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## Gotta Catch 'Em All!: The National Diet's Inadequate Attempt to Control Manga Pirates

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# Gotta Catch ‘Em All!: The National Diet’s Inadequate Attempt to Control Manga Pirates

SYDNEY LANDERS\*

*Internet piracy threatens Japan’s most popular cultural exports: manga and anime. Fans have taken to translating and distributing the works online for other fans to enjoy because official translated versions of manga and anime are released overseas later than the original in Japan, or they are never released at all. In order to combat the illegal downloading and distributing of manga, the National Diet, Japan’s legislature, passed an amendment to the Japanese Copyright Act that increases punishments for leech sites and illegal downloading of manga.*

*This Note discusses the manga and anime industries and their struggles with piracy before reviewing the copyright regimes in the United States and Japan. In critiquing the Japanese Copyright Amendment, this Note considers the hardships of enforcement and the manga and anime industries’ resistance to change with new technologies. This Note concludes that a comprehensive licensing regime is needed to stop manga and anime piracy. Such a regime would facilitate timely distribution to satisfy overseas demand, and copyright owners would profit from the expanded market rather than lose out to piracy.*

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## INTRODUCTION

When possibly facing criminal penalties for copyright infringement, it is important that one is aware of the laws, and for Japanese copyright law, no one offers better advice than Miss Hello Kitty.<sup>1</sup> Japan's Minister of Education, Culture, Sports, Science and Technology selected Miss Kitty, the famous character from *Hello Kitty*, to make Japanese and international users aware of the new copyright laws passed in June 2020.<sup>2</sup> The June Amendment to Japan's Copyright Act brings manga<sup>3</sup> on par with existing copyright regulations regarding the illegal downloading of music and video, establishing new penalties for sharing and downloading manga and other texts without permission.<sup>4</sup> This Amendment came at a critical juncture in Japan's manga industry. Widespread piracy through torrent and leech sites has damaged the industry, with one site alone, Mangamura,<sup>5</sup> depriving manga publishers of an estimated 300 billion yen or \$2.75 billion.<sup>6</sup>

Japanese anime and manga have transcended beyond the country's borders to be enjoyed by fans across the world.<sup>7</sup> According to

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<sup>1</sup> See Andy Malt, *Hello Kitty Hired to Spread Awareness of New Japanese Copyright Laws*, COMPLETE MUSIC UPDATE (Aug. 3, 2020), <https://completemusicupdate.com/article/hello-kitty-hired-to-spread-awareness-of-new-japanese-copyright-laws/> (stating that Miss Kitty's task is to make Internet users knowledgeable about the amendment to Japan's Copyright Act because she takes copyright seriously and is respected worldwide).

<sup>2</sup> *Id.*

<sup>3</sup> See discussion *infra* Section I (manga refers to comics).

<sup>4</sup> Malt, *supra* note 1.

<sup>5</sup> See Lex Celera, *Japan's Biggest Manga Pirate Was Arrested in Manila*, VICE (July 10, 2019, 5:39 AM), <https://www.vice.com/en/article/neag8m/romi-hoshino-manga-mura-arrested> (discussing that Mangamura's manager, Romi Hoshino, was arrested for pirating manga titles). Mangamura was shut down by the Japanese government after it was "branded . . . as one of three websites that internet service providers may block in a bid to address internet piracy." *Id.*

<sup>6</sup> *Japan Enacts Copyright Control Law to Ban Pirated Manga Downloads*, KYODO NEWS (June 5, 2020, 2:08 PM), <https://english.kyodonews.net/news/2020/06/33f524714d35-japan-enacts-copyright-control-law-to-ban-pirated-manga-downloads.html>.

<sup>7</sup> See *The Global Content Marketplace: Audience Demand for Anime*, PARROT ANALYTICS (Aug. 9, 2018), <https://www.parrotanalytics.com/insights/the-global-content-marketplace-audience-demand-for-anime/> ("Anime—or animation in the Japanese style—is one of the more global subgenres of TV content, enjoyed by viewers in almost every country in the world.").

a Parrot Analytics report, the United States (“U.S.”) was “the world’s most enthusiastic international market for anime” in the period between April and June of 2018.<sup>8</sup> Project Anime, an international conference that examines trends in Japanese pop culture,<sup>9</sup> reported that gross sales of manga in the U.S. were up by 7.24% in 2019, with manga representing approximately 25% of the graphic novel market in the U.S.<sup>10</sup> It is clear from this report that manga’s best growth potential is the overseas market.<sup>11</sup> With the increased demand for these forms of entertainment, Japan’s anime and manga industries are struggling to keep up, and when the industries fail to meet this demand, fans take matters into their own hands, circumventing traditional licensing and translation regimes, by obtaining, translating, and distributing the chapters or episodes online.<sup>12</sup>

Despite these profitable overseas markets, Japanese publishers and studios pushed for increased content protection through an amendment to the Japanese Copyright Act instead of supplying these markets with legal access to and translations of the content desired.<sup>13</sup> The Amendment to the Japanese Copyright Act attempts to provide greater protection to Japanese copyright holders in two steps: first, by eliminating leech websites—those that lead to pirated content or other sites—and then, by expanding the scope of what

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<sup>8</sup> *Id.*

<sup>9</sup> *About Our Event*, PROJECT ANIME, <https://project-anime.org/about-event/> (last visited Dec. 25, 2020).

<sup>10</sup> *State of the U.S. Manga Market*, PROJECT ANIME, <https://project-anime.org/wp-content/uploads/2020/01/State-of-the-U.S.-Manga-Market-2019.pdf> (last visited Jan. 4, 2021).

<sup>11</sup> See Spencer Baculi, *Anime and Manga Sales Continue to Grow as Industry Takes Notice of Expanding Overseas Markets*, BOUNDING INTO COMICS (July 10, 2019), <https://boundingintocomics.com/2019/07/10/anime-and-manga-sales-continue-to-grow-as-industry-takes-notice-of-expanding-overseas-markets/> (“The outlook for the future of the manga and anime industry is shining bright as the industry continues to find success and popularity in the international markets.”).

<sup>12</sup> See Jonah Asher & Yoko Sola, *The Manga Phenomenon*, WIPOMAGAZINE (Sept. 2011), [https://www.wipo.int/wipo\\_magazine/en/2011/05/article\\_0003.html](https://www.wipo.int/wipo_magazine/en/2011/05/article_0003.html) (discussing how international manga fans grew frustrated by their inability to access the same manga as Japanese fans and used the Internet to acquire the original manga in Japanese, translate it, and post it back on the Internet for other fans to enjoy).

<sup>13</sup> See *infra* Section II.B.2.

constitutes illegal downloading.<sup>14</sup> While this Amendment may be in copyright holders' best interest, there are a number of practical concerns with enforceability, particularly identifying infringers, and it ignores the underlying issue—the industry's resistance to change.<sup>15</sup> Instead of amending the Japanese Copyright Act, Japanese publishers and studios should consider alternatives that would combat piracy of their content, while capturing the profits of the overseas markets. The best option is a comprehensive licensing scheme that would enable copyright holders to have their works translated and distributed to overseas markets, all while under the copyright holder's supervision.<sup>16</sup> This would satisfy the overseas demands, while allowing the copyright holders to profit from the legal access to the content.<sup>17</sup>

This Note argues that the Amendment to Japan's Copyright Act will not put an end to fan translations of manga and their distribution because of difficulties with enforcement and the benefits of piracy for manga. Further, the industry's resistance to change—like the music industry's resistance during the days of Napster<sup>18</sup>—and its disregard of potential markets have incentivized the widespread, international piracy of manga, resulting in substantially decreased profitability for the industry. Section I will introduce both the anime and manga industries, as they are closely linked, before discussing internal pressures and piracy. Section II describes the copyright regimes of the U.S. and Japan, including the Amendment to the Japanese Copyright Act. Section III addresses the Amendment's likely effectiveness, while Part IV provides further solutions for fan translations and piracy.

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<sup>14</sup> Hitomi Iwase & Michiko Kinoshita, *Revisions to Copyright Act to Tackle Online Pirating*, INT'L L. OFF. INTELL. PROP. NEWSL. (2020), [https://www.jurists.co.jp/sites/default/files/tractate\\_pdf/ja/75630.pdf](https://www.jurists.co.jp/sites/default/files/tractate_pdf/ja/75630.pdf).

<sup>15</sup> See *infra* Section III.

<sup>16</sup> See *infra* Section IV.B.

<sup>17</sup> *Id.*

<sup>18</sup> The Recording Industry Association of American ("RIAA") sued hundreds of individuals for copyright infringement because each shared songs on file sharing networks, but these mass lawsuits failed to curb music file sharing. *RIAA v. The People: Five Years Later*, ELEC. FRONTIER FOUND. (Sept. 2008), <https://www.eff.org/wp/riaa-v-people-five-years-later>.

## I. GENESIS OF MANGA & ANIME

The Japanese term “manga” refers to comics and literally translates to “whimsical or impromptu pictures.”<sup>19</sup> Rising from the ashes of World War II and influenced by the comics and graphic novels from the U.S., manga was born.<sup>20</sup> Known as the “Godfather of Manga”<sup>21</sup> and the “Japanese equivalent to Walt Disney,”<sup>22</sup> Tezuka Osamu is credited with being the great influencer in the origination of serialized storytelling manga.<sup>23</sup> Tezuka’s creation, Tetsuwan Atomu (*Astro Boy*),<sup>24</sup> exposed the world, specifically the U.S., to Japanese animation, or anime.<sup>25</sup>

There are five primary types of manga: (1) shonen, targeted at tween boys; (2) shojo, targeted at tween girls; (3) seinen, targeted at adult men; (4) josei, targeted at adult women; and (5) kodomomuke, targeted at young children.<sup>26</sup> Unlike certain views in the U.S. that comics and cartoons are exclusively for children,<sup>27</sup> manga and

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<sup>19</sup> Edward Diep, *A Brief History of Japanese Manga*, MEDIUM: MR COMICS (Aug. 20, 2019), <https://medium.com/mrcomics/a-brief-history-of-japanese-manga-78dfb3a49380>.

<sup>20</sup> *Id.*

<sup>21</sup> Ederlyn Peralta, *The Differences Between Manga, Manhwa & Manhua, Explained*, COMIC BOOK RES. (July 24, 2020), <https://www.cbr.com/the-differences-between-manga-manhwa-manhua-explained/>.

<sup>22</sup> Diep, *supra* note 19.

<sup>23</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, 162 (2002).

<sup>24</sup> TETSUWAN ATOMU [*Astro Boy*] (Mushi Productions 1963).

<sup>25</sup> Mehra, *supra* note 23, at 162–63; *see also* Tianxiang He, *What Can We Learn from Japanese Anime Industries? The Differences Between Domestic and Overseas Copyright Protection Strategies Towards Fan Activities*, 62 AM. J. COMPAR. L. 1009, 1012–13 (2014) (“When Osamu Tezuka raised the curtain on modern Japanese anime in 1963 with his *Tetsuwan Atomu* (also known as *Astro Boy* in Western countries), these promising figures were completely unimaginable and would remain so until the late 1980s.”).

<sup>26</sup> Amanda Pagan, *A Beginner’s Guide to Manga*, N.Y. PUB. LIBR. (Dec. 27, 2018), <https://www.nypl.org/blog/2018/12/27/beginners-guide-manga>.

<sup>27</sup> *See* Sean Leonard, *Celebrating Two Decades of Unlawful Progress: Fan Distribution, Proselytization Commons, and the Explosive Growth of Japanese Animation*, 12 UCLA ENT. L. REV. 189, 195 (2005) (“Cartoons became ensconced in what James Snead calls a ‘rhetoric of harmlessness’ . . . [N]etworks decided to move the genre to Saturday morning because there were more children in proportion to the total viewership . . .”).

anime target audiences of all ages.<sup>28</sup> While the U.S.'s animation was being sanitized for children in the 1960s, Japan's animation studios were living the mantra that "anime is a medium, not a genre."<sup>29</sup> By the time anime started to become more than a niche genre, piracy, fan distribution, and fansubbing<sup>30</sup> began to fill the gap between supply and demand because of the absence of licensing.<sup>31</sup>

Popular manga and anime titles were not destined to be limited to Japanese audiences only.<sup>32</sup> Anime is no longer a niche medium and has become accessible through widely popular streaming services like Netflix, Hulu, and Amazon Prime Video.<sup>33</sup> Services like Crunchyroll and Funimation exclusively stream anime.<sup>34</sup> Moreover, manga is sold at major booksellers in the U.S., like Barnes and Noble, and many places online, like Viz Media, Comixology, Amazon.com, and Shonen Jump.<sup>35</sup>

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<sup>28</sup> See *id.* ("Anime is short for *animēschon*, a word that the Japanese adopted to describe all animation . . . Anime is a *national medium*, a medium tied closely to the notion of the productive engine of the Japanese nation."); see also Pagan, *supra* note 26 ("There is no rule stating a grown man cannot read a shojo series or, likewise, a teen girl cannot enjoy a seinen series. It all boils down to personal taste.").

<sup>29</sup> Leonard, *supra* note 27, at 195.

<sup>30</sup> See discussion *infra* Section I.D (fansubbing refers to fans translating, subtitling, and releasing copies of anime).

<sup>31</sup> See Lilly Webber, *Japan Anime: Why Netflix is on the Wrong Side of the Showdown*, ASIA MEDIA INT'L (Feb. 15, 2020), <https://asiamedia.lmu.edu/2020/02/15/anime-streaming-showdown-how-netflix-falls-flat/> ("[I]f certain animations weren't popular enough to be dubbed in English, . . . [then] dedicated fans would often pirate Japanese animations from online sources and 'fan-translate' (an unofficial, non-licensed translation) their favorite animations").

<sup>32</sup> See Mehra, *supra* note 23, at 162–63 (recounting the rise of anime in the U.S. after Tezuka's "Kimba the White Lion" and the attention it drew because of the similarities between it and Disney's "The Lion King" paved the way for increasing Japanese exports).

<sup>33</sup> Maxwell Williams, *How Netflix and Other Streaming Services are Doubling Down on Anime*, VARIETY (July 29, 2019, 5:00 PM), <https://variety.com/2019/tv/news/anime-streaming-netflix-1203278207/>.

<sup>34</sup> CRUNCHYROLL, <https://www.crunchyroll.com> (last visited Jan. 5, 2021); FUNIMATION, <https://www.funimation.com> (last visited Jan. 5, 2021).

<sup>35</sup> *Manga Books*, BARNES & NOBLE, [https://www.barnesandnoble.com/b/books/graphic-novels-comics/manga/\\_/N-29Z8q8Zucc](https://www.barnesandnoble.com/b/books/graphic-novels-comics/manga/_/N-29Z8q8Zucc) (last visited Jan. 1, 2021); Vernieda Vergara, *10 of the Best Manga Reader Sites and Apps to Feed Your Need*, BOOK RIOT (June 25, 2020), <https://bookriot.com/best-manga-reader-sites-and-apps/>.

