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**Title**

Celebrating Two Decades of Unlawful Progress: Fan Distribution, Proselytization Commons, and the Explosive Growth of Japanese Animation

**Permalink**

<https://escholarship.org/uc/item/0n29d9kq>

**Journal**

UCLA Entertainment Law Review, 12(2)

**ISSN**

1073-2896

**Author**

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**Publication Date**

2005

**DOI**

10.5070/LR8122027074

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# Celebrating Two Decades of Unlawful Progress: Fan Distribution, Proselytization Commons, and the Explosive Growth of Japanese Animation

By Sean Leonard†

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† Instructor of Japanese Animation, Massachusetts Institute of Technology. Many thanks to Peter Dourmashkin for planting the seeds of this article, to Hal Abelson for watering them, and to Henry Jenkins for suggesting how they should grow. Thanks to Larry Lessig for impelling me to write for a legal audience, to Rebecca Tushnet and Dan Klerman for the numerous comments and valuable feedback, and to Jonathan Zittrain and the Internet Law Program at Harvard for the diversity of perspectives on copyright. Patricia Gercik, Ian Condry, John O'Donnell, and Natsumi Ueki provided valuable commentary on Japanese culture and business. Thanks to Hiroaki Inoue, Noboru Ishiguro, Toshio Okada, and Fred Patten for their candid thoughts and primary materials. Finally, a round of applause must go to all of the fans, for it was through them that the anime revolution happened.

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## I. INTRODUCTION

### I.A. *Growth*

While mainstream American industries shut down their domestic animation facilities,<sup>1</sup> complain about lagging sales,<sup>2</sup> and propose legal interventions to protect their content,<sup>3</sup> interest in and consumption of Japanese animation has increased exponentially across the world in the last ten years. While it is common for over 18,000 fans to simultaneously download the latest *Naruto* episodes from the Internet within forty-eight hours of their initial Japanese broadcast,<sup>4</sup> total yearly sales of anime and related character goods rose to ¥2 trillion (U.S.\$18 billion).<sup>5</sup> In May 2004, a Japanese animation company president confessed that exports of anime and character goods greatly exceeded Japan's exports of steel.<sup>6</sup> Furthermore, the capitalization of Japan's content industry (U.S.\$100 billion) was roughly twice the size of Japan's steel industry (U.S.\$49 billion) in 2001.<sup>7</sup> In his speech to open the 2003 Diet, Prime Minister Junichiro Koizumi cited *Spirited Away* as an example of

<sup>1</sup> Associated Press, *Disney to Close Animation Studio*, FOXNEWS.COM (Jan. 12, 2004), at <http://www.foxnews.com/story/0,2933,108194,00.html>.

<sup>2</sup> Benny Evangelista, *RIAA Decries Drop in CD Sales*, S.F. CHRON., Sept. 3, 2003, at B-1, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/Chronicle/archive/2003/09/03/BU249534.DTL&type=tech>.

<sup>3</sup> Katie Dean, *New Induce Act Alarms Foes*, WIRED NEWS (Sept. 27, 2004), at [http://www.wired.com/news/politics/0,1283,65084,00.html?tw=wn\\_tophead\\_7](http://www.wired.com/news/politics/0,1283,65084,00.html?tw=wn_tophead_7).

<sup>4</sup> Posting of Edward Keyes, *Hordes of Naruto Fans* . . . , to MIT Anime Club mailing list (Jan. 16, 2004) (copy on file with author).

<sup>5</sup> Japan External Trade Org., *Trends in the Japanese Animation Industry* (Apr. 2004), at <http://www.jetro.go.jp/en/stats/economy/jem0404-2e.pdf>.

<sup>6</sup> Noburo Ishiguro, Lecture in Japanese animation course at MIT (May 10, 2004).

<sup>7</sup> Yasuki Hamano, *Building the Content Industry* (compiled from an interview), in Masaki Yamada et al., *The Cutting Edge of Cool*, 2.1 ASIA-PACIFIC PERSPECTIVES, May 2004, at 6, 23. The content industry includes anime, video games, and comics.

the vivacity of the Japanese people, leading some to claim that anime is “the savior of Japanese culture.”<sup>8</sup>

How did anime, once regarded as a product produced for and consumed by Japanese children, become such a powerhouse in the global media market? The surprising answer lies in the international pull of anime to other nations’ shores through wholesale violation of copyright holders’ intellectual property rights. Copyright is meant to promote the progress of knowledge, to incentivize authors to create, and to compensate authors for their contributions to culture. Anime’s international development, however, demonstrates that copyright sometimes has the exact opposite effect.

This article’s core argument is that there are times in which current copyright law fails to promote progress. Conversely, there are times in which cultural, structural, or legal limits on the enforcement of these exclusive rights result in both private profit and cultural progress.

A wave of fans became interested in anime and manga (Japanese comics) shortly after American animation recast itself into kids-only fare on Saturday mornings. The introduction of the VCR into the American and Japanese mass markets in 1975 made trading of animation possible.<sup>9</sup> What followed was the birth of fan distribution—a process of releasing anime shows on a vast underground network of fans throughout the United States.

The anime fan distribution network became a *proselytization commons*: a space where media and ideas could be freely exchanged to advance a directed cause. Fans fervently believed in spreading anime to as many people as possible through coordinated networks that obtained, translated, copied, and distributed video tapes. Through these networks many fans spread knowledge of and enthusiasm for anime, starting many years before the widespread adoption of the Internet.

By 1990 fans started to *fansub*, or translate and subtitle anime videos in addition to distributing them across a wide demographic and geographic range. Through massive copyright infringement, fans shifted the audience for animation from children to viewers young and old. Many fans later started anime companies, becoming the industry leaders of today.

Fan distribution of anime flourished throughout the 1970s through the 1990s and catalyzed a nascent domestic industry. Even though these networks violated copyright law, I argue these acts promoted rather

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<sup>8</sup> *The Hollowing Out of Japan’s Anime Industry*, MAINICHI INTERACTIVE (Feb. 25, 2003), at <http://mdn.mainichi.co.jp/news/archive/200302/25/20030225p2a00m0oa024000c.html>.

<sup>9</sup> Tom Howe, 1975: Sony Betamax Combination TV/VCR Released in the U.S., at <http://www.cedmagic.com/history/betamax-lv-1901.html> (last visited Feb. 16, 2005).

than hindered the progress of the arts. To demonstrate my case, I will provide a brief primer that defines animation, anime, fan distribution, and fansubs. I detail the history of the anime fan phenomenon in the United States from 1976. During that discussion I present a theoretical framework for uses of copyrighted works, and for the proselytization commons evident in the fan distribution phenomenon. Specifically, I determine that fan distribution constituted the demand formation phase necessary, but ancillary, to traditional exploitation of copyrights.

The legal section analyzes fan distribution and fan activities, drawing from Japanese copyright law, American copyright law, and relevant copyright implementation treaties. It further explores the responses of Japanese media companies in light of Japan's culture and law. Then, the analysis shows that fan distributors were left with no recourse but infringing copyright in order to satisfy the goal of progress.

I combine these analyses to assert that spheres of economic and cultural activity were created that existing copyright regimes would have denied, and that these regimes directly contributed to the rapid explosion in anime consumption and profit for all parties involved. I then propose a minor change to copyright law that provides a compatible framework for copyright holders and participatory audiences, and suggest that these classes of changes advance mutual interests rather than balance conflicting interests.

I am not the first writer to notice the problems of copyright or of Japanese media. Professor Rebecca Tushnet's 1997 analysis concerns the behaviors and legal implications of American fan fiction writers.<sup>10</sup> Professor Salil Mehra has contributed valuable analyses of the manga industry and of *dōjinshi*: fan-made comics that frequently employ characters from popular manga.<sup>11</sup> In *Copyright and Comics in Japan* Mehra argues that specific structural barriers have allowed *dōjinshi* authors to operate, and that Japan's relatively weak legal regime prevents copyright holders from inhibiting the development of manga. However, Professor Mehra never examines the animation industry or its exports, instead contemplating "the discrete phenomenon of its coexistence with markets for *dōjinshi*."<sup>12</sup> In both Mehra and Tushnet's arguments, the legal concern turns on the validity of copyright in characters and their transposition into new texts.

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<sup>10</sup> Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651 (1997).

<sup>11</sup> Salil Mehra, *Copyright and Comics in Japan: Does Law Explain Why All the Cartoons My Kid Watches Are Japanese Imports?*, 55 RUTGERS L. REV. 155 (2002).

<sup>12</sup> *Id.* at 164.

Professor Lawrence Lessig has also written extensively on the problems of copyright, calling for balance between “big media” producers and audiences who consume while also transforming and creating from the culture that surrounds them.<sup>13</sup> In a similar manner, endeavors like Creative Commons help independent authors dedicate certain rights to the public domain, thus redressing the poor default balance that copyright law strikes.<sup>14</sup>

Yet many of these writers have instinctively or purposefully pitted owners against audiences. When consumers produce their own works, they build on past culture, and therefore the law should permit their takings for the greater good. A balance needs to be struck, these scholars argue, for creativity and for the progress of the arts.

In contrast, the development of the American anime industry thrived on two decades of wholesale “uncreative” reproduction and distribution. I also seek balance, but I argue that legally sanctioned copying and distributing by fans can reach the same objectives.

## II. ANIMATION, ANIME, AND FANDOM

### II.A. *Animation and Anime in the United States and Japan*

I first draw from media studies to begin with a formal definition of animation. Properly considered, animation is a *medium*, not a genre. Nevertheless, Jason Mittell demonstrated in *Genres and Television* that cultural forces and economic pressures transformed popular conceptions of American animation throughout the middle of the twentieth century.<sup>15</sup> I recount the highlights of Mittell’s narrative here.

American cartoons were originally conceived as relatively sophisticated narratives for all audiences during the studio system of the 1930s and the 1940s, but they became cheap television retreads after the collapse of that system in the 1950s. Shows like *Tom and Jerry* were “sanitized” to remove their politically incorrect content, reducing them to repeated action scenes with fits of unresolved violence.<sup>16</sup> New studios like Hanna-Barbera created new animation to fill the void using *limited animation* techniques on account of their shoestring budgets. These techniques depicted the illusion of motion through disfigured characters, motion lines, and repeated backgrounds in far fewer frames than traditional animation, and were criticized for reducing animation to “il-

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<sup>13</sup> LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 29 *passim* (2004).

<sup>14</sup> See generally CREATIVE COMMONS, at <http://creativecommons.org> (last visited Feb. 19, 2005).

<sup>15</sup> See generally JASON MITTELL, *GENRE AND TELEVISION* (2004).

<sup>16</sup> *Id.* at 70.

lustrated radio” for tasteless children. Cartoons became ensconced in what James Snead calls a “rhetoric of harmlessness.”<sup>17</sup>

American cartoons weathered a stint through primetime in 1961 through 1965 starting with *The Flintstones* on ABC, which recast the genre as adult, family-friendly fare. Despite a dedicated following of *The Flintstones* amongst teens, networks decided to move the genre to Saturday morning because there were more children in proportion to the total viewership, thus providing food and toy sponsors more value for their advertising dollar, even though Saturday morning had far fewer total viewers than primetime.<sup>18</sup>

The effect filed the whole genre under a “kids-only” label and alienated adult viewers and prompted a spate of derivative superhero works—in which the superhero was rarely morally objectionable and the villain always lost—and strong censorship rulings throughout the late 1960s through 1970s. Parent groups and other moral organizations pressured television networks for increased sanitization of animated programming, keeping violence, sophisticated narratives, and skilled artisans away from cartoons.

Japanese animation, or *anime*, developed quite differently from American Animation during this same period. Anime is short for *animçshon*, a word that the Japanese adopted to describe all animation. In America, anime specifically refers to the Japanese product, and is used for both the singular and the plural. Anime is a *national medium*, a medium tied closely to the notion of the productive engine of the Japanese nation. The fannish mantra, “anime is a medium, not a genre,” emphasizes how anime encompasses broader subject matter than Saturday morning cartoons. Nevertheless, I wish to formally distinguish anime as a signifier on par with American film or German novels.

Though various anime were produced throughout the prewar, wartime, and post-World War II periods,<sup>19</sup> most historians cite 1963 as the birth of the modern anime industry when famed manga artist and animator Osamu Tezuka released *Tetsuwan Atomu* (*Astro Boy* in the United States).<sup>20</sup> The series solidified long-standing connections be-

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<sup>17</sup> *Id.* (quoting JAMES SNEAD, *WHITE SCREENS/BLACK IMAGES: HOLLYWOOD FROM THE DARK SIDE* 84-85 (1994)).

<sup>18</sup> *Id.* at 74.

<sup>19</sup> The first Japanese animated film was a 5-minute short film called *Mukuzo Imokawa the Doorman* (Mukuzo Imokawa Genkanban no Maki) produced by Oten Shimokawa in 1917. JONATHAN CLEMENTS & HELEN MCCARTHY, *THE ANIME ENCYCLOPEDIA* 283 (2001).

<sup>20</sup> See *Astroboy 1: Tape One: Birth of Astroboy; The Monster Machine* (NBC television broadcast, 1963).



tween anime and manga, inculcating millions of Japanese youth with the love of a super-robot who looked and acted just like a real boy.<sup>21</sup>

To remain profitable, Tezuka pioneered Japanese limited animation of a kind even more extreme than Hanna-Barbera's. Some half hour *Kimba the White Lion*<sup>22</sup> episodes consisted of 2500 cels,<sup>23</sup> running an average of 1.4 frames per second. Tezuka also orchestrated close ties with toy and merchandizing companies to help finance production in exchange for rights to produce character goods.<sup>24</sup> Both practices remain common in the anime industry to this day. As American cartoons shifted to "tasteless moppets,"<sup>25</sup> Tezuka retained his characteristically sophisticated and heart wrenching narratives, inspiring a future generation of artists to enter the field. Today in Japan, there are over eighty anime productions airing on television every week.<sup>26</sup> This does not count theatrical and direct-to-video<sup>27</sup> offerings, which would bring the number closer to 130.<sup>28</sup>

## II.B. *Fan Distribution and Fansubs*

Fan distribution comprises all of the methods by which fans copy and disseminate anime to other fans; this study specifically examines fan distribution between 1976 and 1993, with reference to subsequent activities.

Fansub is short for fan subtitling, or fan subtitled video. Fansubs are almost exclusively of anime. Fansubs appeared in America in 1989 following the wide consumer availability of Commodore Amiga and Apple Macintosh computers, which could overlay subtitles on top of a video stream with extra hardware. The essential hardware for fansubbing between 1989 and 1998 was a *genlock*, or generator locking device. The device synchronizes an incoming video signal with computer out-

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<sup>21</sup> Tezuka was the most successful at adapting Disney and Fleischer's cinematic visual styles to his manga and subsequently to his anime, and many artists emulated him in the wake of his immediate success. *E.g.*, FREDERIK L. SCHODT, *DREAMLAND JAPAN: WRITINGS ON MODERN MANGA* 25-27 (1996).

<sup>22</sup> See *Kimba the White Lion I: Go Child of Panja* (NBC television broadcast 1965).

<sup>23</sup> Glen Johnson, Jerry Beck, *Kimba, 60's ANIME* (1997), at <http://www.cartoonresearch.com/feature.html>.

<sup>24</sup> Cf. Karen Raugust, *Merchandising in Japan: It's Big Rewards and Competition*, ANIMATION WORLD NETWORK (1997), at <http://www.awn.com/mag/issue2.7/2.7pages/2.7raugustjapan.html>.

<sup>25</sup> MITTELL, *supra* note 15, at 74 ("Since the industry believed that 'uncritical moppets' would watch any cartoon that moved . . .").

<sup>26</sup> Ishiguro, *supra* note 6. See generally CLEMENTS & MCCARTHY, *supra* note 19.

<sup>27</sup> Various OAV, Original Animated Video, or OVA, Original Video Animation.

<sup>28</sup> Ishiguro, *supra* note 6. See generally CLEMENTS & MCCARTHY, *supra* note 19.

put,<sup>29</sup> which enables real-time overlay of subtitles. The results are recorded on another videocassette and distributed through a fan network.<sup>30</sup> By the mid 1990s, these systems allowed for near-perfect alignment of subtitles and spoken dialogue.<sup>31</sup>

Fans who subtitle videos are called fansubbers; a team of fansubbers is known as a fansub group. A fansub group traditionally consists of one or more translators, editors, typesetters, timers, and first-tier distributors.<sup>32</sup> Fansubbers usually add subtitler credits, explanatory cultural notes, and subtitles such as “not for sale or rent” and “cease distribution when licensed” to their works. These markers indicate that their works are not licensed, that no money should change hands for their fansubs, and that viewers should purchase the licensed products once they are available domestically.<sup>33</sup> Many fansubbers and distributors during the 1990s used the self addressed stamped envelope (SASE) system of distribution: fans would send a self addressed stamped envelope with blank tapes and instructions in it, and they would get the tapes back with the episodes recorded on them.<sup>34</sup>

Since 1998, most fansubbers have adopted the practice of *digisubbing*, or releasing their fansubs and encoded video files for Internet distribution. Digisubbing eclipsed physical media-based fansubbing as the dominant distribution method by about 2002.<sup>35</sup> While digisubbing deserves its own analysis, the key features of the fansubbing movement remain present in this modern distribution form.

One of the key features of fan distribution its role as a *proselytization commons*, where the media texts and the ideas of a movement are held in common and are employed to advance a directed cause. As this role permeates the history of fan distribution, the following section acknowledges the characteristics of and changes to the commons as it developed over time.

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<sup>29</sup> J. Kovacs, *An Overview of Genlock* (Oct. 1, 2001), at <http://www.mivs.com/technical/apnotes/an005.html>.

<sup>30</sup> E.g., Chris Gray, *The Fansub FAQ Part I-A*, THE FANSUB WORLD (Jan. 4, 1999), at <http://www.fansubs.net/fsw/general/faq1a.htm>.

<sup>31</sup> E.g., *id.*

<sup>32</sup> E.g., *id.*

<sup>33</sup> E.g., Chris Gray, *The Fansub FAQ Part I-C*, THE FANSUB WORLD (Jan. 4, 1999), at <http://www.fansubs.net/fsw/general/faq1c.htm>.

<sup>34</sup> E.g., John C. Lee, *Untitled* (Aug. 22, 1999) (essay discussing the ethics of acquiring fansubs using SASE and other methods), at <http://www.fansubs.net/view.php3?page=nature>.

<sup>35</sup> See generally postings to MIT Anime Club mailing list (2000-2003) (copies on file with author); GHDpro, *History of AnimeSuki*, ANIMESUKI.COM (Dec. 26, 2004), at <http://www.animesuki.com/doc.php/history.html>.

## III. HISTORY OF FAN DISTRIBUTION AND SUBTITLING

III.A. *Anime in America*

Anime entered the United States before 1975, but with varying degrees of adaptation.<sup>36</sup> While American producers had to stick fairly close to what was onscreen for the graphics, they changed much of the story to cater to American children's perceived tastes. Fred Ladd, who produced the American adaptations *Astro Boy* (1963), *Gigantor* (1965), *Kimba the White Lion* (1965), and *Speed Racer* (1967), notoriously changed names and edited plotlines.<sup>37</sup>

These shows turned out to be popular with Americans, however, and there is little doubt that Ladd contributed towards the short-lived success of anime in the 1960s. Nevertheless, pressure to sanitize American children's television in the 1970s paralleled dramatic advances in violence and sexual content in anime. Fred Ladd points out, "You couldn't give away a Japanese-made series here [by the early 1970s]."<sup>38</sup>

A few Japanese cartoons did make it over to the United States and are worth noting. *Gatchaman* (as *Battle of the Planets*, later *G-Force*) was brought over in 1978, but was significantly sterilized.<sup>39</sup> *Space Battleship Yamato* aired in 1978 with minimal retooling as *Star Blazers*, proving more successful.<sup>40</sup> Interest in anime would surface again in the next decade, but its driving force was different from what ever would have been expected.

Technology provided a vehicle for change in the mid 1970s. Post-*Astro Boy* anime spread through the United States within three months of the release of the first VCRs in November 1975. By March 1976, Japanese community television stations in the United States started running subtitled giant robot cartoons, such as *Getter Robo*.<sup>41</sup>

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<sup>36</sup> See generally Jerry Beck, *Animated Features 1*, at <http://www.cartoonresearch.com/feature.html> (last visited Dec. 4, 2003); TRISH LEDOUX & DOUG RANNEY, *THE COMPLETE ANIME GUIDE* 175 (2nd ed. 1997).

<sup>37</sup> See *Fredd Ladd: An Interview*, ANIMATION WORLD NETWORK (1996), at <http://www.awn.com/mag/issue1.5/articles/deneroffladd1.5.html>. (interview by Harvey Deneroff with Fredd Ladd, Animation Director).

<sup>38</sup> *Id.*

<sup>39</sup> LEDOUX & RANNEY, *supra* note 36, at 19-20.

<sup>40</sup> Its popularity was confined to the East Coast, however, explaining the prevalence of East Coast *Star Blazers* fandom. *Voltron* made significant inroads into the children's market in America in 1984-1986. Shows' Japanese origins were strictly eradicated. *Hyakujuo Go-Lion*, *Kiko Kantai Dairugger XV* [Hundred-Beast King Go Lion, Armored Fleet Dairugger-XV] (Toei Animation, Tokyo 12 Channel television broadcast, 1981-83); *Voltron* (World Events Prods., 1984-85). See generally CLEMENTS & MCCARTHY, *supra* note 19.

<sup>41</sup> Telephone Interview with Fred Patten, First U.S. Anime Club Founder, Cartoon/Fantasy Org. (Nov. 25, 2003) [hereinafter Patten Interview]. Since this telephone interview, Pat-

Fred Patten, founder of the first anime club in the United States, described his experience to me in detail.<sup>42</sup> Patten's first exposure to anime occurred at the Los Angeles Science Fiction Society (LASFS) in 1975, where a fan showed him some animation that he recorded.<sup>43</sup> Over the next year, that fan brought many Japanese giant robot cartoons with English subtitles to the LASFS. Additionally, several other fans recorded shows from Japanese community television and showed them at various fan events. Fans were amazed that the Japanese cartoons depicted so much more passion, conflict, philosophy, and literary depth than cartoons in the United States.<sup>44</sup>

A small group of sixteen fans, Patten included, decided that they liked the Japanese cartoons so much that they should found a separate club. In May 1977 they started the Cartoon/Fantasy Organization (C/FO).<sup>45</sup> That November, fans from the C/FO in Los Angeles started corresponding with other anime fans around the country. They discovered that cartoons differed per region.<sup>46</sup> Consequently, the fans started trading tapes back and forth.

Many LASFS members maintained pen pal relationships with other science fiction fans around the world, including Japan. C/FO members began to trade videos with Japanese fans who wanted *Star Trek* and *Battlestar Galactica*.<sup>47</sup>

Fan clubs in Boston, New York, and Philadelphia formed shortly after the C/FO. There was a mobile fan club on the East Coast that called itself the Gamelan Embassy, named after the antagonists from *Space Battleship Yamato*.<sup>48</sup> By 1979 fans and clubs, having recently established an independent identity from the science fiction movement, began using the term anime.<sup>49</sup>

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ten republished many of his essays and reviews documenting this period. See generally FRED PATTEN, *WATCHING ANIME, READING MANGA: 25 YEARS OF ESSAYS AND REVIEWS* (2004).

<sup>42</sup> *Id.*

<sup>43</sup> LEDOUX & RANNEY, *supra* note 36, at 176.

<sup>44</sup> E.g., *Mirai Shōnen Conan [Future Boy Conan]*, (Nippon Animation, NHK television broadcast, 1978-79).

