, fanvid makers today are trying to avoid doing that through delicate editing, as this then makes it more ambiguous whether a fanvid is infringing copyright in Japan and China. As for the United States, fanvids may still constitute copyright infringement, as most of them will likely fail the fair use test.

In conclusion, most of the abovementioned fan-based activities are probable copyright infringements under the copyright laws of Japan, the United States, and China, despite whatever motivations and ethics those fan groups claim to have. Its seems that the copyright owners should have confidence in enforcing their rights, however, it

82. Sun Zhanlong (孙战龙), Wangluo Tongren Xiaoshuo de Quanli Jieding (网络同人小说的权利界定) [The Demarcation Between the Rights of Internet Fanfiction Authors and Other Rights], WANGLUO FALO PINGLUN (网络法律评论) [INTERNET LAW REVIEW] 170 (2006).
84. Id. art. 22.
86. Metro-Goldwyn-Mayer v. American Honda Motor Co., 900 F. Supp. 1287, 1298 (C.D. Cal. 1995) (holding that there was substantial similarity between a commercial advertisement and the James Bond movies, with regard to “theme, plot, and sequence,” “characters,” and “mood and pace,” as the advertisement had borrowed some elements from the movie series).
89. Id. at 676.
is naive to assume that transnational copyright enforcement will be as unhindered or as smooth as it is domestically, because in practice, enforcement is extremely complicated in foreign countries. Some problems do stand in the way, serving as reasons why Japanese copyright owners have had to alter their copyright strategies in foreign countries, and why fan-based activities could survive and flourish abroad in spite of the local law.

B. The Problems

Generally speaking, the Japanese copyright owners with whom this paper is concerned are capable of controlling the domestic market. Although most types of fan-related activities also exist in Japan, comparatively speaking they do not cause too many problems domestically, as a balance can be maintained between the damages and benefits of fan activities to a certain extent by using market strategies and sending cease and desist letters to guide fans; copyright holder can also use the law and its corresponding enforcements as effective complements. However, the same is not the case in foreign countries such as China and the United States, where there are certain notable problems related to market access. These need to be considered in terms of content exportation and copyright enforcement.

1. Public goods and information asymmetry

Whether copyrightable works are public goods or not is debatable.\(^{90}\) Nevertheless, it is a fact that they are non-rivalrous and to some extent non-excludable, considering the development of file copying and sharing technologies.\(^{91}\) For that reason, Internet-based technologies have initiated an endless "cat and mouse game" in which the copyright holders target countless unauthorized online distributors but achieve little; this strategy is even harder to pursue in terms of transnational copyright enforcement. Furthermore, this also results in information asymmetry, as those unauthorized fan copies abroad will probably induce the adverse selection problem.\(^{92}\)


\(^{91}\) Yoo, supra note 90, at 645 (noting that legal remedies were provided to keep the works excludable to some extent).

\(^{92}\) For example, it has been reported that foreign pirate CDs could be bought at legitimate music stores in China, and look so authentic that hardly anyone could tell the difference between them and genuine ones. See Kevin Maney, *If Pirating Grows, It May Not Be the End of Music World*, USA TODAY, May. 3, 2005, http://usatoday30. usatoday.com/tech/columnist/kevinmaney/2005-05-03-music-piracy-china_x.htm. In such a case, ordinary uninformed consumers may not be able to distinguish "good" from "bad," and will probably choose the cheaper ones. However, research has indi-
2. Copyrightability and prejudice

Many countries such as China have economic and political policies regarding the importation of foreign audiovisual works. For instance, the former Article 4 of the 2001 Copyright Law of China,93 which was revoked in 2010 in response to the 2007 WTO case China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights,94 explicitly denied the possibility of copyright enforcement for works that were unable to pass the censorship of the Chinese government.95 That is to say, before 2010, copyright enforcement, and even the copyrightability, of most foreign audiovisual works such as Japanese anime were reliant on decisions of the Chinese government. Some researchers from Hong Kong have also confirmed that even Hong Kong editions of movies were not able to claim copyright protection if they were not subjected to the proper censorship regime by the appropriate powers before the 2010 revision.96 This was changed after the WTO dispute in the new 2010 Copyright Law of the People's Republic of China. However, even on the assumption that litigation could be raised without any financial difficulty, copyright owners may still have to face problems related to judicial resources. For instance, an important guideline entitled Decision of the CPC Central Committee on Major Issues Pertaining to Deepening Reform of the Cultural System and Promoting the Great Development and Flourishing of Socialist Culture, which was passed by the Communist Party of China in its Sixth Plenary Session of the Seventeenth Committee on Oct. 18, 2011, deems socialist culture to be an important part of China's comprehensive competitiveness today. The main theme in the “Decision” is to boost China's soft power and maintain “cultural security” in the wake of its ongoing economic boom. On Dec. 16, 2011, the SPC issued a related directive document entitled Several Opinions of the Supreme People's Court on Some Issues in Fully Giving Rein to the Function of Intellectual Property

---


Rights Adjudication in Promoting the Great Development and Flourishing of Socialist Culture and Stimulating the Indigenous and Coordinated Development of Economy. It is a major new guideline for courts in China on how to deal with intellectual property cases, though its real purpose is to deepen the reform of China’s cultural system and promote the development of China’s cultural industry, thereby raising China’s comprehensive national strength and international competitiveness. However, there is a potential danger that the courts may treat local and foreign products differently when copyright interests conflict, as may happen under the purpose of developing and promoting “socialist culture.” However, other factors, such as censorship and import quotas, will probably still affect the fate of foreign audiovisual works.