### A. *The Anime Industry*

Japan's film and television industry contributed an estimated 13.7 trillion yen (\$125.8 billion) to the Japanese economy in 2018, which constituted about 1.25% of that year's GDP.<sup>36</sup> Moreover, overseas Japanese animation revenues were 1.009 trillion yen, capturing 46.3% of the overall market size for anime.<sup>37</sup> Licensing, distribution, and merchandising rights are among the largest segments of the overseas sales market.<sup>38</sup> The U.S. had the most anime contracts outside Japan with 467 contracts in 2019.<sup>39</sup>

However, the rapid growth of the animation market has been slowing down with an 100.9% growth rate in 2017 in comparison to a whopping 178.7% growth rate in 2015.<sup>40</sup> A report by the Association of Japanese Animations argues that the diminished growth rate was due to decreased overseas sales, specifically in China.<sup>41</sup> China's imposition of strict regulations and censorship on imported media has increasingly been applied to existing Internet content; thus, buyers are reluctant to purchase foreign content.<sup>42</sup>

In the U.S., Japan's anime market has risen dramatically because of distribution platforms like Crunchyroll, Funimation, Netflix, and others.<sup>43</sup> Netflix not only has licensed anime, but they have also begun heavily investing in original anime content, launching thirty

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<sup>36</sup> Mitsubishi Research Institute, Inc., *Economic Contribution of the Japanese Film and Television Industry*, MOTION PICTURE ASS'N ASIA PAC. (Oct. 2019), [https://www.mpa-apac.org/wp-content/uploads/2019/10/MRI-Japan-ECR-2019\\_FinalReportEN\\_20191021.pdf](https://www.mpa-apac.org/wp-content/uploads/2019/10/MRI-Japan-ECR-2019_FinalReportEN_20191021.pdf); Gavin J. Blair, *Tokyo: Japan's Film and TV Industries Contribute \$126 Billion to Economy*, HOLLYWOOD REP. (Nov. 4, 2019, 9:32 PM), <https://www.hollywoodreporter.com/news/tokyo-japans-film-tv-industries-contribute-126b-economy-1252389>.

<sup>37</sup> Hiromichi Masuda et al., *Anime Industry Report 2019*, ASS'N JAPANESE ANIMATIONS (Apr. 2019), [https://aja.gr.jp/download/anime-industry-report-2019-summary\\_?wpdmdl=1625&refresh=601193bd6afdb1611764669](https://aja.gr.jp/download/anime-industry-report-2019-summary_?wpdmdl=1625&refresh=601193bd6afdb1611764669).

<sup>38</sup> *Anime Market Size, Share & Trends Analysis Report by Type, by Region, and Segment Forecasts, 2019-2025*, GRAND VIEW RSCH. (Dec. 2019), <https://www.grandviewresearch.com/industry-analysis/anime-market> [hereinafter *Anime Market Size*].

<sup>39</sup> Masuda et al., *supra* note 37.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

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

<sup>43</sup> *Anime Market Size*, *supra* note 38.

original anime in 2018.<sup>44</sup> John Dederian, Netflix's director of content for Japan and anime, states that the streaming company has "seen a significant growth year over year for the years [it has] been investing more into anime."<sup>45</sup> If the amount of anime currently translated and licensed for the U.S. is not enough, Crunchyroll offers simulcasts, which allows subscribers to "[a]ccess the latest anime and drama on the same day it is broadcast in Japan."<sup>46</sup> On August 10, 2021, Sony, the parent company of Funimation, completed the purchase of Crunchyroll from AT&T for \$1.175 billion.<sup>47</sup> This acquisition not only signals the significant value of the industry in the U.S. but also the potential for the combined companies "to compete at a truly global scale."<sup>48</sup>

### B. *The Manga Industry*

According to the All Japan Magazine and Book Publishers' and Editors' Association 2019 report, "[t]he publishing market (estimated sales amount), which is the sum of paper and electronics, increased by .02% from the previous year to 1,543.2 billion yen."<sup>49</sup> Although paper magazines, including comics, have been on the steady decline, electronic comics mitigated the downturn with an increase of about 25% in sales.<sup>50</sup> Japan's electronic publishing market exceeded 300 billion yen, with e-comics comprising 259.3 billion yen.<sup>51</sup>

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<sup>44</sup> Williams, *supra* note 33.

<sup>45</sup> *Id.*

<sup>46</sup> *Simulcast Calendar*, CRUNCHYROLL, <https://www.crunchyroll.com/simulcastcalendar> (last visited Jan. 1, 2021).

<sup>47</sup> Roxy Simons, *Crunchyroll and Funimation Merger Explained and What Happens Now*, NEWSWEEK (Aug. 10, 2021, 5:50 AM), <https://www.newsweek.com/crunchyroll-funimation-merger-explained-what-happens-now-1617743>.

<sup>48</sup> Jay Peters, *Sony is Buying Anime Streaming Service Crunchyroll from AT&T for \$1.175 Billion*, VERGE (Dec. 9, 2020, 7:26 PM), <https://www.theverge.com/2020/12/9/22166585/sony-buy-anime-streaming-service-crunchyroll-at-t-funimation> (quoting Colin Decker, CEO of Funimation Global Group).

<sup>49</sup> Press Release, National Publishing Association/Publishing Science Research Institute, 2019 nen no shuppan shijō o happyō [Announcement of the Publishing Market in 2019] (Jan. 24, 2020) (on file at <https://www.ajpea.or.jp/information/20200124/index.html>).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

In the U.S., the manga category “exceed[ed] the 5 percent growth of the total adult-comic/graphic novel category” with a 16% growth from January to May in 2019.<sup>52</sup> The industry is expected to continue skyrocketing with a projected “seven-year compound annual growth rate (“CAGR”) of 8 percent through 2019.”<sup>53</sup> Younger customers, between the ages of thirteen and twenty-nine, comprised an estimated 75% of manga purchasers in 2016 and 2017.<sup>54</sup>

Interestingly, it appears that sales of manga are more dependent on the popularity of the anime than vice versa.<sup>55</sup> Dallas Middaugh cites anime as the “strongest driver of manga sales in the U.S.” and that “anime can propel an already-popular series to greater heights . . . or move an obscure series to the top of the list.”<sup>56</sup> As an example, *Attack on Titan* was the fifteenth best-selling manga in Japan before the anime aired.<sup>57</sup> After airing, sales of the *Attack on Titan* manga skyrocketed, becoming the second best-selling manga in Japan in 2013.<sup>58</sup>

### C. *Under Pressure*

While the anime and manga industries have seen high profits and increased growth,<sup>59</sup> there are pressures hindering their true

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<sup>52</sup> *Sales of Manga Books are on the Rise in the United States*, the NPD Group Says, NPD (June 3, 2019), <https://www.npd.com/wps/portal/npd/us/news/press-releases/2019/sales-of-manga-books-are-on-the-rise-in-the-united-states-the-mpd-group-says/>.

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

<sup>54</sup> *Id.*

<sup>55</sup> *See id.* (“There is a strong correlation between the manga series that are growing quickly in the U.S. and the availability of related Japanese anime on video streaming (SVOD) platforms, like Crunchyroll, Netflix, and Hulu . . . ‘Watching anime is a discovery mechanism for the related manga,’ McLean said. ‘Once the major platforms made a commitment to anime, manga purchasing really took off. It’s been a very exciting trend to follow.’” (quoting Kristen McLean, books industry analyst for NPD Group)).

<sup>56</sup> *State of the U.S. Manga Market*, *supra* note 10.

<sup>57</sup> Egan Loo, *30 Top-Selling Manga in Japan by Series: 2012*, ANIME NEWS NETWORK (Dec. 2, 2012, 7:00 PM), <https://www.animenewsnetwork.com/news/2012-12-02/30-top-selling-manga-in-japan-by-series/2012>.

<sup>58</sup> Egan Loo, *Top-Selling Manga in Japan by Series: 2013*, ANIME NEWS NETWORK (Dec. 1, 2013, 8:00 PM), <https://www.animenewsnetwork.com/news/2013-12-01/top-selling-manga-in-japan-by-series/2013>.

<sup>59</sup> *See discussion supra* Section I.A and Section I.B.

potentials.<sup>60</sup> This Section will discuss the intense working conditions of the artists behind the entertainment, as well as foreign sources of anime and manga that pose a threat to Japan's monopoly on these entertainment forms.<sup>61</sup> Further, it will explain why the largest obstacle facing the industries is Internet piracy.<sup>62</sup> Lastly, this section will conclude with a discussion of how piracy exacerbates the struggles facing studios and producers trying legal avenues to restrict pirate actors.<sup>63</sup>

### 1. FROM WITHIN

Japanese anime studios are facing increasing pressures internally.<sup>64</sup> Anime, like manga, is carefully crafted by the hands of skilled artists, but those artists are in short supply due to low pay and long hours.<sup>65</sup> The low wages stem from production companies setting an anime's budget as low as possible.<sup>66</sup> Even though Tezuka is considered the "Godfather of Manga," his production company set an impossible example that has become the industry standard.<sup>67</sup> Tezuka's company "undersold his show to get it on air" and used

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<sup>60</sup> See discussion *infra* Section I.C.1–3.

<sup>61</sup> See discussion *infra* Section I.C.1–2.

<sup>62</sup> See CODA, 2019 nen onrain de ryūtsūsuru Nippon kontentsu no kaizokuban higaigaku o suikei [*Estimated Pirated Damage Amount of Japanese Content Distributed Online in 2019*], CONTENT OVERSEAS DIST. ASS'N (Dec. 16, 2020), <http://www.coda-cj.jp/news/detail.php?id=205> [hereinafter *Estimated Pirated Damage*] (estimating that between 333.37 billion and 430.31 billion yen worth of Japanese content had been pirated in 2019).

<sup>63</sup> See discussion *infra* Section I.C.3.

<sup>64</sup> See Eric Margolis, *The Dark Side of Japan's Anime Industry*, VOX (July 2, 2019, 8:30 AM), <https://www.vox.com/culture/2019/7/2/20677237/anime-industry-japan-artists-pay-labor-abuse-neon-genesis-evangelion-netflix> ("But anime's outward success conceals a disturbing underlying economic reality: Many [sic] of the animators behind the onscreen magic are broke and facing working conditions that can lead to burnout and even suicide.").

<sup>65</sup> *Anime Market Size*, *supra* note 38.

<sup>66</sup> Margolis, *supra* note 64.

<sup>67</sup> See *id.* ("Tezuka's company made up the deficit and the show was a success, but he unknowingly set a dangerous precedent: making it impossible for those who followed in his footsteps to earn a living wage."); Mehra, *supra* note 23, at 163 ("Besides introducing Japanese cartoon to the large American market, Tezuka also innovated in the business methods of manga and anime. He installed a system of recycling drawings to alleviate the high cost of labor involved in animation production.").

merchandise to make up for the deficit.<sup>68</sup> Parent companies continually rely on this model because merchandise makes up the majority of their income,<sup>69</sup> making an estimated 500.3 billion yen in 2018.<sup>70</sup> While successful for Tezuka and his company, the precedent was set for keeping costs excessively low.<sup>71</sup> Low wages are not simply a result of animators not asking for higher wages, but an amalgamation of factors, including a decrease in revenue for individual companies despite increases in total revenue because of the sheer number of anime studios.<sup>72</sup>

Moreover, animators are competing against “essentially unpaid freelancers who are passionate about anime,” who make about two dollars per drawing.<sup>73</sup> Therefore, in order to further develop as an industry, it is essential to increase the “economic level of animators and improve the environment . . . .”<sup>74</sup> Achieving higher wages without first changing the industry landscape would result in smaller studios going out of business and Hollywood-style mega studios developing generic content that lacks the “spirit of anime.”<sup>75</sup> Furthermore, Japan’s aging population and low birth-rate could pose additional problems for the industry domestically with indirect effects on the overseas market.<sup>76</sup>

## 2. JAPAN’S MONOPOLY

Anime and manga are no longer exclusively Japanese products.<sup>77</sup> Japan’s monopoly of the industries is being challenged by

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<sup>68</sup> Margolis, *supra* note 64.

<sup>69</sup> *Id.*

<sup>70</sup> Masuda et al., *supra* note 37.

<sup>71</sup> Margolis, *supra* note 64.

<sup>72</sup> *Id.*; see also “Kimi no na wa”: *Kōchō no ura de anime seisaku kaisha no heikin uriagedaka, 10 nenkan de 4 wari genshū* [Average Sales of Animation Production Companies, Down 40% in 10 Years], IT MEDIA ONLINE (Aug. 24, 2017, 6:52 PM), <https://www.itmedia.co.jp/business/articles/1708/24/news127.html> (Japan) [hereinafter *Average Sales of Animation Production Companies*].

<sup>73</sup> Margolis, *supra* note 64.

<sup>74</sup> *Average Sales of Animation Production Companies*, *supra* note 72.

<sup>75</sup> Margolis, *supra* note 64.

<sup>76</sup> Anime Market Size, *supra* note 38 (explaining that an aging workforce and low birth rate would create a shortage of highly skilled, experienced artists).

<sup>77</sup> See Allison Stalberg, *15 American Cartoons That Were Influenced by Anime*, COMIC BOOK RES. (Jan. 11, 2021), <https://www.cbr.com/american->

extremely popular, profitable, non-Japanese productions.<sup>78</sup> In 2018, the U.S. total box office for animation in North America was over \$1.639 billion, which was “113.8% over the previous year.”<sup>79</sup> In particular, Sony Pictures Animations’ Oscar-winning movie, *Spider-Man: Into the Spider-Verse*, has made Japanese producers sweat.<sup>80</sup> *Into the Spider-Verse* is one of the first theatrical animations produced for Americans, not primarily for children, that uses styles most similar to Japanese anime.<sup>81</sup> The popularity of this animated film poses a threat to Japan’s production companies because “Hollywood has finally advanced into the realm overlapping with the adult animation market that had been Japan’s monopoly.”<sup>82</sup> The authors of the Anime Industry report for 2019 fear that “[i]f this trend shifts into high gear, the existence of Japanese animation may be questioned again.”<sup>83</sup>

Additionally, there is manga production in languages other than Japanese occurring all over the world, “inspired mostly by the corpus of translated manga.”<sup>84</sup> This translated manga, referred to as original English-language manga,<sup>85</sup> original non-Japanese manga, Amerimanga, or Euromanga, has not been very widely accepted.<sup>86</sup> Some view these manga as “shallow copies of foreign cultural objects.”<sup>87</sup> Nevertheless, there are still a number of popular non-Japanese manga that encapsulate the feel of Japanese manga but with cultural references tailored to the specific population,<sup>88</sup> something

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cartoons-influenced-by-anime/ (providing a list of American cartoons that could be compared to Japanese anime); Matthew Meylikhov, *10 Essential OEL Manga That Belong in Every Comic Collection*, PASTE MAG. (June 25, 2015, 1:00 PM), <https://www.pastemagazine.com/comics/manga/10-essential-oel-manga-that-belong-in-every-comic/> (providing a list of English language comics comparable to Japanese language manga).

<sup>78</sup> See Stalberg, *supra* note 77; Meylikhov, *supra* note 77.

<sup>79</sup> Masuda et al., *supra* note 37.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> Cathy Sell, *Manga Translation and Interculture*, 6 MECHADEMIA: SECOND ARC 93, 94 (2011).

<sup>85</sup> *Id.*; Meylikhov, *supra* note 77.

<sup>86</sup> Sell, *supra* note 84, at 94.