<sup>45</sup> LEDOUX & RANNEY, *supra* note 36, at 176.

<sup>46</sup> New York was getting *Cyborg 009* and *Galaxy Express 999*, for example, which were not being shown in Los Angeles. *Cyborg 009* (Toei Animation & Sunrise, television broadcast, 1968, 1979). See generally CLEMENTS & MCCARTHY, *supra* note 19. *Galaxy Express 999* (Toei Animation, Fuji TV broadcast, 1978). See generally CLEMENTS & MCCARTHY, *supra* note 20.

<sup>47</sup> Patten Interview, *supra* note 441.

<sup>48</sup> The Gamelans were devoted to showing Japanese animation at the science fiction and comic book conventions in the New England and Mid-Atlantic regions. Patten Interview, *supra* note 441.

<sup>49</sup> E.g., Patten Interview, *supra* note 41.

The C/FO kept in contact with producers of anime on an informal basis.<sup>50</sup> Patten and the C/FO became involved with several Japanese animation studios, in particular Toei Animation, Tokyo Movie Shinsha (TMS), and Tatsunoko Pro, to help promote anime program materials in America. However, the Japanese were unsuccessful in accessing the American market because the barriers to entry through their targeted channels were too high.

In 1978, Toei Animation established its first regular office in North Hollywood. Toei representatives discovered the C/FO directly and asked if its members could help them do some marketing research.<sup>51</sup> Toei provided a 16mm promotional reel with its cartoons, which the C/FO showed at Westercon XXXIII in Los Angeles.<sup>52</sup> Toei then provided merchandise for test marketing at San Diego Comic-Con 1980,<sup>53</sup> where Patten ran the first American fan convention dealer's table.<sup>54</sup> In 1980, TMS contacted Patten directly and provided him with a subtitled 35mm print of *Lupin III: Castle of Cagliostro* for showing at the 1980 World Science Fiction Convention in Boston, Noreascon II, because TMS was seeking feedback and fans' reactions.

At the time it was unusual for Japanese companies to interact directly with fans; the Japanese head offices frowned on direct involvement with fans in Japan, other than to gauge a film's success. The existence of, much less the participation with, American fans was virtually unthinkable. Patten recalled that Jun Hirabayashi of TMS said that "it was highly unusual for a company representative to be dealing so informally with fans on a business level, and that in Japan, company representatives would never associate with fans except for planned publicity events at which the fans would simply be an audience."<sup>55</sup>

Kôki Narushima,<sup>56</sup> a Tatsunoko executive, made frequent business trips to Hollywood during this period. During these business trips Narushima would give Patten video tapes of Tatsunoko's programming to unofficially show around to any Hollywood executives. Narushima

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<sup>50</sup> C/FO invited Osamu Tezuka to its monthly meetings in March and December 1978; Tezuka encouraged fans to promote Japanese animation. LEDOUX & RANNEY, *supra* note 36, at 176.

<sup>51</sup> Patten Interview, *supra* note 411.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> The Comic-Con 1980 program guide has evidence of Toei's involvement, with a two-page article titled "The Japanese are here!" and illustrated with Tezuka's Astro Boy and Kimba. *Id.* fig.4.

<sup>55</sup> E-mail from Fred Patten (Oct. 1, 2004, 03:33:14 PDT) (on file with author).

<sup>56</sup> Cf. Anime News Network Encyclopedia, *Anime News Network - Kouki NARUSHIMA*, at <http://www.animenewsnetwork.com/encyclopedia/people.php?id=11989> (last visited Oct. 10, 2004).

was also clear that Patten was never to represent himself as an official Tatsunoko representative.<sup>57</sup> However, Tatsunoko had a studio run Japanese fan club for publicity purposes, and if Patten would serve as the club's American agent, it would accept American fans so that they could buy used production cels and other goods.<sup>58</sup>

These Japanese company representatives refused to license fan screenings and tape reproductions. Patten specifically recalls the representatives' explanation:

The reasons involved protections of copyrights; the impracticality of studios in Japan giving written permission to informal American fan groups to show their animation; the risk of losing the opportunity to sell their programs to American syndicated TV markets if the American TV representatives felt that there were already too many bootleg video copies in circulation; and other cavils of this nature.<sup>59</sup>

While the Japanese representatives could not support the fan activity in principle, they knew that fans were not profiting from their activities and that the studios were getting free publicity. Still, Japanese representatives in America did not officially acknowledge those uses because they were targeting major television syndicates; involvement with fans could have jeopardized their positions. Meanwhile, the Japanese head offices remained uninformed about fan activity in the United States.

Some Japanese creators began to feel that there was a growing, overlooked market in America.<sup>60</sup> Nevertheless, by 1982 the Japanese studios calculated that they were not going to succeed in the American market. The last known commercial push came from Toei Animation when it was trying to sell its first *Galaxy Express 999* theatrical feature to the major American movie studios. Toei again recruited C/FO members to help send out invitations to Hollywood studio representatives for a test screening in Burbank, about two blocks from the Warner Brothers studio. No Hollywood executives attended the screening.<sup>61</sup>

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<sup>57</sup> Patten Interview, *supra* note 41.

<sup>58</sup> E-mail from Fred Patten, *supra* note 55 (purportedly available in *C/FO Bulletin* 1980).

<sup>59</sup> E-mail from Fred Patten, *supra* note 55.

<sup>60</sup> Tezuka made another appearance at Comic-Con 1980, this time as part of his self-organized tour including Go Nagai, Monkey Punch, and Yumiko Igarashi. Patten, *supra* note 41; LEDOUX & RANNEY, *supra* note 36, at 176-77.

<sup>61</sup> Patten Interview, *supra* note 411.

By the end of the year, Toei sold *Galaxy Express 999* to Roger Corman's New World Pictures, a low-budget exploitation company.<sup>62</sup> Toei ended relations with the C/FO and returned to Japan.<sup>63</sup>

### III.B. *Responses to Copyright Permissions and Infringement*

When a potential user of a copyrighted work wishes to use it,<sup>64</sup> the rights holder may take one or more legal or nonlegal courses of action. I have categorized these responses into six types, three of which are acknowledged responses and three of which are unacknowledged responses.

The first acknowledged response is *permissive acknowledgement*, that is, an acknowledgement from the rights holder that grants permission to the requestor. The second response is *prohibitive acknowledgement*: an acknowledgement that simply denies the request, or requests that the potential infringer cease use. Cease-and-desist letters, court injunctions, and court rulings are all prohibitive acknowledgements. *Negotiatory acknowledgement* is potential permission, depending on negotiations between the two parties. This type of acknowledgement is common in business transactions.

U.S. copyright law permits the copyright holder to control a very large set of uses, so many of the fans' activities fall under copyright's domain. In a perfect world, rights holders would permit uses that benefit society, would negotiate uses that are part of their industry's value chain, and would prohibit uses that serve neither. The requestor would comply with the rights holder, and would cease any infringing uses.

This is not a perfect world, however, so to understand the full universe of responses, one must also consider options outside of the law.

There are three nonlegal options that a copyright holder can pursue; these options are *unacknowledged responses*. In these responses, the rights holder, *i.e.*, the representatives of the company, disavow any knowledge of or contact with the requestor, and the requestor is left with an ambiguous (that is, an unacknowledged) response.

The first response is *uninformed ignorance*: the rights holder has no idea what is going on. Perhaps the infringer has not come to the holder's attention, or perhaps the holder has no reason to suspect that the property has been released outside of the nation's borders.

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<sup>62</sup> See Gary Morris, *Notes toward a Lexicon of Roger Corman's New World Pictures*, BRIGHT LIGHTS FILM J. NO. 27, Jan. 2000, available at <http://www.brightlightsfilm.com/27/newworldpictures1.html>.

<sup>63</sup> Patten Interview, *supra* note 411.

<sup>64</sup> 17 U.S.C. § 106 (2003). For notes regarding citation of in-force copyright law, see *infra* p. 185 and note 185.

The second response is *deliberate* or *strategic ignorance*. In this model, a rights holder does not wish to authorize the use; rather, the holder wishes to seek benefits that result from the unauthorized use. The rights holder allows the requestor to bear the risk of the use. If the requestor's actions ultimately benefit the rights holder, then the holder can reap those benefits. If, however, the requestor fails, the holder may disavow any relationship with the user, or may sue the user for damages.

For example, in *Legal Fictions*, Prof. Rebecca Tushnet illustrates how unauthorized fan fiction in America may strengthen fan commitments to media texts such as *Star Trek* and *Dungeons and Dragons*.<sup>65</sup> While some corporate authors have expressed a general approval of the fannish practice, many remain silent. These authors rarely furnish written authorization to fans. Tushnet provides substantial evidence in support of a fair use defense with respect to fans' use of copyrighted characters in a fan fiction story; nevertheless, writers of fan fiction frequently add disclaimers<sup>66</sup> stating that even if they are infringing, they wish to do no harm. These writers live in fear that authors could sue them at a moment's notice.<sup>67</sup>

Strategic ignorance bears similarities to passive acquiescence in that the copyright holder does not actively submit to the use, although said holder may frown upon that use. Acquiescence might bar a preliminary injunction,<sup>68</sup> but would not bar victory on an infringement claim. If a copyright owner brought suit against an infringer and argued that initially it tried not to find out about infringing activities, the court would treat their inaction as acquiescence. However, said copyright owner would only bring suit to enforce its rights against the infringer. In the absence of evidence of a negotiatory acknowledgement, the defendant would clearly lose.

The third response is *dismissive ignorance*. Despite a small flow of information regarding the use, the holder chooses to ignore the use, not because of a hope that "inertia" will take its course, but because of the holder's perception that responding to the request would only waste company time. The rights holder views the requestor as a *lost cause*.

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<sup>65</sup> Tushnet, *supra* note 10, at 664.

<sup>66</sup> *Id.* § IV.A.1.

<sup>67</sup> Tushnet provides several possible motivations for the copyright holders' strategic ignorance: one of which intersects with a brand management problem. If a rights holder of *Star Trek* authorized a fan fiction story with gay characters, that alternate character trait might seep into canonical *Star Trek* and alter the value of the brand.

<sup>68</sup> *Richard Feiner & Co., Inc. v. Turner Entm't Co.*, 98 F.3d 33, 34 (2nd Cir. 1996).



The key difference between strategic and dismissive ignorance is: in strategic ignorance, an entity maintains at least constructive knowledge of the actions of others. The owner may not know about every fan fiction authored, but understands that fans are authoring them and are posting them online or in fan magazines. Dismissive ignorance, in contrast, looks and behaves exactly like uninformed ignorance. The litmus test for dismissive ignorance, then, is some sort of tacit information provided to an owner, coupled with the owner's future behavior that indicates information is not being acted upon.

How did the Japanese respond to fandom's potential infringements? According to Narushima's response, representatives in America responded in strategic ignorance: these representatives did not acknowledge those uses because they were targeting major television syndicates; involvement with fans could have jeopardized their positions. Furthermore, the Japanese head offices frowned on direct involvement with fandom, other than to use it as a gauge of their film's success for their predetermined purposes.

While the representatives in America responded strategically, the Japanese head offices remained uninformed. The Japanese head offices saw failure written all over the American market. Their uninformed ignorance would later turn to dismissive ignorance, like a child who hates apples just because the first one she ate had a worm.

### III.C. *Development of the Closed Proselytization Commons*

After the Japanese companies backed out of the American market in 1982, there were no legal forces to discourage fans from copying and distributing tapes amongst themselves. From the late 1970s to the end of the 1980s, there were movements to establish international fan clubs with chapters in many cities. The theory behind a central organization was that they could promote anime much more efficiently and could get more anime for the chapters in different cities to watch.<sup>69</sup>

The visual quality of tapes started deteriorating as the number of fans increased in America because fans started making multi-generation copies of the videos. Visual quality remained high within the first year after C/FO members began to receive tapes from people in Japan. By the early 1980s, however, some of the copies C/FO members reported were fifteenth to twentieth generation copies, which were extremely poor. It became common for fans to compare video quality between their tapes.<sup>70</sup>

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<sup>69</sup> See, e.g., Patten Interview, *supra* note 411.

<sup>70</sup> Patten Interview, *supra* note 411 (the better quality tape would eventually be shown).

Many fans also experienced ideological conflicts as the fandom grew. Patten reports, for example:

I got into some pretty bitter arguments with some fans in the early 80s [within the C/FO] that thought we should not try to promote Japanese anime, that we ought to keep it a small select group, you know—neat stuff that only we were aware of. I have always disputed it.<sup>71</sup>

An overwhelming majority of fans, however, felt that anime should expand to more segments of the American public. Some Japanese-speaking fans began to write translation booklets to accompany untranslated anime programming at clubs and conventions.<sup>72</sup> Plot synopsis booklets also existed: each booklet contained up to a full page synopsis of the action in an anime film (the most common) or the episodes in a television series. Translators and compilers of these books considered their work the American equivalents of *roman* albums<sup>73</sup> and other anime specialty books.

The fan clubs' desire for original Japanese anime contrasted sharply with other attempts to market anime in America after the Japanese companies pulled out of the market. During the 1980s, a few B-grade movie companies would buy Japanese cartoons with the express intent of carving them up into "kiddy" cartoon movies, often with significant rewriting of plot and dialogue.<sup>74</sup>

Perhaps the most notorious example of rewriting is the revisionist *Warriors of the Wind* (1986),<sup>75</sup> based upon Hayao Miyazaki's *Nausicaä of the Valley of the Wind* (1984).<sup>76</sup> New World Pictures cut a half hour out of it, reduced expenses wherever possible, and changed most char-

<sup>71</sup> Patten Interview, *supra* note 411. In 1985, the Gamelan Assembly announced that they were dissolving because anime was now popular enough that conventions were scheduling their own official anime rooms. Patten Interview, *supra* note 411.

<sup>72</sup> Patten Interview, *supra* note 411; LEDOUX & RANNEY, *supra* note 36, at 177-78. A translation booklet would usually be twenty-five to thirty pages with the entire dialogue for a full length movie or a batch of episodes. Translators would publish the booklet in fanzine format, *i.e.*, as an amateur-produced magazine written for a subculture of fans. THE AM. HERITAGE DICTIONARY OF THE ENG. LANGUAGE (4th ed., 2000) [hereinafter AM. HERITAGE DICTIONARY], in *Dictionary.com/fanzine*, available at <http://dictionary.reference.com/search?q=fanzine> (last visited Apr. 28, 2004).

<sup>73</sup> See generally *Star Blazers and Yamato Books* (discussing *roman* albums), at <http://www.desslok.com/INFO/books.htm> (last visited Feb. 21, 2005). Called by the same term in Japanese, *roman* albums are compilations of production stills and information from various anime; they are highly prized among collectors. Authors of translation and plot synopsis booklets mainly wanted prestige within the anime fan community.

<sup>74</sup> Patten Interview, *supra* note 411. See LEDOUX & RANNEY, *supra* note 36, at 19 *passim*; see also Morris, *supra* note 62.

<sup>75</sup> WARRIORS OF THE WIND (New World Pictures, Apr. 1986).

<sup>76</sup> KAZE NO TANI NO NAUSHIKA [NAUSICAA OF THE VALLEY OF THE WIND] (Toei Inc., 1984).

acter names. Both Hayao Miyazaki and Isao Takahata were appalled. In 1992, Takahata said of the edited version:

It is absolutely horrible! They did an enormous and aberrant censorship; they cut Hisaishi's pieces of music, [not to mention] the changed dialogues. It was a great error of Studio Ghibli and we haven't given broadcast [sic] rights to foreign countries since, and we'll never again give such rights without an attentive examination of the conditions beforehand. For that matter, the international rights for *Nausicaä* given to the U.S.A. will be over in 2 or 3 years. All these movies are grounded strongly in Japanese culture and are not conceived with an eye towards exportation. Censoring them is worse than betraying them.<sup>77</sup>

Copied videos of the original *Nausicaä* had come over to America; these videos were quickly disseminated throughout the fan base. Despite New World Pictures's poor handling of *Nausicaä*, fans were inspired by Miyazaki's original. Patten recounts that, because of *Nausicaä*'s seminal influence, fans organized the first anime tour to Tokyo in summer 1986 in order to see Miyazaki's *Laputa: Castle in the Sky*, as well as the landmarks that they had only glimpsed in anime.<sup>78</sup>

Despite these attempts by some American companies to bastardize anime productions for the American market, anime made at least one faithful foray into the commercial sector in the mid 1980s. In 1981, Carl Macek assisted with marketing and promotion for the movie *Heavy Metal*<sup>79</sup>, leading him to research animation that was not oriented toward the children's market. While Macek was working on *Heavy Metal*, he let the fledgling C/FO chapter of Orange County meet once a month in his comics and memorabilia shop. Macek became aware that a cult interest in anime was growing among the young adult public, an interest ignored by the entertainment establishment. Soon after, representatives of a production firm and licensee named Harmony Gold contacted Macek, informing him that they had worldwide rights outside Japan to several Japanese cartoon series. They had bought the rights mainly to sell in Europe and Latin America, dubbing them into Italian, French, and Spanish. They wanted to try and capitalize on their investment in

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<sup>77</sup> Interview by Cedric Littardi with Isao Takahata, Animation Director, in *An Interview with Isao Takahata* (Steven Feldman ed., Ken Elecor trans., 1993), at [http://www.nausicaa.net/miyazaki/interviews/t\\_corbeil.html](http://www.nausicaa.net/miyazaki/interviews/t_corbeil.html). See also HELEN MCCARTHY, HAYAO MIYAZAKI: MASTER OF JAPANESE ANIMATION, 78-79 (1999) (quoting *Interview with Hayao Miyazaki*, YOUNG, Feb. 20, 1984).

<sup>78</sup> Patten Interview, *supra* note 411.

<sup>79</sup> HEAVY METAL (Columbia Pictures, 1981). *Heavy Metal* itself was a bold and expensive experiment in pushing boundaries on the midnight film circuit, featuring flying cars, plenty of drug use, and a plethora of busty women.

America, but they were not sure how to go about it.<sup>80</sup> Macek agreed to help edit *Macross*,<sup>81</sup> *Orguss*,<sup>82</sup> and *Southern Cross*<sup>83</sup> into *Robotech*, which turned out to be a resounding commercial success.<sup>84</sup>

While Macek edited *Robotech* rather seriously, the end product was markedly more faithful to its original Japanese roots than previous commercial attempts. It kept in, for example, the pivotal love triangle between Hikaru Ichijo (Rick Hunter), Lynn Minmay (Lynn Minmei), and Misa Hayase (Lisa Hayes), pushing genre boundaries and audience assumptions on both Japanese and American animated television. Viewers across America noticed and began to seek out additional sources of anime, joining or forming clubs wherever possible. Not ironically, the creator of this pivotal catalyst for anime fans was none other than a fan himself who relied extensively on the fan network and its sentiments.

By the late 1980s, the C/FO had over three dozen chapters throughout America, and it even maintained a chapter called C/FO Rising Sun near an air force base in Japan.<sup>85</sup> The organization had established a massive official system for the distribution of untranslated tapes among its member chapters. In 1985, many of the C/FO's videos not acquired through pen pal relationships or Japanese family members were acquired through little "mom and pop" video stores that sold or rented Japanese videos.<sup>86</sup> Some store owners would ask their relatives in Japan to record and send Japanese shows to them. They would then offer the tapes to customers. Fans would purchase or rent these tapes, copy them, and circulate them in the fan community.<sup>87</sup>

In Japan, however, another fan network was forming led by James Renault<sup>88</sup> and the fans at C/FO Rising Sun. Many of the people involved in the early days of the fan network who were copying and send-

<sup>80</sup> E.g., Patten Interview, *supra* note 41.

<sup>81</sup> *Chōjīkū Yōsai Makurosu [Super Dimension Fortress Macross]* (Tatsunoko Prods., 1982).

<sup>82</sup> *Chōjīkū Seiki Ōcir\_O;gasu [Super Dimension Century Orguss]* (Studio Nue, Tokyo Movie Shinsha Co., 1983).

<sup>83</sup> *Chōjīkū Kidan Southern Cross [Super Dimensional Cavalry Southern Cross]* (Tatsunoko Prods., 1984).

<sup>84</sup> *ROBOTECH* (Harmony Gold Ltd. 1985); see also Patten Interview, *supra* note 41 (Macek promoted *Robotech* by attending a number of science fiction conventions, talking to the fans, and finding out what the fans wanted).

<sup>85</sup> E.g., Patten Interview, *supra* note 41.

<sup>86</sup> These stores were located in districts such as Little Tokyo in Los Angeles, Nipponmachi in San Francisco, the Japanese district of New York. See, e.g., Patten Interview, *supra* note 41.

<sup>87</sup> Patten Interview, *supra* note 41.

<sup>88</sup> Pseudonym. Telephone Interview with James Renault, Anime Convention Executive and Fan Organizer (Dec. 3, 2003)(hereinafter Renault Interview).

ing tapes were affiliated with the armed forces. Renault became involved with anime growing up overseas. His father was a military man: throughout the 1960s and 1970s Renault's family was stationed at Tachikawa airbase, and later Misawa airbase, in northern Japan. A Japanese nanny cared for Renault most of the time in his youth, during which he watched a lot of Japanese television.<sup>89</sup> He developed relationships with Japanese pen pals, to whom he would send tapes of American programming.<sup>90</sup> He began to develop a ritual gift exchange to build his subcultural capital.

Renault returned to America to finish high school and college. While in America, he met serious anime archivists, including Patten. Renault watched the C/FO grow and expand from afar; his main source of anime was through his pen pals in Japan. He would occasionally "sit down and binge watch for hours at a time," but would not watch every day, nor would he watch every tape he had.<sup>91</sup> Renault had many Japanese pen pals, and the majority of them eventually became animators themselves.<sup>92</sup> Through these animators, Renault met many other people who were studying under them, or otherwise were involved with them in their studios.

Renault joined the military in 1986, and had the great fortune to be sent back to the Misawa base where he was raised. He resumed contact with many of his old pen pals, and he reentered organized fandom.<sup>93</sup> Renault would drive from Misawa to Tokyo every weekend to shop, to drop "goodies" off to people in studios, to build up relationships, find out what was going on in the industry, and to follow up on things he was reading in Japanese animation magazines.<sup>94</sup> Later that year, he met Joshua Smith<sup>95</sup> who was the president and chief operator of C/FO Rising Sun.

Led by Renault, C/FO Rising Sun applied American military distribution techniques to their operations. Renault used his experience to produce tapes on request, copying over forty tapes per week.<sup>96</sup> When Renault worked with the fansubbing group Teiboku Fansubs in 1993,<sup>97</sup>

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<sup>89</sup> Renault Interview, *supra* note 87.

<sup>90</sup> Renault Interview, *supra* note 87. His family was among the first to own a Betamax on the airbase. Renault Interview, *supra* note 8788.

<sup>91</sup> Renault Interview, *supra* note 87.

<sup>92</sup> His pen pals included artists like Kenichi Sonoda, Monkey Punch (who was a good friend of Renault's father, as both were avid jazz collectors), and Go Nagai. Renault Interview, *supra* note 87.

<sup>93</sup> Renault Interview, *supra* note 87.

<sup>94</sup> Renault Interview, *supra* note 8788.

<sup>95</sup> Pseudonym.

<sup>96</sup> Renault Interview, *supra* note 87.