3. Censorship and quotas

Even under the best situations, where we assume the Japanese titles are free of the aforementioned problems in foreign markets, they still have to face possible content censorship and import quotas. Anime is renowned for its undiscriminating nature, normally containing sexual and violent elements. For instance, in an online interview, Ma Kai, the director of the program Comic World on the Children’s Channel of CCTV, the Chinese state broadcaster, revealed that the imported animation works on their channel were under multiple levels of censorship, for the purpose of filtering content that would be inappropriate for children. Past and current legislation and regulations also indicate that topics such as sensitive political content, obscenity, and violent content are included on the censorship lists too. As to the importation quotas, the broadcast hours for for-

97. Sean Kirkpatrick, Comment, Like Holding a Bird: What the Prevalence of Fansubbing Can Teach Us About the Use of Strategic Selective Copyright Enforcement, 21 TEMP. ENVTL. L. & TECH. J. 131 (2003).


eign animated programs are extremely limited, and a regulation document of the State Administration of Radio, Film, and Television (SARFT) has indicated that “the number of foreign animated works imported by the qualified institutes must equal their own production, and an institute without its own domestic productions will be disqualified from importation”. The SARFT has promised to support “Chinese original production” with regard to “funding, broadcasting recommendations, intellectual property protection, etc.” The existence of this policy has also been confirmed by the Japanese anime industry. 

Although Japan has a relatively close relationship with the United States, as they have a strong partnership and share interests in multilateral cooperation, Japanese anime and related products in the U.S. market have also been under severe censorship, but the purpose there is to filter violence and sexual content and to adapt it to the local language environment. Some believe that these harsh editing criteria may even encroach on the moral rights and integrity of the Japanese copyright holders and that these have in fact triggered some fan-based activities such as fansubs. However, the situation in the United States is different from that in China, as most of the censorship rules in China focus more on political considerations. By contrast, the motivation in the United States is the desire to treat Japanese anime as if they were only for child consumption.

100. See Foreign Television Program Import and Broadcast Management Regulations art. 18:

All foreign film and television dramas broadcast every day by television channels, may not exceed 25 per cent of the total film and television drama broadcast time of the said channel on that day; other foreign television programs broadcast every day, may not exceed 15 per cent of the total broadcast time of the said channel on that day... [Without SARFT approval, no foreign film and television dramas may be broadcast during the golden hours (19:00-22:00).]

(Translated by author.)


103. TOEI ANIMATION CO., PRESENTATION FOR THE THIRD QUARTER PERIOD OF FY ENDING MARCH 2011, (APRIL 2010—DECEMBER 2010 at 6-2, http://corp.toei-anim.co.jp/pdf/201103_3Q_persen_e.pdf (noting that in China, the “import of TV license is limited”).


105. Daniels, supra note 78, at 714–16.
4. Transaction Costs

Even if their works could enter the foreign market without politically related problems, the copyright owners would still have to deal with the issues of commercial promotion and copyright enforcement matters, especially when trying to break into a nascent foreign market. For example, Toei Animation Corporation tried to establish itself in the U.S. market between 1978 and 1982, but eventually they failed because anime was still in the early stage of development in the United States at the time.\(^{106}\) Marketing costs for animation titles in a foreign market could be extremely high in the early stages. For example, one report indicates that the marketing costs, including promotion and advertising of a foreign cartoon for theatrical release in the United States, are in the tens of millions of dollars.\(^ {107}\) In addition, copyright enforcement abroad is not only problematic but also costly. Japanese copyright owners lack personnel who are well versed in international intellectual property issues, which has resulted in them having low profitability abroad.\(^ {108}\)

5. Markets and Fans

It is clear that the starting point for the discussions above is that when people in one country are interested in the works of another, then the copyright owners will seek promotion there, and claim their rights when infringement happens. Interestingly, according to the long-tail theory, when the search costs are close to zero, theoretically any niche market, including the Japanese anime market, will benefit from the vast opportunities offered by the Internet and grow bigger as other new markets do.\(^ {109}\) Nevertheless, the power of Japanese anime should not be exaggerated. It is true that anime has attracted the attention of many people worldwide, but it is still a niche market in comparison to Hollywood productions, and it is struggling to increase profits from overseas markets and to cater to the different cultural

\(^{106}\) Leonard, supra note 46, at 287.

\(^{107}\) See Ellen Wolff, Foreign Toonmakers Eye U.S. Market: Language, Marketing Costs Make America a Tough Nut to Crack, VARIETY, Jun. 5, 2011, http://www.variety.com/article/VR1118037712 (“The challenge, he says, is marketing: ‘Family films are the most expensive to market. You can’t get away with $10 million–$15 million in P&A. You need to be in the $25 million–$30 million range to have a chance.’”).