<sup>87</sup> *Id.*

<sup>88</sup> Meylikhov, *supra* note 77.

which is troublesome for translators given the high-context nature of the Japanese language.<sup>89</sup>

### 3. INTERNET PIRACY

Internet piracy threatens manga, like anime and other forms of popular media, because it continues to be the most common way to consume content.<sup>90</sup> But, how does this happen? Digital piracy especially targets manga and anime because international fans “are increasingly frustrated by the inability to access the same content as their Japanese counterparts.”<sup>91</sup> According to the Content Overseas Distribution Association (“CODA”), an association comprised of “content holders of music, movies, anime, broadcast programs, games, etc.” with the “purpose of promoting overseas expansion and combating piracy,”<sup>92</sup> piracy is rampant across multiple industries of Japan’s entertainment sector.<sup>93</sup> CODA’s December 2020 report estimates that the damage caused by piracy of online distributed Japanese content in 2019 was between 333.37 billion and 430.31 billion yen.<sup>94</sup> Of these numbers, it is estimated that damage to video—including television, film, digital, and advertising—was between

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<sup>89</sup> See Zack Davisson, *Confessions of a Manga Translator*, COMICS J. (Mar. 7, 2016), <http://www.tcj.com/confessions-of-a-manga-translator/> (providing an account of how manga translators translate the story from Japanese to English, in this case, and how Japanese is a “high context language,” which requires more cultural context to fully understand the scene).

<sup>90</sup> See Fahim Ahmed, *Streaming Sites Taken Down as Japan Exerts Stricter Piracy Laws*, MEDIUM: CROWN (Aug. 17, 2020), <https://medium.com/the-crown-writer/streaming-sites-taken-down-as-japan-exerts-stricter-piracy-laws-131ee8403013> (providing the background to the Japanese Copyright Amendment and detailing the damages done by pirates to the manga industry); Jovana Letić, *Piracy Statistics for 2020—People Would Still Download a Car*, DATAPROT (Nov. 14, 2019), <https://dataprot.net/statistics/piracy-statistics/> (providing a number of piracy statistics, such as a ranking of the countries using pirate sites the most, amount of music piracy, and how many jobs are lost each year because of piracy).

<sup>91</sup> Asher & Sola, *supra* note 12.

<sup>92</sup> Letter from Noriyuki Tada & Kenro Goto, Representative Dirs. of Content Overseas Distrib. Promotion Org. (Aug. 2019) (on file at <http://www.coda-cj.jp/organization/aisatsu.html>).

<sup>93</sup> *Estimated Pirated Damage*, *supra* note 62.

<sup>94</sup> *Id.*

154.5 billion to 253.34 billion yen, and damage to publication, including manga, was between 140.77 billion to 155.208 billion yen.<sup>95</sup>

Leech sites and torrenting are the two main methods to obtain pirated content.<sup>96</sup> A leech should conjure up an image of the blood-sucking worms<sup>97</sup> used in the 19th century for medical procedures.<sup>98</sup> That mental image approximates an internet leech. An online “leech is an individual who drains resources, bandwidth, or data off a website or a network, often in an unethical manner.”<sup>99</sup> The term is predominately “used in the context of peer-to-peer (P2P) sharing.”<sup>100</sup> Professor Annemarie Bridy provides a succinct definition: “A leecher is a peer in the process of acquiring a file. A seed is a peer that already has a complete copy of the file and that remains in the torrent to serve the leechers. Every torrent requires at least one seed.”<sup>101</sup>

BitTorrent is “the largest decentralized P2P communications protocol for distributing data and large files over the Internet.”<sup>102</sup> BitTorrent works by “divid[ing] the download process into a large number of different P2P connections over which small fragments of the downloaded file are transferred from multiple sharing sources”; the software then reconstructs the file.<sup>103</sup> The “[m]ore peers in a

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<sup>95</sup> *Id.*

<sup>96</sup> See Annemarie Bridy, *Is Online Copyright Enforcement Scalable?*, 13 VAND. J. ENT. & TECH. L. 695, 697 (2011) (“To make a long (and technically complicated) story short, the Internet’s designers solved the problem of scale by decentralizing the transmission of data and distributing it in tiny packets throughout the entire network.”).

<sup>97</sup> *Leech*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/leech> (last visited Dec. 27, 2020).

<sup>98</sup> *Leeching*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/science/leeching> (last visited Jan. 4, 2021).

<sup>99</sup> *Leech*, TECHOPEDIA, <https://www.techopedia.com/definition/4006/leech> (last visited Jan. 4, 2021).

<sup>100</sup> *Id.*

<sup>101</sup> Bridy, *supra* note 96, at 701.

<sup>102</sup> *About BitTorrent*, BITTORRENT, <https://www.bittorrent.com/company/about-us/> (last visited Jan. 2, 2021).

<sup>103</sup> Tilman Klumpp, *File Sharing, Network Architecture, and Copyright Enforcement: An Overview*, 35 MANAGERIAL & DECISION ECON. 444, 450 (2014).

swarm make for faster downloads ‘because there are more sources of each piece of the file.’”<sup>104</sup>

To gain access to a particular file, “a user must find a descriptor document, called a *torrent file*, that describes how the desired content file has been broken up into fragments and how these fragments can be identified.”<sup>105</sup> Then, the “software must locate peers on the network that can supply the fragments described in the torrent file.”<sup>106</sup> What makes BitTorrent such a damaging force for copyright holders is that it “operates in a largely decentralized fashion,” generally insulating itself from anti-piracy measures.<sup>107</sup> Leech sites can further create copyright loopholes by having a managing body located in a country without diplomatic relations to Japan, rendering Japan’s copyright protection inapplicable.<sup>108</sup>

In addition to the new Japanese Copyright Amendment, Japan’s publishers have begun to fight back against file sharing and caching.<sup>109</sup> Four Japanese publishers, Shueisha, Kadokawa, Kodansha, and Shogakukan, sued Hoshinoromi, a manga pirate site poised to replace Mangamura,<sup>110</sup> in a New York federal court for “willful and

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<sup>104</sup> Sean B. Karunaratne, Note, *The Case Against Combating BitTorrent Piracy Through Mass John Doe Copyright Infringement Lawsuits*, 111 MICH. L. REV. 283, 289 (2012) (quoting Carmen Carmack, *How BitTorrent Works*, HOWSTUFFWORKS, <http://computer.howstuffworks.com/bittorrent2.htm> (last visited Jan. 23, 2021)).

<sup>105</sup> Klumpp, *supra* note 103, at 450 (emphasis original).

<sup>106</sup> *Id.*

<sup>107</sup> Karunaratne, *supra* note 104, at 290.

<sup>108</sup> Shusuke Murai, *Internet Piracy Taking Major Bite Out of Japan’s Famed Manga Culture*, JAPAN TIMES (Apr. 10, 2018), <https://www.japantimes.co.jp/news/2018/04/10/reference/internet-piracy-taking-major-bite-japans-famed-manga-culture/>.

<sup>109</sup> See Andy Maxwell, *Cloudflare Agrees to Stop Caching Pirate Content in Japan, If Court Declares Sites Illegal*, HACKERNOON (June 14, 2020), <https://hackernoon.com/cloudflare-agrees-to-stop-caching-pirate-content-in-japan-if-court-declares-sites-illegal-t1o3vup> (discussing Shueisha, Kadokawa, Kodansha, and Shogakukan’s cases against Hoshinoromi in the New York federal court and in the Tokyo District Court). Cache, for computers, refers to data storage of “typically transient in nature, so that future requests for that data are served up faster than is possible by accessing the data’s primary storage location.” *What is Caching and How it Works*, AMAZON WEB SERVICES, <https://aws.amazon.com/caching/> (last visited Jan. 23, 2021).

<sup>110</sup> Maxwell, *supra* note 109.

massive infringement of the Publishers' manga."<sup>111</sup> According to the Complaint, "[a]s of July 29, 2019, the front page of Hoshinoromi proudly boasted of a catalogue of over 93,000 volumes or books that it copied and is distributing for free."<sup>112</sup> Like many other piracy sites, Hoshinoromi "profits from the piracy through advertisements."<sup>113</sup> Hoshinoromi uses Cloudflare<sup>114</sup> to cache infringing content from the site and its back-end servers through "a reverse proxy to mask the server locations and operators."<sup>115</sup> The Publishers requested an extension to discovery because they struggled to identify and serve the Defendants due to the intricate systems employed by the company to conceal their identity and location.<sup>116</sup> On May 11, 2020, the Publishers voluntarily dismissed the case against the defendant.<sup>117</sup>

Even though the case in the U.S. was settled, Cloudflare was sued by the same four publishers in Tokyo's District Court for

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<sup>111</sup> Complaint at 1, *Shueisha Inc. v. Does 1-100*, No. 1:19-cv-08227 (S.D.N.Y. Sept. 4, 2019).

<sup>112</sup> *Id.* at 2.

<sup>113</sup> *Id.* at 3.

<sup>114</sup> Cloudflare is one of the world's largest networks with data centers in over 250 cities worldwide, which allows anyone with Internet to have faster and more secure websites. *What is Cloudflare?*, CLOUDFLARE, <https://www.cloudflare.com/learning/what-is-cloudflare/> (last visited Sept. 23, 2021). Cloudflare also provides encryption services, and to create secure encryptions, randomness is extremely important. *How do Lava Lamps Help with Internet Encryption?*, CLOUDFLARE, <https://www.cloudflare.com/learning/ssl/lava-lamp-encryption/> (last visited Sept. 23, 2021). To produce the unpredictable data necessary for encryptions, Cloudflare utilizes lava lamps because the lava "never take the same shape twice." *Id.* (discussing how Cloudflare utilizes the lava variations to create encryptions).

<sup>115</sup> Complaint, *supra* note 111, at 9.

<sup>116</sup> See Letter to the Honorable Sarah Netburn at 2, *Shueisha Inc. v. Does 1-100*, No. 1:19-cv-08227 (S.D.N.Y. Sept. 4, 2019) ("After receiving a preliminary report on January 17, 2020, the Publishers learned that none of the discovery obtained personally identifies the Defendants . . . While the Publishers sent copies of the Complaint to these [email] addresses with the intention of reasserting their motion for service by email, all three returned an undeliverable response."). Defendants even went so far as to close their email account so that the Publishers could not formally serve the complaint after filing a motion requesting service by email. *Id.* at 1.

<sup>117</sup> Notice of Voluntary Dismissal Without Prejudice at 1, *Shueisha Inc. v. Does 1-100*, No. 1:19-cv-08227 (S.D.N.Y. May 8, 2020).

housing pirated content on its servers.<sup>118</sup> Piling onto the fight is another Japanese publisher, Takeshobo, that sued Cloudflare for copyright infringement.<sup>119</sup> Takeshobo likely decided to sue Cloudflare instead of individual infringers because of the outcome of the Hoshinoromi case.<sup>120</sup> According to a statement from Takeshobo, the company asked Cloudflare “directly to remove the uploaded copyright material from [Cloudflare’s] server, but because no action was taken,” Takeshobo requested that the court force Cloudflare “to remove the copyright infringing page and pay damages.”<sup>121</sup> Reportedly, Cloudflare agreed that if the Tokyo District Court found any copyright infringement, it “will ‘stop caching content on its Japanese servers from specified piracy websites.’”<sup>122</sup>

With the value of Japan’s manga and anime industries, it is no surprise that Japan is attempting to protect it through all means necessary, including amending their Copyright Act.<sup>123</sup> Moreover, Japan’s legislative action was expected given the complexities of holding individual infringers and pirate sites liable.<sup>124</sup>

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<sup>118</sup> Megan Peters, *Top Japanese Publishers Reach Settlement with U.S. Company Over Manga Piracy*, COMICBOOK (Feb. 24, 2020, 11:20 AM), <https://comicbook.com/anime/news/manga-piracy-free-lawsuit-agreement-shueisha-kodansha/>.

<sup>119</sup> Andy Maxwell, *Manga Publisher Takeshobo Sues Cloudflare for Copyright Infringement*, TORRENTFREAK (Jan. 8, 2020), <https://torrentfreak.com/manga-publisher-takeshobo-sues-cloudflare-for-copyright-infringement-200108/>. The Complaint for this case could not be found due to the limited availability of recent cases online.

<sup>120</sup> See Letter to the Honorable Sarah Netburn, *supra* note 116, at 2 (revealing the difficulties with which the Publishers had identifying and contacting the defendants); see also Bridy, *supra* note 96, at 705 (“When a system is as large, dynamic, and decentralized as a P2P network, trying to shut it down by targeting individual nodes is a losing proposition.”).

<sup>121</sup> Maxwell, *supra* note 119.

<sup>122</sup> Peters, *supra* note 118.

<sup>123</sup> See Murai, *supra* note 108 (“The rapid growth of piracy websites has prompted publishing houses and the government to campaign against piracy, hoping to protect one of Japan’s famed cultural export items.”).

<sup>124</sup> See, e.g., Complaint, *Shueisha Inc. v. Does 1-100*, No. 1:19-cv-08227 (S.D.N.Y. Sept. 4, 2019).

D. *Fan Activities and How They Push the  
Boundaries of Copyright*

Overseas fans who wish to immediately consume certain titles of anime and manga are continually frustrated by the language barrier and other restrictions, such as differences in cultural views, creating a market failure.<sup>125</sup> For the purposes of this Note, there are three general categories of fan activities: scanlations, fansubs, and doujinshi.<sup>126</sup> To quench their thirst for content, fans have turned to each other to solve this market failure through scanlations and fansubs.<sup>127</sup>

Scanlations are “translated versions of Japanese manga.”<sup>128</sup> To create a scanlation, fans will scan the original manga into an electronic format (if not already in that format), “a practice known as *jisui*,” then translate and edit the manga before reuploading it to the Internet.<sup>129</sup> Fansubs are essentially scanlations but for anime, where “fansubbers translate, subtitle, and release copies of television shows and films originally broadcast or released in Japan (in Japanese) for other fans to watch.”<sup>130</sup>

With the high degree of effort required to produce these translated versions of manga and anime, scanlators and fansubbers

<sup>125</sup> See Asher & Sola, *supra* note 12 (noting that some titles never get released internationally without heavy censoring because of the belief that they are inappropriate for the market).

<sup>126</sup> See He, *supra* note 25, at 1013 (“Generally speaking, typical fan works include *fansubs*, *fanvids*, *fanfics*, *scanlations*, and *doujinshi*.” (emphasis original)). Fanvids refer to “the practice in which people create music videos using one or more copyrighted visual media sources without permission.” *Id.* at 1013 n.20.

<sup>127</sup> See Asher & Sola, *supra* note 12 (“When it was first launched internationally, manga occupied a niche market in many countries. However, it soon captured the imagination of readers around the world, spawning an enthusiastic international fan base that became increasingly frustrated by the inability to access the same content as their Japanese counterparts. The need to translate manga from Japanese meant there were inevitable delays in their international release . . . Many [fans] learned Japanese, acquired the original manga, then scanned, translated, edited and posted them on the Internet for free downloading.”).

<sup>128</sup> Tiffany Lee, Note, *Fan Activities from P2P File Sharing to Fansubs and Fan Fiction: Motivations, Policy Concerns, and Recommendations*, 14 TEX. REV. ENT. & SPORTS L. 181, 182 (2013).

<sup>129</sup> Asher & Sola, *supra* note 12.