<sup>97</sup> Pseudonym.

he again applied his logistics knowledge to Teiboku's distribution practices. He taught these methods to other fansubbing and distribution groups so that they could maximize their tape output.<sup>98</sup>

Renault explained that back in the 1970s and 1980s there were no legal ramifications and distributors operated freely:

Every now and again, somebody would pick up a license and bring a show to America which they would dub over and change . . . but we wanted to see what the original looked like. [T]he motivation was just to get anime to the masses, and to that end, we spent a lot of money and postage!<sup>99</sup>

Tape fidelity remained a major drawback to this distribution system: viewers of anime in the mid and late 1980s suffered through Japanese commercials, shaky video, and the ever-present language barrier.<sup>100</sup> Being able to watch anime in any form was reward enough.

Anime bootlegging—that is, the mass copying of anime tapes for profit—was virtually nonexistent in America at this time. Attempts quickly collapsed because, with one letter, groups like the C/FO would be delighted to send the untranslated Japanese materials for free. Bootleggers could not match the C/FO's quality, price, or selection. C/FO chapters could obtain any show that anybody wanted, and they could get the show for the minimal cost of postage.<sup>101</sup>

Despite the well developed network, in the mid 1980s a divide emerged between the “haves” and the “have-nots.” Access to anime became a matter of who one knew in order to gain access. Once someone knew the right people, however, it was easy to access any anime available, quality issues aside.<sup>102</sup>

Fan distribution through C/FO's efforts, particularly C/FO Rising Sun, sought to keep anime free but controlled within the C/FO organization. C/FO chapters only sent material to people who they thought really wanted anime and who would share it with other close friends.<sup>103</sup>

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<sup>98</sup> The MIT Anime Club's archives confirm Renault's account. A variety of tapes, including *Dirty Pair TV Episodes 1-13, 14-26*, and *OVA's 1-10*, with approximate dates—1985 to 1986—were uncovered. See *Dâti Pea [Dirty Pair]* (Bandai Entm't, Sunrise Inc. television series, 1985).

<sup>99</sup> Renault Interview, *supra* note 87.

<sup>100</sup> *E.g.*, Patten Interview, *supra* note 411. Also confirmed through the MIT Anime Club's archives.

<sup>101</sup> *E.g.*, Patten Interview, *supra* note 411.

<sup>102</sup> Participants in subcultures run on subcultural capital as markers of social prestige, yet paradoxically, since subcultural capital is based upon “secret” knowledge, it quickly becomes devalued as the mainstream devours it. Martin Roberts, *Notes on the Global Underground: Subcultural Elites, Conspicuous Cosmopolitanism*, GLOBALIZATION, IDENTITY & THE ARTS CONF., U. MANITOBA (Oct. 20, 2001), available at [http://www.umanitoba.ca/faculties/arts/english/media/workshop/papers/roberts/roberts\\_paper.pdf](http://www.umanitoba.ca/faculties/arts/english/media/workshop/papers/roberts/roberts_paper.pdf).

<sup>103</sup> Renault Interview, *supra* note 87.

C/FO chapters also adhered to their “free and controlled” philosophy when they engineered their arrangements between clubs. They proclaimed: *Show it to all of your friends in order to promote Japanese animation.*<sup>104</sup> Assuming that a fan had access to the network, he or she could access as many anime and related goods as were available.

### III.C.1. Fan Networks as Proselytization Commons

In terms of the theorist Yochai Benkler,<sup>105</sup> the fan distribution phenomenon may be analyzed as a layered network. The physical layer (the postal system) operated as a commons for many types of media, but both U.S. law and the logical layer (towards the late 1980s, the C/FO organization) restricted access to the physical layer’s contents. The logical layer operated under control, and the content layer (anime) operated as a commons directed towards a particular cause: to get more anime to the masses.

I dub the anime network that existed during the 1980s a *closed proselytization commons*. Like Lawrence Lessig’s characterization of the early Internet as an innovation commons,<sup>106</sup> the proselytization commons offered a world of creativity—a world of *difference*—to those who had access to it.

This commons of anime distribution, however, existed several years before the widespread adoption of the Internet. Its defining feature was not the freedom to innovate. Rather, it was the freedom to advance a directed cause—the spread of Japanese animation—through any of the anime titles and the values held in common. In practice, the commons of the mid 80s was closed: it did not embrace the end-to-end principle of provider neutrality.<sup>107</sup> The C/FO built a model of control into the commons, assuming that *it*, the C/FO, controlled access to the largest flows of anime throughout the United States. This arrogance proved to be its downfall, leaving the next generation to the construction of a new, *open* proselytization commons based on fansubs.

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<sup>104</sup> Renault Interview, *supra* note 87.

<sup>105</sup> *InfoAnarchy Wiki: Yochai Benkler* (Oct. 21, 2003), at [http://www.infoanarchy.org/wiki/wiki.pl?Yochai\\_Benkler](http://www.infoanarchy.org/wiki/wiki.pl?Yochai_Benkler).

<sup>106</sup> LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* 23 (2001).

<sup>107</sup> *Cf.* JEROME H. SALTZER & M. FRANS KAASHOEK, *TOPICS IN THE ENGINEERING OF COMPUTER SYSTEMS*, at 4-1 (2004). *See also* Lawrence Lessig, *A Threat to Innovation on the Web* (Dec. 13, 2002), in posting of Dave Farber, *[IP] Lessig: Coalition Asks FCC to Ensure End-to-End, Interesting-People* (14 Dec. 2002), available at <http://www.interesting-people.org/archives/interesting-people/200212/msg00053.html> (Originally published in Financial Times Online).

### III.D. *Development of the Open Proselytization Commons*

The very first known fansub was reported from C/FO Rising Sun in 1986, sent to that chapter by the late Roy Black of C/FO Virginia in Blacksburg. Though the picture quality had been completely bled out, the tape represented the first faltering steps of a revolutionary leap: for the first time, a fan could watch an episode and fully understand what was going on.<sup>108</sup>

The C/FO's power and influence began to wane by late 1988. Established chapters refused to trade or communicate with one another due to politicking and hoarding of subcultural capital. If a group had a larger membership or an item of value, the group would withhold items from another group to get something else that they wanted. Many of the chapters fell into a classic resource deadlock.<sup>109</sup>

In 1989 a power struggle ensued at the very top of the C/FO. Patten felt that he should step down for the good of the organization, so that anime distribution could move to the next level. Many accused Patten of disloyalty because he began to write articles for general magazines.<sup>110</sup> Patten reasoned that if the purpose of his fan involvement was to proselytize anime and make it better known in America, it was advantageous to publish his work in a popular culture magazine instead of a club magazine.<sup>111</sup>

Patten stepped down amidst the fury, but he did not set up a clear line of succession. In the infighting that resulted, new leaders came to power who wanted to change C/FO operations to fit their own designs.<sup>112</sup>

Although the C/FO promised unfettered access to anime within its organization, access into the C/FO's networks proved more difficult than one might expect. To gain access from the C/FO's central command, a group had to be a member organization.<sup>113</sup> The C/FO would bring in new charter members, but then after a while, Central Com-

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<sup>108</sup> Black sent C/FO Rising Sun a third-generation copy of a fourth or fifth generation copy of a *Lupin III* episode that someone had genlocked with a Commodore Amiga and had subtitled, scene by scene. The technology to fansub was extremely expensive for an average fan (on the order of \$4000 in 1986); the time commitment per episode was over one hundred hours. Renault nevertheless was "blown away at somebody having that level of patience. It was kind of like giving the caveman fire. It was just, now that we have it, we have to figure out how we're going to put it to use." Renault Interview, *supra* note 87.

<sup>109</sup> See SALTZER & KAASHOEK, *supra* note 107, at 2-1.

<sup>110</sup> Patten Interview, *supra* note 411 (rather than for the perpetually behind-schedule C/FO fanzine).

<sup>111</sup> Patten Interview, *supra* note 411.

<sup>112</sup> Renault Interview, *supra* note 87.

<sup>113</sup> Renault Interview, *supra* note 87 (C/FO Central Command moved from Los Angeles to San Antonio).



mand stopped sending tapes to those charter members on request, causing much strife.<sup>114</sup>

The late 1980s became a rough time for fandom because of the increased difficulty in obtaining materials from these established groups.<sup>115</sup> Most of the chapters seceded from the C/FO, which ceased to exist as a conglomerate organization in July 1989.<sup>116</sup> In 1990, the C/FO would be referred to as “the Collapsing Fan Organization” alluding to its tortuous demise.<sup>117</sup>

Right after the C/FO dissolved, fansubbing became accessible to the public. The rise of fansubbing has little relation to the C/FO’s demise, probably owing instead to affordable subtitling tools. Although fansubbers and anime companies started at about the same time, the companies were equally dependent on the fan base as they were on the rapidly declining price of technology.

The earliest subtitled, widely-distributed fansubs were the first two episodes of *Ranma ½*, fansubbed under the Ranma Project which started at BayCon in San Jose, California in May 1989.<sup>118</sup> The Ranma Project had three members: one was responsible for translation, one was responsible for English composition, and one was responsible for the actual subtitling and character generation.<sup>119</sup> Members of the Ranma Project would buy Japanese laserdiscs to subtitle, resulting in pristine first generation copies. Although Usenet and interview sources concede that other subtitling projects existed, the Ranma Project represented the first coordinated subtitling effort that successfully distributed its tapes throughout the country. It exhibited its work at

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<sup>114</sup> Renault Interview, *supra* note 87.

<sup>115</sup> For example, C/FO San Antonio, C/FO Denver (C/Food), and C/FO Sacramento. Renault Interview, *supra* note 87.

<sup>116</sup> Posting of Mike Tatsugawa, *Re: Please Help with Anime Fandom History!!* to news:rec.arts.anime (July 21, 1993), available at <http://groups-beta.google.com> with Message-ID 1993Jul21.012418.5880@nic.csu.net.

<sup>117</sup> *E.g.*, posting of Gerard Pinzone, *Anime Enquirer*, to news:rec.arts.anime (Oct. 31, 1990), available at <http://groups-beta.google.com> with Message-ID 9010310259.AA14987@cwns12.INS.CWRU.Edu.

<sup>118</sup> Posting *Ranma Project (Was: Where's Animestuff 12???)* to news:rec.arts.anime (Feb. 10, 1990), available at <http://groups-beta.google.com> with Message-ID 42581@ames.arc.nasa.gov. Posting of Robert J. Woodhead, *MADOX-01 Subtitled SNEAK PREVIEW*, to news:rec.arts.anime (Aug. 31, 1989), available at <http://groups-beta.google.com> with Message-ID 850@biar.UUCP; posting of Robert J. Woodhead, *MADOX-01 SHIPS!!!* to news:rec.arts.anime (Apr. 6, 1990) (*MADOX-01* tape confirmed in MIT Anime Club master VHS library), available at <http://groups-beta.google.com> with Message-ID 1048@biar.UUCP; AnimEigo, *History – About Us* (2002), at <http://www.animeigo.com/About/HISTORY.t>.

<sup>119</sup> I have not disclosed the names of the members out of respect for their wishes as stated in their correspondences; however, the original sources illuminate. Posting *ANIMECON Video: Who, What, Why* to news:rec.arts.anime (Aug. 28, 1991), available at <http://groups-beta.google.com> with Message-ID 1991Aug28.071932.25274@nas.nasa.gov.

AnimeCon '91 over the hotel's video system.<sup>120</sup> Perhaps even more remarkable was the speed of the project's subtitling and distribution; within weeks of the Japanese laser discs being released, members of the Project subtitled and distributed the episodes.<sup>121</sup>

Through this period, Japanese companies still remained inactive in the American market. This is demonstrated by the Ranma Project's charter post, as well as several kernels of thought developed throughout the fansubbing movement:

> Also, are the subtitled episodes mentioned available anywhere???

No. This is where the problems [come] in.

Since we do not have the official rights to do any of these, we really cannot 'sell' these on the open market. I have given a number of copies away, with my blessing to the [recipients] to copy the hell out of it, but this is a VERY grey area. I fully expect to either be told to stop by Kitty Films (which I would) or be sued the s\$!t out of, which would only make potential audiences over here [very] mad . . . .

The reality just may be that they just don't care, period. A well known comic book writer who's spent a lot of time in Japan (come on. . .you should know who this is. . . .) said that when he met with some executives in a couple of studios and let them know the 'piracy' situation [that's] going on here, they said they didn't care what went on over here. Was this because of the yen-dollar exchange wouldn't make it profitable for anything to be released here, or they just think of us as a bunch of [weird] Americans.<sup>122</sup>

While the Ranma Project was active, it managed to subtitle the first two seasons of *Ranma ½*, some *Maison Ikkoku*, and a smattering of other titles. The Project lasted through January 1992, at which point the members ended operations for personal reasons.<sup>123</sup> No evidence suggests that Project members were sued or ordered to cease; indeed, the members remained active on newsgroups and at conventions well after this January 1992 post.<sup>124</sup>

U.S. entertainment executives, and increasingly Japanese anime industry analysts, enjoy saying, "trade follows the films."<sup>125</sup> But what do the films follow? I argue that media texts follow demand for the texts, and that demand comes from a public fervent to watch them. Fans built

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<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> Posting *The Ranma Project Suspends Operations* to news:rec.arts.anime (23 Jan. 1992), available at <http://groups-beta.google.com> with Message-ID 1992Jan24.022343.6677@nasa.nasa.gov.

<sup>124</sup> See Soc'y for the Promotion of Japanese Animation, *American Guest and Industry Panels*, ANIME EXPO 1992 MEMORIES (July 3-6, 1992), at <http://www.animeexpo.org/memories92/panels2-92.html>.

<sup>125</sup> *Japan Gives Strapped Toon-Houses Cash*, ANIMATION WORLD NETWORK (July 7, 2004), at [http://news.awn.com/index.php?ltype=top&newsitem\\_no=11409](http://news.awn.com/index.php?ltype=top&newsitem_no=11409).

fervor for anime by constructing an *open* proselytization commons, whose chief aim was to spread anime as far and wide as possible. The Ranma Project started on the premise that since *Ranma ½* might *never* be released commercially, it was worth the Project's efforts to translate *Ranma ½* and show it to fans.

As groups became more organized, fansubbers began to talk to one another, some by the Internet. By 1993, fansubbers<sup>126</sup> coordinated with one another to prevent releasing two translations for the same show.<sup>127</sup> Cooperation also allowed fansub groups to monitor one another. Anime fansubbers grew to about four groups between the foundation of the Ranma Project and AnimeCon '91, then to eight groups in the following six months. The number of groups increased to fifteen following Anime Expo '92, where it remained for about two years. Groups multiplied through 1993, and increased steadily into the mid 1990s.<sup>128</sup>

In the earliest days (1989 through 1990), fansubbers served as their own distributors: they copied tapes individually for anyone who requested them. A tiered distribution system quickly replaced this model, where distinct members of a fansubbing group would copy and distribute tapes to individuals or organizations for further distribution. Renault recounted that if he could produce twelve tapes a week, he would be fine.<sup>129</sup> When fans started getting Internet access in increasing numbers and started becoming aware of additional titles, distribution demands "exploded." In a few cases, the fansubbing group would establish a subcommittee, usually a single person, to manage distribution. More likely, other groups such as college based clubs allied with fansubbers to distribute the fansubs to other clubs.<sup>130</sup>

The rise of clubs, industry, and fansubbing gave rise to anime conventions: gatherings where fans and newcomers alike could revel in fansubbed and licensed anime.

AnimeCon '91 in San Jose was well attended by fans old and new who were interested in anime, catalyzing an open anime fandom.<sup>131</sup>

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<sup>126</sup> The first known reference to the videos as "fansubs" was made in March 1993. Posting of Jeff Yang, *ANIMEIGO HAS RANMA?!?!* to news:rec.arts.anime (Mar. 4, 1993), available at <http://groups-beta.google.com> with Message-ID C3CzA8.Frt@panix.com.

<sup>127</sup> Renault Interview, *supra* note 87.

<sup>128</sup> Renault Interview, *supra* note 87. Cf. asudem, FANSUB DATABASE (May 1, 2001) at [http://www.fansubs.net/fsd/index\\_10\\_0.html](http://www.fansubs.net/fsd/index_10_0.html) (examining list of fansubbers). The MIT Anime Club's library collection and acquisition history also confirm this trend.

<sup>129</sup> Renault Interview, *supra* note 87.

<sup>130</sup> E.g., Renault Interview, *supra* note 87. See. Doris Chan, *The History of CJAS*, CORNELL JAPANESE ANIMATION SOCIETY HOMEPAGE, <http://www.cjas.org/content/view/7/33/>.

<sup>131</sup> *AnimeCon 1991 Information*, ANIME-CONS.COM, <http://www.anime-cons.com/events/info.shtml/138> (listing attendance as 2,100 people).

The writings of Cal-Animage Alpha founder and AnimeCon vice-chairman, Mike Tatsugawa, capture this moment in history:

What fandom is witnessing is truly a rare sight and one that we should all stop and appreciate—the transformation of a medium . . . . No longer do we have to settle for fifth generation tapes as our source of entertainment, or word-of-mouth synopses of videos . . . . Our job several years ago was to expand the Japanese animation fandom base through any means possible. Now, our task has changed. There is still a need to get more fans involved in anime, but there are more ways to do it now than at any other point in our short history. Subbing videos was great a few years ago, and in my opinion is still great today, but now we must work with the companies willing to expand into the American market . . . . It's time for animation fans to leave the cradle and start pushing harder than ever before to bring anime into the mainstream. The anime explosion is about to happen. The only question is whether we are willing to accept the results.<sup>132</sup>

Despite this activity, Japanese companies remained reluctant to support American industry and fandom. Although the anime studio Gainax made an official appearance at AnimeCon '91 and at certain science fiction conventions in preceding previous years,<sup>133</sup> Gainax's presence was an exception rather than the rule. Their appearance owed more to the pro-fan orientation of its staff than any sentiment shared throughout the Japanese industry. Most Japanese companies continued to refuse to consider the American market. The appearance of certain creative figures suggests a split between the fans and the business interests of the day.

The vast majority of shows at AnimeCon '91 were licensed from Japanese licensors, but were screened without subtitles, leaving many of the 2100 attendees<sup>134</sup> bewildered.<sup>135</sup> Thereafter, the staff of Anime Expo '92 expended significant effort securing permissions from Japanese and American companies to screen subtitled anime. Harvey Jackson<sup>136</sup> reported these activities during his involvement with Anime Expo '92, Anime America '93 (San Francisco), and Anime Expo '93 (Los Angeles). When Jackson ran programming for these conventions,

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<sup>132</sup> Mike Tatsugawa, *Editor's Note* to CAL-ANIMAGE, 2.2 Ä-NI-MÉ: THE BERKELEY JOURNAL OF JAPANESE ANIMATION (Mike Tatsugawa et al. eds., Aug. 1991).

<sup>133</sup> For example, Gainax's first president Toshio Okada attended Noreascon II in his youth.

<sup>134</sup> *AnimeCon 1991 Information*, *supra* note 131.

<sup>135</sup> There were a handful of subtitled anime at AnimeCon '91: the *Ranma ½* and *Maison Ikkoku* fansubs, as well as the few industry releases available, were shown. *ANIMECON Video: Who, What, Why*, *supra* note 119.

<sup>136</sup> Pseudonym. Telephone Interview with Harvey Jackson, Anime Convention Organizer and Fansubber (Dec. 3, 2003)(hereinafter Jackson Interview).

he contacted all of the companies and explicitly asked them if the convention could have permission to screen subtitled materials.<sup>137</sup>

The Japanese licensors would give the convention permission to subtitle, so long as the American companies approved the script that the convention would ultimately use.<sup>138</sup> The cautious approach of Japanese licensors suggests a suspicious but dismissive approach to copyright permissions: while they did not wish to jeopardize their titles in production in America, they did not want to spend company time supervising the particulars.

Anime Expo '92 had fans in newly formed fansub groups subtitle nearly all of its programming. When convention attendees discovered that local fansub groups had translated many of the convention materials, they all wanted copies. Anime Expo was not in a position to offer copies, but the various fansub groups made it known through word-of-mouth that they would happily provide copies to members of anime clubs. Many people in the Bay Area formed clubs just to get access.<sup>139</sup>

### III.D.1. Fansubbing and its Causal Link to Licensing

To understand the repercussions of fansubbing on fandom and industry, consider the following cases. For Anime Expo '93, Kiotsukete Studios<sup>140</sup> subtitled all six episodes of *Tenchi Muyo!*, all three then existing episodes of *Ah! My Goddess*, *Ranma ½ Movie 2*, two of the *Gundam* movies, *Koko wa Greenwood*, and *All-Purpose Cultural Cat Girl Nuku Nuku*.<sup>141</sup> American companies licensed many of these titles soon after Anime Expo '93. Every single showing at the convention was well attended, and people wanted to see the titles professionally released. Circulation of some of these titles was already in discussion, but there were other shows without any industry interest that were picked up after the convention.<sup>142</sup>

Whether or not these fansubs actually prompted American companies to license these titles is a matter of hot debate. However, anime companies—from 1991—plainly licensed titles circulating in the fansub community with far greater frequency than non-fansubbed titles. If licensing of these titles were mere coincidence, import houses would have to have relied on the show's popularity in Japan to predict popu-

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<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> Pseudonym. *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *E.g.*, Anime News Network Encyclopedia, *Anime News Network – Here is Greenwood (OAV)*, at <http://www.animenewsnetwork.com/encyclopedia/anime.php?id=504> (last visited Apr. 28, 2004).

larity with the American public. If a causation link exists, it owes to the existing popularity of anime among American fandom as measured by attendance at conventions, proliferation of clubs, consumption of fansubs, and motivations of fan-oriented industrialists.

I conclude the latter: given the universe of potential titles to license, and the still-limited appeal of anime in the American public, early anime companies had to rely on the existing fan base, and had to grow that fan base, if they were to turn a profit. That fan base relied on the circulation of fansubs. Conceptually, the proselytization commons shaped the commercial enterprise,<sup>143</sup> not the other way around.

Consider *Koko wa Greenwood*.<sup>144</sup> *Koko wa Greenwood* was first issued as a girls' manga; it had no following in Japan outside of teenage girls who were following the manga. Those girls hated the more boy-oriented anime. When Kiotsukete started distributing *Greenwood*, no one wanted it; Kiotsukete had to include it as an extra episode at the end of a tape just to get people interested in it.<sup>145</sup> After people started watching *Greenwood*,<sup>146</sup> demand grew, and the property became valuable enough to license. Kiotsukete, the only group to fansub *Greenwood* in its entirety, stopped releasing it and told its distributors to stop distributing it. Fans then had to purchase the licensed copies.<sup>147</sup>

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<sup>143</sup> As *infra* §III.E pp. 168-182 will demonstrate.

<sup>144</sup> Also *Here is Greenwood*, which Software Sculptors licensed in 1996. See posting of Dmitri "Dmitheon" Lenna, *Soft.Sculp Has Greenwood*, to news:rec.arts.anime (Mar. 25, 1996), available at <http://groups-beta.google.com> with Message-ID 4j7t3b\$h1n@warren1a.its.rpi.edu>#1/1; cf. Central Park Media, *Here is Greenwood: Vol 1 (sub)* (1 Oct.1996), at [https://secure.centralparkmedia.com/cpmdb/cfcpm.cfm?Cat=SSVS\\_9610](https://secure.centralparkmedia.com/cpmdb/cfcpm.cfm?Cat=SSVS_9610) (last visited Dec. 4, 2003).

<sup>145</sup> Jackson Interview, *supra* note 1365.

<sup>146</sup> See, e.g., *MIT Anime Showing History*, MIT ANIME CLUB, <http://web.mit.edu/anime/www/Showings/past-showings.shtml> (last modified Dec. 14, 2004).

<sup>147</sup> Jackson Interview, *supra* note 1365. See Lenna, *supra* note 1443.