\(^{108}\) Japan External Trade Org., supra note 13 (“[T]he extreme shortage of personnel well-versed in international legal affairs related to intellectual property rights has resulted in low profitability for Japanese anime overseas. When video software is sold in the U.S., for example, the distributor generally provides a minimum guarantee and also makes payments if sales exceeded the minimum. Japanese anime rights owners need people who can negotiate with U.S. counterparts on equal terms, and also audit sales performance, to ensure equitable, profitable arrangements in overseas markets.”).

demands of the targeted countries as well.110 Consequently, if Japanese works want to succeed in a foreign market today, they must gain a certain degree of publicity. To achieve that goal, traditionally the owners of Japanese anime would not only have to have the same status as their local competitors in terms of distribution, but also be able to access a large promotional budget. However, this has not been the case for the Japanese. The preconceived idea that “animation is only for child consumption” in countries such as China and the U.S, is one of the reasons hindering it from becoming part of mainstream culture, and instead has made it a comparatively fringe group.111 The producers of this genre are facing these problems in the United States and China, and, what is more, they are encountering a major problem in developing foreign fan bases as a result.

In general, the copyrightability of most Japanese anime in China was in doubt before 2010. After the 2010 revision of the CCL, copyrightability has been confirmed. However, the practical protection of Japanese anime is still unresolved in China because of the potential judicial bias, political intervention, and other factors such as transaction costs and marketing, which have led so far to market failure.112 It is foreseeable that some of these factors will affect their U.S. market as well, as study have found that the problems of incomplete information and externalities will possibly cause market failure there, at least in the case of fansubs.113 That is to say, Japanese copyright owners are neither able to maintain the balance with fan-produced work in foreign countries that they enjoy domestically, nor are they able to invest heavily in foreign promotion. Furthermore, with respect to foreign works, the motivations of fan activities and


111. From the discussions above in Part II.B.3, it is obvious that China and the United States are both censoring anime for child protection purposes, and that will definitely affect the future market of anime. Interestingly, research suggests that perceptions that fans themselves are “socially maladjusted” is also making it harder for anime to become a part of mainstream culture. See MARK I. WEST, THE JAPANIFICATION OF CHILDREN’S POPULAR CULTURE: FROM GODZILLA TO MIYAZAKI 123-24 (Scarecrow Press. 2009).("[The] anime fan subculture's worth as being "normal" is derived only from its similarities to mainstream culture. . . . However . . . there is no room for social acceptance of those who actually do fit the stereotype of the socially maladjusted fan.").

112. See, e.g., Eric Priest, The Future of Music and Film Piracy in China, 21 BERKELEY TECH. L.J. 795, 821-29 (2006) (noting that endemic problems such as local protectionism are standing in the way of protecting copyrights against unauthorized distribution); Wu, supra note 3, at 628 (explaining the problem of transaction costs); Michael Geist, The Truth About Pirates and Profits: A Market Failure, Not Legal One, MICHAEL GEIST [Blog], Mar. 22, 2011, http://www.michaelgeist.ca/2011/03/ssrc-piracy-report-column-post/ (summarizing that in many developing countries, "piracy is primarily a function of market failure").

the fan community ethos are changing rapidly nowadays in countries like China. In the absence of a mutual trust between local fans and copyright owners, fan groups in China are contributing based on various motivations, rather than merely fandom. Therefore, the foreign fan community ethos is not as stable as it is in a closed market. Due to the foregoing problems and other reasons, they have resorted to adopting two sets of copyright enforcement strategies.

C. The Reasons

It is easy to find cases where copyright owners have frowned upon fan activities or even raised charges against participators. Conversely, cases can also be found in which copyright owners were not against fan activities, or even concurred with them to a certain degree. Take the J.K. Rowling case as an example, Rowling, the author of the Harry Potter books, had tolerated, and even praised, the series’s unofficial fan site, owned by Steven Vander Ark, until Vander Ark decided to publish and claim copyright on a Harry Potter reference book based on the materials on his site. Rowling sued to enjoin its publication. Interestingly, Rowling and her partners intentionally ignored Vander Ark’s website but only focused on the publication and the commercialization of those materials. In other words, Rowling opted to tolerate the website, but the print publication of those materials crossed the line and she decided to act. Another recent example is that of a famous fanfic named In Excess, from the popular Japanese anime Naruto. It was first posted on Fanfiction.net and was subsequently published in 2012. However, unlike in its online version, the names of the original anime characters were all changed in the print version.