<sup>130</sup> Jordan Hatcher, *Of Otakus and Fansubs: A Critical Look at Anime Online in Light of Current Issues in Copyright Law*, 2 SCRIPT-ED 514, 517 (2005).

usually work in teams.<sup>131</sup> For fansubbing, “[a] fansub group traditionally consists of one or more translators, editors, typesetters, timers, and first-tier distributors.”<sup>132</sup> Fansubs and scanlations are particularly useful for non-Japanese audiences, not only because the consumer can understand what is happening, but also because of the inclusion of explanatory cultural notes that describe cultural references that would otherwise be incomprehensible to foreign audiences.<sup>133</sup> These fan activities and the anime and manga industries have “both a symbiotic and antagonistic” relationship as “each requires the other for its survival, and yet they compete to capture the attentions of a growing audience of anime viewers.”<sup>134</sup> With the knowledge of fan activities, some studios send cease-and-desist letters to those groups, but many just ignore the activities.<sup>135</sup>

Almost every person involved in fansubbing or scanlating, including the end consumer, understands that the practice infringes on the copyright owner’s exclusive rights, but many believe that their activities are justified.<sup>136</sup> For the most part, fansub groups follow a code of ethics: “you do not distribute a title that has a North American licensor.”<sup>137</sup> Furthermore, “[s]elling fansub translations is frowned upon in the fansubbing community and is considered bootlegging.”<sup>138</sup> Some fansub groups state that they are “in the tradition of opening and testing markets for anime overseas.”<sup>139</sup> Many of the

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<sup>131</sup> Leonard, *supra* note 27, at 197.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*; see, e.g., Ian Condry, *Dark Energy: What Fansubs Reveal about the Copyright Wars*, 5 MECHAMEDIA 193, 201 (2010) (“The fansubs for *Samurai Champloo* included on-screen explanations of food like *dango* (rice dumplings) and *monjayaki*. In episode 1, one fansub clarified that ‘Edo is the old name for Tokyo,’ whereas the DVD release leaves ‘Edo’ untranslated.”).

<sup>134</sup> Mizuko Ito, *Ethics of Fansubbing in Anime’s Hybrid Public Culture in FANDOM: IDENTITIES & COMMUNITIES IN A MEDIATED WORLD* 333 (Johnathan Gray et al. eds., 2017).

<sup>135</sup> *Id.* at 338.

<sup>136</sup> Condry, *supra* note 133, at 194.

<sup>137</sup> *Id.* (quoting Christopher McDonald, *Unethical Fansubbers*, ANIME NEWS NETWORK (June 8, 2003), <https://www.animenewsnetwork.com/editorial/2003-06-08/2>) (internal quotations omitted).

<sup>138</sup> LaToya D. Rembert-Lang, Comment, *Reinforcing the Tower of Babel: The Impact of Copyright Law on Fansubbing*, 2 AM. UNIV. INTELL. PROP. BRIEF 21, 22 (2010).

<sup>139</sup> Ito, *supra* note 134, at 338.

translations “boldly display within the translated text of the television program or movie that it is not for sale”<sup>140</sup> or include a subtitle to “cease distribution when licensed” to “indicate that their works are not licensed.”<sup>141</sup>

This Note would not be complete without a brief introduction of doujinshi, whereby authors take “characters and background elements from manga, anime, or video game sources and develop them with a different story line,”<sup>142</sup> akin to fan fiction. Doujinshi is usually self-published manga produced by amateur authors.<sup>143</sup> While fan fiction in the U.S. is hardly ever commercially sold,<sup>144</sup> there are organized doujinshi markets where doujinshi are sold for a profit.<sup>145</sup> Even though in 2012, “560,000 attendees participated in the three-day semiannual *doujinshi* market,”<sup>146</sup> copyright holders generally tolerate the activities.<sup>147</sup> There are two reasons behind this tolerance: it benefits the industry<sup>148</sup> and doujinshi are not direct substitutes for

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<sup>140</sup> Rembert-Lang, *supra* note 138, at 22.

<sup>141</sup> Leonard, *supra* note 27, at 197.

<sup>142</sup> He, *supra* note 25, at 1013.

<sup>143</sup> See Mehra, *supra* note 23, at 164 (“Although *dōjinshi* has been used to refer to manga (often produced for sale) by ‘amateur’ authors, including those amateur works involving original characters, the bulk of such ‘amateur manga’ is, in fact, based on characters that have been published previously.”).

<sup>144</sup> See Rebecca Tushnet, Comment, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651, 664 (1997) (“Fan fiction is mostly nonprofit, and on the Web no one has to pay to read it. Copyright disclaimers, therefore, often emphasize their noncommerciality as a reason to protect fan fiction . . . .”); see, e.g., ARCHIVE OF OUR OWN, <https://archiveofourown.org> (last visited Jan. 5, 2021) Archive of Our Own is one of the larger sites for fan fictions across a broad range of topics. *Id.*

<sup>145</sup> See Mehra, *supra* note 23, at 164 (“Starting in the 1970s, markets for the organized sale of *dōjinshi* emerged. By 1990, the largest of these short-duration spot markets for the sale of *dōjinshi* (*dōjinshi sokubaikai*), the Tokyo Comic Market, drew 13,000 artist/sellers and 212,000 visitor/buyers.”).

<sup>146</sup> He, *supra* note 25, at 1014.

<sup>147</sup> See *id.*

<sup>148</sup> See *id.* (“It is unquestionably an enormous market that is theoretically competing with the market for authentic works, but interestingly, copyright owners and the industry have tolerated these activities, even though they are mostly illegal under Japanese copyright law, simply because their existence benefits the industry as a whole.”).

the manga that they emulate.<sup>149</sup> The global success of manga is believed to lie with the fan-activities surrounding it.<sup>150</sup> Many other scholars have written on the copyright implications of these activities, how a fair use doctrine akin to that of the U.S. would benefit doujinshi, and expanding on Japan's tolerance towards it.<sup>151</sup>

## II. COPYRIGHT REGIMES

The U.S. and Japan are both signatories of the Berne Convention for the Protection of Literary and Artistic Works (“Berne Convention”)<sup>152</sup> and the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS Agreement”).<sup>153</sup> Both would have been signatories of the Trans-Pacific Partnership (“TPP”),<sup>154</sup> but in 2016, the Trump Administration decided to withdraw from the TPP.<sup>155</sup>

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<sup>149</sup> See Simone Schroff, *Where to Draw the Line: The Difference Between a Fan and a Pirate in Japan*, 26 INT'L J. CULTURAL POL'Y 433, 440 (2020) (“Doujinshi are not considered a market harm. Most Doujinshi do not qualify as substitutes for the original and the overall Doujinshi market remains small compared to the professional Manga market and therefore does not threaten the latter.”) (internal citations omitted).

<sup>150</sup> See *id.* (“Thirdly, Manga's global success lies in its widespread fan-activities and the popularity of content among Doujinshi artists is by itself a legitimate measure of success.”) (internal citations omitted).

<sup>151</sup> See, e.g., Yoshimi M. Pelc, Comment, *Achieving the Copyright Equilibrium: How Fair Use Law Can Protect Japanese Parody and Dojinshi*, 23 SW J. INT'L L. 397 (2017) (discussing dojinshi, its copyright implications in the U.S. and Japan, and how a fair use doctrine akin to the U.S.'s would promote dojinshi).

<sup>152</sup> Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, revised at Paris July 24, 1971 (amended 1979) 25 U.S.T. 1341, 828 U.N.T.S. 221. [hereinafter Berne Convention]; see also *Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886)*, WORLD INTELL. PROP. ORG., [https://www.wipo.int/treaties/en/ip/berne/summary\\_berne.html](https://www.wipo.int/treaties/en/ip/berne/summary_berne.html) (last visited Dec. 28, 2020).

<sup>153</sup> *Overview: The TRIPS Agreement*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/trips\\_e/intel2\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm) (last visited Dec. 28, 2020) [hereinafter TRIPS Agreement].

<sup>154</sup> *Overview of TPP*, OFF. U.S. TRADE REPRESENTATIVE, <https://ustr.gov/tpp/overview-of-the-TPP> (last visited Jan. 2, 2020) [hereinafter TPP].

<sup>155</sup> Alana Semuels, *TPP's Death Won't Help the American Middle Class*, THE ATLANTIC (Nov. 15, 2016), <https://www.theatlantic.com/business/archive/2016/11/tpps-death-wont-help-the-american-middle-class/507683/>.

The Berne Convention and TRIPS Agreement treaties require each signatory country to grant copyright holders certain protections and rights, like the exclusive right of translation, reproduction, distribution, performance, and adaptation.<sup>156</sup> Moreover, the TRIPS Agreement mandates “the minimum standards of protection to be provided by each Member,” “domestic procedures and remedies for the enforcement of intellectual property rights,” and “makes disputes between WTO [World Trade Organization] Members . . . subject to the WTO’s dispute settlement procedures.”<sup>157</sup> Despite their similarities, there are still differences between the U.S.’s and Japan’s copyright regimes.

#### A. *The United States’ Perspective*

In the U.S., the author of a protected work has the exclusive right to reproduction, preparation of derivative works, distribution, and public display and performance.<sup>158</sup> Section 101 of the Copyright Act of 1976 defines derivative work as “a work based upon one or more preexisting works, *such as a translation . . .*”<sup>159</sup> Copyright infringement occurs when someone “violates any of the exclusive rights of the copyright owner.”<sup>160</sup> Thus, when a user shares copyrighted work over BitTorrent or another P2P network, that user violates the copyright owner’s exclusive right to reproduction and distribution.<sup>161</sup> Additionally, whenever someone makes an unauthorized translation through a fansub or scanlation, they are violating the author’s exclusive right to prepare derivative works.<sup>162</sup> If that fansub or scanlation is shared over BitTorrent or another P2P network, the infringer is likely also violating the copyright owner’s exclusive right to reproduce and distribute the original work.<sup>163</sup>

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<sup>156</sup> Berne Convention, *supra* note 152, arts. 8–9, 11–12.

<sup>157</sup> TRIPS Agreement, *supra* note 153.

<sup>158</sup> 17 U.S.C. § 106 (2020).

<sup>159</sup> 17 U.S.C. § 101 (2020) (emphasis added).

<sup>160</sup> 17 U.S.C. § 501(a) (2020).

<sup>161</sup> *See, e.g., A&M Records v. Napster*, 239 F.3d 1004, 1014 (9th Cir. 2001) (affirming the district court’s holding that users of the file-sharing software infringed on the copyright holder’s rights of reproduction and distribution).

<sup>162</sup> 17 U.S.C. §§ 101, 106 (2020).

<sup>163</sup> *See* 17 U.S.C. § 501 (2020).

As required by the Berne Convention,<sup>164</sup> the Visual Artists Rights Act of 1990 (“VARA”) provides limited moral rights protection.<sup>165</sup> Moral rights refer to noneconomic rights that are deemed personal to the author, including the right to be credited as the author (right of attribution) and the right to prevent prejudicial distortions of the work (right of integrity).<sup>166</sup> However, VARA applies *only* to “work[s] of visual art,”<sup>167</sup> and “[f]ansub translations are not considered a work of visual art and are not entitled to the protection under moral rights.”<sup>168</sup> Fansubs are not visual art because, as defined by section 101 of the Copyright Act, a work of visual art does not include “any poster, map, . . . book, [or] magazine . . . .”<sup>169</sup> Therefore, the copyright owner’s only preventative measure against fansubs and scanlations are based on the derivative works right.<sup>170</sup>

The fair use doctrine under section 107 of the Copyright Act provides an affirmative defense for an alleged infringing use.<sup>171</sup> An infringing use is considered to be “fair use,” and not an infringement of copyright, if the subsequent work is used “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research . . . .”<sup>172</sup> In reviewing such cases, courts must consider four factors: “the purpose and character of the use”; “the nature of the copyrighted work”; “the amount and substantiality of the portion used”; and “the effect of the

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<sup>164</sup> See Berne Convention, *supra* note 152, art. 6bis(1) (“Independently of the author’s economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.”).

<sup>165</sup> See 17 U.S.C. § 106A (1990).

<sup>166</sup> *Authors, Attribution, and Integrity: Examining Moral Rights in the United States*, COPYRIGHT.GOV, <https://www.copyright.gov/policy/moralrights/> (last visited Sept. 20, 2021).

<sup>167</sup> 17 U.S.C. § 106A (1990).

<sup>168</sup> Rembert-Lang, *supra* note 138, at 25.

<sup>169</sup> 17 U.S.C. § 101 (2020).

<sup>170</sup> See Rembert-Lang, *supra* note 138, at 25 (“As a result, United States copyright law protects an artist’s right to prevent fansub translation of their works based on the derivative works right.”); 17 U.S.C. § 106A (1990) (applicability of VARA is dependent on the work being classified as a visual art).

<sup>171</sup> 17 U.S.C. § 107 (2020).

<sup>172</sup> *Id.*

use upon the potential market for or value of the copyrighted work.”<sup>173</sup>

If deemed infringing, potential remedies include injunctions, impounding of infringing articles, damages and profits, and costs and attorney’s fees.<sup>174</sup> Moreover, the Copyright Act provides for criminal offenses when there is willful infringement “for purposes of commercial advantage or private financial gain,” by reproducing or distributing copies with a retail value of more than \$1,000, or “by the distribution of a work being prepared for commercial distribution.”<sup>175</sup>

### B. *Japan’s Perspective*

A copyright holder in Japan has two types of rights: moral and economic.<sup>176</sup> Japan’s moral rights are broader than VARA’s limited moral rights and include the right of making a work public, of attribution, and of preserving “the integrity of that work and its title.”<sup>177</sup> The economic rights of copyright holders extend to the right of reproduction, performance, distribution, and preparation of derivative works.<sup>178</sup>

Article 113 of the Japanese Copyright Act provides that infringement includes “the distribution, possession for the purpose of distribution . . . an object made through an act that infringes the moral rights of the author, [or] the copyright, . . . with knowledge of such infringement.”<sup>179</sup> Additionally, there is an infringement of the author’s moral rights if the exploitation of a work “is prejudicial to the honor or reputation of the author.”<sup>180</sup> The Japanese Supreme Court recently held that Twitter users infringed a photographer’s moral right of attribution because the photo they retweeted was

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<sup>173</sup> *Id.*

<sup>174</sup> 17 U.S.C. §§ 502–505 (2020).

<sup>175</sup> 17 U.S.C. § 506(a)(1) (2020).

<sup>176</sup> Chosaku-ken-ho [Copyright Act], Law No. 48 of 1970, art. 17(1) (Japan), available at WIPO LEX, <https://wipo.lex.wipo.int/en/text/578251> (last visited Oct. 9, 2021) [hereinafter Japanese Copyright Act].

<sup>177</sup> Compare *id.* art. 18–20 (providing three distinct types of moral rights available to all copyrightable works) with 17 U.S.C. § 106A (1990) (providing vague rights available only to visual art).

<sup>178</sup> Japanese Copyright Act, *supra* note 176, art. 21–28.

<sup>179</sup> *Id.* art. 113(1)(ii).