## III.D.2. Fansubbing vis-à-vis Bootlegging

Table 1	Fansubs	Bootlegs
Starting Date	1986/1989	1600 <sup>148</sup>
Quality	Medium-to-High	Low-to-Perfect
Profit?	Non-profit: SASE; enough money to pay for tapes	Profit
Identifying marks	“Not for Sale or Rent.”	None
Economic Intent	Complementary or Prerequisite Good	Substitute Good
Stated Intent	“Spread Japanese Animation”	“Make a Buck”
Distribution	Decoupled	Integrated/Only
Licensed?	No	No
“Law-Compliance Method”	Cease Distribution after Licensing	Disappear if Threatened

**Table 1: Categories and distinctions between fansubs and bootlegs.**

Table 1 distinguishes the practices and customs of fansubbers and bootleggers. Fansubbers’ stated intent was to spread the awareness of Japanese animation: although they have been accused of merely “preaching to the converted,”<sup>149</sup> fansubbers successfully introduced the post-*Akira* generation to the diversity that the medium offered. From their earliest days, all fansubbers would remove their titles from circulation once they were licensed in the United States.<sup>150</sup> In all but the earliest fansubs, fansubbers would add subtitles like “Not for Sale or Rent” and “Stop Distribution When Licensed” in addition to their fansub group name; they would also encourage fansub viewers to purchase the licensed product once it was made available.<sup>151</sup>

Consider William Chow of the Vancouver Japanese Animation Society, Canada, who was the first major fansub distributor circa Novem-

<sup>148</sup> Printing presses outside London.

<sup>149</sup> E.g., by Carl Macek and Jerry Beck. Posting of Jimmy Chan, *Baycon (Was Re: Cal-Animage)*, to news:rec.arts.anime (July 4, 1990), available at <http://groups-beta.google.com> with Message-ID 1990Jul4.185255.10375@agate.berkeley.edu.

<sup>150</sup> Posting of Jeff Yang, *Here It Is, the Village Voice Article*, to news:rec.arts.anime (Nov. 12, 1992), available at <http://groups-beta.google.com> with Message-ID 1992Nov12.121449.21495@panix.com.

<sup>151</sup> Virtually all fansubs contain these warnings; the MIT Anime Club’s archives provide ample evidence. For specific textual evidence, see, for example., Fred Patten, *Go to JAILED*, 3 MANGA MAX (Feb. 1999) (hereinafter Patten/JAILED), reprinted in PATTEN, *supra* note 411, at 120.

ber 1990.<sup>152</sup> Tapes from his Arctic Animation outfit went so far as to include these warnings during character dialogue, which some fans reported as annoying.<sup>153</sup> He gained a degree of notoriety in the fan community because of his insistence at charging for tapes instead of using the SASE (self-addressed, stamped envelope) method, placing him in the eyes of some as a bootlegger. Evidence suggests, however, that Chow and other Arctic Animation associates made little if any money off of their subtitled operations, and they ceased distribution after a title was licensed.<sup>154</sup>

Bootleggers were only interested in making a profit at the industry's expense. There were unscrupulous enterprises run by the pseudonymous S. Baldrick and E. Monsoon that would bootleg material—even fansubs—in order to sell them at science fiction and anime conventions, where they would market themselves as if they were an anime club.<sup>155</sup> Kiotsukete used to unwittingly duplicate tapes for such bootleggers, and then the bootleggers would erase the segment of the tape where it said, “Not for Sale or for Rent,” which Kiotsukete put at the beginning and end of every episode on every tape.

Once Kiotsukete members started seeing bootleggers hawking their material at conventions, they became more restrictive when distributing to other groups.<sup>156</sup> By 1995, Kiotsukete set a quota on copies made, and required that people prove that they were members of anime clubs.<sup>157</sup> As technology advanced, Kiotsukete developed watermarking, overlays, and commercial spots between the breaks to better identify the group and to raise the barrier that bootleggers had to cross in order to duplicate Kiotsukete's work.<sup>158</sup> Years beforehand, the Ranma Project likewise restricted its distribution when one of its members discovered that a well-known Philadelphia bootlegger was bootlegging its tapes in 1990.<sup>159</sup>

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<sup>152</sup> Posting of Dave Gelbart, *Anime, O.R. Sub, 'Zines, Scripts*, to news:rec.arts.anime (Nov. 12, 1990), available at <http://groups-beta.google.com> with Message-ID 1PHJs2w163w@questor.wimsey.bc.ca.

<sup>153</sup> Jackson Interview, *supra* note 1365.

<sup>154</sup> See posting of William Chow, *Arctic Animation Update*, to news:rec.arts.anime (Apr. 24, 1991), available at <http://groups-beta.google.com> with Message-ID o3NV13w164w@questor.wimsey.bc.ca.

<sup>155</sup> See, e.g., posting of C-ko Kotobuki to news:rec.arts.anime (Feb. 12, 1995), available at <http://groups-beta.google.com> with Message-ID 12FEB199514063544@uhcl2.cl.uh.edu.

<sup>156</sup> Jackson Interview, *supra* note 1365.

<sup>157</sup> Jackson Interview, *supra* note 1365.

<sup>158</sup> Jackson Interview, *supra* note 1365. Also confirmed through the MIT Anime Club's archives.

<sup>159</sup> Posting *The Ranma Project* to news:rec.arts.anime (June 7, 1991), available at <http://groups-beta.google.com> with Message-ID 1991Jun8.005138.28192@nas.nasa.gov.



### III.D.3. Preparation, Distribution, and Exhibition of Fansubs

Japanese companies knew that convention in-house staff would prepare subtitles with their permissions, but it was not made explicit what would happen to those subtitled versions after the convention. Again consider Kiotsukete Studios, one of the fansub groups that subtitled several anime for Anime Expo '93. Without exception, if an American company owned a title, Kiotsukete would not distribute it. If a subtitled version of an unlicensed title happened to exist in the aftermath of a convention, however, Kiotsukete would send copies to those who asked.<sup>160</sup>

Whereas fansubbers always stopped sharing after a title was licensed, distributors acted inconsistently.<sup>161</sup> Unlike fansubbers, some distributors continued distributing tapes.<sup>162</sup> Furthermore, groups would use other fansubbed tapes as trade bait, which continued the propagation of material. One anime club president, for example, attested that during his early days as a member he had to “amass a large enough collection [of anime material] copied from the club library in order to have enough interesting stuff to trade with others.”<sup>163</sup>

Fansubs might also be shown at anime clubs after they had been licensed. The member of Kiotsukete, who was also an officer at a local fan club in 1993, reported that there were “a lot of times [when] we would subtitle a show just because we wanted to screen it for our clubs, and to that end, there were a lot of times when we did that, but we did not distribute it.”<sup>164</sup> For example, local anime clubs connected to Kiotsukete had already screened several fansubbed *Ah! My Goddess* episodes when AnimEigo, an American importer, announced that *Ah! My Goddess* would be commercially released the following year. After the announcement, Kiotsukete subtitled episodes five and six and screened them at its affiliated clubs, but did not distribute the episodes.<sup>165</sup> Kiot-

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<sup>160</sup> This initial distribution consisted of two men with four professional series S-Deck VCRs making copies for everybody, but they would copy and distribute in their leisure time. Jackson Interview, *supra* note 13635.

<sup>161</sup> Certain histories have lumped fansubbers and distributors together as “tape-traders,” a term that simplifies the complexities of the period. *E.g.*, Right Stuf Int’l, *Fans, Fansubs, and J.A.I.L.E.D.*, HIST. OF ANIME IN THE U.S. (2002), at [http://www.rightstuf.com/resource/us\\_fans.shtml](http://www.rightstuf.com/resource/us_fans.shtml).

<sup>162</sup> Contrary to popular belief, however, William Chow seems to have followed the “cease-after-license” protocol. See posting *Fan Subtitlers List (7/14/93)* to news:rec.arts.anime (July 14, 1993), available at <http://groups-beta.google.com> with Message-ID 1993Jul14.172239.17863@news.uakron.edu.

<sup>163</sup> Telephone Interview with Former President of a Large East Coast Anime Club (Nov. 23, 2003).

<sup>164</sup> Jackson Interview, *supra* note 135.

<sup>165</sup> Jackson Interview, *supra* note 1365.

sukete-connected clubs even let companies like AnimEigo know that they were going to screen the anime “for them.”<sup>166</sup>

Despite these copyright infringing activities, it is important to distinguish between fansubbers, distributors, and clubs with respect to the preparation, propagation, and exhibition of tapes.

The Kiotsukete member pointed out that the prevailing motivation was to interest more people in anime. No fansubber made a profit off of his or her work.<sup>167</sup> There were some fansubbers who obtained jobs in the domestic industry because of their work, because for some, fansubbing was their only way of showing the industry that they had the ability to do the work. For others, fansubbing showed the broader industrial and cultural establishments that anime *worked*. Fandom acted as a source for the nascent industrial base.

Most fansubbers subtitled because they loved anime. The member concluded, “I did it because I wanted to see more anime [everywhere]. I wanted to see more people enjoy Japanese animation, and to that end, that was my goal, and I think that I have been pretty successful with it.”<sup>168</sup>

### III.E. *Industry*

Four of the six American importers are considered in this section: A.D. Vision (now ADV Films), AnimEigo, Streamline Pictures, and Pioneer LDC.<sup>169</sup> The proselytization commons shaped each company’s formation and initial operation.

#### III.E.1. A.D. Vision

John Ledford and Matt Greenfield met while both were working for businesses that rented and sold anime laserdiscs.<sup>170</sup> Ledford and Greenfield also ran a Houston-based animation club in 1992, during which—through the fan network—they met with several others who were working in the manga industry in Japan. Ledford and Greenfield decided to form A.D. Vision, after which they went to Japan, talked to

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<sup>166</sup> Jackson Interview, *supra* note 1365.

<sup>167</sup> Jackson Interview, *supra* note 1365.

<sup>168</sup> Jackson Interview, *supra* note 1365.

<sup>169</sup> The other two companies are Central Park Media and Viz Communications. Their stories are similar: they were started by fans and industrialists closely connected with the fandom; they adopted the fan-induced mantra to maintain fidelity of the original anime while expanding their markets.

<sup>170</sup> *Cinescape List Honors John Ledford During Company’s Tenth Anniversary*, ANIME NEWS NETWORK (June 11, 2002), at <http://www.animenewsnetwork.com/article.php?id=4027>.

studio representatives, and convinced them to license A.D. Vision's first anime, *Devil Hunter Yokho*.<sup>171</sup>

Greenfield and Ledford staged their first preorder at Anime America in 1993. They made the announcement on Friday, June 26, and on Saturday they opened up their booth to a horde of excited anime fans.<sup>172</sup> A.D. Vision continued to release many successful titles.<sup>173</sup> Significantly, A.D. Vision got its start in the fan network, and depended upon it for its initial sales.

### III.E.2. AnimEigo

The history of AnimEigo is well-documented.<sup>174</sup> Although CEO Robert Woodhead is not a fan per se, the history of the company is very connected with organized fandom. Co-founder Roe Adams was a huge anime fan; he was seen regularly during the early years of the Cornell Japanese Animation Society in 1988.<sup>175</sup> The first post by AnimEigo on Usenet claims that "AnimEigo is a cooperative venture of Anime fans."<sup>176</sup> Without the fan network and exposure to existing, unreleased Japanese animation, it is unlikely that AnimEigo would have started.

### III.E.3. Streamline Pictures

While Carl Macek was producing *Robotech the Movie* in 1986, he brainstormed a new business venture with Jerry Beck, who ran the New York chapter of the C/FO during the early 1980s. They launched Streamline Pictures in 1988 with *Akira* (1989), followed by a slew of titles that typified anime available in the early 1990s. In perfect tune with the proselytization commons, Macek stated, "The whole goal of Streamline was to bring anime to a broad audience."<sup>177</sup>

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<sup>171</sup> Personal Interview with David Williams, founding member and ADR Director, A.D. Vision (2005). See Anime News Network Encyclopedia, *Anime News Network – Devil Hunter Yokho (OAV)* (reporting a Dec. 15, 1992 vintage release date for the USA subtitled VHS version), at <http://www.animenewsnetwork.com/encyclopedia/anime.php?id=372> (last visited Apr. 28, 2004).

<sup>172</sup> Jackson Interview, *supra* note 13635. Jackson claims to have been at the table; he was one of the first to purchase a tape of *Battle Angel*, one of A.D. Vision's earliest titles.

<sup>173</sup> *Id.* See Ledford *One of Genre Entertainment's 'Most Powerful,' ANIME NEWS NETWORK* (Aug. 11, 2003), at <http://www.animenewsnetwork.com/article.php?discuss=4027>.

<sup>174</sup> AnimEigo, *supra* note 117.

<sup>175</sup> Lawrence Eng, *CJAS 10th Anniversary*, CORNELL JAPANESE ANIMATION SOCIETY (1998) (quoting a June 2, 1998 personal communication of the founder and first president of CJAS, Masaki Takai), at <http://www.cjas.org/content/view/6/33/>.

<sup>176</sup> Woodhead, *supra* note 11817.

<sup>177</sup> Glenn Schmall & Kristyn Schmall, *An Interview with Carl Macek*, ANIME TOURIST (July 2000), at <http://anime-tourist.com/article.php?sid=154>.

Although Streamline was at the center of a heated “dub-versus-sub” debate in the fan community, dubbing turned out to be less of a concern in the long run than maintaining the fidelity of the story in the original animation. Subtitling was much cheaper than dubbing the videos, and tended to have higher translation quality because of poor voice talent in the early years. However, Streamline Pictures made a point of only dubbing. Macek and Beck contended that most of the general public would not take the trouble to read subtitled videos.<sup>178</sup>

Due to the long history of high-quality and abundant English-language programming in the United States, much the American public remains reluctant to go to the trouble of watching a subtitled video or movie. By 1993, Streamline’s tapes were selling so much better than other companies’ that the others realized that they needed to go to the expense of dubbing rather than subtitling their releases if they wanted to expand the market and make money.

Once dubbing was decoupled from the hack-and-slash methods of anime importation in the 1980s, fan furor slowly receded and sales rapidly increased. Fred Patten, a longtime friend of and advisor to Carl Macek, joined Streamline Pictures in 1990; one of his main duties was to verify the accuracy of the negatives, sound effects, and raw translations that Streamline received when they licensed a title. The Japanese industry was so used to Americans completely rewriting scripts that they tended to send over very sloppy translations. For instance, original translations included character names such as “Man A” or “Charlie,” so that American producers could rename them “Pete,” “Bob,” or whatever struck their fancies. One of Patten’s many jobs, then, was to research and reinstate original character names. Streamline Pictures espoused the core rhetoric of the proselytization commons, leading to its early success.

#### III.E.4. Pioneer LDC

A subsidiary of Pioneer Corporation of Japan, Pioneer Animation was the first Japanese company to enter the American anime industry, announcing its entrance on April 21, 1993.<sup>179</sup> Pioneer’s first projects were *Tenchi Muyo!* and *Moldiver*, both of which the company released on laserdisc and VHS.<sup>180</sup>

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<sup>178</sup> Chan, *supra* note 14948.

<sup>179</sup> Posting of Mike “Shogun” Tatsugawa, *Growth in the Anime Industry*, to news:rec.arts.anime (Apr. 21, 1993), available at <http://groups-beta.google.com> with Message-ID 1993Apr21.020015.4982@nic.csu.net.

<sup>180</sup> *Id.*

It remains unclear that the presence and success of *Tenchi Muyo!* fansubs directly motivated Pioneer to enter the market; it also is unclear whether Pioneer's American subsidiary moved autonomously or in response to directives from the Japanese head office. Some industry insiders, for example, claim that Pioneer mainly entered to build support for its laserdisc format.<sup>181</sup> It is clear, however, that Pioneer saw enough profit in the field to justify entering in 1993, thanks in part to the fan base. In his second letter to anime fans, David Wallace, Marketing Manager at Pioneer, wrote: "Is Pioneer creating this product for the fans or for a larger audience? / We are trying to reach the broadest audience for this product. Maybe we are trying too much, but, we think we can succeed and satisfy the hotaku(sic) and also reach a more general audience."<sup>182</sup> Wallace's response matches the rhetoric of the proselytization commons. Pioneer entered the American anime industry with intent to grow the market, relying on the existing fan base and its established gospel.

### III.F. *Recognition in Japan*

Up through 1993, the buck basically stopped in Japan both literally and metaphorically. Properties might go to Taiwan or the Philippines and earn ancillary profits; if a title went to China, it was more often than not on a "pirate ship" or through a "tape dungeon," where it would be copied and distributed on the black market. The Japanese never expected, however, that anime would become popular in America. AnimEigo's first licensor, for example, was shocked when AnimEigo wrote them a check for additional royalties: the licensor did not expect additional royalties!<sup>183</sup> Noboru Ishiguro, director of *Macross*, wrote:

Years before *Maison Ikkoku* was on TV in Italy, however, it was being avidly watched and promoted by English-speaking anime fans in [the] U.S. For that reason alone, I must acknowledge a sense of gratitude, and renew my respect for everyone who helped pave the way for the popularity anime enjoys today in America.

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To be fair, [these statements] are the kind that can only be made in retrospect. Back when I and the other animators I worked with were doing our work on *Yamato*, *Macross*, and *Megazone*, we had no time

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<sup>181</sup> Personal Interview with American anime executive (Nov. 30, 2004).

<sup>182</sup> Letter from David Wallace, Marketing Manager, Pioneer Entertainment, to Michael Stude et al. (Nov. 17, 1993), reprinted in posting of Michael Stude, *Pioneer News*, to news:rec.arts.anime (Nov. 27, 1993) (alteration in original) (*otaku*, in this case, refers to fans of Japanese animation), available at <http://groups-beta.google.com> with Message-ID - 1331469918snx@izumi.DIALix.oz.au.

<sup>183</sup> AnimEigo, *supra* note 11817.

to imagine how we'd be perceived on the outside (much less in other countries), and all we really worried about was making our deadlines from week to week.<sup>184</sup>

Without the fan network, and specifically without fan distribution, anime's success could have never happened.

#### IV. LEGAL ANALYSIS OF FAN DISTRIBUTION AND SUBTITLING

I will analyze next the legal implications of the fan distribution network between 1976 and 1993, drawing from American copyright,<sup>185</sup> Japanese copyright law (JCL),<sup>186</sup> and relevant international treaties: the Universal Copyright Convention (UCC)<sup>187</sup> and the Berne Convention (Berne).<sup>188</sup> Fans committed copyright infringement on a wide scale in order to satisfy their goals. Though the outcome of this fan distribution was desirable in the long run, the law did not sanction it at any point. Before discussing the fans, however, this analysis explores the roles of Japanese laws and Japanese companies to understand why they ignored the market for over two decades.

##### IV.A. *Basics of International Copyright Law*

There is no such thing as universal copyright for a work of authorship. Copyright is a bundle of intangible property rights created entirely by the laws of individual countries.<sup>189</sup>

<sup>184</sup> Noburo Ishiguro, *Foreword to LEDOUX & RANNEY*, *supra* note 36, at vi-vii.

<sup>185</sup> The relevant law is recorded in the Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541, 17 U.S.C. §§ 101-810 (current version at 17 U.S.C. §§ 101-1332 (2003)). Since the cited law has not materially changed since 1976, I cite from the 2003 version. Relevant portions of Title 17 revised since 1976 are noted where necessary. *See also* U.S. COPYRIGHT OFFICE, CIRCULAR 92: COPYRIGHT LAW OF THE UNITED STATES OF AMERICA AND RELATED LAWS CONTAINED IN TITLE 17 OF THE UNITED STATES CODE (June 2003), *available at* <http://www.copyright.gov/title17/index.html>.

<sup>186</sup> Chosakuken [The Copyright Act], Law No. 48 of 1970 [hereinafter JCL] (current version last amended by Law No. 147 of 2004) (translated in *Copyright Law of Japan*, COPYRIGHT RESEARCH AND INFORMATION CENTER (Yukifusa Oyama et al. trans., Dec. 2004), *at* [http://www.cric.or.jp/circ\\_e/clj/clj.html](http://www.cric.or.jp/circ_e/clj/clj.html)).

<sup>187</sup> Universal Copyright Convention, *opened for signature* Sept. 6, 1952, 6 U.S.T. 2732, 216 U.N.T.S. 132 [hereinafter UCC Geneva], Universal Copyright Convention as revised at Paris on 24 July 1971, 25 U.S.T. 1341, 943 U.N.T.S. 178 [hereinafter UCC] (entered into force July 10, 1974), *available at* [http://www.unesco.org/culture/laws/copyright/html\\_eng/page1.shtml](http://www.unesco.org/culture/laws/copyright/html_eng/page1.shtml).

<sup>188</sup> Berne Convention for the Protection of Literary and Artistic Works, *opened for signature* Sept. 9, 1886, as revised at Paris on July 24, 1971, S. Treaty Doc. No. 27, 99th Cong., 2d Sess. 1 (1986) (entered into force Mar. 1, 1989), 828 U.N.T.S. 221 [hereinafter Berne], *available at* [http://www.wipo.int/treaties/en/ip/berne/trtdocs\\_wo001.html](http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html); Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988) (codified in scattered sections of 17 U.S.C.).

<sup>189</sup> *See* PAUL GOLDSTEIN, INTERNATIONAL COPYRIGHT 13 *passim* (2001).

In the United States, copyright subsists “in original works of authorship fixed in any tangible medium of expression,” such as “motion pictures and other audiovisual works.”<sup>190</sup> Regarding audiovisual works such as anime, the copyright owner may reproduce the work, distribute the work to the public, prepare derivative works (adapt the work), perform the work publicly, and authorize others to do so.<sup>191</sup> These rights are subject to a laundry list of exceptions.<sup>192</sup> Additionally, fair uses do not constitute infringement.<sup>193</sup> Works, particularly anime, are subject to protection if “on the date of first publication, one or more of the authors is a national or domiciliary of the United States, or is a national, domiciliary, or sovereign authority of a treaty party . . . or the work is first published in the United States or in a foreign nation that, on the date of first publication, is a treaty party.”<sup>194</sup>

For the purposes of this article two international treaties are relevant: the UCC and Berne. The United States acceded to the former in 1952 and to the latter in 1989.<sup>195</sup> Japan acceded to UCC on April 28, 1956, and to Berne on July 15, 1899;<sup>196</sup> therefore, these treaties both circumscribe the copyrights of Japanese nationals outside of Japan. According to UCC, “[p]ublished works of nationals of any Contracting State . . . shall enjoy in each other Contracting State the same protection as that other State accords to works of its nationals first published in its own territory, as well as the protection specially granted by this Convention.”<sup>197</sup> Berne states, “[a]uthors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws . . . grant to their nationals, as well as the rights specially granted by this Convention.”<sup>198</sup>

In U.S. law, 17 U.S.C. § 104 implements these same requirements, so works of authorship that are granted copyright in Japan are also granted copyright in the United States.<sup>199</sup>

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<sup>190</sup> 17 U.S.C. § 102 (2003).

<sup>191</sup> 17 U.S.C. § 106 (2003).

<sup>192</sup> 17 U.S.C. § 108-122 (2003).

<sup>193</sup> 17 U.S.C. § 107 (2003).

<sup>194</sup> 17 U.S.C. § 104(b) (2003).

<sup>195</sup> Berne, *supra* note 18887.

<sup>196</sup> UCC Geneva, *supra* note 18786, Apr. 28, 1956, Japan; UCC, *supra* note 18786, Oct. 21, 1977, Japan; Berne, *supra* note 18887, July 15, 1899, Japan.

<sup>197</sup> UCC, *supra* note 18786, art. II(1).

<sup>198</sup> Berne, *supra* note 18887, art. 5(1).

<sup>199</sup> 17 U.S.C. § 104(c) (2003).