In China, those online writers who have gained a huge number of fans through the free online publication of their works would tend to have a more positive attitude towards fan-appropriation of their later

---

114. It is widely believed that the primary motivation for fansubbing is fandom. See e.g., Tiffany Lee, Fan Activities from P2P File Sharing to Fansubs and Fan Fiction: Motivations, Policy Concerns, and Recommendations, 14 Tex. Rev. Ent. & Sports L. 181, 194 (2013) ([M]otivations for sharing anime illegally among non-Japanese are . . . to promote the anime industry.); Leonard, supra note 42, at 221 (“The Kiotsekute member pointed out that the prevailing motivation was to interest more people in anime.”). However, as digisubs arose and fansubbing became an international phenomenon, it has been observed that, at least for fansubbers of U.S. TV shows in China, their motivation varies. See Peng Qiu, Audience Activity in the New Media Era: Chinese Fansubs of U.S. TV Shows 42–47 (Dec. 2010) (unpublished M.A. thesis, University of Florida), available at http://ufdcimages.uflib.ufl.edu/UF/E0/04/26/11/00001/qiu_p.pdf.


117. The title “In Excess” evokes a connotation of N(aruto) and Sas(uke), the names of the two main characters of Naruto.
published versions. For instance, a famous Chinese historical novel named *Those Stories of the Ming Dynasty* (明朝那些事儿), which ultimately sold more than five million copies, was first posted chapter by chapter on the author’s blog. It was soon published, after it had acquired a considerable number of followers. In the last volume of the series, the author states that he is not a “businessman” and that he will insist on “publishing his works online for free” even though his publisher had warned him that he would lose “millions in revenue” by doing that. He is intent on doing this because what he had gained from free distribution is “obvious enough.” A similar situation is that of science fiction writer Liu Cixin, whose *Three Body* (三体) trilogy was first published online for free, attracting many followers and even Hollywood buyers. He permitted the publication of a famous fanfic of his work, the *Three Body X* (三体X), which is a sequel to the original work. Interestingly, the fanfic was also published chapter by chapter online and for free before its print publication. In another example, a popular rock song, *Chun Tian Li* (In Spring), which was composed by the famous rock star Wang Feng, was covered by two migrant workers, and their version recorded millions of hits after it was posted on famous video-sharing platforms. Interestingly, Wang Feng, along with other celebrities, praised their performance and even invited them to perform the song with him during his concert. This promotion eventually led to the duo—known as “Xuriyangang” (旭日阳刚)—performing at the CCTV Spring Festival Gala, which is one of China’s most important television events. However, Wang Feng decided to enjoin them from further exploiting his song commercially after he found that “his kindness was taken advantage of by them.”

It is clear that the copyright owners in the aforementioned cases have shown a certain degree of tolerance of fan-based activities around their works, which is similar to the copyright strategies of the Japanese anime industry that were discussed earlier. Nonetheless, these cases are of a domestic nature, and just like the *doujinshi* case in Japan, they represent the discretionary power of the copyright owners in their internal market, as potential problems there are gen-

---

118. Dang Nian Ming Yue (当年明月), *Epilogue, in Mingchao Naxie Shier* 7 (明朝那些事儿7) [7 THOSE STORIES OF THE MING DYNASTY] (2009).

119. During an interview at the Hong Kong Book Fair 2011, Liu Cixin explicitly mentioned that although he “doesn’t like fanatics” because they will “block the way” of his future writing of that series, he had nonetheless given his permission for the publication of *Three Body X*. The live recording of his interview is available at [http://115.com/file/dn0l573a](http://115.com/file/dn0l573a).


erally controllable. For copyright infringements that happen abroad, they have weaker control over their works and face the problems discussed in Part II.B if they try to enforce their rights in a foreign country. It is also one of the reasons that Japanese copyright owners tolerate fan activities abroad, even though they know that they will have less control in the foreign market.

In sum, the Japanese anime industry's reasons for adopting flexible domestic and foreign copyright strategies are as follows:

First, global synchronous copyright protection is theoretically tenable but practically infeasible. On the one hand, the costs of enforcing are more than could be earned from it, especially in the case of overseas enforcement. If we examine the issue from an economic perspective, the transaction costs remain the determining factor, because any transaction cost will become unbearable, as the number of potential users is infinite. In other words, it is impossible for the copyright owners to identify each usage/user (most of them have a very low value) and enforce their rights too. Moreover, taking doujinshi as an example, one of the reasons why the industry has chosen to allow these copycat works to survive, within limits, is that the legal resources in Japan are insufficient; research has also shown that they are facing the same problem in transnational licensing. On the other hand, besides the economic issues, the protection of local and foreign audiovisual products may actually be unequal in some countries. For instance, someone in China entering one of the most disreputable movie download sites ad libitum can easily find almost every title imaginable but hardly anything local, especially those new movies in theaters. This is because great pressure from the international and domestic movie industries has forced some of these famous sites, such as VERYCD, which was once a file sharing site based on eMule technology, to be transformed into an online introductory site that work as a movie encyclopedia with links to other licensed online streaming platforms. As to Japanese anime, it is notable that even though official authorization is granted in many cases, unauthorized fan distribution still commonly coexists with

122. Wu, supra note 3, at 630.
123. Lessig, supra note 28, at 27.
124. Leonard, supra note 42, at 239 ("They lacked expertise in the field of international intellectual property law.").
125. In China, some telesync versions of currently-screening domestic movies have shown up on some small sites, but this issue is negligible considering its social influence and the purpose of this article.
official licensed distribution. This shows that the local copyright owners are better protected at home than abroad.