<sup>180</sup> *Id.* at 113(7).

automatically trimmed, and the photographer's name was not visible unless the user clicked on the image.<sup>181</sup>

Moreover, inaccurate translations may also violate a copyright holder's moral "Right to Integrity."<sup>182</sup> As "[a]n author's moral rights are exclusive to that author, and are inalienable[,]" a violation of an author's moral rights is considered to be more severe than a violation to economic rights.<sup>183</sup> Although fans continually complain about the accuracy of licensed translations,<sup>184</sup> it is unlikely that the translation would undermine the "integrity of that work."<sup>185</sup> However, if the translations, fan-made or licensed, are deemed wildly inaccurate to the point of modifying the work's message, or "prejudicial to the honor or reputation of the author," then it could constitute infringement.<sup>186</sup>

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<sup>181</sup> Sayuri Umeda, *Japan: Supreme Court Says Retweeting Tweet with Photo Infringes Right of Attribution*, LIBR. CONG.: GLOB. LEGAL MONITOR (Sept. 23, 2020), <https://www.loc.gov/law/foreign-news/article/japan-supreme-court-says-retweeting-tweet-with-photo-infringes-right-of-attribution/>. The case document can be found here in Japanese: <https://perma.cc/2XJV-2F93>.

<sup>182</sup> Japanese Copyright Act, *supra* note 176, art. 20(1) ("The author of a work has the right to preserve the integrity of that work and its title, and is not to be made to suffer any alteration, cut, or other modification thereto that is contrary to the author's intention.").

<sup>183</sup> *Id.* art. 59; see Tatsuhiro Ueno, *Moral Rights, in JAPANESE COPYRIGHT LAW: WRITINGS IN HONOUR OF GERHARD SCHRICKER* 41, 42 (Christopher Heath et al., eds., 2005) ("For this reason, many copyright contracts contain clauses in which the author declares in advance that he will not exercise his moral rights with respect to the licensed exploitation. The validity of such clauses is not unanimously accepted, however. To the majority of commentators, at least blanket waivers are invalid as they offend the public order and good morals pursuant to Sec. 90 of the Civil Code.").

<sup>184</sup> See J.D. Considine, *Anime's Growing Market Otaku: They are the Serious Fans of Japanese Animation, and They are a Growing Group*, THE BALTIMORE SUN (Apr. 16, 1996), <https://www.baltimoresun.com/news/bs-xpm-1996-04-16-1996107115-story.html> ("While it's true that most American otaku don't speak or read Japanese, those who do can be quite cantankerous about the way dialogue is translated.").

<sup>185</sup> Japanese Copyright Act, *supra* note 176, art. 20(1).

<sup>186</sup> See *id.* art. 113(7) ("The exploitation of a work in a way that is prejudicial to the honor or reputation of the author is deemed to constitute an infringement of the author's moral rights."). While no cases regarding translations affecting the author's "right to integrity" could be found, a plaintiff was successful on its "right to integrity" claim when its song had been adapted and reproduced, but the

Just as the U.S.'s copyright regime operates to “promote the Progress of Science and useful Arts,”<sup>187</sup> Japan’s attempts to balance protection of copyright with the development of education, art and culture.<sup>188</sup> To do so, Articles 30 to 46 list a number of limitations of copyright holder rights like personal use, incidentally captured works, and reporting of current events.<sup>189</sup>

For those found to be infringing, the Japanese Copyright Act provides for the recovery of damages<sup>190</sup> and injunctive relief.<sup>191</sup> An infringer may face “imprisonment for a term of up to ten years, a fine of up to ten million yen, or both” for infringing on a copyright owner’s moral, economic, or neighboring rights.<sup>192</sup>

### 1. REMAINS OF THE TPP AND RISE OF THE CPTPP AND RCEP

To provide a complete picture of Japan’s copyright regime, it is necessary to discuss the TPP and its evolved form, the Comprehensive and Progressive Agreement for the Trans-Pacific Partnership (“CPTPP”) because of their copyright implications in Japan and the other signatory countries.<sup>193</sup> After President Trump withdrew the U.S. from the TPP, the “remaining members decided to proceed with the agreement by amending and rebranding it as the

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defendant kept twenty-seven of the thirty-one lines of lyrics the same. Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] June 29, 2011, Hei 2010 (wa) no. 16472, Chiteki Zaisan Kōtō Saibansho, [Chizai Kōsai Web] 1 (Japan), *available at* [https://www.ip.courts.go.jp/app/files/hanrei\\_en/462/001462.pdf](https://www.ip.courts.go.jp/app/files/hanrei_en/462/001462.pdf).

<sup>187</sup> U.S. CONST. art. 1, § 8, cl. 8.

<sup>188</sup> *Copyright System in Japan*, COPYRIGHT RSCH. & INFO. CTR., <https://www.cric.or.jp/english/csj/csj4.html> (last visited Dec. 23, 2020).

<sup>189</sup> Japanese Copyright Act, *supra* note 176, arts. 30–46.

<sup>190</sup> *Id.* art. 114(3).

<sup>191</sup> *Id.* art. 112(1) (“The author, copyright owner, owner of print rights, performer, or owner of neighboring rights, may file a claim against a person who is infringing or who is likely to infringe the moral rights of the author, the copyright, the print rights, the moral rights of the performer, or the neighboring rights, for the cessation or prevention of such infringement.”).

<sup>192</sup> *Id.* art. 119(1).

<sup>193</sup> Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Mar. 8, 2018, [https://www.international.gc.ca/trade-commerce/trade-agreements-acords-commerciaux/agr-acc/cptpp-ptpgp/cptpp\\_explained-ptpgp\\_apercu.aspx?lang=eng](https://www.international.gc.ca/trade-commerce/trade-agreements-acords-commerciaux/agr-acc/cptpp-ptpgp/cptpp_explained-ptpgp_apercu.aspx?lang=eng) [hereinafter CPTPP].

CPTPP.”<sup>194</sup> Additionally, Japan is a signatory of the Regional Comprehensive Economic Partnership (“RCEP”),<sup>195</sup> with some scholars suggesting that the desire for this trade agreement was greatly accelerated when the U.S. was planning to join the TPP.<sup>196</sup>

Article 1 of the CPTPP incorporates all chapters of the TPP, but Article 2 suspends certain provisions, including some for intellectual property, such as the Term of Protection for Copyright and Related Rights.<sup>197</sup> The RCEP’s intellectual property chapter seems “to offer stronger protection than the CPTPP” because of the TPP’s provisions that were not included.<sup>198</sup> The RCEP “focuses more on the balance of rights and obligations to prevent the abuse of IP rights.”<sup>199</sup> Further, the RCEP emphasizes “the significance of fair use, transfer of technology and socio-economic welfare in the international community,” with a section regarding “the protection of genetic resources, traditional knowledge and folklore.”<sup>200</sup>

## 2. NEW LEGISLATION

On June 12, 2020, Japan’s National Diet, passed the Law to Partially Revise the Copyright Law and the Law Concerning Special Exceptions to Registration of Copyrighted Works of Programs

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<sup>194</sup> Yose Rizal Damuri, *How Might the Trans-Pacific Partnership Affect the Game?*, in POTENTIAL BENEFITS OF AN AUSTRALIA-EU FREE TRADE AGREEMENT: KEY ISSUES AND OPTIONS 75, 76 (Jane Drake-Brockman & Patrick Messerlin, eds., 2018).

<sup>195</sup> Regional Comprehensive Economic Partnership, ch. 11, Nov. 15, 2020, <https://rcepsec.org/legal-text/> [hereinafter RCEP].

<sup>196</sup> See, e.g., Peter K. Yu, *TPP, RCEP and the Future of Copyright Norm-Setting in the Asian Pacific*, in MAKING COPYRIGHT WORK FOR THE ASIAN PACIFIC: JUXTAPOSING HARMONIZATION WITH FLEXIBILITY 19, 25 (Susan Corbett & Jessica C. Lai, eds., 2018).

<sup>197</sup> Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Inst. for Int’l L. & Just., art. 18.63, Mar. 8, 2018, <https://www.iilj.org/wp-content/uploads/2018/03/CPTPP-consolidated.pdf>.

<sup>198</sup> Yu, *supra* note 196, at 33.

<sup>199</sup> Zhang Can, *What’s Special about RCEP’s IP Chapter?*, CHINA GLOB. TELEVISION NETWORK (Nov. 23, 2020, 9:27 PM), <https://news.cgtn.com/news/2020-11-23/What-s-special-about-RCEP-s-IP-chapter--VERx4otQCA/index.html>; see generally RCEP, *supra* note 195, ch. 11.

<sup>200</sup> Can, *supra* note 199; see RCEP, *supra* note 195, ch. 11, § G.

(“Japanese Copyright Amendment”).<sup>201</sup> Currently, there is no official translation of the Japanese Copyright Amendment, so this section will be a paraphrased report based on news reports and an international legal blog from a Japanese law firm<sup>202</sup> that details the Japanese Copyright Amendment.

The Japanese Copyright Amendment can be divided into two main parts: (1) addressing leech sites that provide hyperlinks to infringing material, and (2) addressing the illegal downloading of content through those hyperlinks.<sup>203</sup>

i. *Leech Sites*

Leech sites refer to those that provide users with hyperlinks to material, usually pirated.<sup>204</sup> Before this Japanese Copyright Amendment, the act of providing a hyperlink to pirated content was not considered infringing, and thus, the seeder would not be subject to an injunction or criminal penalties.<sup>205</sup> Now, providing such a hyperlink “constitutes copyright infringement so long as such ‘leech websites’ particularly induce the public to pirated materials.”<sup>206</sup> However, if a link is to an unauthorized derivative work, like an

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<sup>201</sup> Chosakukenhō oyobi puroguramu no chosakubutsu ni kakaru tōroku no tokurei nikansuru hōritsu no ichibu o kaiseisuru hōritsu [Law to Partially Revise the Copyright Law and the Law Concerning Special Exceptions to Registration of Copyrighted Works of Programs], Law No. 48 of 1945 (Japan), available at [http://www.shugiin.go.jp/inter-net/itdb\\_housei.nsf/html/housei/20120200612048.htm](http://www.shugiin.go.jp/inter-net/itdb_housei.nsf/html/housei/20120200612048.htm) (in Japanese) [hereinafter Japanese Copyright Amendment]; *Explanatory Material of the Act for Partial Revisions of the Copyright Act*, AGENCY OF CULTURAL AFFS., [https://www.mext.go.jp/content/20200306-mxt\\_hourei-000005016\\_02.pdf](https://www.mext.go.jp/content/20200306-mxt_hourei-000005016_02.pdf) (in Japanese).

<sup>202</sup> *Nishimura & Asahi*, INT’L L. OFF., [https://www.internationallawoffice.com/Directory/Nishimura-Asahi/Tokyo?utm\\_source=Nishimura+%26+Asahi&utm\\_medium=pdf&utm\\_content=ILO+newsletter+83248&utm\\_campaign=ILO+Newsletters](https://www.internationallawoffice.com/Directory/Nishimura-Asahi/Tokyo?utm_source=Nishimura+%26+Asahi&utm_medium=pdf&utm_content=ILO+newsletter+83248&utm_campaign=ILO+Newsletters) (last visited Apr. 14, 2021).

<sup>203</sup> Kenji Tosaki, *Japan: Copyright Laws and Regulations 2021*, ICGI.COM (Oct. 14, 2020), [<sup>204</sup> See \*supra\* Section I.C.3.](https://icgl.com/practice-areas/copyright-laws-and-regulations/japan; Japan Enacts Copyright Control Law to Ban Pirated Manga Downloads, supra note 7.</a></p>
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<sup>205</sup> Tosaki, *supra* note 203.

<sup>206</sup> *Id.*

unauthorized translated version of the manga, it does not infringe the author's copyright.<sup>207</sup>

The Japanese Copyright Amendment punishes those who copy and paste hyperlinks of infringing material on message boards, and those who run sites devoted to piracy.<sup>208</sup> Providers of hyperlinks face "imprisonment for up to three years, a fine of up to [3 million yen] or both."<sup>209</sup> Operators of leech sites "will face penalties of up to five years in jail or a maximum fine of 5 million yen, or both."<sup>210</sup> These provisions regarding leech sites came into effect on October 1, 2020.<sup>211</sup>

Even before coming into effect, certain pirate sites felt the impact of this Amendment.<sup>212</sup> KissAnime and, its sister site, KissManga closed their websites on August 14, 2020, after being active for nearly ten years.<sup>213</sup> These sites had their Japanese beta server taken down, leading to the closure of the sites.<sup>214</sup> There have been other sites shut down since then,<sup>215</sup> but there are still a number of leech sites operating.<sup>216</sup>

## ii. *Illegal Downloading of Content*

The second part of the Japanese Copyright Amendment addresses the illegal downloading of content, and it "prohibit[s] downloading a work that was illegally uploaded knowing that such a work

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<sup>207</sup> Iwase & Kinoshita, *supra* note 14.

<sup>208</sup> *Japan Enacts Copyright Control Law to Ban Pirated Manga Downloads*, *supra* note 6.

<sup>209</sup> Iwase & Kinoshita, *supra* note 14.

<sup>210</sup> *Japan Enacts Copyright Control Law to Ban Pirated Manga Downloads*, *supra* note 6.

<sup>211</sup> Tosaki, *supra* note 203.

<sup>212</sup> Ahmed, *supra* note 90.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*; see also Si Jia, *Pirate Streaming Sites KissAnime & KissManga Shut Down Permanently as Japan Cracks Down on Piracy*, GEEK CULTURE (Aug. 15, 2020), <https://geekculture.co/pirate-streaming-sites-kissanime-kissmanga-shut-down-permanently-as-japan-cracks-down-on-piracy/> (containing a screenshot of KissAnime's shutdown notice that appeared on Discord).

<sup>215</sup> Ahmed, *supra* note 90.

<sup>216</sup> *See Pirated Manga Crisis Even Worse Since Closure of Mangamura Site*, ASAHI SIMBUN (June 17, 2021, 7:00 PM), <https://www.asahi.com/ajw/articles/14366448> (noting that there was approximate 750 operational manga pirate websites and that the number has increased since 2019).

was illegally uploaded.”<sup>217</sup> This finally brings manga onto the same level as music or video because “downloading pirated music or videos even for private use was already illegal and subject to claims . . . .”<sup>218</sup> Repeat offenders are those who are punished most harshly, facing “up to two years in jail or a maximum fine of 2 million yen (\$18,320), or both.”<sup>219</sup> In order to establish criminal liability, the basic elements of copyright infringement must be met along with “the work being fee based (i.e., presented to the public for value); and the downloading was done continuously or repeatedly.”<sup>220</sup> This provision came into effect on January 1, 2021.<sup>221</sup>

While this may seem like a harsh punishment, the original 2019 proposal was more strict, “attempt[ing] to outlaw and criminalise the downloading of all other pirated works, including manga, photographs, and books.”<sup>222</sup> After opposition that the proposal would be overbroad,<sup>223</sup> the Japanese Copyright Amendment provides a number of exemptions to avoid “hinder[ing] internet use and freedom of expression.”<sup>224</sup> The following activities are exempted:

[U]nintentionally downloading pirated content, even when grossly negligent; downloading derivative works and parodies; downloading or screenshotting minor amounts of pirated content, such as a couple of panels of manga; and downloading pirated content under special circumstances that do not unfairly prejudice the interests of the copyright owner.<sup>225</sup>

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<sup>217</sup> Tosaki, *supra* note 203.

<sup>218</sup> Iwase & Kinoshita, *supra* note 14.

<sup>219</sup> *Japan Enacts Copyright Control Law to Ban Pirated Manga Downloads*, *supra* note 6.

<sup>220</sup> Iwase & Kinoshita, *supra* note 14.

<sup>221</sup> *Japan Enacts Copyright Control Law to Ban Pirated Manga Downloads*, *supra* note 6.