#### IV.B. *Copyright in Japanese Animated Works in Japan*

Japanese copyright law differs in certain respects from American copyright law, shaping the legal posture of Japanese companies as well as Japanese fans. In its “Purpose,” JCL asserts:

The purpose of this Law is, by providing for the rights of authors and the rights neighboring thereon . . . to secure the protection of the rights of authors, etc., having regard to a just and fair exploitation of these cultural products, and thereby to contribute to the development of culture.<sup>200</sup>

##### IV.B.1. What Is Owned and Who Owns It

Japanese law grants protection to anime as “cinematographic works.”<sup>201</sup> Cinematographic works are eligible for copyright for seventy years.<sup>202</sup> Works must be authored by Japanese nationals, or must be first published in Japan.<sup>203</sup> Three classes of protection exist in Japanese law: moral rights, copyrights, and neighboring rights. JCL makes special assignments of authorship and economic rights—and therefore moral rights and copyrights—to particular parties.

Moral rights are inalienable, and are conferred upon the original authors of a cinematographic work. Original authors are defined as “those who, by taking charge of producing, directing, filming, art direction, etc., have contributed to the creation of that work as a whole, excluding authors of novels, scenarios, music or other works adapted or reproduced in that work.”<sup>204</sup> Similar to works made for hire in U.S. copyright law, a person or entity will be considered the author of a work if the work is made by an employee of that person or entity during the course of the employee’s duties, and if the work is made public under the name of such legal person, unless otherwise stipulated in a contract in force while making the work.<sup>205</sup>

Copyright in a cinematographic work belongs to “the maker of that work, provided that the authors of the work have undertaken to participate in the making thereof.”<sup>206</sup> “Makers of cinematographic works” refers to “those who take the initiative in, and the responsibility for, the making of a cinematographic work.”<sup>207</sup> Because neighboring rights in Japanese copyright law provide particular rights to broadcast-

<sup>200</sup> JCL, *supra* note 185, 1 § 1 art. 1.

<sup>201</sup> JCL, *supra* note 185, 2 § 1 art. 10.

<sup>202</sup> JCL, *supra* note 185, 2 § 4 art. 54.

<sup>203</sup> JCL, *supra* note 18685, 1 § 2 art. 6.

<sup>204</sup> JCL, *supra* note 185, 2 § 2 art. 16.

<sup>205</sup> JCL, *supra* note 185, 2 § 2 art. 15.

<sup>206</sup> JCL, *supra* note 185, 2 § 3(4) art. 29(1).

<sup>207</sup> JCL, *supra* note 185, 1 § 1 art. 2(1)(x).



ers, broadcasters also frequently invest in the work to become “makers.” In practice, the responsibility clause in JCL motivates several other classes of companies— distribution houses, derivative work companies such as toymakers, and production companies—to form a holding company and to become joint copyright holders. A production company, *i.e.*, a company where the producer, director, and assistant directors work, takes charge of authoring the work.

Given the statutes and the plethora of industrial preferences, it is not possible to generalize about the assignment of authorship in the anime industry. One director may work freelance, *e.g.*, Akitaroh Daichi; another director may be fully employed by his production company, but may hold a controlling stake in the company, *e.g.*, Hayao Miyazaki. However, moral rights play a crucial role in the organization of the anime industry for reasons enumerated above.<sup>208</sup>

Subcontracting occurs frequently in the anime industry; it is rare for a large project not to have multiple studios working on it at the same time. Conceptually, subcontractors are workers-for-hire for the purpose of copyright law, and do not share in moral or economic rights. However, extensive collaboration on a project may alter the producer-subcontractor relationship, in which case the divisions of assets and rights are properly left to contracts.

#### IV.B.2. Domestic and International Rights

JCL grants many rights analogous to those in the United States. There are a few notable differences for the purpose of this analysis.

One significant difference is that JCL grants the author the moral right of “preserv[ing] the integrity of his work,” and preventing any “distortion, mutilation, or other modification against his will.”<sup>209</sup> Similarly, JCL reserves the economic right of the original author in “the exploitation of a derivative work.”<sup>210</sup> The creators of original works wield tremendous statutory power to control modification of, and to reap profits from, all succeeding generations of derivative works, not just the first series of derivative works from the original.<sup>211</sup>

Neighboring rights exist in Japanese copyright law; they are granted to those who communicate works to the public (for example, broadcasters), even though these groups do not create works *per se*.<sup>212</sup>

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<sup>208</sup> See *infra* §IV.C.3 p. 219.

<sup>209</sup> JCL, *supra* note 185, 2 § 2 art. 20(1). See also JCL 2 § 2 art. 20(2) (narrow statutory limitations).

<sup>210</sup> JCL, *supra* note 185, 2 § 3(3) art. 28.

<sup>211</sup> See *infra* §IV.C.3 pp. 219-224.

<sup>212</sup> JCL, *supra* note 185, 4 § 4 arts. 98-100.

Neighboring rights, moral rights, and economic rights overlap in statute and in practice, diluting the monopoly advantages of these rights if different parties hold them.

JCL contains no general fair use provision.<sup>213</sup> Instead, it contains a laundry list of limitations on copyright. The most notable are reproduction for personal, family, or “limited circle” use (called “private use”), and quotations in textual and pictorial forms.<sup>214</sup>

In almost all cases, U.S. law applies to fan distributors in the United States. JCL applies to recordings extracted from Japan and sent to America, and JCL also bears significantly on the legal culture and economic structure of the anime industry in Japan.

#### IV.C. *Why the Japanese Ignored the American Market*

As the earliest evidence from the Ranma Project suggests, many Japanese corporate representatives were peripherally aware of fan subtitling. They had been similarly aware of fan distribution in 1978. They were not aware, however, the extent to which fan distribution played in developing a sustainable, growing interest in anime consumption. In this section, I will unpack the Japanese responses through 1993 employing three different modes: a legal analysis, a cultural analysis, and a structural analysis.

##### IV.C.1. Dismissive Ignorance

Japanese companies really did not care much about the U.S. market. During 1976 through 1993, Japanese companies did not think they would be able to sell animated entertainment goods to America, partly because of the attitudes of American companies towards anime, and partly because Japanese products were never made with an eye towards exportation. America was the market that every international industry wanted to enter, but Hollywood entertainment establishments like Warner Bros. and Disney continually denied the Japanese entrance. American entertainment companies ignored them (for example, the failure of Warner Brothers to attend screenings between 1978 and 1982), rewrote and culturally decimated their scripts (for example, the *Warriors of the Wind* remake of *Nausicaä*), or in one case, plagiarized

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<sup>213</sup> Some have argued that the moral rights of authors in Japanese copyright law form the exact opposite of the fair use rights of the public in American copyright law. *E.g.*, Keiji Sugiyama, *Japanese Copyright Law Development* (Apr. 19, 2001), available at [http://www.softic.or.jp/en/articles/fordham\\_sugiyama.html](http://www.softic.or.jp/en/articles/fordham_sugiyama.html).

<sup>214</sup> JCL, *supra* note 185, 2 § 3(5) arts. 30-50.

their stories without recognition (for example, the infamous Kimba/Simba case<sup>215</sup>).

These signals prompted Japanese licensors to summarily reject any notion that the American market would be cracked. Therefore, whenever an American brought the “piracy” situation to the attention of Japanese agents, the agents responded in *dismissive ignorance*. They dismissed any possibility that authorizing or prohibiting the use could affect their businesses, and therefore acted as if completely uninformed.

To clarify, dismissive ignorance from the 1970s through early 1990s was not merely “dismissive market miscalculation.” In the 1980s, there was no market for sophisticated animated programming, and the illegal circulation of tapes was necessary for the market to grow so rapidly. Acting rationally, the Japanese companies would have had to invest in the market to grow it. Such an undertaking would have been unthinkable given the risk and the potentially enormous capital required. They failed to imagine that a growing fan movement would actually build a viable market, or that such a market would form through the massive underground circulation of tapes.

#### IV.C.2. Cultural Resistance

Dismissive ignorance alone cannot account for the peculiarities of the anime industry’s business practices. As Kôki Narushima explained to Fred Patten, Japanese companies would never associate so closely with fans, let alone enter into legal contracts with them. Indeed, Narushima and others indicated that they were using fandom for free publicity to attract the attention of traditional syndications, and that granting permission might thwart the incentive of said syndications to be the first to bring the shows to the public. As *Harper & Row* illustrated so plainly, losing the opportunity of first publication can have serious economic consequences for a rights holder.<sup>216</sup>

Furthermore, embedded in the logic of Japanese business is an avoidance of venture enterprises or business transactions on account of their inherit risk, potential for failure, and exposure to public scorn. When AnimEigo began operations in 1989 and cofounder Robert Woodhead traveled to Japan to seek licenses, he received a culturally enlightening response:

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<sup>215</sup> See Craig Andersen, *Remake of Tezuka’s Popular Story Turns into Denial? KIMBA THE WHITE LION: KIMBA W. LION’S CORNER OF THE WEB* (July 20, 2004), at <http://www.kimbalion.com/rant2.htm>.

<sup>216</sup> *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 543 (1985).

“Robert, everyone wants to be the second person to do business with you.”

According to Okada, at every Japanese company there is an unwritten book of rules, and as long as you follow the rules, even if a deal messes up, it’s not such a bad thing. But if you do something new and that messes up, then you’re up the creek. And unfortunately for us, there was no rule about selling Anime to the US . . . . Once one of the companies did business with us, assuming things went well, then all the other companies would copy from that company’s unwritten book of rules into their (also unwritten) book of rules, and we’d be home free.<sup>217</sup>

Patricia Gercik agrees: “We saw the influx of Japanese car manufacturers in the 1980s with their suppliers in tow. Once Honda and Toyota had done it, everyone seemed to follow in the same order and using the same formula. It is always hard to be the first person on the block [but] a personal relationship would make all the difference.”<sup>218</sup>

The cultural resistance runs far deeper than a distrust of unmediated confrontation.<sup>219</sup> Japanese holding companies could not believe that their domestic properties had value in America, nor did they have sufficient expertise to license or realize that value. Given the level of difficulty that a fledgling, professional anime company experienced at obtaining permissions, the level of ridicule levied against many kinds of fandom in late 1980s Japan, and the reserve of the representatives in dealing with Patten a decade prior, one may easily deduce that anime companies were in no position to consider relations with a foreign, underground fandom.

#### IV.C.3. Fragmented Existence

Resistance ran deeper than a cultural analysis alone may explain. This analysis considers the structure of the Japanese media-industrial complex, its relation to JCL, and its implications for the abandoned American market.

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<sup>217</sup> AnimEigo, *supra* note 117.

<sup>218</sup> E-mail from Patricia Gercik (Oct. 4, 2004, 10:22:06 EDT) (on file with author); *see generally* PATRICIA GERCIK, ON TRACK WITH THE JAPANESE: A CASE-BY-CASE APPROACH TO BUILDING SUCCESSFUL RELATIONSHIPS (1996). Gercik serves as a consultant to executives at major multinational corporations doing business with Japan, and is Managing Director of the MIT Japan Program.

<sup>219</sup> Regarding legal confrontation, Takeyoshi Kawashima has argued that out of respect for norms and desire for harmony, potential Japanese plaintiffs tend to avoid judicial resolution in Japan. *See* Takeyoshi Kawashima, *Dispute Resolution in Contemporary Japan*, in *LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY* 41 (Arthur Taylor von Mehren ed., 1963), available at <http://www.lfip.org/laws827/documents/session10/Dispute%20Resolution%20115-117.pdf>.

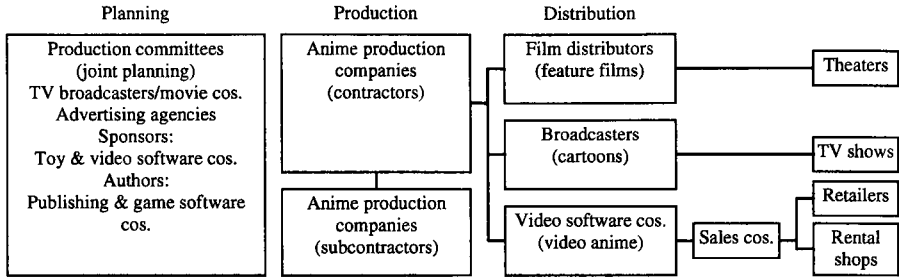


Figure 1: Structure of Japanese Anime Industry.<sup>220</sup>

Figure 1 represents the structure of the anime industry, in simplified form, according to a recent report by the Japan External Trade Organization. The figure shows the many different companies involved in the chain of production from planning through distribution. Tezuka motivated the tie-ins between anime and other character-branding enterprises as early as 1963, but this structure would be more thoroughly developed when the value of ancillary rights became apparent after the successes of *Space Battleship Yamato* (1974, CD sales) and *Gundam* (1978, action figures and model kits). Given the expense of anime production, investors typically minimize risk by choosing tested and proven hits. When an original manga or video game become successful, various product producers create a holding company (e.g., *The Akira Committee*) and order an anime made for television broadcast and video distribution. The companies then set up an elaborate cross-media campaign to cater to the burgeoning character goods market.

When I say “order an anime,” I wish to suggest a socioeconomic relation that does not immediately follow from the diagram at-hand or from the previous discussion of neighboring rights.<sup>221</sup> Broadcasters and toy manufacturers already have their own established domestic channels to distribute content. An anime company may be a member of a large holding company, but frequently they are the least powerful. The expense of producing an anime makes it ipso facto an unprofitable independent venture.

Furthermore, the law distinctly privileges the *gensaku*, or original author, with the right to control all adaptations, no matter how far down the derivative works chain the work may be. Broadcasters and video makers almost always get the rights to “making available.” A non-originating production company is a gear in the media apparatus. That production company acts more as a worker-for-hire than a privi-

<sup>220</sup> Japan External Trade Org., *supra* note 5.

<sup>221</sup> See *infra* §IV.B p. 199.

leged creator or distributor, even though that producer receives, *prima facie*, extensive statutory rights. Even when a director at a production company conceives of the original story, that production company's exclusive rights are quickly divvied up among other interests in order to raise necessary capital.

The structure of JCL gives opposing financial incentives to broadcasters and video makers, which control distribution, authors, who control derivative production, and anime producers, who may control little at all. The copyright holders have no financial interest in understanding external markets if their channel assets are within Japan. Given this fragmented existence, it should come as no surprise that Japanese animation companies have traditionally lacked funds and motivation to support experts familiar with international intellectual property rights.<sup>222</sup>

Professor Mehra uncovers disparities in the balance of trade between the United States and Japanese markets for animation.<sup>223</sup> His findings, however, have less to do with infringing *dōjinshi* and more to do with the long history of artistic censorship and audience assumptions in American animation and comics. Yet the lack of enforcement in both cases promotes progress. In the *dōjinshi* case, the economic incentives are too low and the social penalties too high for Japanese holders to bring suit; in the U.S anime case, apathy and fragmentation of Japanese interests permit an unlikely commons among a dissenting public. Mehra argues that commons can enhance industry creativity. I agree, and wish to take that argument further: commons can create industries.

Perhaps the most convincing evidence for the Japanese being unaware of the developing American market is the establishment of American importers. These industrialists were aware of fan distribution, and they essentially started because they recognized the neglected market. When the American importers started up and tried to license materials from the Japanese firms, the Japanese firms nearly laughed them out of Tokyo. If the Japanese firms were acting strategically, they would have allowed fan distribution to continue, but would have quickly moved in to start American operations and reap all of the profits. The Japanese were totally blindsided.

My discussion of structure should not obscure the basic facts. Anime is the amplifier of the media-industrial apparatus, the key to the success of subsequent character goods and "the supreme goodwill am-

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<sup>222</sup> Japan External Trade Org., *supra* note 5.

<sup>223</sup> Mehra, *supra* note 11, at 191.

bassador”<sup>224</sup> to foreign lands. Yet an amplifier is just a device. What matters is who drives and powers that amplifier, and how they craft their message through it.

#### IV.D. *America*

Americans drove that amplifier, releasing anime without the copyright owners’ consent for over two decades. If Japanese rights holders were not going to sue, does it matter whether or not the Americans committed gross copyright infringement? Consider, however, that the Japanese did not strategically ignore America. They dismissed it, not realizing the extent of the distribution in or the potential value of the market. If anime succeeded in America in the early 1980s, the rights holders could have very well exercised and enforced their American rights. Or, worse, they could have licensed distribution to large, traditional American firms, who were more likely to do the same. If the fans’ actions are to be evaluated in any legal context, therefore, one must consider whether they actually infringed, irrespective of whether they would be held accountable for their actions. In the following sections I consider each of their acts in turn. As the reader shall see, most of these actions allegedly infringed the copyright holders’ rights. I then turn to the fans’ remaining defense: fair use.

#### IV.E. *Time-Shifting/Fan Recording from America*

The first potential infringement raised in 1976 was the practice of time-shifting recordings from Japanese community television in the United States.

*Sony v. Universal*<sup>225</sup> clearly covered time-shifting of broadcast works, *i.e.*, recording these works for home use. In it, the Supreme Court ruled that time-shifting was a fair use,<sup>226</sup> that the practice carried no likelihood of non-minimal harm to the potential market as demonstrated by the copyright-holding respondents, and that the sale of home video tape recorders to the general public did not constitute contributory infringement because of the significant potential for non-infringing uses.<sup>227</sup> I concur in affirming the fair use of time-shifting American broadcast anime for private, home use: this fan practice does not constitute copyright infringement.

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<sup>224</sup> Osamu Tezuka, *Foreword* to FREDERIK L. SCHODT, MANGA! MANGA! THE WORLD OF JAPANESE COMICS 10 (1st ed. 1983).

<sup>225</sup> 464 U.S. 417 (1983).

<sup>226</sup> *Id.* at 442 *passim*.

<sup>227</sup> *Id.* at 446.

#### IV.F. *Sharing Among Friends*

Lending videotapes to others is analogous to lending books. According to the first sale doctrine, the materials in which copyrighted works are fixed are treated as property, and can be bought, sold, leased, and rented without the permission of the copyright holder. This doctrine is embodied in 17 U.S.C. §§ 109 and 202.<sup>228</sup> Private sharing among friends, as fans did in the early days, does not constitute infringement.

#### IV.G. *Showings at Clubs*

Showing an anime at a club, whether recorded from American television or not, constitutes a public performance of a copyrighted work.<sup>229</sup> The most significant exemption in statute is 17 U.S.C. § 110(1), which states that, notwithstanding § 106, “performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution” is not an infringement of copyright. I have shown, however, that college-based anime clubs did not start en masse until the late 1980s. Even then, college-based anime clubs would probably not qualify under the strict language of “face-to-face teaching activities” in Section 110. Furthermore, anime clubs in the late 1970s knew at least that representatives of Toei, TMS, and Tatsunoko refused to authorize their screenings. Showings at early anime clubs were in violation of copyright.

#### IV.H. *Copying and Sending Across Country*

Private distribution does not infringe copyright. However, systematic reproduction and distribution of complete tapes on the scale that was being practiced since the late 1970s clearly began to approximate distribution to the public:<sup>230</sup> fans copied whole works multiple times and sent them to people whom they hardly knew or with whom they had no formal affiliation. Even if the distribution was private, fans violated the reproduction right.<sup>231</sup> A fair use analysis notwithstanding, reproduction and dissemination of anime across the country in the late 1970s through early 1980s was illegal.

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<sup>228</sup> “[Notwithstanding § 106(3)], the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.” 17 U.S.C. § 109(a) (2003). “Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied.” 17 U.S.C. § 202 (2003).

<sup>229</sup> 17 U.S.C. § 106(3) (2003).

<sup>230</sup> *Cf. id.*

<sup>231</sup> 17 U.S.C. § 106(1) (2003) (U.S. Copyright Law does not limit the reproduction right to reproduction for public consumption, as it limits the distribution right).



IV.I. *Pen Pals in Japan*

Interestingly enough, the pen pal relationships that C/FO members struck up in the early 1980s became significant sources of untranslated anime. In principle, a Japanese pen pal would be exercising his legal right to “reproduce by himself a work forming the subject matter of copyright . . . for the purpose of his personal use, family use or other similar uses within a limited circle (hereinafter referred to as ‘private use’).”<sup>232</sup> This argument follows a similar line of reasoning that *dōjin-shi*, or Japanese fan comic, authors would use in intervening years to justify their practice of selling fan-comics that bore uncanny resemblances to professional characters. In the American anime fan case, the aforementioned argument sounds tenable: exportation is permitted in the country of origin, so should not importation be permitted as well?

American copyright law is silent on the topic of exports out of foreign countries, most likely because such a law would be unenforceable outside of U.S. jurisdiction. 17 U.S.C. §§ 601-603, however, have much to say on the subject of importation: most of it is unlawful. Indeed:

Importation into the United States, without the authority of the owner of copyright under this title, of copies or phonorecords of a work that have been acquired outside the United States is an infringement of the exclusive right to distribute copies or phonorecords under section 106, actionable under section 501.<sup>233</sup>

Even though exportation from Japan may be lawful, importation is unlawful without permission of the copyright holder.

There are, however, three exceptions to 17 U.S.C. § 602(a). Exception (a)(1) did not apply in this case, although I will revisit it in a later section.

Subsection (a)(2) legalizes importation “for the private use of the importer and not for distribution.” Even though one could argue that the C/FO’s systematic library processes were not fully established in the early 1980s, it is clear that fans would distribute these tapes among one another, ultimately forming long and widely-reaching distribution chains. Compare these fan trades with modern-day P2P sharing techniques. The distribution mechanism of early fandom could not propagate anime at the same speed or fidelity as modern-day P2P, but it had the same global reach and decentralized organization.

Furthermore, Subsection (a)(2)’s use of “distribution” does not qualify itself with “public distribution,” as does 17 U.S.C. § 106(3). This analysis reduces (a)(2) to two interpretations: in one interpretation,

<sup>232</sup> JCL, *supra* note 185, 2 § 3(5) art. 30.

<sup>233</sup> 17 U.S.C. § 602(a) (2003).

(a)(2) bans “private *and* public distribution,” while in another interpretation, (a)(2) bans “public distribution,” employing the same reading as 17 U.S.C. § 106(3). The former interpretation is unlikely: banning private distribution would mean that one could not import a book for a friend’s birthday. Private use thus includes private distribution. However, fans copying tapes to send to others would trigger the reproduction right, which *infra* p. 229 §IV.H argues is illegal.

The latter half of (a)(2) legalizes imports in “personal baggage,” which applies to fan trips to Japan as early as 1986. Fan “binge buying” on a Tokyo run is not recorded in the early 1980s. The subsection can only apply in circumstances where fans merely imported, but did not copy, tapes when passing them along the underground network.

Subsection (a)(3), “importation by [an educational organization] of an audiovisual work solely for its archival purposes,” likewise cannot apply because copies would be used for more than “solely” archival purposes. In any case, fans’ processes were systematic enough as seen by the uniform degradation in tape quality to disqualify them according to the latter half of subsection (a)(3). The process of *disseminating* anime through Japanese pen pals was unlawful in the United States, even if the initial receipt of tapes from Japanese pen pals were legal.

#### IV.J. *Recording and Sending Anime from Japan to America*

This analysis turns to fan activities in the mid-to-late 1980s, when fans disseminated Japanese animation at a much more rapid pace throughout the community.

U.S. military personnel performed a major role in the reproduction and distribution effort. 17 U.S.C. § 602(a)(1) specifies an exemption,<sup>234</sup> but upon review of the evidence, the U.S. military personnel who disseminated tapes were not officially acting on behalf of the government. Though disseminators employed the military mail system, the consumables on base, and their military education, they operated during their off-duty hours and paid for all of their material resources without direct reimbursement from the government. The disseminators directed themselves; they did not act under the authority of a commanding officer. It is ironic that U.S. military personnel—who were still functioning in *some* official capacity by virtue of being on base in Japan—aided and abetted this reverse flow of culture.