Second, unlike commercial pirates and free riders, fans are potential consumers. It is well established that fan-based activities are beneficial in many ways if they can be controlled (c.f. *doujinshi*). The *doujinshi* community has a strong ethos, and the mutual trust and interaction between fans and the industry has ensured that business, the fan community, and the entire society benefit equally from *doujinshi* activities. Furthermore, a 2009 survey indicated that nearly sixty-seven percent of *doujinshi* authors had lost money in Comiket transactions, which means most *doujinshi* works do not qualify as substitute goods. In terms of foreign markets, it is believed that some fan-based activities will help to “curb piracy” if properly regulated. As the case of anime fansubs in the United States demonstrates, when “the scope and enforcement of copyright are relaxed in nascent markets and on undervalued properties,” the result can be “overwhelmingly successful” with regard to development of the arts, which is the ultimate purpose of copyright in most countries.

Third, for the Japanese domestic market, we can conclude that the industry, as the representative of the community rather than individuals, has certain copyright strategies that are not parallel with the copyright legislation regarding *doujinshi*-like works. According to a senior practitioner in the production field, nowadays the overall economic recession and the competition between commercial authors in Japan have made *doujinshi* an important income source for lower-tier authors. Nevertheless, although the border remains vague, the example of Comiket and the enormous number of *doujinshi* works that are sold there suggests these are accepted by the industry. It is also true that Article 28 of the JCL clearly states that the author of the original work shall “have the same rights” as the subsequent author in exploiting the derivative work, while Article 20(1) of the JCL also indicates that the author can object to any modification of his

---

128. For a good example, see the Naruto page on VeryCD, http://www.verycd.com/topics/2849835/. To summarize, a user can find download pages under the “resource” category; however, if the user is not registered (which is available free), has not contributed to the group up to a certain level, and/or has not earned a “silver medal,” he or she will see a notice that says “this resource is lacking the certificate of rights, therefore the download links for it are unavailable.” Conversely, if the user is registered and has satisfied all of the abovementioned criteria, he or she will see all the download links after logging in.


131. *Id.* at 265.

work. In other words, the original authors enjoy greater control over the derivative works of their titles in the domestic market than in a foreign one. Thus, some fan-based activities are allowable in practice—otherwise, the copyright owners could simply pull out and forbid them at any time.

Fourth, in terms of foreign markets, the copyright strategy of the Japanese industry is to let go of some of these fan activities, as its control over foreign markets is unavoidably weak due to the problems outlined in Part II.B. I have interviewed legal staff from the industry about the current attitude of their company towards some fan-based activities, and all the responses were negative. Nakamura Kimihiko, of the Tokyo Broadcasting System Television (TBS), airing his personal perspective, believes that although fan works such as fansubs are somewhat beneficial in terms of market cultivation in foreign licensing, the industry will in no way recognize their efforts officially because doing so would be risky. However, the anime industry is forced to go overseas, since digitalization and online file sharing are unstoppable. And with the marketing costs abroad being so costly, they have no choice but to endure most illegal appropriations outside their domestic borders, including fan-based activities. Traditional promotion used to be the only way to break into a foreign market, but the problems detailed above have made it very difficult. We should also note that things have changed with the information revolution, for now the Internet offers an alternative—to build from the bottom rather than the top. This means it is possible to generate a market for a product by selectively tolerating foreign fan activities. If the industry really wants to reap overseas profits, considering the overall number of potential titles to license and the development stage they are in, then they will have to rely on fan cultivation. Moreover, fan-based activities could be the best source for early product evaluation, as they offer another way to introduce the hottest titles into the targeted market, since audiovisual product importation is restricted in some countries and traditional market research is impractical from a cost-benefit analysis perspective.


134. E-mail from Nakamura Kimihiko, Legal Advisor, Tokyo Broadcasting System Television (Nov. 19, 2012) (on file with author).

III. LIMITATIONS AND POSSIBLE SOLUTIONS

A. LIMITATIONS

The Japanese anime industry has a desirable end product (i.e., anime itself), but its foreign copyright strategy inadvertently creates undesirable outcomes: its domestic experience is inapplicable in foreign markets. Generally speaking, the limitations on the strategy can be summarized as follows.