<sup>222</sup> Iwase & Kinoshita, *supra* note 14.

<sup>223</sup> *See id.*

<sup>224</sup> *Japan Enacts Copyright Control Law to Ban Pirated Manga Downloads*, *supra* note 6.

<sup>225</sup> Iwase & Kinoshita, *supra* note 14.

The exclusion of downloading parodies is directly related to the popularity and, arguably, the culture of doujinshi in Japan.<sup>226</sup>

According to an online poll by Publishers PR Center, “around 90 percent of respondents said they will stop using, or use less frequently, piracy websites if downloading from those sites becomes illegal.”<sup>227</sup> Many believe that the loopholes that remain, such as: “videos showing copyrighted items in the form of a picture-story show”; streaming, as Mangamura utilized; and using overseas servers with “‘bulletproof hosting’ services that are lenient about what can be hosted on their servers” will undercut the effectiveness of the Amendment.<sup>228</sup>

### III. WILL IT BE EFFECTIVE?

Despite the Japanese Copyright Amendment’s noble goals of eliminating illegal downloads and leech sites<sup>229</sup> and providing more revenue to the manga industry, there are certain problems that may limit the Amendment’s success. The first problem relates to enforcing the provisions of the Japanese Copyright Amendment, especially given the difficulties of identifying and serving infringing defendants.<sup>230</sup> Furthermore, piracy has been shown to be beneficial to completed manga series, increasing their sales; thus, the Japanese Copyright Amendment may restrict a potential benefit to the manga industry.<sup>231</sup> Moreover, the Japanese Copyright Amendment may just be a patch for a larger issue facing both the anime and manga industries: the traditional content providers’ unwillingness to

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<sup>226</sup> See Mehra, *supra* note 23, at 179–82. Mehra suggests that manga artists do not bring lawsuits against infringing doujinshi, not because of the aversion to litigation, but because of the culture of imitation fostered in the 1940s and 1950s where artists frequently used others’ characters. *Id.* at 179. Moreover, Mehra proposes that there is a tacit agreement between the infringing doujinshi and the individual artist whereby there is reciprocal infringement and the market acts as a place to discover new artistic talent. *Id.* at 182–85.

<sup>227</sup> *Japan Enacts Copyright Control Law to Ban Pirated Manga Downloads*, *supra* note 6.

<sup>228</sup> *Id.*

<sup>229</sup> See *supra* Section II.B.2.

<sup>230</sup> See Letter to The Honorable Sarah Netburn, *supra* note 116 (detailing the Publishers’ inability to identify and serve the Defendants); discussion *infra* Section III.A.

<sup>231</sup> See discussion *infra* Section III.B.

change with new technology and profit from potential overseas markets.<sup>232</sup>

### A. *Enforcement*

One of the main problems relating to this Amendment is enforcement.<sup>233</sup> Enforcement is costly, and, in a perfect world, every violator of any law would be identified and subsequently punished, but it would cost an exorbitant amount.<sup>234</sup> While it is true that in the real-world, no country or people would want to spend their entire fiscal budget on punishing every single offender, this disconnect is often corrected through a harsher punishment for the crime.<sup>235</sup> By increasing the expected punishment for a particular offense, the punishment itself works to deter would-be offenders;<sup>236</sup> however, this only works to a point.<sup>237</sup> As economist George Stigler explains, even though the larger punishment would give the prospective offender a smaller net utility from the crime, it is on a diminishing scale.<sup>238</sup>

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<sup>232</sup> See discussion *infra* Section III.C.

<sup>233</sup> See Eldar Haber, *The Criminal Copyright Gap*, 18 STAN. TECH. L.J. 247, 277 (2015) (“[T]he Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) requires member states to provide for criminal procedures and penalties, along with enforcement procedures, but does not address the scale of enforcement.”).

<sup>234</sup> See George J. Stigler, *The Optimum Enforcement of Laws*, 78 UNIV. CHI. J. POL. ECON. 526, 526–27 (1970) (“There is one decisive reason why the society must forego ‘complete’ enforcement of the rule: enforcement is costly . . . . We could make certain that crime does not pay by paying enough to apprehend most criminals. Such a level of enforcement would of course be enormously expensive, and only in crimes of enormous importance will such expenditures be approached.”).

<sup>235</sup> See *id.* at 527 (“The cost limitation upon the enforcement of laws would prevent the society from forestalling, detecting, and punishing all offenders, but it would appear that punishments which would be meted out to the guilty could often be increased without using additional resources.”).

<sup>236</sup> See *id.* (“The offender is deterred by the expected punishment . . . . increasing the punishment would seem always to increase the deterrence.”).

<sup>237</sup> See *id.* (“If the offender will be executed for a minor assault and for a murder, there is no marginal deterrence to murder.”).

<sup>238</sup> See *id.* (“It is no doubt true that the larger the punishment, the smaller will be the expected net utility to the prospective offender from the commission of a given offense. But marginal decisions are made here as in the remainder of life, and the marginal deterrence of heavy punishments could be very small or even negative.”).

Thus, “[i]f the thief has his hand cut off for taking five dollars, he had just as well take \$5,000.”<sup>239</sup> In the context of the Japanese Copyright Amendment, an infringer may well as infringe a full-length manga series instead of a single chapter if the punishment will be the same.<sup>240</sup>

A behavioralist approach to enforcement realizes and incorporates the reality that people are not rational actors.<sup>241</sup> Potential offenders regularly exercise self-control, enabling them to consider the costs and benefits of a crime, but this self-control may lapse, causing the offender to commit a crime without considering the consequences.<sup>242</sup> Individuals exercising self-control are often deterred by high sanctions imposed for repeat offenders, “even if the punishment for a first time offender is very low.”<sup>243</sup> With low punishment for first-time offenders and high punishment for repeat offenders, a system of enforcement can deter would-be offenders and “minimize the cost of punishing individuals who lapse and commit crime.”<sup>244</sup> The Japanese Copyright Amendment would likely find success in its enforcement under this theory because it harshly punishes repeat offenders, but it provides low punishment for first-time offenders.<sup>245</sup>

If these new provisions are strictly enforced, they may in fact reduce the number of hyperlinks to pirated material, which, in turn, would decrease the number of illegal downloads.<sup>246</sup> It is also very likely, however, that those providing hyperlinks and downloading

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<sup>239</sup> *Id.*

<sup>240</sup> *See supra* Section II.B.2.ii.

<sup>241</sup> *See* Murat C. Mungan, *A Behavioral Justification for Escalating Punishment Schemes*, 37 INT’L REV. L. & ECON. 189, 189 (2014).

<sup>242</sup> *Id.* at 190.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *See Japan Enacts Copyright Control Law to Ban Pirated Manga Downloads*, *supra* note 6; *supra* Section II.B.2.ii.

<sup>246</sup> *See* HUBERT DOUGLAS HENDERSON, SUPPLY AND DEMAND 39 (John Maynard Keynes, ed., 1922) (“But cost of production is the chief factor which, in the case of commodities, ultimately determines the conditions of supply.”); *cf. id.* at 20 (“[D]emand is in excess of supply. Then the price will tend to rise. After the price has risen, the supply will become larger, while the demand will fall away.”).

pirated content will continue to do so, especially if there is no enforcement.<sup>247</sup>

At the same time, if these laws are enforced only sometimes, it is probable that infringers will simply risk being caught because their net utility from the activity surpasses the probability of punishment.<sup>248</sup> Additionally, “[t]he legitimacy of legal provisions declines in the eyes of the user if they are not enforced.”<sup>249</sup> Even worse, “selective enforcement leads to uncertainty in the market with a potentially detrimental impact on innovation.”<sup>250</sup> This practice privileges one type of user over another and chilling new business models, especially those dealing with distribution.<sup>251</sup> It is highly possible that if these provisions are not policed and there is nothing new to fill the gap, like a free, authorized manga website running solely from advertisement revenues, this Amendment would just be symbolic.

Moreover, “[l]aws often go unenforced because they conflict with prevailing social norms,”<sup>252</sup> and if sharing manga online has become a norm that society treasures, then it is possible that people will push for lax enforcement of these regulations through budgeting.<sup>253</sup> Illegal downloading of manga is not likely a norm that the majority of fans wish to cultivate because of the value of the

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<sup>247</sup> Cf. Kenworthy Bilz & Janice Nadler, *Law, Moral Attitudes, and Behavioral Change*, in THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW 241, 245 (Eyal Zamir & Doron Teichman, eds., 2014) (“Undoubtedly, laws are sometimes effective because they are backed by the threat of punitive enforcement.”).

<sup>248</sup> Cf. *id.* at 245–46 (“In general, when the law imposes obligations and punishment in concordance with general intuitions about justice, then people are more likely to view the legal system as a legitimate and reliable source of morality. Individual cases decided consistently with lay intuitions of justice reinforce the notion that the law is a source of moral guidance.”).

<sup>249</sup> Schroff, *supra* note 149, at 433.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> Daron Acemoglu & Matthew O. Jackson, *Social Norms and the Enforcement of Laws*, 15 J. EUR. ECON. ASS’N 245, 245 (2017).

<sup>253</sup> See Stigler, *supra* note 234, at 527 (“The society will normally give to the enforcement agencies a budget which dictates a much lower level of enforcement.”).

Japanese manga industry and how much Japanese culture is influenced by it.<sup>254</sup>

Although Japan is not nearly as litigious as the U.S.,<sup>255</sup> there is a possibility of major pushback during enforcement.<sup>256</sup> The U.S.'s early attempts to curb P2P sharing of illegally downloaded music resulted in the Recording Industry Association of America ("RIAA") suing 261 individuals for sharing songs on file sharing networks, resulting in more damage done than corrected.<sup>257</sup> Over its five year lifespan, RIAA's campaign targeted about 30,000 alleged file-sharers, resulting in RIAA paying approximately \$64 million in legal fees for a meager \$1.36 million back in damages.<sup>258</sup> In reality, it turns out that the campaign did nothing to stop or scare file sharers as the number of "P2P usage has grown steadily since the RIAA's litigation campaign began in 2003."<sup>259</sup> While it may not be in Japan's legal culture to create massive litigation campaigns like RIAA's, something similar to it may cause backlash against enforcement and increase the number of those infringing.

Additionally, how can infringers be identified? Shueisha's inability to identify the defendants and serve them could very likely be

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<sup>254</sup> See Asher & Sola, *supra* note 12 ("Nearly every aspect of Japanese popular cultural production can trace its roots to the industrial complex that is manga which has become a mainstay of the Japanese economy and culture . . . . As a gateway to Japanese culture, [manga] has attracted a global fan base and fueled interest in Japanese culture.").

<sup>255</sup> Sean Kirkpatrick, *Like Holding a Bird: What the Prevalence of Fansubbing Can Teach Us About the Use of Strategic Selective Copyright Enforcement*, 21 TEMP. ENV'T L. & TECH. J. 131, 148 (2002).

<sup>256</sup> See, e.g., *RIAA v. The People: Five Years Later*, *supra* note 18 (recounting the history of RIAA's mass John Doe lawsuit campaigns to combat Internet music piracy, including a discussion about an increase in P2P traffic after the RIAA lawsuits).

<sup>257</sup> *Id.*; Christopher Siebens, Note, *Divergent Approaches to File-Sharing Enforcement in the United States and Japan*, 52 VA. J. INT'L L. 155, 162 (2011).

<sup>258</sup> Siebens, *supra* note 257, at 162-63. The litigation was more of a scare tactic than a way to recapture lost revenues. See *RIAA v. The People: Five Years Later*, *supra* note 18 ("The RIAA has frequently justified the lawsuit campaign as the most effective way to get music fans to understand that downloading is illegal and can have serious consequences.").

<sup>259</sup> *RIAA v. The People: Five Years Later*, *supra* note 18.

the future of all litigation regarding this Amendment.<sup>260</sup> Software like BitTorrent and Cloudflare would only serve to further cloak the identities of those providing hyperlinks and downloading pirated manga because their decentralized nature makes it increasingly difficult to hold people accountable.<sup>261</sup> If the identification of individual infringers is frustrated, there will likely be an effort to file contributory liability suits against BitTorrent, similar to those against Grokster.<sup>262</sup>

Faced with a new, decentralized P2P file sharing technology,<sup>263</sup> the Supreme Court in *Metro-Goldwyn Mayer Studios, Inc. v. Grokster, Ltd.* held that “one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.”<sup>264</sup> Compare *Grokster*’s holding to *Sony Corp. of America v. Universal City Studios, Inc.*, where Sony’s Betamax and its ability to copy copyrighted material was placed under scrutiny.<sup>265</sup> The Supreme Court found that “the sale of copying equipment . . . does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes.”<sup>266</sup> The *Grokster* decision focused on Grokster supplying a demand for copyright infringement technology, the

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<sup>260</sup> See Letter to The Honorable Sarah Netburn, *supra* note 116, at 2 (mentioning how the Publishers could not properly identify or contact the Defendants because of the Defendants’ actions to conceal their identities).

<sup>261</sup> See Bridy, *supra* note 96, at 716 (“High-volume infringement is relatively easy to detect and combat when the content in question is fixed on the servers of easily identifiable intermediaries with duly designated DMCA [Digital Millennium Copyright Act] agents; it becomes much harder to detect and combat when that content is in transit across a distributed network whose membership is anonymous and dynamic.”); Johnathan Band, *The Copyright Paradox: Fighting Content Piracy in the Digital Era*, BROOKINGS (Dec. 1, 2001), <https://www.brookings.edu/articles/the-copyright-paradox-fighting-content-piracy-in-the-digital-era/> (“Further, technologies like Gnutella do not require a central server, as does Napster or a typical pirate web site, making it hard to detect infringers.”).

<sup>262</sup> See generally *Metro-Goldwyn Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) (holding Grokster vicariously and contributorily liable for Internet users’ infringement activity while using Grokster’s P2P software).

<sup>263</sup> *Id.* at 920.

<sup>264</sup> *Id.* at 919.

<sup>265</sup> *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

<sup>266</sup> *Id.* at 442.

lack of filters to eliminate infringing activity, and inducement of that activity.<sup>267</sup> Simply put, Grokster “had a reputation” for piracy, whereas Sony was widely known for making beloved products like the Walkman.<sup>268</sup> Professor Tim Wu describes the Supreme Court’s *Grokster* approach as “a ‘bad actor’ approach,” where the Court decided to punish “the bad guys” so as to not upset the “incumbent industry.”<sup>269</sup> Wu explains that “[t]he ‘bad actor’ approach to anti-trust aims to punish or block various ill-intended business practices that are regarded as wrongful, and likely damaging to favored sectors of the economy.”<sup>270</sup> BitTorrent would likely be seen as a “bad actor” because of its association with the decentralized P2P networks of Internet-past, like Napster and Grokster. Thus, if it becomes nearly impossible to identify and subsequently sue individual infringers under the provisions of the Japanese Copyright Amendment, BitTorrent and Cloudflare may face contributory liability suits for their software with rulings akin to that of *Grokster*.<sup>271</sup>

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<sup>267</sup> *Grokster*, 545 U.S. at 939.