<sup>234</sup> “[This subsection does not apply to—] importation of copies or phonorecords under the authority or for the use of the Government of the United States or of any State or political subdivision of a State . . .” 17 U.S.C. § 602(a)(1) (2003).

There are, however, extenuating circumstances: disseminators copied and sent Japanese videotapes and laserdiscs to America. If these commercially-released products were copied on Japanese territory, one could evoke a “private use” argument in favor of their reproduction. However, once these copied tapes entered U.S. soil on the military base, they would infringe per 17 U.S.C. § 602(a). Likewise, if an anime broadcast was recorded on Japanese territory and brought onto the military base, the recording would infringe the same clause.

If these commercially-released products were copied on U.S. territory, disseminators would clearly infringe the exclusive right of reproduction in 17 U.S.C. § 106(1), although they would clear the importation test. The case of an anime broadcast intercepted and recorded on U.S. military property is much less clear. Assume *arguendo* that the recording is created without violating 17 U.S.C. § 602(a) for only the following reason: there is no willful traversal of a country’s borders with a television show fixed in a tangible medium.

The latter two scenarios do not consider that the C/FO may have constituted a nonprofit library operation, however. Even if one assumes that C/FO qualified as a nonprofit, educational and publicly-accessible (that is, accessible with a uniform membership fee) library, “Limitations on exclusive rights: Reproduction by libraries and archives,” 17 U.S.C. § 108, cannot justify the disseminator’s actions because it does not apply to cinematographic works.<sup>235</sup> Therefore, C/FO Rising Sun’s recordings were illegal.

That disseminators’ actions were illegal may have been obvious from the start, but additional evidence suggests that the U.S. Customs Service could have caught the disseminators, like all other importers of infringing goods. By law, customs checks all shipments—including APO mail—entering the United States.<sup>236</sup>

The U.S. Customs Service maintains an aggressive intellectual property enforcement program: in recent years, the Service has seized

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<sup>235</sup> 17 U.S.C. § 108(h) (1976) (“[t]he rights of reproduction and distribution under this section do not apply to . . . a motion picture or other audiovisual work other than an audiovisual work dealing with news” except for certain classes of uses and works that do not apply) (current version at 17 U.S.C. § 108(i) (2003)).

<sup>236</sup> Cf. *U.S. Customs and APO Mail* (Oct. 7, 2003), at <http://ima.korea.army.mil/Newcomer/US%20Customs%20and%20APO%20Mail.htm>. “In either case, the Secretary of the Treasury is authorized to prescribe, by regulation, a procedure under which any person claiming an interest in the copyright in a particular work may, upon payment of a specified fee, be entitled to notification by the Customs Service of the importation of articles that appear to be copies or phonorecords of the work.” 17 U.S.C. § 602(b) (2003). “[Violating articles] are subject to seizure and forfeiture . . . . Forfeited articles shall be destroyed as directed by the Secretary of the Treasury or the court, as the case may be.” 17 U.S.C. § 603(c) (2003).

millions of dollars worth of media annually (\$38.5 million in 1999; \$7.9 million in 2000).<sup>237</sup> However, enforcement starts with cooperation between “trained enforcement officers, other government agencies, and the trade community.” Anime companies exhibited dismissive ignorance, and they lacked expertise in the field of international intellectual property law. It is unlikely that one of their representatives would have taken the trouble to complete the Service’s Copyright Recordation Application Template, which requires submitting an application fee, a U.S. Copyright Office-issued registration, and copies or likenesses of the work.<sup>238</sup>

#### IV.K. *Translation*

A translation is a quintessential example of a derivative work, and derivative works fall under the domain of copyright protection.<sup>239</sup> Because translations are wholly based on their original works, no copyrights can subsist in them.

#### IV.L. *Fansubbing*

VHS fansubbing combines translation, typesetting, and reproduction onto a videotape, followed by an initial round of distribution. As this analysis has shown, these translation, reproduction, and distribution steps are illegal. Therefore, the law prohibits fansubbing as practiced from 1989.

#### IV.M. *Fair Use*

##### IV.M.1. Preamble

This analysis now turns to the fans’ defense to infringement: fair use. Originally conceived as fair abridgement in English common law,<sup>240</sup> fair use is an affirmative defense to alleged copyright infringe-

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<sup>237</sup> U.S. Customs and Border Protection, *IPR Seizure Statistics by Top Trading Partner and Commodity*, [http://cbp.gov/xp/cgov/import/commercial\\_enforcement/ipr/seizure/trading/](http://cbp.gov/xp/cgov/import/commercial_enforcement/ipr/seizure/trading/) (last visited Oct. 7, 2004).

<sup>238</sup> U.S. Customs and Border Protection, *Import / Commercial Enforcement / Intellectual Property Rights*, [http://cbp.gov/xp/cgov/import/commercial\\_enforcement/ipr/](http://cbp.gov/xp/cgov/import/commercial_enforcement/ipr/) (last visited Oct. 7, 2004).

<sup>239</sup> 17 U.S.C. § 103. Both UCC and Berne offer specific guidelines for obtaining non-exclusive licenses to prepare translations when an authorized translation does not exist in a target language. Unfortunately, both treaties specify that domestic law must establish the right to a translation license; the United States has never enacted such a provision. Consequently, fan translations could never have been lawfully prepared.

<sup>240</sup> WILLIAM F. PATRY, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW* 6-7 (2d ed. 1995) (discussing *Gyles v. Wilcox*, 26 Eng. Rep. 489 (Ch. 1740)).

ment. Fair use is like a very soft and thin cushion—what Lessig illustrates in *Free Culture* as “a tiny sliver”—around the hard rights that copyright law grants.<sup>241</sup> Wide judicial discretion has led to a variety of contradictory opinions, some narrowing while others widely broadening rights that the public may exercise. Professor Lloyd Weinreb once commented, “The field is littered with the corpses of overturned opinions . . .”<sup>242</sup>

In 1976, Congress codified fair use using Justice Story’s guidelines from 1841,<sup>243</sup> expressly noting four factors:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>244</sup>

Given that both the statute and common law call for inclusive evaluation, Weinreb argues for a more expansive definition of fair use that accounts for a community’s normative values. I shall analyze the fans’ fair use defense from a traditional utilitarian standpoint, and then will quickly approach broader questions of fairness while grounding arguments in case law.

#### IV.M.2. Nature of the Work

Regarding the “nature of the copyrighted work,”<sup>245</sup> all anime are creative rather than informational. When the work is creative, use of these works is less likely to be deemed fair use.<sup>246</sup> Because the works are not legally unpublished, they do not qualify for a narrowing of fair use rights.<sup>247</sup> Beyond these considerations, a court should not look at the contents of a copyrighted work.<sup>248</sup>

<sup>241</sup> LESSIG, *supra* note 13, at 141-142, 142 fig.2.

<sup>242</sup> Lloyd L. Weinreb, *Fair’s Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1137 (1990).

<sup>243</sup> *Folsom v. Marsh*, 9 F. Cas. 342 (C.C. Mass. 1841) (No. 4,901).

<sup>244</sup> 17 U.S.C. § 107 (2003).

<sup>245</sup> 17 U.S.C. § 107(2) (2003).

<sup>246</sup> *Bridge Publ’n, Inc. v. Vien*, 827 F. Supp. 629, 635 (S.D. Cal. 1993).

<sup>247</sup> *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564 (1985) (“Our prior discussion establishes that the scope of fair use is narrower with respect to unpublished works.”); 471 U.S. at 553 (quoting S. REP. NO. 94-473, at 64 (1975)).

<sup>248</sup> *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 606 F. Supp. 1526, 1536 (C.D. Cal. 1985), *aff’d*, 796 F.2d 1148 (9th Cir. 1986).

## IV.M.3. Purpose and Character of the Use: Transformation

The urgings of Judge Leval<sup>249</sup> and subsequent Supreme Court cases argue that “the purpose and character of the use,”<sup>250</sup> require distinguishing between whether the new work merely supersedes the objects of the original creation, or “whether and to what extent the new work is ‘transformative,’”<sup>251</sup> altering the original with new expression, meaning, or message. The court’s ironic presumption of a “new work,” rather than a work employing a use under copyright, requires further discussion under the third statutory factor.<sup>252</sup>

The former notwithstanding, courts have consistently ruled on the transformative nature of works by considering their intratextual characteristics.<sup>253</sup> Courts have not considered the intertextual or extratextual characteristics of a text under the corpus of transformative use; those characteristics were exactly what the fans modified by creating a proselytization commons *around* texts.<sup>254</sup>

Artists and scholars for generations have noticed the transformative nature of context extrinsic to works.<sup>255</sup> In the legal discourse, if this type of transformation is considered at all, it is considered in apposition to the wholesale taking of works. It has been only very recently that legal scholars, such as Professor Tushnet, have argued that ordinary copying can serve constitutionally sanctioned aims.<sup>256</sup> The only time the

<sup>249</sup> Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1105 *passim* (1990).

<sup>250</sup> 17 U.S.C. § 107(1) (2003).

<sup>251</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (quoting Leval, *supra* note 248, at 1111).

<sup>252</sup> See *infra* §IV.M.8 p. 278.

<sup>253</sup> How, for example, the similarities between the “hearts” of two songs might pass or fail the transformative use test despite the second song’s use of a mere first line and opening bass riff. *Campbell*, 510 U.S. at 588.

<sup>254</sup> Indeed, if messages in support of texts are recognized at all, the Supreme Court recognized them in the fourth statutory provision when the court considered how Sony marketed the Betamax as a device that could assist with time-shifting of programs, thus advocating certain new classes of uses. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 436 (1984).

<sup>255</sup> For instance, Marcel Duchamp initiated readymade art in 1913 by naming a porcelain urinal “Fountain” and submitting it to exhibition. Art in Inner Melbourne, *Borrowing in Art—Historical Background*, VCEART (2000), at <http://www.vceart.com/explore/ideas/page.2.html>. The reader should have little doubt that the urinal in question, before its appropriation, contained copyrightable expression, see 17 U.S.C. § 102(5) (2003). Professor Marshall McLuhan founded media studies by claiming that the medium is the message. MARSHALL McLUHAN, *UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN* 7 (MIT Press 1994) (1964). In 1990 Professor Henry Jenkins wrote specifically on the ways in which participatory fan culture can transform and reinterpret texts. HENRY JENKINS, *TEXTUAL POACHERS: TELEVISION FANS AND PARTICIPATORY CULTURE* 23 *passim* (1992).

<sup>256</sup> Rebecca Tushnet, *Copy this Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L. J. 535, 547 *passim*.

statute recognizes such transformation is when the use is educational.<sup>257</sup> However, trying to categorize the fannish activities as “educational” would clearly exceed the bounds of Congress’ definitions.

By not accounting for the rhetoric of the proselytization commons, one is forced to conclude that fans’ uses were in no way transformative: they just copied tapes and sent them all over the country. Subtitles are illuminative at best, providing an interpretation of the texts without substantially criticizing them. A translation is presumptively a derivative work;<sup>258</sup> a transformative work that escapes the confines of the preceding definition must add so much new criticism or parody of the old work that the contributions overshadow the original. Translations, and therefore fansubs, do not. Translations amplify and clarify messages to new audiences.

#### IV.M.4. Commerciality

The first statutory factor suggests that the commercial nature of a use should be considered in adjudicating fair use. Legislative history suggests that the intent of Congress was to expressly recognize that, “the commercial or non-profit character of an activity, while not conclusive with respect to fair use, can and should be weighed along with other factors in fair use decisions.”<sup>259</sup>

Ultimately, the fair use defense requires an analysis of “the purpose and character of the use,” of which commerciality is only a part. Profitability matters, but not as much as the defendant’s objective to profit at the copyright holder’s expense.

The voluntary efforts of countless fans as matters of courtesy and allegiance to common causes should not go unnoticed.<sup>260</sup> In this case, I consider that fans’ activities were largely noncommercial in scope and unprofitable in object; thus, they do not weigh against a finding of fair use. When considering the purpose and character of their uses, the organized associations that fans formed, *e.g.*, the Cartoon/Fantasy Organization and various anime conventions, do not weigh against a fair use ruling, even if those organizations acquired various types of assets in property.

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<sup>257</sup> H.R. REP. NO. 94-1476, at 62 (1976).

<sup>258</sup> 17 U.S.C. § 101 (2003).

<sup>259</sup> *Id.* at 66 (1976).

<sup>260</sup> With reference to the SASE distribution method, consider the costs actually incurred in the banal exercises of everyday life, such as sending mail, driving, or connecting to the Internet. Costs are associated with each transaction, but they are rarely so unique that they warrant especial attention. If I borrow a friend’s car for half an hour, social custom suggests that I fill up her car’s gas tank before returning it to her, irrespective of how much gas I have used.

Contrast this commerciality factor with Professor Mehra's argument that *dōjinshi* are largely commercial in scope, in spite of some Japanese fannish rhetoric to the contrary. Japanese conventions are sales conventions; how-to manuals on creating *dōjinshi* proudly trumpet the sales motive.<sup>261</sup> American anime conventions were about the transformation of a medium,<sup>262</sup> with similar aims but discrete organizations compared to fan distribution.

#### IV.M.5. Effects on Potential Markets

The fourth statutory factor, which the Supreme Court said in *Harper & Row* "is undoubtedly the single most important element of fair use,"<sup>263</sup> prompts a consideration of "the effect of the use upon the potential market for or value of the copyrighted work."<sup>264</sup> In hindsight, one may conclude that fan distribution greatly enhanced the value of anime as a whole, as well as specific titles in particular. May one conclude that the fourth statutory factor presumptively determines fair use, overlooking the sins of some for the redemption and progress of many? As *Campbell v. Acuff-Rose* described: "Evidence favorable to an alleged copyright infringer concerning relevant markets, without more, is no guarantee of a finding of fair use," and: "Judge Leval gives the example of the film producer's appropriation of a composer's previously unknown song that turns the song into a commercial success; the boon to the song does not make the film's simple copying fair."<sup>265</sup>

While the general availability of a work and the copyright holder's intent to develop or license it matter in fair use rulings, these factors are tertiary considerations at best. *Maxtone-Graham v. Burtchaell* upheld a fair use defense on an anti-abortion book *Rachel Weeping*, which copied interviews, amounting to 4.3% of the text, from a nonfiction pro-abortion book *Pregnant by Mistake*.<sup>266</sup> The latter book's out-of-

<sup>261</sup> Mehra, *supra* note 11, at 165; *id.* at 165 n.58 (quoting translated title "Take Aim! The Key to Making *Manga dōjinshi*: I Want to Make *dōjinshi* that Will Get Attention, Sell Out, and Have Multiple Print Runs").

<sup>262</sup> See Tatsugawa, *supra* note 131 (quoted *infra* p. 132; see accompanying text).

<sup>263</sup> *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985).

<sup>264</sup> 17 U.S.C. § 107(4) (2003).

<sup>265</sup> 510 U.S. 569, 591 n.21 (1994) (paraphrasing Leval, *supra* note 24950, at 1124 n.84, "it should be considered an infringement, regardless of the absence of market impairment"). However, the fans' actions were outright takings rather than appropriations.

<sup>266</sup> 803 F.2d 1253, 1265 (2d Cir. 1986); S. REP. NO. 94-473, at 64 (1975) ("[I]f the work is 'out of print' and unavailable for purchase through normal channels, the user may have more justification for reproducing it than in the ordinary case"); H.R. REP. NO. 94-1476, at 67 (1976).



print status was considered among many other determinative factors.<sup>267</sup> In any case, the out-of-print condition draws an analogy to fully-exploited property, rather than property that has never been exploited.

*Mattel, Inc. v. Pitt* ruled in favor of a defendant who added sado-masochistic overtones to Barbie dolls by repainting and recostuming them.<sup>268</sup> The court held that the defendant's use was transformative, that the new use does not produce cognizable market harm, and that child-oriented Mattel would not likely develop or license others to develop the sale of "adult" dolls.<sup>269</sup> I have already shown that Japanese license holders intended to develop the American market in the early 1980s, but merely failed in their methodologies. The concern with market intent turns on the degree of transformation. Surprisingly, case history does not favor the fans.

#### IV.M.6. Community and Normative Standards

The aforementioned interpretations turn out to be unfairly presumptive without weighing the perspective with which one approaches the evidence. Shortly after Judge Leval's influential article, Professor Weinreb issued a commentary in which he eschewed Judge Leval's strictly utilitarian approach for a more ample one that, in his terms, encapsulates the normative standards of community. Speaking from only one position is likely to skew the results away from fairness as its own virtue.<sup>270</sup> If *Sony* has directed this study to a "sensitive balancing of interests,"<sup>271</sup> whose interests are at stake; indeed, *what* community shall one draw from to apply normative standards?

In *Sony*, the court did not limit the community to those who time-shifted; rather, the court defined the community as those who produced and watched television, neatly encompassing the invested public as well as the invested private interests. The search for the relevant public in this case reveals several interest groups: the fans themselves, the potential fans (indeed, the potential market) and potential producers, the Japanese producers, the large American syndications that refused through inaction to import Japanese products, and the smaller American syndications that continued to eviscerate anime through the late 1980s.

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<sup>267</sup> *Mastone-Graham*, 803 F.2d at 1264 n.8; see also *id.* at 1263 (quantitatively assessing "the amount and substantiality of the excerpts in relation to the copyrighted work as a whole").

<sup>268</sup> 229 F. Supp. 2d 315, 318 (S.D.N.Y. 2002).

<sup>269</sup> *Id.* at 324; see also *Campbell*, 510 U.S. at 592.

<sup>270</sup> Weinreb, *supra* note 241, at 1141.

<sup>271</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 455 (1984).

The normative standards of this community reveal a multiplicity of viewpoints, the strongest of which derived from the fans in reaction against existing American firms; the weakest of which derived from the Japanese firms on account of the actions of the latter. The normative standards of the fans reveal the most about this dysfunctional community, for the fans themselves alleged it was illegal to copy and distribute tapes, but copied and distributed anyway in reaction against inaction, injustice, and misunderstanding on the part of the firms. While the fans' widely-held suspicion of infringing copyright law does not pronounce their own sentence, it at least crystallizes one notion: if they infringed, they probably did so willfully.<sup>272</sup>

In any case, good faith in obtaining and using a copyrighted work has no bearing on a finding of fair use,<sup>273</sup> purpose of the use notwithstanding.<sup>274</sup> Suppose that fans traveled to Tokyo with the express intent of "copying the hell out of" all of the laserdiscs that they could find. In the absence of outright theft, and with substantial written and oral testimony that said fans spent egregious sums on said laserdiscs, one cannot reasonably conclude that fans acted willfully unless they knew conclusively that they could not avail themselves of a fair use defense. Therefore, I will temporarily eschew exploration of fans' motives, considering instead their effects.

#### IV.M.7. Effects, not Motives

Their effects were, in the net, positive: fans became importers and producers who found neglected potential for profit and proliferation. Many traditional domestic producers lost opportunities to profit from licenses of Japanese content, but they decided to pursue their own markets: such is the nature of a free economy. Based on this preliminary conclusion, assume *arguendo* that fans acted in fair use, irrespective of their motives.

How can one account for the bootleggers E. Monsoon and S. Baldrick? Shall they be vindicated as well, because they spread anime at any cost, and indeed, with considerable profit to them? The first statutory factor intercedes: commerciality weighs against fair use, especially acts for the purpose of private financial gain at the expense of the copyright

<sup>272</sup> 17 U.S.C. § 504(c)(2) (2003).

<sup>273</sup> Compare *Harper & Row*, 471 U.S. 539, 562-563 (1985) ("fair use presupposes good faith and fair dealing"), with *Fisher v. Dees*, 794 F.2d 432, 437 (9th Cir. 1986), and *Leval*, *supra* note 248, at 1126-1127 ("[g]ood faith is irrelevant to fair use analysis"), cited in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 585 (1994). "If the use is otherwise fair, then no permission need be sought or granted . . . being denied permission to use a work does not weigh against a finding of fair use." *Campbell*, 510 U.S. at 585, n.18.

<sup>274</sup> *Infra* §IV.M.3 p. 248.

owner. Normative community standards also intercede, for fans complained bitterly against these wolves in their midst.

Unfortunately, this fair use ruling would discourage industrial formation. If commercial entities had to obtain a license, what good would it be to obtain one if someone else could fairly circulate fansubs in any case? What incentive would Japanese companies have to license rights if the fans could get them for free? Finally, what incentives would fans have to signal a change in industrial practice, when they have satisfied their own demand?

The results of demand without a proselytization commons and without legally licensed works are obvious. Look to China and East Asia, where unchecked pirates have routinely usurped demand and have made conditions unfavorable for legitimate operations to license and distribute works that ultimately profit Japanese animation companies.<sup>275</sup> If the law sanctions fans who merely satisfy demand, they usurp demand.<sup>276</sup> Fair use thus leads to patently unfair copyright infringement. *Reductio ad absurdum*, the original premise must be false.

Fans' uses were unfair. If those uses were fair then copyright would fail to create incentive for producers and importers, would fail to grant an exclusive right, and thus would fail to impel the progress of science and the arts by the constitutional means of securing exclusive rights.<sup>277</sup> Alternatively, one would be forced to consider the fans' motives, which have traditionally resisted deliberation in adjudication of copyright.<sup>278</sup>

#### IV.M.8. Realities and Substantiality

Regardless, the third statutory factor, "the amount and substantiality of the portion used in relation to the copyrighted work as a whole,"<sup>279</sup> greatly weighs against fan distribution. Many of the court cases mentioned have considered alleged infringements of very small portions of works. When they have consisted of whole works, they consist of relatively selective classes of works in relation to the entire field of televised material.<sup>280</sup> Indeed, the congressional illumination of making "multiple copies for classroom use"<sup>281</sup> for the purposes of teaching has rarely been invoked in the case law, and then never successfully for

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<sup>275</sup> See Japan External Trade Org., *supra* note 5.

<sup>276</sup> See *Fisher*, 794 F. 2d at 438; *Campbell*, 510 U.S. at 598 (Kennedy, J., concurring).

<sup>277</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>278</sup> Cf. *Campbell*, 510 U.S. at 585 n.18.

<sup>279</sup> 17 U.S.C. § 107(3) (2003).

<sup>280</sup> 464 U.S. at 446. In *Sony*, several advocates stressed that some classes of works (in televised programming) were fine to copy.

<sup>281</sup> 17 U.S.C. § 107 (2003).

activities beyond the immediate scope of teaching.<sup>282</sup> The H.R. committee specified that their guidelines were minimum and not maximum standards for educational fair use,<sup>283</sup> but the courts have been reluctant to expand on that minimum. Fans copied and distributed everything that they liked and could access.

The Supreme Court acquitted Sony of contributory infringement, but the Court's decision repeatedly qualified the practice of time-shifting with private home use.<sup>284</sup> The Court referenced library-building with extreme disfavor.<sup>285</sup> A similar Court could only more greatly disfavor time-shifting programs to another continent,<sup>286</sup> then building library and distribution operations around them. Without considering the proselytization commons, these fans appear as petty pirates.

The core rhetoric of the proselytization commons is to spread anime by any means necessary, including potentially unlawful ones. Thus, fans became martyrs, condemned to infringe for the progress in which they so fervently believed.<sup>287</sup>

#### IV.M.9. Inevitable Infringement

If one admitted fans' motives as supporting and conclusive evidence, one would also have to permit certain levels of *inevitable infringement* as a consequence of the commons. Suppose that an organization controlled the commons, policed it, and kept its elements free as long as participants adhered to a strict code of conduct. As the Cartoon/Fantasy Organization demonstrated, such commons quickly become oligarchical and authoritarian before collapsing. In an open proselytization commons, stability and progress can be maintained, even if fansubbers recognize that their works may fall to disreputable distro houses.