First, the industry has recognized the power of the fan communities in foreign countries, but has failed to treat them as being distinct from commercial pirates and free riders; this will cause many problems.\footnote{136 For example, the Japanese Animation Industry Legal Enforcement Division (J.A.I.L.E.D.), which existed between 1995 and 1996 and was led jointly by U.S. and Japanese anime companies, pursued several video dealers and fan groups, but triggered a backlash from the fans and therefore ceased to operate further. See Leonard, \textit{supra} note 42, at 259–55.} By choosing to avoid making a distinction and claiming all such activities are illegal, tolerating most of the fan activities is a contradiction. Second, the passive nature of the strategies results in market instability, especially in foreign countries; in other words, the positive results cannot be guaranteed.\footnote{137 Merely tolerating overseas fans means the connection between the fans and the copyright owners is not officially established in the designated market, therefore the copyright owners are incapable of exerting control on foreign fan groups. It is foreseeable that the copyright owners will not be able to keep track on statistics such as the range of fan distributions, what types of fan works were generated, and whether the fans will cease to exist because they may lost their interest in a specific title. Thus it is fair to say that the positive outcomes we have witnessed are unstable.} Third, the anime industry still lacks a proper plan to reap profits from abroad, as it knows so little about them.\footnote{138 See Hiroko Tabuchi, \textit{Why Japan's Cellphones Haven't Gone Global}, N.Y. Times, July 19, 2009, http://www.nytimes.com/2009/07/20/technology/20cell.html. The report notes that the Japanese cellphone industry has excellent products but has failed to go overseas, because that fast development "turned increasingly inward"—the industry was satisfied with the rapid growth of the local cellphone market in the late 1990s and early 2000s, they perceived a lack of incentives to go abroad. This phenomenon is named the "Galápagos syndrome." The term was initially used to describe Japanese 3G cellphones, but is now being used for similar phenomena in other markets. Anime appears to qualify for this label: anime is unique to other markets, because Japanese use animation as a media rather than a genre and sometimes their products contained adult features; their anime is facing many restrictions outside Japan; the industry was content with its local market; and there is a lack of incentives in the industry to explore foreign markets. See Leonard, \textit{supra} note 42, at 229–34.} With the domestic revenue of the industry decreasing, because of shrinking demographics and overall economic recession in Japan, profitable foreign sources should be of critical importance, but lack of understanding of foreign markets is proving to be a barrier. This may as well be ascribed to the "Galápagos syndrome"\footnote{139 See Leonard, \textit{supra} note 42, at 229–34.} from which Japan is now suffering, as many of its unique and creative products, such as cellphones and anime, are faltering in overseas markets.
B. Possible Solutions

The problem of fan-related activities in copyright law is a side effect of globalization. The Internet and state-of-the art copy technologies have pushed copyrightable works such as Japanese anime around the world. For that reason, Japanese copyright owners have to envisage a possible way to compete in a global market, because to turn a blind eye to what is happening outside of Japan will not provide much help in stopping disturbing appropriations. But what we do know is that raising the copyright protection standard, namely the “top-down” protection pattern, is no panacea for the ills.

The existing solutions that have been proposed for fan-based activities can be divided into two categories: governmental and non-governmental. Typical governmental proposals mainly focus on revising the law, e.g. proposals for new fair use or copyright exception terms, proposals for a copyright taxation system, and proposals for an exemption period or an interpretive right in the copyright law. The non-governmental proposals can be further divided into two groups: those designed for the copyright holders and those designed for the fan communities to adopt. Proposals for change from the copyright owners include Creative Commons (CC) licenses and a No Action Policy (NAP), which refers to revocable exemption notices that could be posted by copyright owners, granting authorization to the public for selective appropriations in a flexible manner. Proposals for fan communities have mainly come from within. Meanwhile, they mainly amount to the establishment of a community ethos. In view of the fact that commercial pirates are taking advantage of fansubs, seizing the fan-translated subtitles or even video files and selling them directly, and with the concern that they may face copyright challenges in the future, fansub groups have started to put certain warnings and disclaimers onto their fansubs, in order to justify their activities.

As the matter stands, none of these proposed solutions are perfect. The idea of building the ethos of the fan community is brilliant but impractical, since there are far too many fan groups and they are all trying to build their own ethos, not to mention that in the digital age, fan groups are much more powerful and could easily deviate

140. See Daniels, supra note 78, at 735; see also Noda, supra note 23, at 99.
142. Leonard, supra note 42, at 256 (suggesting an exemption period for appropriating copyright owners' works right before they themselves begin exploitation in a foreign market); Noda, supra note 34, at 140–48 (suggesting that it is reasonable to have an interpretive right containing all the permissible fan-base activities).
143. Wu, supra note 3, at 633–35.
144. In most cases, they consist of warnings such as “Not for commercial purposes.” See, e.g., Web Site Terms and Conditions of Use, Fansub-Share.org, http://fansub-share.org/tou/.
from their fragile ethos.\textsuperscript{145} Revising the fair use doctrine would be a positive step in terms of achieving justice in individual cases, but it would still require case-by-case judgment, and thus would offer little help in resolving the daily problem of massive copyright infringements. The taxation system would settle this, but this radical step would require a fundamental change in the copyright system, which might be improper to consider during this period of market and technology transition.\textsuperscript{146} The proposals for having an exemption period and an interpretive right in the copyright law might be good ideas, but they rely too much on the notions of “proselytization commons”\textsuperscript{147} and “canonical/non-canonical distinction”\textsuperscript{148} that were deemed to be the characteristics of the fan-based activities. These proposals are attractive, but the expected outcome is questionable, since the aforementioned characteristics are hard to prove and, as we discussed above, fan contributors now have mixed motivations other than pure fandom. Furthermore, these proposals would not be able to prevent free riders from taking advantage of them. The CC license proposal is persuasive, but it is difficult for large firms to utilize these licenses as it entails persuading copyright owners to waive some of their rights indefinitely.\textsuperscript{149} The NAP is less demanding and comes with a certain degree of flexibility and it is more practical than CC licenses, since it is revocable. However, since it does not provide any guidance for reaping the benefits generated by fans, it still has room for improvement in terms of solving fan work problems.