<sup>268</sup> Tim Wu, *The Copyright Paradox*, 2005 SUP. CT. REV. 229, 240 (2005) (“The file-sharing movement was seen less as a legitimate market entrant and instead as a bunch of radicals hailing from the West Coast and Amsterdam. The contrast with Sony from the 1970s is important . . . Sony was the inventor of the Walkman and other gadgets, and widely beloved. It came to the Court as a respectable, even earnest company whose products were used by decedent citizens. That cultural difference between Kazaa on the one hand and Sony on the other arguably made a difference in the *Grokster* litigation.”).

<sup>269</sup> *Id.* at 230. The *Grokster* decision was seen as a political move out of a difficult situation but poses real questions regarding whether courts should be choosing the winners among market entrants without weighing consumer welfare in doing so. *Id.* Compare this approach to *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), where the Supreme Court essentially directs an approach to weigh the social costs and benefits of any new technology. *Id.* at 234.

<sup>270</sup> *Id.* at 236.

<sup>271</sup> Grokster’s software did not rely on central servers to distribute electronic files. Like other P2P networks, users can distribute all types of electronic files, but with this power, copyright infringers found a way to distribute copyrighted works without paying for them. *Grokster*, 545 U.S. at 919–20. StreamCast, another defendant in the case, relies on Gnutella technology, which, in many respects, was similar to that technology used by Grokster, called FastTrack. *Id.* at 921. Gnutella and FastTrack are “languages through which computers can communicate with each other.” Klumpp, *supra* note 103, at 447. BitTorrent uses P2P transfers without utilizing a central directory note, but BitTorrent is different from FastTrack and Gnutella in two ways: (1) it divides the downloading process over

### B. *Piracy is Useful (to a Point)*

Despite what it may seem, piracy has been found to be useful, to a certain extent, for the manga industry.<sup>272</sup> After “analyz[ing] 3,360 volumes of 484 comic titles for eight months” before applying a regression model, Professor Tatsuo Tanaka found that “[p]iracy decreases sales of ongoing comics, but it increases sales of completed comics.”<sup>273</sup> Tanaka suggests that because there is no longer promotion for those titles that have been completed, piracy becomes the substitute for advertisement and “*reminds* consumers of past comics and stimulates sales . . . .”<sup>274</sup> Ongoing comics do not get the benefit of the “remind effect” because they are well-known and have constant advertisement.<sup>275</sup> With increased policing and punishment for illegal downloading, it is likely that publishers would miss out on profits from older, completed manga.<sup>276</sup> Although it is more likely that sales revenue for new manga will eclipse that of completed manga, it is still a revenue stream that could be diminished.<sup>277</sup>

Moreover, piracy of manga is necessary to fill the gap between supply and demand, especially for translated manga in overseas

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a vast number of P2P connections with fragments of the file transferring from multiple sources, and (2) each user that receives a download must be a source of the content for as long as the download process. *Id.* at 450. With its “[m]ultiple sourcing and reciprocity,” the BitTorrent system is actually *more centralized* than Gnutella or FastTrack. *Id.* (emphasis added). However, because of the reciprocity of the system, freeloaders are non-existent, and “copyright holders would have to drive users off the network entirely . . . .” *Id.* at 451. Therefore, copyright holders have sued “third-party indexing and tracking operators that comprise the BitTorrent directory system” and internet service providers. *Id.* at 452.

<sup>272</sup> See generally Tatsuo Tanaka, *The Effects of Internet Book Piracy: Case of Comics* (Aug. 8, 2019) (unpublished manuscript) (on file with the Institute for Economic Studies, Keio University) (using a regression analysis to examine the market effects of piracy on manga).

<sup>273</sup> *Id.* at 3.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.* at 18.

<sup>276</sup> See *id.* at 3 (“Since completed comics series have already ended, and publishers no longer do any promotion for them, consumers almost forget completed comics.”).

<sup>277</sup> See *id.* at 32 (“[The] number of volumes of completed comics outnumbers newly published volumes of ongoing series. Which effect [displacement or advertisement effect] is dominant depends on the total sale share of ongoing and completed comics, and this figure is not available.”).

markets.<sup>278</sup> Manga sales in the U.S. have skyrocketed, with over a 5% growth in just a few months in 2019,<sup>279</sup> but there is still a disconnect when it comes to new manga.<sup>280</sup> There seems to be only a handful of publishing houses that release English translated manga at the same time or with a slight delay from Japan.<sup>281</sup> Because avid foreign manga fans want the new manga chapter as soon as their counterparts in Japan, they must rely on scanlations, even though some would gladly pay for legally distributed English translations.<sup>282</sup> Publishing houses themselves may not enter the markets because of costs associated with developing relationships with U.S. or online distributors, like monitoring costs and any fees associated with the promotion of their products.<sup>283</sup> Unfortunately, this is a puzzle that does not seem to have an answer readily available. It would seem advantageous for publishing houses to enter this market

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<sup>278</sup> See Karl Bode, *Study Again Shows "Pirates" Tend to be the Biggest Buyers of Legal Content*, VICE (June 7, 2018, 1:38 PM), <https://www.vice.com/en/article/evkmz7/study-again-shows-pirates-tend-to-be-the-biggest-buyers-of-legal-content> (“[T]he study also showed that 83 percent of those questioned try to find the content they are looking for through above board services before trying anything else.”). The survey quoted is behind a £1,000 paywall. *2017 Annual Piracy Report*, MUSO, <https://www.muso.com/annual-piracy-reports> (last visited Jan. 27, 2021).

<sup>279</sup> See *Sales of Manga Books Are on the Rise in the United States*, *supra* note 52; see discussion *supra* Section I.B.

<sup>280</sup> See Yatharth Sood, *A Case for Piracy?*, MEDIUM: STARTUP (Sept. 10, 2020), <https://medium.com/swlh/a-case-for-piracy-3e8add29f369> (“This lack of supply amidst a surprisingly consistent demand is far worse with manga. Very few mangas have official English translations and the ones made [by] fans frequently get taken down and targeted by the publishers because of copyright issues.”).

<sup>281</sup> See, e.g., *About*, KODANSHA COMICS, <https://kodanshacomics.com/about/> (last visited Jan. 1, 2021). Crunchyroll also does simulpubs of manga. *Manga Simulpub*, CRUNCHYROLL, <https://www.crunchyroll.com/comics/manga/simulpub> (last visited Aug. 14, 2021).

<sup>282</sup> See Schroff, *supra* note 149, at 438 (“Fan translations are driven by the (perceived) shortcomings in how products are listed in other countries.”); Bode, *supra* note 278 (“The survey found that the top reason that users pirate is the content they were looking for wasn’t legally available (34 percent) was too cumbersome or difficult to access (34 percent), or wasn’t affordable (35 percent).”).

<sup>283</sup> See Casey Brienza, *Did Manga Conquer America? Implications for the Cultural Policy of “Cool Japan,”* 20 INT’L J. CULTURAL POL’Y 383, 392 (2014) (“These new publisher sites must somehow gain reader recognition and visibility for their releases in the digital space.”).

instead of having their works translated and distributed without any payment to the creator.

Piracy in certain industries, like manga or games, is “almost always a service problem and not a pricing problem.”<sup>284</sup> Gabe Newell, the co-founder and CEO of Valve,<sup>285</sup> while discussing piracy of video games, said that:

[I]f a pirate offers a product anywhere in the world, 24/7, purchasable from the convenience of your personal computer, and the legal provider says the product is region-locked, will come to your country three months after the U.S. release and can only be purchased at a brick and mortar store, then the pirate’s service is more valuable.<sup>286</sup>

To manga aficionados, the pirate’s service is more valuable than waiting and hoping that the manga will be translated and released in their country because they can get English translations as soon as Japan gets the chapter.<sup>287</sup> Furthermore, scanlations are prominent because of “fans’ dissatisfaction with low-quality authorised translations and the extensive adaption for the target market.”<sup>288</sup>

Moreover, illegal online content of partial works is tolerated for two reasons: non-replacements and trailers.<sup>289</sup> Pieces of manga or anime would not replace legal sales of that product because reading or watching clips “is not the same experience as watching the film as a whole.”<sup>290</sup> These clips also work as trailers, exposing potential viewers to material to show its attractiveness.<sup>291</sup> Scanlations and

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<sup>284</sup> Colin Campbell, *Gabe Says Piracy Isn’t About Price*, IGN ENT. (Jan. 17, 2012), <https://www.ign.com/articles/2011/11/25/gabe-says-piracy-isnt-about-price> (quoting Gabe Newell).

<sup>285</sup> *Id.*; see *About*, VALVE, <https://www.valvesoftware.com/en/about> (last visited Jan. 1, 2021).

<sup>286</sup> Campbell, *supra* note 284.

<sup>287</sup> See Schroff, *supra* note 149, at 438 (“First, there is a significant time delay between the Japanese and its international releases which is filled by the fans. In response, there is an increasingly strong drive to have simulcasting for Anime and simultaneous publishing for Manga.”).

<sup>288</sup> *Id.* (citation omitted).

<sup>289</sup> *Id.* at 439.

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

fansubs serve this second purpose very well. Fan translators “aim to create a buzz about their favourite series in the hope that it may be licensed officially in their home country”;<sup>292</sup> their ethos of not translating a work if it has been licensed further reflects this attitude.<sup>293</sup>

With the Japanese Copyright Amendment, new, translated manga distribution will likely come to a standstill—either indefinitely, or until people are willing to accept the risk. In turn, this would isolate overseas consumers who rely on scanlations to read their favorite manga. But if Japanese studios are not focused on overseas markets, why should these studios care about enforcing their copyrights abroad when the pirated material would not be replacing the legal product?

### C. *Resistance to Change*

Increased copyright protection may not be the best way to address and combat the piracy problem of manga.<sup>294</sup> Intellectual property (“IP”) law works to restrict the distribution of public goods, those that would be available to everyone, through artificial scarcity in order to exploit them.<sup>295</sup> The Internet has turned classic IP inside out through its ease of producing and distributing content.<sup>296</sup> Because the Internet has taken an unwieldy, expensive process and made it available simultaneously for next to nothing, traditional industries have seen diminishing value for their networks of distribution and creative minds.<sup>297</sup> Professor Mark A. Lemley describes the change as “the democratization of content distribution”: once online,

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<sup>292</sup> *Id.*

<sup>293</sup> *See* McDonald, *supra* note 137 (discussing the general ethos of the fansub community).

<sup>294</sup> *See* Mark A. Lemley, *IP in a World Without Scarcity*, 90 N.Y.U. L. REV. 460, 462 (2015) (“[A] world in which all the value resides in information is a world in which we need IP everywhere—controlling rights over everything—or no one will get paid to create. That has been the response of IP law to the Internet so far, but that response is problematic . . .”).

<sup>295</sup> *Id.*

<sup>296</sup> *See id.* at 461 (“[The Internet] has changed the way in which information is distributed, separating the creators of content from the distributors . . . . [T]he Internet has not only slashed the cost of creation, production, and distribution; it has also disaggregated creation and distribution.”).

<sup>297</sup> *See id.* at 468–71 (discussing content creation and distribution before and after the rise of the Internet).

the work can be copied and transmitted to others for no cost.<sup>298</sup> Because of the ease with which people can copy works, “lots of people will engage in illegal copying but no one will create under those circumstances.”<sup>299</sup> However, contrary to established IP and copyright belief, people create for intrinsic motivations and are not driven exclusively by economic benefits.<sup>300</sup> Thus, increased IP protections may not help to restrict those willing to create for their own motivations, like to create buzz behind their favorite manga or share a non-translated anime with their overseas friends.<sup>301</sup>

Traditional content providers have been and continue to be on the side of fighting technological progress, and decrying its detrimental effects on their bottom lines instead of using that new technology to benefit their industry.<sup>302</sup> Even though copyright is associated with individual authority, it also fosters “industrial policy,” where “[i]t provides some level of support and protection to a group

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<sup>298</sup> *Id.* at 470.

<sup>299</sup> *Id.* at 482.

<sup>300</sup> *See id.* at 485 (“Economic scholarship suggests that while recording industry revenues have declined substantially from their high in 1999, there are more songs being released than ever before, more new artists than ever before, and more purchases of music than ever before, and the songs released are of at least as high quality as before the Internet.”); Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 515 (2009) (“Psychological and sociological concepts can do more to explain creative impulses than classical economics. As a result, a copyright law that treats creativity as a product of economic incentives can miss the mark and harm what it aims to promote.”).

<sup>301</sup> *See* Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 COLUM. L. REV. 257, 257–58 (2007) (“There is abundant evidence that the social value of innovations far exceeds the private value. But there is also good evidence that, contrary to what economists might assume, these spillovers actually encourage greater innovation.”); Tushnet, *supra* note 300, at 522 (“Many standard experiences of creativity simply do not fit into the incentive model, whether the incentives are measured in money or in reputation.”). Margaret Atwood, the famous Canadian writer collected “over seventy answers to the question of why writers write. Only two include ‘[t]o make money . . . .’” *Id.* at 523.

<sup>302</sup> *See* Lemley, *supra* note 294, at 483–84. When Napster rose in popularity, instead of figuring out a way to utilize the service, or a similar type, for their own benefit, the traditional content providers in the music industry instead decided to file thousands of lawsuits against individual infringers and Napster. *See id.* at 483 n.113 (“[C]opyright owners have sued direct facilitators like Napster; makers of software that can be used to share files; those who provide tools to crack encryption that protects copyrighted works . . . .”).

of favored industries . . . at some expense to other industries and consumers.”<sup>303</sup> These industries argue that without extra government protection, they would no longer be viable.<sup>304</sup> As Lemley points out, “IP owners lost the fight to keep content off the Internet . . . [because] there was simply too much value to the Internet as a whole and the digital distribution of content.”<sup>305</sup> Moreover, there is no one infringer who can be shut down to restrict the distribution of copyrighted material.<sup>306</sup> When one site goes down, two more take their place.<sup>307</sup>

Japan’s manga and anime industries are succumbing to the same problems as the music industry did with Napster:<sup>308</sup> instead of recognizing the incredible amount of potential profits in the overseas markets for translated manga and anime, they pushed for expanded punishments.<sup>309</sup> The industries decry the amount of profits they are losing but have made little in-roads in capturing the profits from those who are resorting to fansubs and scanlations.<sup>310</sup> Some call the manga industry distributing English-translated manga “fighting back” against pirates.<sup>311</sup> In actuality, all they are really doing is meeting the already existing demand. These traditional anime and manga companies are deluded when it comes to consumer activities,

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<sup>303</sup> Wu, *supra* note 268, at 232.

<sup>304</sup> *Id.*

<sup>305</sup> Lemley, *supra* note 294, at 499.

<sup>306</sup> *See id.* (“There is no central infringer on the Internet.”).

<sup>307</sup> *See id.* (“But because there was so much demand for content online, even when sites were shut down, others promptly took their place.”).

<sup>308</sup> *See* Mark A. Lemley, *Is the Sky Falling on the Content Industries*, 9 J. ON TELECOMM. & HIGH TECH. L. 125, 129–131 (2011) (recounting the campaigns against innovations in music technology like digital audio cassettes and MP3 players by content owners who were concerned that the technologies were undermine legitimate sales of music because customers would have less of an incentive to buy the owner’s copy).

<sup>309</sup> *See* discussion *supra* Section II.B.

<sup>310</sup> *See* Asher & Sola, *supra* note 12 (“The need to translate manga from Japanese meant there were inevitable delays in their international release. Moreover, many titles were never released internationally because they were deemed inappropriate for specific markets, were unsuccessful in Japan, or were only published locally by independent publishers.”). Only recently have companies really begun simulcasts or simulpubs for international audiences. *See About*, *supra* note 281.