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<sup>282</sup> See generally *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F.Supp. 1522 (S.D.N.Y. 1991) (holding copying and repackaging of large sections for educational purposes by a duplication business not to be "fair use").

<sup>283</sup> H. REP. NO. 94-1476, at 68 (1976).

<sup>284</sup> 464 U.S. at 425 *passim*.

<sup>285</sup> *E.g., id.* at 458, 484.

<sup>286</sup> *But cf. id.* at 449-50 ("Moreover, when one considers the nature of a televised copyrighted audiovisual work, see 17 U.S.C. § 107(2) (1982 ed.), and that time-shifting merely enables a viewer to see such a work which *he had been invited to witness* in its entirety free of charge, the fact that the entire work is reproduced, see § 107(3), does not have its ordinary effect of militating against a finding of fair use" (emphasis added)).

<sup>287</sup> *Cf. Katharine Mieszkowski, Thou Shalt Not Steal*, SALON, May 25, 2004 (discussing trends among some Christian teenagers who share religious hits as a means of expressing their faith and spreading the Word), [http://archive.salon.com/tech/feature/2004/05/25/christian\\_pirates/index.html](http://archive.salon.com/tech/feature/2004/05/25/christian_pirates/index.html), cited in Tushnet, *supra* note 256 at 580 ("likening music to the Bible itself, which should be disseminated by any means necessary").

An open proselytization commons can come at odds with property and copyright, if said commons proselytizes copyrighted works. Proselytizing the idea of anime is inextricably tied to proselytizing anime itself: the most expedient way to convince others is to make them see and believe. In a commons, one's worth is measured by what one shares, not what one hoards. The medium is the message;<sup>288</sup> the idea is the expression.<sup>289</sup>

Nevertheless, commons and copyright can coexist. The chief aim of anime's proselytization commons was to build demand so that an industry could form to legitimately compensate the Japanese rights holders, and to drive anime further into the heart of the American public. Fan distributors acquiesced to bootleggers because fan distributors held no legal rights of their own, but bootlegging was an unintended consequence or *emergent property* of the rapid spread of anime, not a symptom of anime's demise.

Suffice to say, the fair use defense of fans' general practices does not withstand the scrutiny of our current law.

#### IV.N. *Audience-Shifting as Free Exercise*

The fans copied and distributed anime en masse largely because they sought an alternative to childish animated programming. At its core, this programming was the product of top-down decisions and censors to reshape animation into the image and demographic of Saturday morning cartoons. Fans expressed their preference by developing rhetoric and arguments that they extolled throughout the country.

At the center of their arguments was anime itself, an idea so closely tied to its expression that the only way for fans to convince others of its viability was to distribute it through a massive underground network. Copyright burdened them, and they chose to commit infringement if they were to satisfy their ultimate goal of bringing anime to the American market. In the absence of copyright concerns, one could easily deduce that the fans' speech was fervent, opinionated, and dissenting speech—the exact kind that the First Amendment is meant to protect.

The actions of the fans need not be dissenting in order to fall under the First Amendment's scope. There has been a disturbing trend in fair use literature, as Professor Tushnet reflects, to inflate the transforma-

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<sup>288</sup> McLuhan, *supra* note 255, at 7.

<sup>289</sup> *Contra* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 556 (1985), *quoted in* Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts after Eldred*, 44 *Liquormart*, and *Bartnicki*, 40 *Hous. L. Rev.* 697, 713 (2003).

tive requirement of the first statutory factor and to conflate that requirement with the free speech value of dissent.<sup>290</sup> In fairness, dissent catalyzes the proselytization commons and obviates the expression of speech. Change requires dissent.

However, the aim of copyright law is not change but diversity: to encourage more creativity, to reward authors for what are rightfully theirs, and therefore to increase the selection of works. I contend that even if American animation had not fallen under the muzzle of self-censorship, there would still be great value in introducing Japanese animation to Americans, for the same reasons that anyone would expose himself or herself to another's work. Exchange promotes the development of culture.

Current copyright regimes do not recognize the proselytization commons or the value of intertextual transformation. Said commons can shift a medium to new and unexploited audiences, whether those audiences have a different skin color or live on a different continent than the copyright holder had in mind. Yet present copyright regimes do not permit audience-shifting through grassroots distribution, even though such audience-shifting is recognizable and commercially desirable.

Audience-shifting benefits society's interest in a diverse artistic sphere by increasing accessibility when markets and audiences have been systematically abandoned, dismissed, or ignored. Regarding dissemination, copyright law should not discriminate beyond its economic dimensions. Universal availability—at some price—should be guaranteed by more than narrowly-carved exceptions to copyright's otherwise impregnable bulwark.

By discriminating, such regimes betray the constitutional premise of our copyright laws to impel progress of the arts. What better aim could a movement have in our democratic society than the democratization of a medium previously accessible to the priesthood of Japanese Studies majors?

#### IV.O. *Distributing Fansubs before and after Licensing*

Since 1989, fans have distinguished between two periods for an anime product: the period before a title was domestically licensed, and the period after. Fansubs infringe during both periods. However, a fansub during the latter period violates a domestic copyright of a domestic licensee, rather than a domestic copyright of an overseas owner. The normal commercial exploitation of an anime work does not begin in the

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<sup>290</sup> Tushnet, *supra* note 256, at 586 *passim*.

U.S. until the Japanese owner licenses one or more rights to a company that will exploit the American market.

Japanese companies did not license these rights en masse for over two decades until fans created their own market through systematic violation of Japan's unexploited copyrights. This risk-taking by fans tells much about the pivotal role of a proselytization commons in the progress of the arts. Furthermore, this analysis demonstrates how copyright law could have obstructed that progress had any of copyright's minutiae been enforced.

Despite all of this evidence, perhaps it was in the best interests of the Japanese to ignore all of this infringement. Although they missed the revolution in 1990, perhaps they should have acted in strategic rather than dismissive ignorance. Inaction either way permits a commons to form; the dismissive part just made the message of the proselytization commons more earnest.

First, I think that there is something quite wrong about fans copying for expressive and constructive purposes at their great fiscal and personal peril. Tushnet explains, "there's something problematic about a defense of a law that relies on massive underenforcement to protect speech,"<sup>291</sup> or as I argue, to promote public and private objectives. If the objective of a law is clearly and only met by breaking it, then the problem lies in the law rather than in its transgression. Better laws can strike balances that promote all parties: in this instance, vindicating the fans could only further promote copyright holders' interests.

The former principle notwithstanding, perhaps it is in enlightened self-interest that a rights holder ignore all of this infringement, co-opting the activity to its benefit. This strategy may succeed after the market and its norms are well-established. In 2005—again the peace and security of fansubbers notwithstanding—I would recommend that Japanese owners simply leave fans alone. When demand in a market is just starting to form, however, this brand of enlightened self-interest is untenable.

If the Japanese owners act in enlightened self-interest, then their interests dictate that they should permit fansubs because fansubs help them build a market. However, if the owners tolerate them too much by explicitly granting them licenses, implicitly granting them licenses through vague semi-public statements, or strategically ignoring them while remaining acutely aware of what they are doing, then their toleration may destroy the value of their property. TV broadcasters and other downstream entities will argue, "We do not want to buy titles for

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<sup>291</sup> Tushnet, *supra* note 256, at 586.

which you have already established a distribution channel.” Acknowledgement and tolerance are dangerous because the opportunity costs are too high. The owner is thus thrown into a zero-sum game, just as described in the fair use analysis. The owner might be forced to threaten and prosecute the fans while accepting unfavorable terms from a broadcast network, which is more interested in maintaining its existing programming lineup than scheduling genre-shattering animated material.

The problem between owners, importers, and the public is not who is excluding whom; the problem is the exclusivity itself. For that limited time before a work begins to be actively exploited in the foreign country, copyright acts as a liability. Rational, law-abiding, “smalltime actors” would not want to risk violating it, and rational owners interested in encouraging or strategically ignoring the “smalltime actors” are prohibited from doing so because of copyright’s extraordinary opportunity costs.

Rather than tweaking black-letter law, however, suppose that at trial, the fans’ defense argues that the court should limit the plaintiff’s relief to \$0, or a symbolic \$1, in actual damages. Since I have shown that fans have no other defense according to copyright law, this option deserves some discussion. Modern U.S. copyright law provides that for foreign works, an action may be brought to court at any time.<sup>292</sup> However, a plaintiff may not collect statutory damages<sup>293</sup> or attorney’s fees<sup>294</sup> for infringements that took place before registration of the copyright, unless the plaintiff registers within the first three months of creation.<sup>295</sup> Since fansubbers do not profit from their activities and do not charge for their wares, and since the titles are unavailable in the United States, a court should not award actual damages or infringer’s profits.<sup>296</sup> Without even a market for goods, it is impossible to demonstrate a causal connection between infringements and loss of revenue.<sup>297</sup> Economically, fans’ activities produce net gains for rights holders, at the expense of the fans’ time and resources. A criminal charge would like-

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<sup>292</sup> 17 U.S.C. § 501(b) (2003).

<sup>293</sup> *Id.*; 17 U.S.C. § 504(c) (2003).

<sup>294</sup> 17 U.S.C. § 505 (2003).

<sup>295</sup> 17 U.S.C. § 412 (2003), *cited with approval and applied in* *Bus. Travels Analysts, Inc. v. Freedonia Group, Inc.*, 887 F.2d 399, 403-04 (2nd Cir. 1989).

<sup>296</sup> 17 U.S.C. § 504(b) (2003).

<sup>297</sup> *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 543 (1985), *quoted in* *L.A. News Serv. v. Reuters Television Int’l, Ltd.*, 942 F. Supp 1265, 1274 (C.D. Cal. 1996) (also concluding that extraterritorial damages are inadmissible).



wise fail for fans' want of "commercial advantage or private financial gain."<sup>298</sup>

Injunctions,<sup>299</sup> impounding of infringing articles,<sup>300</sup> and circumvention of copyright protection<sup>301</sup> remain. The court is granted wide latitude whether to "order the impounding [of infringing copies and related instruments] on such terms as it may deem reasonable."<sup>302</sup> The court could skip impounding altogether, and would be advised to do so in light of possible First, Fourth, and Fifth Amendment violations. Practitioner Paul S. Owens writes that the statute "permit[s] seizures of property without providing notice and an opportunity to be heard at a meaningful time . . . most seriously, the impoundment procedures present grave danger to the fundamental right of free speech by allowing virtually unregulated restraints and suppressions . . ."<sup>303</sup> Seizure must be essential to the protection of a plaintiff's interests for an injunction to be awarded,<sup>304</sup> but here, the interests of copyright holders are clearly divided.

Regarding the circumvention provision introduced in the Digital Millennium Copyright Act of 1998,<sup>305</sup> a court must award either actual or statutory damages, the latter determined "as the court considers just."<sup>306</sup> Despite ambiguity in and want of adjudication on the statutory language, a "just court" should force the plaintiff to recoup actual damages, which would be \$0. Since criminal penalties for circumvention are only required if commercial advantage or private financial gain are present,<sup>307</sup> no criminal wrongdoing would be found.

However, there is no latitude for a stay on injunctions under § 502. The court is limited to issuing injunctions "on such terms as it may deem reasonable to prevent or restrain infringement of a copyright," and there is little doubt that copyrights are being infringed. The court has "broad powers to enjoin infringement,"<sup>308</sup> and a showing of in-

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<sup>298</sup> 17 U.S.C. § 506(a)(1) (2003). § 506(a)(2) states, "by reproduction or distribution, including by electronic means, of [copies of works in a 180-day window] which have a total retail value of more than \$1,000." The defense would have to argue that the retail value of the copies is \$0 because it was unavailable in the United States.

<sup>299</sup> 17 U.S.C. § 502 (2003).

<sup>300</sup> 17 U.S.C. § 503 (2003).

<sup>301</sup> 17 U.S.C. §§ 1201-1205 (2003).

<sup>302</sup> 17 U.S.C. § 503(a) (2003).

<sup>303</sup> Paul S. Owens, *Impoundment Procedures under the Copyright Act: the Constitutional Infirmities*, 14 HOFSTRA L. REV. 211, 259 (1985).

<sup>304</sup> *Paramount Pictures Corp. v. Doe*, 821 F.Supp. 82, 89 (E.D.N.Y. 1993).

<sup>305</sup> 17 U.S.C. § 1201-1205 (2003).

<sup>306</sup> 17 U.S.C. § 1203(c)(3)(A) (2003).

<sup>307</sup> 17 U.S.C. § 1204(a) (2003).

<sup>308</sup> *Superhype Publ'g, Inc. v. Vasiliou*, 838 F.Supp. 1220, 1226 (S.D. Ohio 1993).

fringement triggers presumptions of irreparable harm.<sup>309</sup> Thus, a rights holder can enjoin uses at any time. If an owner brought a suit, he would almost certainly have to demand injunctive relief in addition to almost all of the other forms of relief that the law offers. Requesting any less in court might be seen by a potential licensee as passively letting these infringements slide. Filing suit any less promptly may permit the defense to rebut an injunction on a theory of acquiescence.<sup>310</sup> These alternatives would damage the value of the owner's property.

Here is the great conundrum of theory: A copyright holder who condones an infringement may wish to grant an implicit or explicit nonexclusive license, but the nonexclusive license diminishes or destroys the value of a future exclusive license. To really enforce one's copyright, an owner must demonstrate willingness to see the suit through to the bitter end, even if that end would leave both parties worse off.

Worse yet, the proselytization commons is easily disturbed or turned sour by motions at legal involvement. As anime consumption in America grew throughout the 1990s, fears of tape piracy for profit worsened among domestic anime companies. These concerns turned on some legitimate evidence: S. Baldrick and E. Monsoon, for example, and sundry dealers at "Creation Cons" that would sell the fansubs of others for \$15 per tape.<sup>311</sup> Led by Central Park Media/U.S. Manga Corps., anime companies created the Japanese Animation Legal Enforcement Division (J.A.I.L.E.D.), consisting of "a lawyer on retainer and a tipline with which people could be anonymously reported."<sup>312</sup>

J.A.I.L.E.D. operated between 1995 and 1996, with little success and some surprising results. Some anime companies were more proactive than others: VIZ took piracy "very personally,"<sup>313</sup> while Stream-

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<sup>309</sup> *Wainwright Sec., Inc. v. Wall St. Transcript Corp.*, 558 F.2d 91, 94 (2d Cir. 1977), cited in *Atari, Inc. v. N. Am. Philips Consumer Elec. Corp.*, 672 F.2d 607, 620 (7th Cir. 1977) (stating that irreparable harm can be established "even without the aid of that presumption"). See also *Haan Crafts Corp. v. Craft Masters, Inc.*, 683 F.Supp. 1234 (N.D. Ind. 1988) (lowering the bar to "likely copyright infringement").

<sup>310</sup> *Richard Feiner & Co., Inc. v. Turner Entm't Co.*, 98 F.3d 33, 34 (2nd Cir. 1996) ("An unreasonable delay suggests that the plaintiff may have acquiesced in the infringing activity, or that any harm suffered by the plaintiff is not so severe as to be 'irreparable.'"). See *infra* §III.B p. 63.

<sup>311</sup> Gray, *supra* note 30.

<sup>312</sup> Right Stuf Int'l, *supra* note 161.

<sup>313</sup> *Id.*; posting *THIS IS RUMOR CONTROL - HERE ARE THE FACTS* to news:rec.arts.anime (May 11, 1995) (starting a large flame war regarding actions of some VIZ representatives threatening fans; periodically inciting fans' posts to boycott VIZ), at <http://groups-beta.google.com> with Message-ID Ja2frKe.csue@delphi.com.

line Pictures never joined.<sup>314</sup> J.A.I.L.E.D. managed to contact several bootleggers, and in one incident, successfully sued a video dealer called the Karate Center for \$410,178.40 in damages.<sup>315</sup> However, J.A.I.L.E.D. also illustrated what anime executive John O'Donnell called "the law of unintended consequences."<sup>316</sup> At Anime Expo '95 J.A.I.L.E.D. representatives claimed "they honestly hadn't thought of many of the situations brought up by the [fans];"<sup>317</sup> elsewhere, "J.A.I.L.E.D. is certainly not an organization devoted to antagonize anime fans. Anime fans are the basis of our business and we thoroughly appreciate their support and opinions."<sup>318</sup> Nevertheless, many members of the fan community, especially fansubbers, viewed J.A.I.L.E.D. with extreme suspicion and contempt:

Does that mean that JAILED is targeting [fansubbing] at the moment? NO. Could someone prosecute you for trading in fansubbed tapes? YES.

. . . .

And what would this accomplish for JAILED? It would SEVERELY piss off the fans. They don't want to curtail fansubbing OR piss off the fans. . . they want to ensure profits for the commercial material . . . . Both camps want the bootleggers (at conventions and such) out of business. Really, nothing has changed except that now the industry

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<sup>314</sup> Posting of centralparkmedia@delphi.com, *J.A.I.L.E.D. official Announcement!* to news:rec.arts.anime (May 31, 19e95) [hereinafter *J.A.I.L.E.D. Announcement*] (posting a press release from May 22, 1995), at <http://groups-beta.google.com> with Message-ID Rq388hn.cenparkmedia@delphi.com. Carl Macek is paraphrased as saying: "What a stupid idea. Going after fans like that is self-defeating." Posting of Enrique Conty, [*AnAm*] *Anime America Day 1 Report (Partial)*, to news:rec.arts.anime (July 8, 1995), at <http://groups-beta.google.com> with Message-ID 3tkskm\$rjj@newdelph.cig.mot.com. See also posting of Jerry Shaw, *Re: Lack of Miyazaki*, to news:rec.arts.anime (July 15, 1995) (explaining that at the AX '95 Streamline panel, Carl received a round of applause when he said that he did not agree with JAILED), at <http://groups-beta.google.com> with Message-ID 3u8be0\$3uo@news2.deltanet.com.

<sup>315</sup> *Central Park Media Corp. v. Karate Center*, 95 Civ. 5463, 1996 U.S. Dist. LEXIS 16794, at \*1 (S.D.N.Y. 1996) (recommended order), adopted by 1996 U.S. Dist. LEXIS 16406 (S.D.N.Y. 1996). See also Right Stuf Int'l, *supra* note 1610; posting of centralparkmedia@delphi.com, *J.A.I.L.E.D. at Work!!* to news:rec.arts.anime (Aug. 10, 1995) (posting a press release from Aug. 22, 1995, with headline "J.A.I.L.E.D. Does First Bust With a Bang: Seizes Over 10,000 Pirate Videos in New York"), at <http://groups-beta.google.com> with Message-ID Rq388hn.cenparkmedia@delphi.com.

<sup>316</sup> Patten/JAILED, *supra* note 1510, at 119 (in reprint).

<sup>317</sup> Posting of Neil Nadelman, \*\*\*\* *CLEARING THE AIR ABOUT JAILED* \*\*\*\*, to news:rec.arts.anime (July 12, 1995), at <http://groups-beta.google.com> with Message-ID JtAiQYj.docsane@delphi.com.

<sup>318</sup> J.A.I.L.E.D. Announcement, *supra* note 31403. In an interview for an article published in 1999: "'Let's face it,' says Shawne Kleckner of The Right Stuf International, 'anime as an industry was born on the tradition of fans spreading around illegal video copies. What we're trying to do is close down the groups that are making fifty or 100 or 500 copies for sale outside fandom,'" Patten/JAILED, *supra* note 150, at 120 (in reprint).

has a visible Big Stick, which is not being brandished in “our” direction.<sup>319</sup>

This suspicion turned into a general distrust of the industry that persisted many years thereafter.<sup>320</sup> Despite noble aims and supportive public statements, the J.A.I.L.E.D. experiment failed because the law does not distinguish between different classes of activity. If fans in the “old guard” may take any comfort in the law, they should note that copyright holders have only three years from the date of infringement to press their civil claims.<sup>321</sup>

This discussion ends at the heart of the matter: the problem is not who excludes whom; the problem lies with the exclusivity itself.

#### IV.P. *Not Against Copyright*

This analysis is not attempting to construct an argument against the whole of international copyright law. Copyrights, and international recognition thereof, are invaluable in numerous cases. International copyright recognition has been instrumental to anime’s commercial success for Japan as well as for America. Every time an anime gets licensed, copyright sanctions a transfer of exclusive rights between two countries, along with continual transfers of capital and value. As one American executive in the field said, “the most effective argument starts, ‘Pay to the Order of.’”<sup>322</sup> Without international copyrights, the anime market could not have grown as it has today.

But as valuable as copyrights have been in the commercialization of anime, they have also proved an insurmountable barrier to entry. Without the very real risk that fans took in their love for the medium, anime would be far less popular and profitable than it is today.

My argument is about timeliness. The value of a copyrightable work varies from time to time according to any number of external factors.<sup>323</sup> As I have shown, however, there exist limited times in which

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<sup>319</sup> Posting of Mark L. Neidengard, *Re: \*\*\*\* CLEARING THE AIR ABOUT JAILED \*\*\*\**, to news:rec.arts.anime (July 13, 1995), at <http://groups-beta.google.com> with Message-ID 3u3hdc\$kvq@gap.cco.caltech.edu.

<sup>320</sup> For example, in an interview for an article published in 1999, John O’Donnell said: “JAILED was never aimed at fans. But everybody took it as an attack against fandom, and we couldn’t tell them otherwise. So we realized it’s better not to say anything in public—to work behind the scenes,” Patten/JAILED, *supra* note 1510, at 119 (in reprint).

<sup>321</sup> 17 U.S.C. § 507(b) (2003). Criminal proceedings used to be limited to three years, but the No Electronic Theft (NET) Act of 1997 increased the window to five years. 17 U.S.C. § 504(a) (2003); Pub. L. No. 105-147, 111 Stat. 2678.

<sup>322</sup> Telephone Interview with Robert Woodhead, CEO, AnimeEigo (Nov. 23, 2003).

<sup>323</sup> *Eldred v. Ashcroft*, 537 U.S. 186, 207 n.15 *passim* (2003) (citing multiple, conflicting authorities about the economic value of an extended copyright term); 537 U.S. at 228 (Stevens, J., dissenting).

copyright law has not promoted private or public interests. Furthermore, there exist limited times in which violating copyright has substantially and measurably promoted the same interests.

#### IV.Q. *Decoupling Fixation and Enforcement*

If the problem is about exclusivity, then the best option may be to begin enforcement of copyright when a rights holder actively uses or licenses its work in the target market. While this rule may appear as a rather major change, it is actually quite minor, and is consistent with public and private interests as well as the current operations of media markets. Before the copyright holder makes a work available in a jurisdiction, including the case where the holder systematically excludes a jurisdiction from distribution, the holder should be unable to exercise his exclusive rights in that jurisdiction.

The trigger in the enforcement of copyright—actual use—would cover all transferable exclusive rights, not just the § 106 rights to reproduce, distribute, perform, display, and adapt. Given that the natural trigger for copyright creation moved from registration to actual fixation in a tangible medium,<sup>324</sup> the trigger for copyright enforcement would naturally move to actual exploitation. Inalienable author's rights, enumerated in § 106A, might still begin at fixation.