What is suggested here is something simple. Like most reforms, this paper endorses the opinion that the first step should come from the industry rather than the legislature—by adopting a flexible strategy towards copyright enforcement. As Lunney has elaborated, if we consider copyrightable works to be discrete public goods, then government intervention may not be needed even when there is a market

\textsuperscript{145} For example, some Chinese fansub groups have crossed the line of “noncommercial use,” which is generally viewed as the core ethos of fansub communities. A 2009 report illustrated that some of the distinguished Chinese fansub groups with huge member bases could earn millions of RMB per year from advertising revenues, since sponsors are willing to pay because these big sites could bring in considerable clicks. But only the administrative members of these communities would have access to that money. \textit{See} Lele (乐乐), \textit{Bufen Zimu Shouru Da Baiwan Yuan Yingshi Wangluo Fanyi Quushi Youdao} (部分字幕组收入达百万 维视网络翻译取之有“道”) (\textit{Some Fansub Groups Make Millions a Year: Internet Video Translation Paves the Way to Riches}), \textit{Laodong Bao} (劳动报) [\textit{WORKER DAILY}], Aug. 6, 2009, http://ld.eastday.com/l/20090806/ul610796.html (China).

\textsuperscript{146} Lessig, \textit{supra} note 28, at 301.

\textsuperscript{147} Leonard, \textit{supra} note 42, at 192 (explaining it as “a space where media and ideas could be freely exchanged to advance a directed cause”).

\textsuperscript{148} Noda, \textit{supra} note 34, at 137 (claiming that this distinction “prevents their activities from eroding the copyright holder’s incentives”).

\textsuperscript{149} Wu, \textit{supra} note 3, at 634.
failure.\textsuperscript{150} Thus, the cure for mass disobedience should come from the industry’s side.\textsuperscript{151} But more importantly, a collaborative relationship between the copyright owners and the fan community would help stabilize the positive outcome and define the latitude of the fan community.

My proposal would first require the copyright owners to post revocable exemption statements, which is similar to CC licenses and NAPs, to exempt tolerable foreign fan-based activities from copyrighted titles until the given products are officially launched in a foreign market. Second, copyright owners should be urged to foster a relationship between the fan communities and the copyright owners that is analogous to what the Japanese have managed domestically. This would create a digital copyright “ecosystem,” with direct or indirect shepherding of foreign fan communities toward a bona fide and controllable community. A statement could also be posted on their official websites, stating what kinds of fan-based activities are exempted from infringement charges before the market access; this would give fan communities a certain degree of stability. The industry could then unify the fan communities through selective cooperation, such as setting up official sites with similar functions as fan community sites, to allow them to participate in certain fan activities, give fans guidance, and help them build their ethos. Fans would join the official sites willingly because they would acquire a quasi-legal status and yet could still make fan contributions for various motivations besides just fandom. As Benkler has noted, “[w]hat makes peer-production enterprises work best has been the capacity to harness many people, with many and diverse motivations, towards common goals in concerted effort.”\textsuperscript{152}

This flexible enforcement strategy would cost significantly less than the traditional one. Furthermore, since it is immoral to induce fans to violate the law by simply tolerating copyright infringing fan-based activities and taking advantages of it, the suggested strategy could remedy this contradiction by demarcating a legal boundary. Moreover, it would not act as a radical reform plan as it is flexible and revocable. However, as previous studies have demonstrated, the cooperation model between copyright owners and the amateur fan contributors, or, to put it another way, the combination of market norms and fan community norms, must be carefully designed, otherwise the great creative power of fans might be turned into a mediocre


\textsuperscript{151} Id. at 32.

\textsuperscript{152} Yochai Benkler & Helen Nissenbaum, Commons—based Peer Production and Virtue, 14 Journal of Political Philosophy 394(2006).
one. A well-designed cooperation model could also distinguish free riders and other infringers from fans, and put the main focus on commercial piracy, as participants such as devoted fans are potential customers and only fans would be keen on official recognition and yearn for the success of their beloved works, and fans with other motivations would be more than happy to have an official platform to do what they used to do without liability worries.

CONCLUSION

"The predominant forces that have shaped the (copyright) law are economic." Being driven to search for maximum profit in foreign countries, numerous copyrighted works from various industries, including anime, are reconstructing the copyright framework with their real-life commercial activities.