Congress may only grant exclusive rights, but it does not have to grant them all the time. As much as current jurisprudence and technology permit, Congress should recognize those rights when they stand to promote progress. Likewise, it should make those rights evanesce when inaction would do better than a “system” that no longer “promotes the Progress of Science.”<sup>325</sup>

The uses of fans and disseminators should not merely be fair uses as limitations on copyright holders' exclusive rights. These proselytizing uses should be free from exclusion by others, until the rightful author or owner exercises his or her rights by actively vending, or licensing to vend, works in the United States. The proselytization commons could then speed along with the shared constitutional objective of promoting the progress of the arts, and dismissive ignorance<sup>326</sup> would disappear because the new incentives would greatly favor domestic exploitation. Since there would no longer be opportunity costs for rights holders to know about unauthorized activity, the rights holders could actively

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<sup>324</sup> 17 U.S.C. §§ 101, 102(a), 302(a) (2003) (enacted as Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541).

<sup>325</sup> See 537 U.S. at 212, *construing* *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 6 (1966).

<sup>326</sup> *Infra* §III.B p. 63; *infra* §IV.C.1 p. 214.

monitor the fan distribution of its works, and could license them once their value increased. Where the works are made available and distributed widely, the rights holder would also duly spread knowledge of his or her commercial exploitation.<sup>327</sup> Once a title is licensed and scheduled for release, then unauthorized versions would become infringing: legal to possess, but illegal to further create or spread.

A copyrighted work should be free for *everyone's* taking until the copyright holder lawfully takes it and excludes others consistent with the progress motive. Such a system provides tremendous incentive for foreign copyright holders to publish and distribute their works inside the United States. One would hope to encourage the near-simultaneous worldwide exhibition of blockbusters such as *The Matrix Revolutions*,<sup>328</sup> and the rapid distribution of licensed works over instantaneous media such as the Internet.<sup>329</sup> Such simultaneous exhibition would not only curb real piracy, but would provide maximum accessibility to the public at the earliest possible date.

In fact, the simultaneous release of Hollywood's most valuable properties is already practiced to curb piracy. Yet for most works, simultaneous release is impractical because it is expensive to concurrently develop "localized assets," and unclear how popular a title will be in a foreign market, especially when that title is strongly tied to local tastes and customs.<sup>330</sup> Fan distribution thus promises a first-order glimpse of a property's value in a target market: the ultimate viral marketing strategy. This refined valuation lowers risk and results in appropriate transfers of wealth to creators.

Fans cannot match the quality of professional voice actors, nor can they produce most "localized assets," which include mass-produced action figures, popular target-culture soundtracks, and product tie-ins. The value-add by importers and distributors would not be diminished as long as they act timely—an objective that the law should support.

The proposed doctrine should not offset or diminish the rights enjoyed by unpublished works. A copyright holder still controls first dis-

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<sup>327</sup> Rights would still be solvent on the market, since publishers (*especially* multinational ones) have a *de facto* interest in excluding other publishers, as well as would-be pirates.

<sup>328</sup> THE MATRIX REVOLUTIONS (Warner Bros., released Nov. 5, 2003 in 46 countries).

<sup>329</sup> *But cf.* *Eldred v. Reno*, 239 F.3d 372, 379 (2001) ("in an era of multinational publishers and instantaneous electronic transmission, harmonization in this regard has obvious practical benefits for the exploitation of copyrights"), *quoted in* 537 U.S. at 198. Irrespective of the benefits of "harmonization" at the end of a copyright, I contend that at the beginning of a work's public life, a "hilly" doctrine within each jurisdiction would prompt publishers to disseminate works faster and wider than a "flat" doctrine has done.

<sup>330</sup> Roundtable Lunch Discussion, Comparative Media Studies at MIT, with David Kung, Marketing Executive, Creative Arts Agency (May 3, 2005).

tribution, which typically occurs in the country of lead production. By keeping a work unpublished everywhere, a copyright holder is rationally exercising his or her right to exclude. I have no sympathy for illegal software<sup>331</sup> rings that would release movies or software before (or even for some time after) the initial street date.<sup>332</sup> However, it is a legal fiction to presume that because the work was offered for sale to one public, that it is instantly available to all publics: the law should provide additional incentives<sup>333</sup> so that the objective matches the reality.

Once one member of one public has access, then any member of any public can and should have access: the author may no longer limit access to the work beyond that which will provide him or her with a just and fair exploitation<sup>334</sup>—the fruits of the labor, and thus the end in securing exclusive rights. There is no plausible *copyright-related* reason why a producer of a film should exercise his copyright to prevent the people of Oregon from watching the film or owning copies when he is distributing the film at reasonable prices to the other states, and through the normal venues.<sup>335</sup>

A copyright holder only rationally refuses public help when he fears that so permitting would undermine the value of his exclusive rights. Otherwise, the rights holder would welcome the increase of his property's popularity, especially if he could capture the resulting economic benefits. If a copyright holder abandons a market, there is good reason to suspect market failure; however, market failure merely weighs in favor of fair use. Dissemination weighs in favor of free use.

Furthermore, although the Berne Convention requires that "the enjoyment and the exercise of these rights shall not be subject to any formality,"<sup>336</sup> the text implies that the term may begin at any time, pro-

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<sup>331</sup> "Warez."

<sup>332</sup> See Brooks Boliek, *Pirates Face World of Hurt*, THE HOLLYWOOD REP.COM (Apr. 23, 2004), at [http://www.hollywoodreporter.com/thr/article\\_display.jsp?vnu\\_content\\_id=1000495256](http://www.hollywoodreporter.com/thr/article_display.jsp?vnu_content_id=1000495256).

<sup>333</sup> See JAMES MADISON, NOTES ON DEBATES IN THE FEDERAL CONVENTION OF 1787, at 480 (1966) ("To encourage by premiums & provisions, the advancement of useful knowledge and discoveries," Tues. Aug. 18, 1787, Madison's suggestion), available at <http://www.yale.edu/lawweb/avalon/debates/818.htm>.

<sup>334</sup> JCL 1 § 1 art. 1.

<sup>335</sup> E.g., "theatrical release." Cf. LESSIG, *supra* note 13, at 143, 226.

<sup>336</sup> Berne, *supra* note 187, art. 5(2). Berne does not strictly specify the beginning of the term of protection. "[T]he term of protection [for cinematographic works] shall expire fifty years after the work has been made available to the public with the consent of the author, or, failing [that], fifty years after the making," Berne, *supra* note 187, art. 7. Furthermore, the right of reproduction is statutorily limited when domestic legislation permits it "in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author" (9.2). No such statutory exception exists for the right of translation.

vided that no formality is required, enumerated formalities notwithstanding.<sup>337</sup> Berne further leaves “the public” underspecified, referring either to the public in the country at issue, or to one of any publics in the Berne Union. I contend that a term that begins when a work has been made available to the American public with the consent of the author is not subject to the aforementioned limitation.<sup>338</sup>

In any case, the World Trade Organization recently ruled that uses not in conflict with normal exploitation may be permissible, extrapolating from the Article 9(2) limitation and from Article 13 the TRIPs agreement.<sup>339</sup> As I have argued, fan distribution enhances rather than conflicts normal exploitation, thus suggesting favorable adjudication under that court’s “three-step test.”<sup>340</sup>

An *exclude it when you begin to use it* doctrine must rest on equitable forms of *use*. The doctrine is not intended to destabilize staggered, imminent distribution—a common practice with Hollywood’s first-run movies. By analogy to patents, consider a copyright holder who has not offered his or her work to a certain public, but has been diligent in reducing the work to a practicable form via translation, adaptation, emulation, conversion, etc., and has publicly announced the imminent issuance of the work to the target public.<sup>341</sup> The holders’ action may then be construed as a *use precluding excuse*.<sup>342</sup> Again by analogy to the modern patent system: a patent is not usually enforceable until it is-

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<sup>337</sup> Berne specifies, for instance, that a fixation requirement may be domestically legislated, Berne, *supra* note 187, art. 2(4). By definition, a term, as a period of time, must have at least two of the three specified: a beginning, an end, or a duration. When only one of the three is specified, the other two are arbitrary.

<sup>338</sup> Given my argument *ante* and the text’s use of the definite article.

<sup>339</sup> TRIPs art. 13 (“Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder”).

<sup>340</sup> See generally Jane C. Ginsberg, *Toward Supranational Copyright Law? The WTO Panel Decision and the “Three-Step Test” for Copyright Exception*, REVUE INTERNATIONALE DU DROIT D’AUTEUR, Jan. 2001, at 10 *passim* (examining the ruling that uses not in conflict with normal exploitation are permissible). Similar to Berne, the WIPO Copyright Treaty, art. 6, specifies the “right of distribution” but leaves “the public” underspecified. The WIPO Performances and Phonograms Treaty does not apply to cinematographic works. UCC arts. II-IV does not prohibit domestic formalities in order to exercise certain rights; it also flexibly defines the duration of protection so that domestic distribution could be a trigger.

<sup>341</sup> Cf. 35 U.S.C. § 102(g).

<sup>342</sup> Suppose that DreamWorks SKG announces that it will release *The Terminal* (2004) on November 23, 2004 in the U.S. If DreamWorks further claims that its licensee will release a Krakosian-language version on March 30, 2005, then DreamWorks and its licensee should have every right to exclude Krakosian rebels from releasing an unauthorized version. However, if DreamWorks determines to ignore the Krakosian market, or even if DreamWorks licenses *The Terminal* to a company and fails to announce that they will release a Krakosian version “well after the war.” In that case, DreamWorks’s decision should not effectively censor a potentially valuable commentary on Krakosian society.



sues,<sup>343</sup> when its scope has been effectively fixed. However, a patent owner may collect royalties starting from the 18-month publication date of the original patent application, provided that the other parties have actual notice of the published patent application, and that the patent actually issues.<sup>344</sup>

Furthermore, the public use of foreign works should not confuse unlicensed titles for licensed ones. It would be both perfectly constitutional and desirable to require a formal mark or disclaimer on these works under theories of trademark confusion<sup>345</sup> and preservation of authorial integrity.<sup>346</sup> Such a requirement could only spur the growth of proselytization commons over pirated copies. The usual admonitions in the subtitles of fansubs would be sufficient.<sup>347</sup> *By admitting the copyright holder's disuse, unlicensed users support their own excuse.*

This doctrine grants the moral high ground to publishers and allows fansubbers and publishers to cooperate in limited ways. Neither established fansubbers nor nascent industrialists wish to *steal* from Japanese authors. Both react to the injustice that works are unavailable at any price. By complying with the proselytization commons, publishers can regulate post-licensed unauthorized copying more effectively without fan backlash, "the law of unintended consequences." In turn, fansubbers can clearly distinguish their aims from those of the real pirates.

Both fansubbers and industrialists work for the theoretical benefit of authors. However, direct interaction between fansubbers and authors would potentially undermine the value of the authors' works; importers have direct access to authors and owners. Once a title is licensed, it becomes a domestic problem to stop unauthorized copies from further circulating or interfering with sales. The problems of Internet distribution and peer-to-peer downloading are real; however, they present little theoretical difference than the problems of open fan distribution a decade prior.

Fansubbers and distributors occupy different camps: broadly speaking, distributors of fansubs have always been divided between those who stop when a title is licensed, and those who do not. In 1995 the unscrupulous distributors included S. Baldric and E. Monsoon; in 2005, these distributors include traders on eBay, WinMX, and KaZaA. Fansubbers have little interest in seeing their titles distributed after being licensed. Thus, granting fansubbers amnesty would separate mo-

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<sup>343</sup> 35 U.S.C. § 154(a)(2) (2003).

<sup>344</sup> 35 U.S.C. § 154(d)(1) (2003).

<sup>345</sup> See generally 15 U.S.C. §§ 1051-1127 (2003) (collectively the Lanham Act).

<sup>346</sup> 17 U.S.C. § 106A (2003).

<sup>347</sup> *Infra* §III.D.2 p. 147.

tives and would pin noncompliant distributors between legally-empowered fansubbers and owner-authorized importers.

A commercial/non-commercial distinction fails to encapsulate the dynamics of the proselytization commons. If fans make a work truly free before it is licensed, then no pirate will be able to operate for private profit. Social norms will prevail over legal barriers. Nevertheless, keeping in criminal penalties for infringement for private financial gain would only help police the commons and protect legitimate rights holders. However, this control can only come from the government, as the C/FO demonstrated. Once unauthorized and unlicensed fansubs gain quasi-legal status, they can be lightly and effectively regulated.

Unfettered authors advance culture, and authors deserve ample rights. However, if history serves as any guide, publishers—rather than authors—have served as the main advocates of exclusive rights over the centuries.<sup>348</sup> Authors<sup>349</sup> care less about *who* distributes their works, so long as they are duly recognized for their work as distributed and perceived. Orson Scott Card (*Ender's Game*) recently claimed: “Authors cannot choose the audiences that love their work.”<sup>350</sup> Authors are in the business of creating works; publishers<sup>351</sup> are in the business of disseminating them. When publishers see no value in disseminating an author's work, perhaps public action can convince them otherwise.<sup>352</sup>

This principle of limiting copyright is consistent with the constitutional statement “to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>353</sup> It is further consistent with the patent system, and with public and private interests. Of

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<sup>348</sup> Printing presses outside London, such as the Scottish, threatened the dominant Stationers' Company in London. LESSIG, *supra* note 13, at 87, 88; Malla Pollack, *Purveyance and Power, or Over-Priced Free Lunch: The Intellectual Property Clause as an Ally of the Takings Clause in the Public's Control of Government*, 30 SW. U. L. REV. 1, 94 (2000) (“Overwhelmingly, the Stationers' motives appear to have been monetary”). GOLDSTEIN, *supra* note 18988, at 4 (“Copyright politics divides more along sectoral than national lines. A book publisher in England has far more in common with a book publisher in France . . . than it does with a library in England”).

<sup>349</sup> In the ideal sense of authorship, an Author is the entity creating the work.

<sup>350</sup> Orson Scott Card, Boskone 42 Guest of Honor Speech (Feb. 19, 2005). See generally Orson Scott Card, *Uncle Orson Reviews Everything: Rio Riot, MP3, Copyright, and Battling 1,000*, THE RHINOCEROS TIMES, May 6, 2002, available at <http://www.hatrack.com/osc/reviews/everything/2002-05-06.shtml>.

<sup>351</sup> Again, the archetypal Publisher takes a heretofore unknown work of an Author and disseminates it for the private benefit for both Author and Publisher.

<sup>352</sup> The First Amendment can only help the public's case, but I do not consider that amendment the source of their inclusive grant.

<sup>353</sup> U.S. CONST. art. I, § 8, cl. 8.

course, in the wake of *Eldred v. Ashcroft*<sup>354</sup> few argue that the Progress Clause substantially limits the power of Congress. This proposal, therefore, is certainly within the realm of Congress to enact.

Nevertheless, Congress's policies "by constitutional command"<sup>355</sup> must promote the Progress of Science and useful Arts. "This is the standard expressed in the Constitution and it may not be ignored."<sup>356</sup> Madison wrote: "The utility of this power will scarcely be questioned . . . . The public good fully coincides in both [copyright and patent] cases with the claims of individuals."<sup>357</sup> When drafting the Constitution, the report of the committee appointed by the Continental Congress to study literary encouragement stated that "the protection and security of literary property would greatly tend to encourage genius . . . ."<sup>358</sup> While exclusive rights clearly have tradeoffs, few would deny that the *stated* goal of copyright is to mutually advance individual expression and public access.

Copyright is effectively a monopoly, and arguments will always remain about the fairness of that monopoly grant. The right to charge \$1 or \$1 million to enjoy or build upon a copyrighted work may infuriate some opponents of copyright: that balance may always be a political one left to Congress.

Yet sometimes strict adherence to copyright law—even its fair use provisions—results in works that are unavailable at *any* price. Sometimes, copyright means that the public cannot learn, in a deep and fundamental way, about what they are missing. Sometimes, copyright results in denying a public the right to read, even after the copyright owner has released his or her work to the world public. Sometimes, copyright denies those same owners of the profits they could have reaped from other publics, while allowing other owners to monopolize domestic markets and exclude upstart competitors. While the owners of domestic distribution networks may simply reflect on what would actually sell, they more accurately state what they *think* will sell, and thus what they will let the public see. These owners legitimately want to

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<sup>354</sup> 537 U.S. 186 (2003) (upholding the constitutionality of the Copyright Term Extension Act).

<sup>355</sup> *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 6 (1966).

<sup>356</sup> *Id.*

<sup>357</sup> THE FEDERALIST NO. 43 (James Madison), *construed in* 537 U.S. at 212 n.18. *But see* Malla Pollack, *What Is Congress Supposed to Promote? Defining "Progress" in Article I, Section 8, Clause 8 of the United States Constitution, or Introducing the Progress Clause*, 80 NEB. L. REV. 754, 787 *passim* (2001) (dismissing "The Federalist's squib as a rapidly penned attempt to discuss all clauses in the proposed Constitution").

<sup>358</sup> XXIV JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789 326 (1922), *quoted in* Pollack, *supra* note 357, at 373.

minimize risk; yet, by refusing to grant innovative titles an audience, they reflect, reinforce, and ultimately dictate cultural policy. These practices may be “social norms” in the media industry; in other industries, they might be called “anticompetitive behaviors” and “antitrust violations.” For those times, the minutiae of copyright fundamentally fail the interests that they supposedly address.

Fan distribution should not merely carve another narrowly-tailored exception into copyright law’s expansive reach. Copyright may bar a vast constellation of uses (for limited Times), but copyright should only be justified when it lies on the critical path to Progress.

#### IV.R. *Concluding the Legal Analysis*

Fan distribution and fan subtitling, in virtually all of their permutations, were illegal according to copyright law. U.S. copyright law presented systematic barriers to entry for both fans and industry alike. In violating the law, fans took substantial risks; these risks were mitigated by apathy and dismissal, not investment, encouragement, or legal support, on the part of the Japanese.

#### V. PROGRESS AGAINST THE LAW

Since the turn of the millennium, Japanese animation has entered the mainstream in the U.S. *Spirited Away* won an Academy Award, the Anime Network took off in numerous markets, and Cartoon Network pushed boundaries with *avant-garde* anime on Adult Swim, which boosted the network to become the number one ad-supported cable channel among older viewers during the timeslot’s debut in 2003.<sup>359</sup> That same year, Turner Broadcasting revealed that Cartoon Network’s cash flow (\$241 million) made it more profitable than CNN, with viewers drawn especially to Adult Swim programming. Anime comprises an estimated sixty percent of all broadcast animation worldwide; in the United States, annual anime sales totaled \$500 million in 2002.<sup>360</sup>

For this dramatic growth, organized fandom deserves a round of applause. Quite against the restrictions of copyright, underground distribution flourished for two decades to build a base for a nascent domestic industry. That fans succeeded owes much to the apathy of foreign copyright holders, but even more to fans’ own tenacity. Ironically, the least “creative” of activities—as defined by creation of origi-

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<sup>359</sup> *Adult Swim Ratings Soar: Double & Triple Digit Gains*, ICv2 NEWS (Jan. 27, 2003), at <http://www.icv2.com/articles/news/2287.html>.

<sup>360</sup> *Anime and Manga Sales Growing Around the World: Anime Makes Up 60% Of All Broadcast Animation*, ICv2 NEWS (June 24, 2003), at <http://www.icv2.com/articles/home/2953.html>.

nal works of authorship—spawned a proselytization commons that proved enormously creative and profitable for all involved.

The rise of Japanese animation's success from the fandom provokes rethinking the incentives that copyright provides and withholds. Considering the barrier that copyright law presented to fans, it is remarkable that the industrial base grew so rapidly. In a May 2003 statement by the Development Bank of Japan, Hiroaki Yamato writes:

Long ago, serious adult discussion about *anime* was unheard of, but now, even the economic media elite is giving serious attention to the issue. Long before the promotion of Japanese intellectual property became a big topic, copyright royalties for Japanese animated characters were already providing substantial contribution towards the lowering of Japan's massive deficit in service income.<sup>361</sup>

When a media revolution sparks a major economic shift for a country, one wonders not only how the revolution happened, but whether current conditions permit a media success story like it to happen again. The proselytization commons subsisted on violations of copyright, yet induced progress of the arts.

Anime is not an isolated case for proselytization commons in support of unavailable copyrighted works. Since the anime revolution, many manga began to be imported into the U.S. by fans as "scanlations."<sup>362</sup> Video games and out-of-manufacture console systems can be played via "emulation."<sup>363</sup> Some Japanese video games, such as "dating simulations" and obscure role-playing games, are actively translated and distributed either whole or "patched" to encourage purchase of the original game.<sup>364</sup> The entire genre of *yaoi* (homosexual fan fiction and professional comics written by and aimed at Japanese female readers) was imported by fans,<sup>365</sup> and has now started to gather industry inter-

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<sup>361</sup> Hiroaki Yamato, *Viewpoint: Content from Japan*, DEV. BANK OF JAPAN, MONTHLY ECON. NOTES (May 2003), available at [http://www.dbj.go.jp/english/library/pdf/men/men\\_0305.pdf](http://www.dbj.go.jp/english/library/pdf/men/men_0305.pdf).

<sup>362</sup> See generally *Scanlation*, WIKIPEDIA, at <http://en.wikipedia.org/wiki/Scanlation> (last modified May 18, 2005).

<sup>363</sup> See generally *Console emulator*, WIKIPEDIA, at [http://en.wikipedia.org/wiki/Console\\_emulator](http://en.wikipedia.org/wiki/Console_emulator) (last modified May 14, 2005).

<sup>364</sup> E.g., INSANI.ORG (an "eroge" fansubbing group dedicated to translating dating sims, and for some games, releasing patches to the original, purchased retail version), at <http://www.insani.org> (last modified May 4, 2005). See generally *Fan Translation*, WIKIPEDIA (discussing video game translation), at [http://en.wikipedia.org/wiki/Fan\\_translation](http://en.wikipedia.org/wiki/Fan_translation) (last modified May 18, 2005).

<sup>365</sup> E.g., AESTHETICISM (a *yaoi*, "boy-love," shounen-ai, anime, manga, *dōjinshi*, and much-more publication and site since 1998), at <http://www.aestheticism.com> (last modified May 8, 2005). See generally *Yaoi*, WIKIPEDIA, at <http://en.wikipedia.org/wiki/Yaoi> (last modified May 15, 2005).

est.<sup>366</sup> Even Japanese, Korean, and Chinese live-action dramas are being subtitled and watched all over the world, in places and by people whom the original creators never envisioned would be interested.<sup>367</sup> Many of these commons rely on the same basic principles developed by American fansubbing: given authorial disinterest, fans should help make titles available so that the legitimate rights holders can enter or reenter these markets. If one looks beyond modern copyright, one finds whole fields of unauthorized cultural appropriations that have resulted in great wealth for the “victimized” countries: silk, fine china, and *ukiyo-e* woodblock prints, to name a few.

Paradoxically, we live in an age where some media industries clamor for perfect control over their copyrighted works. As the Japanese government has come to recognize the value of its once-disavowed mass culture, it has been considering strengthening its intellectual property system, with America as a model.<sup>368</sup> Where does the contradiction lie: in the truth about the progress, or in an assumption about the copyright?

The argument of this analysis is not against the whole of copyright. I argue instead against an incorrect inference: that progress of the arts and development of culture require perfect control over copyright from fixation to expiration. When the scope and enforcement of copyright are relaxed in nascent markets and on undervalued properties, progress of the arts will ensue. In the anime case, it proved overwhelmingly successful.

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<sup>366</sup> E.g., BE BEAUTIFUL (a publisher of yaoi in the U.S., currently focusing on manga but looking to expand to other media), at <http://www.bebeautifulmanga.com> (last modified May 18, 2005).

<sup>367</sup> E.g., JAPAN-TV FAN SUBS (an Asian television fansubbing group), at <http://www.jtv-drama.org> (last modified May 2005).

<sup>368</sup> See Japan External Trade Org., *supra* note 5.