The Japanese anime industry has flexible copyright strategies at home and abroad, and while it does tolerate some infringing works such as doujinshi in the open market, it remains vigilant with regard to those fan-related activities that involve online distribution. For example, the newly revised Article 119(3) of the JCL proves that the content industry is trying to control the behavior of domestic Internet users, as it criminalizes the private downloading of copyrighted works to some extent. Moreover, a controversial clause was inserted as an amendment after the original bill had been submitted, by which it escaped the deliberation of the education ministry and

153. See e.g., Lawrence Lessig, Remix: Making Art and Commerce Thrive in the Hybrid Economy 237 (2008) (every company building a hybrid will face exactly the same challenge: how to frame its work, and the profit it expects, in a way that doesn't frighten away the community). For a discussion about the problems that arise when social and market norms collide, see Dan Ariely, Predictably Irrational: The Hidden Forces that Shape Our Decisions 68–88 (1st ed. 2008). For a discussion about the problems that arise when markets reach into spheres of life governed by nonmarket norms, see Michael J. Sandel, What Money Can't Buy: The Moral Limits of Markets 84–91 (2012). See also Hye-Kyung Lee, Participatory Media Fandom: A Case Study of Anime Fansubbing, 33 Media, Culture & Soc'y 1131, 1137 (2011) ("[W]hat is more interesting about fan-translation and distribution is that it represents a new model of cultural work that cannot simply be imitated by the industries' commercial operation."); Trebor Scholz, Market Ideology and the Myths of Web 2.0, 13 First Monday, Mar. 3, 2008, http://firstmonday.org/ojs/index.php/fm/article/view/2138/1945Ali%C3%A1 ("[T]he core question for Yale law school professor Yochai Benkler is how to manage the marriage of money and nonmoney without making nonmoney feel like a sucker. In other words, how can we harvest/monetize the labor and presence of those millions on Myspace, for example, without making them feel bad?").


was passed by the National Diet.\textsuperscript{156} In other words, it is largely an end product of industrial lobbying. As for Japan's foreign copyright strategy, it has intentionally ignored most fan-based activities in nascent markets such as China, but in a better-developed market such as the United States, fan-based activities are under a certain degree of pressure, as the industry's control over the market is stronger and the market coverage rate is higher.\textsuperscript{157}

The problems that lie ahead are manifold. First, the development of Internet and related technologies has pushed the Japanese anime industry into considering foreign markets in order to protect its works, as many of them become freely accessible online soon after broadcasting. However, as a private right, in most countries any legal action against copyright infringement cannot be initiated unless copyright holders raise formal complaints, and evidently the industry does not have enough resources to do this for each infringing act—it is impossible in practice to identify and sue every infringer especially when they are in foreign countries. Moreover, the harmonizing process through international or multilateral agreements is slow, and problems relating to reluctant cooperation and the political considerations of the other countries may also weaken Japanese control over their works. It is also true that copyright enforcement is dependent on economic capability and the status of market development. Thus, copyright owners have willfully ignored most fan-based activities and put their main focus on chasing commercial infringements. The reasons for doing so are absolutely clear: they were forced to expand their market, and ignoring most fan-based activities and only pursuing commercial piracy was the best way to access and compete in a nascent foreign market considering the beneficial aspect of fan-based activities and the unavoidable problems. Theoretically, as the market grows larger, Japanese copyright holders can take more of the initiative in terms of market control, especially as the numbers become more substantial. Thus, in the future they could maximize their profit under those unavoidable barriers with much lower investment. However, it is difficult in practice to promptly calculate whether a potential market is formed, as the response of copyright holders towards foreign fan-based activities is more negative—they tolerate


\textsuperscript{157} For instance, in 2011, Funimation, a large animation streaming website in the United States that has released a considerable amount of Japanese anime since 1994, sued 1,337 downloaders over one of their imported titles, \textit{One Piece}, for which the company had acquired licenses from Toei in 2009. The beginning of similar legal actions can be traced back to 2005. A full list of their licensed works is available at http://www.funimation.tv/shows/. For a cached version of the old page, indicating the licenses held for each work, see http://changedmy.name/funimation-license-mirror/.
most foreign fan activity reluctantly, as they have comparatively weaker control over foreign markets.

The Japanese case illustrates that a certain degree of fan activity should and could be allowed to create beneficial results, even though the law says differently. Of course it is the right of the owners to tolerate and ignore any infringing activity or take action selectively, but in the long term, this strategy will offer no help in eliminating massive online infringements, which is ultimately the result that the owners desire. Besides, a legal system that has been constantly challenged by mass infringement around the world is in itself sufficient proof that something needs to be changed. The Japanese domestic case demonstrates that it is feasible for the industry to respond effectively. Nevertheless, its responses are still insufficient, given the ambivalent attitude of the industry towards fan-generated work and the anarchic nature of foreign fan-based activities. To shake off the "Galápagos syndrome," the industry should take a more active role in transnational licensing transactions by establishing a flexible relationship with its foreign fans and shepherding them toward authorized communities and practices. Such positive interaction would in turn generate increased popularity and create the market demand that the industry is seeking.

There are more options for protecting the interests of copyright holders other than simply raising the protection standard blindly. The anime industry chose one and it succeeded in part, but more needs to be done if a positive relationship between the law, the copyright owners, and the fan communities is to be established. As scholars have indicated, since offering products for free in some way may not be a problem,158 the industry should really put more focus on how to reap its benefits by multiple means.

---

158. See Ariely, supra note 153, at 49–67. See generally Anderson, supra note 41.