<sup>311</sup> Asher & Sola, *supra* note 12.

believing that consumers would patiently await a translated, authorized version of the works, if they are ever distributed or translated.<sup>312</sup>

Instead of fighting illegal distribution through increased IP protection, traditional content industries need to recognize why there is so much illegal activity and then seize those lost profits by emulating how pirates are obtaining their goods.<sup>313</sup> Creating harsher punishments for downloading manga may in fact increase profits that studios and artists may see because consumers will be forced to purchase the manga.<sup>314</sup> However, studios are still leaving large sums of money on the table by ignoring the overseas fans desperately asking for those same products.<sup>315</sup>

This Amendment may make some infringers stop in their tracks, but it does not address the motivations behind why there are infringers. Of course, not all those infringing in Japan are associated with fansubs and scanlations, but those groups should be considered because of the lucrative potential markets for studios and publishers.<sup>316</sup> Instead of fighting infringing activity through legislation, the

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<sup>312</sup> See Schroff, *supra* note 149, at 438 (“[T]here is a significant time delay between the Japanese and its international releases which is filled by the fans. In response, there is an increasingly strong drive to have simulcasting for Anime and simultaneous publishing for Manga . . . . Rights holders have therefore addressed fan translations by meeting the fans’ demand . . . . However, significant gaps remain and with it, the translation communities continue to thrive.”).

<sup>313</sup> See *id.* (“Since time is of the essence, most of these distributions are digital and rely on the same closed environment approach . . . . Translations now stay closer to the original, explaining foreign terms . . . .”).

<sup>314</sup> See Stigler, *supra* note 234, at 526 (“The goal of enforcement, let us assume, is to achieve that degree of compliance with the rule of prescribed (or proscribed) behavior that the society believes it can afford.”); Henderson, *supra* note 246, at 37 (“[I]n the light of experience and common sense, upon what factors their [commodities’] price seems mainly to depend? Two factors spring to mind at once; their cost of production and their usefulness.”). In the context of increased punishments, the cost of production would equate the expected punishment for providing hyperlinks. See Stigler, *supra* note 234, at 527 (“The offender is deterred by the expected punishment, which is (as a first approximation) the probability of punishment times the punishment . . . .”).

<sup>315</sup> See Masuda et al., *supra* note 37 (“Considering the growth rate of the overseas market in the past years, it was more likely that the overseas market overtook the domestic market [for anime] in 2018.”).

<sup>316</sup> See *id.* Based on Japanese animation market trends in the broad sense, in 2018, overseas animation revenues were over 1 billion yen. *Id.* This number could likely be much higher if studios and publishers fully realized the potential of overseas markets and captured them.

industries should find a new way to profit from their goods utilizing similar methods as the infringers. For instance, they should provide more accurate translations of anime and manga at the same time, or soon after release in Japan, without adapting the content for foreign audiences, especially if the series is not targeted to children, through free or low-fee sites.

#### IV. FURTHER SOLUTIONS

The Japanese Copyright Amendment provides traditional content providers greater protections through increased punishment for providing hyperlinks to pirated content and downloading that content.<sup>317</sup> Despite this effort, there will be serious challenges facing content owners in ensuring that the Amendment works to their satisfaction.<sup>318</sup> Also, there are a number of alternatives that could combat the problems of piracy and decreased returns in the anime and manga industries, while profiting from the expanding overseas markets.<sup>319</sup> If Japan implements a fair use doctrine similar to that of the U.S., it may provide protection for fansubs and scanlations, but only if they are sufficiently transformative.<sup>320</sup> Consequently, the best option for traditional content providers would be to increase the legal channels by which international fans can access anime and manga in a more timely manner through simulcasts<sup>321</sup> and simulpubs.<sup>322</sup>

##### A. *A U.S. Model of Fair Use Would be Ineffective*

Some scholars have suggested that Japan adopt a fair use doctrine akin to the U.S.'s in order to combat the apparent market failure with translations and overseas markets.<sup>323</sup> Before diving into a four

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<sup>317</sup> See *supra* Section II.B.

<sup>318</sup> See *supra* Section III.

<sup>319</sup> See *infra* Section IV.A and Section IV.B.

<sup>320</sup> See *infra* Section IV.A.

<sup>321</sup> Simulcasts refer to simultaneous release of translated anime for streaming with the release of the original Japanese version. See *Simulcast Calendar*, *supra* note 45.

<sup>322</sup> See *infra* Section IV.B. Simulpubs refer to the simultaneous publishing of translated manga with the release of the original Japanese version. See *About*, *supra* note 281.

<sup>323</sup> See, e.g., Rembert-Lang, *supra* note 138, at 26–29 (arguing that fansubs would be classified as fair use).

factor analysis, these scholars should recall that “[f]air use is the last refuge of a copyright infringer,”<sup>324</sup> and that fair use does not denote a right to use, but rather a defense to infringing use.<sup>325</sup> It is as if these scholars are analogizing to the old adage, “it is best to ask for forgiveness than for permission.” Even so, direct translations would not be considered fair use.

### 1. PURPOSE AND CHARACTER OF THE USE

For this factor, courts look at whether the new work serves a commercial or educational purpose and whether the new use is transformative when compared to the underlying work.<sup>326</sup> Commercial use weighs against a finding of fair use, according to the U.S. Supreme Court’s decision in *Sony Corp. of America v. Universal Studios, Inc.*<sup>327</sup> After *Campbell v. Acuff-Rose Music, Inc.*,<sup>328</sup> the transformative nature of the new work became synonymous with Factor One, and ultimately, fair use.<sup>329</sup> The *Campbell* test requires a court to consider “whether the new work merely ‘supersede[s] the objects’ of the original creation, or instead adds something new, with a further purpose or different character, altering the first with

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<sup>324</sup> Matthew Africa, *The Misuse of Licensing Evidence in Fair Use Analysis: New Technologies, New Markets, and the Courts*, 88 CALIF. L. REV. 1145, 1152 (2000).

<sup>325</sup> See 17 U.S.C. § 107 (“[T]he fair use of a copyrighted work, . . . is not an infringement of copyright.”).

<sup>326</sup> *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1269 (11th Cir. 2001).

<sup>327</sup> 464 U.S. 417, 449 (1984).

<sup>328</sup> 510 U.S. 569, 579 (1994).

<sup>329</sup> See *Cariou v. Prince*, 714 F.3d 694, 706 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 618 (2013) (“The law imposes no requirement that a work comment on the original or its author in order to be considered transformative, . . . Instead, as the Supreme Court as well as decisions from our court have emphasized, to qualify as a fair use, a new work generally must alter the original with ‘new expression, meaning, or message.’” (quoting *Campbell*, 510 U.S. at 579)); see also Kim J. Landsman, *Does Cariou v. Prince Represent the Apogee or Burn-Out of Transformativity in Fair Use Jurisprudence? A Plea for a Neo-Traditional Approach*, 24 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 321, 343 (2014) (“The opinion engaged in the requisite balancing of the four statutory factors, but its conclusion that the uses were transformative enough in twenty-five of the works inexorably led to the determination that all factors favoring the plaintiff did not matter as much and to the ultimate conclusion of fair use.”).

new expression, meaning, or message . . . .”<sup>330</sup> According to the *Campbell* analysis, transformative works “lie at the heart” of the fair use analysis and “the more transformative the new work, the less will be the significance of other factors, like commercialism . . . .”<sup>331</sup> However, commercial purpose does not defeat a highly transformative use and commercial profits do not preclude a finding of fair use.<sup>332</sup>

Generally, fansubs and scanlations are not sold for profit,<sup>333</sup> but websites hosting fan-translated and pirated material frequently use advertisements as revenue.<sup>334</sup> Fansubs and scanlations would likely be deemed to have a commercial purpose because the infringing translator and host website would be profiting from advertising revenues.<sup>335</sup> It follows that the more hits on the websites, the more revenues the website will earn. Moreover, if the infringing use was exploitative, meaning the sole reason why people would visit the website is to view the fansub or scanlation, then the commercial nature of the use weighs more heavily against a finding of fair use.<sup>336</sup> On the other hand, if the use is highly transformative and not exploitative, then the commercial nature of the use is superseded by the transformative use, favoring a finding of fair use.<sup>337</sup> Fan-translated work on a hosting website would be considered exploitative because the sole reason why someone would go to the website is to view the infringing content. As further discussed below, fansubs and scanlations would not be transformative, so the infringing use would be

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<sup>330</sup> *Campbell*, 510 U.S. at 579 (internal citations omitted).

<sup>331</sup> *Id.*

<sup>332</sup> *Id.* at 584 (“Accordingly, the mere fact that a use is educational and not for profit does not insulate it from a finding of infringement, any more than the commercial character of a use bars a finding of fairness.”).

<sup>333</sup> See Rembert-Lang, *supra* note 138, at 22 (“Selling fansub translations is frowned upon in the fansubbing community and is considered bootlegging.”).

<sup>334</sup> See Ernesto Van der Sar, *Pirate Sites Generate \$111 Million in Ad Revenue a Year*, TORRENTFREAK (Oct. 5, 2017), <https://torrentfreak.com/pirate-sites-generate-111-million-in-ad-revenue-a-year-171005/> (“The study, carried out by Ernst and Young, reveals that the top 672 piracy sites still generate plenty of revenue. A whopping \$111 million per year, to be precise.”).

<sup>335</sup> See *Perfect 10, Inc. v. Amazon.com*, 508 F.3d 1146, 1166 (9th Cir. 2007).

<sup>336</sup> *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818 (9th Cir. 2003).

<sup>337</sup> See *Perfect 10, Inc.*, 508 F.3d at 1166 (declining to place considerable weight on Google’s AdSense revenues when considering the commercial nature of Google’s use of the Perfect 10 photos as thumbnails).

deemed having a commercial purpose, weighing against a finding of fair use.<sup>338</sup>

As for educational purposes, one could argue that manga and anime provide overseas audiences with insight into Japanese culture, values, customs, and language.<sup>339</sup> Nonetheless, this argument is tenuous at best and likely overshadowed by the entertainment value.

The primary focus then is on whether and to what extent scanlations supersede the objects of the original. They do not. Fan-translations serve the same purpose as the original manga, just in a different language for a new audience.<sup>340</sup> This is especially true with direct translations where the original speech remains unaltered, but now in a new language.<sup>341</sup> There is an argument, albeit a weak one, that “idiomatic translations,” those that “focus on the communication of the source language in a natural way or through slang for the subbing audience,” would be transformative because it requires the translator to internalize the Japanese phrases and rewrite it in the target language, while conveying the same message.<sup>342</sup> Nevertheless, through abstraction, even idiomatic translations serve the same

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<sup>338</sup> Cf. *Kelly*, 336 F.3d at 818.

<sup>339</sup> Rembert-Lang, *supra* note 138, at 27 (“Insight into other cultures, languages and experiences provide opportunities for educational learning opportunities, and should also be considered when examining the first factor analysis of a fair use defense in favor of fansub translations.”).

<sup>340</sup> See *Nihon Keizai Shimbun, Inc. v. Comline Bus. Data*, 98 Civ. 641 DLC, 1998 U.S. Dist. LEXIS 6806, at \*39 (S.D.N.Y. Apr. 14, 1998) (“That is, in merely taking excerpts from Nihon’s articles and rendering the most effective translation of those excerpts, or rearranging the order of the very same words and phrases, Comline in no way ‘adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.’” (quoting *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 112 (2d Cir. 1998))).

<sup>341</sup> See *id.* (“To the contrary, Comline reports the very same news as does Nihon, in highly similar terms, and with almost exactly the same expression and structure.”).

<sup>342</sup> Rembert-Lang, *supra* note 138, at 26; see also *Davisson*, *supra* note 89 (“My job as a translator is to take all that context and language and reshape it into something that reads as if it was originally written in English . . . . Along with translating the words on the page, I add context and create bridge sentences that might not have been in the original. I fill in gaps that would have been apparent to Japanese readers. And sometimes I rewrite things entirely.”).

basic purpose as the original work;<sup>343</sup> thus, Factor One weighs against a finding of fair use.

## 2. NATURE OF THE COPYRIGHTED WORK AND AMOUNT AND SUBSTANTIALITY OF THE USED PORTION

Factors Two and Three have become overshadowed by the transformative purpose from Factor One, and thus, they are almost unimportant for the fair use analysis.<sup>344</sup> For the second factor, a court must determine “where the copyrighted work falls on the ‘hierarchy of copyright protection in which original, creative works are afforded greater protection than derivative works or factual compilations.’”<sup>345</sup> Courts must further consider whether the original work is a “core concern of copyright protection.”<sup>346</sup> The underlying manga is original and creative, and therefore afforded greater protection, favoring a finding against fair use.<sup>347</sup>

For Factor Three, a court considers the quantitative and qualitative aspects of the copyrighted work taken by the subsequent work<sup>348</sup> and whether the taking was reasonable in relation to the subsequent work’s purpose.<sup>349</sup> Even if the copyrighted work is

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<sup>343</sup> See *Nihon Keizai Shimbun, Inc. v. Comline Bus. Data*, 166 F.3d 65, 72 (2d Cir. 1999) (holding that Factor One weighed against a finding of fair use because the direct translations were not transformative and did not add anything new to the work); *Landsman*, *supra* note 329, at 360 (“Literary translation is, at its best, a retelling of a story in a different language that requires a rare combination of skill and creativity to communicate meanings not only across languages but also across cultures.”).

<sup>344</sup> See *Cariou v. Prince*, 714 F.3d 694, 709–10 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 618 (2013) (devoting only a small discussion for factors two and three after having decided that the work was transformative); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 612 (2d Cir. 2006) (“We recognize, . . . that the second factor may be of limited usefulness where the creative work of art is being used for a transformative purpose.”).

<sup>345</sup> Jaime E. Muscar, Comment, *A Winner is Who? Fair Use and the Online Distribution of Manga and Video Game Fan Translations*, VAND. J. ENT. & TECH. L. 223, 244 (2006) (quoting *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1271 (11th Cir. 2001)).

<sup>346</sup> *Bill Graham Archives*, 448 F.3d at 612.

<sup>347</sup> See, e.g., *Ringgold v. Black Ent. Television, Inc.*, 126 F.3d 70, 78, 80 (finding the second factor favored plaintiff Ringgold because of “the imaginative nature of her artwork”).

<sup>348</sup> See 17 U.S.C. § 107(3).

<sup>349</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994).

reproduced in its entirety, it does not preclude a finding of fair use if the subsequent work serves a substantially different purpose.<sup>350</sup> For scanlations and fansubs, they require using the entirety of the underlying work in order to effectively convey the original message of the manga or anime.<sup>351</sup> If a court were to determine that the scanlations and fansubs were transformative, then it is likely that the fan's use of the underlying work in its entirety would not preclude this factor weighing in favor of the fan-translated work.<sup>352</sup> Nevertheless, the complete copy of the underlying manga or anime would cause a court to weigh this factor against a finding of fair use because it is unlikely that the fan-translated works would be considered transformative.<sup>353</sup>

### 3. EFFECT OF THE USE UPON THE POTENTIAL MARKET FOR OR VALUE OF THE COPYRIGHTED WORK

Factor Four requires courts to consider the extent of market harm by the individual infringer as well as “whether unrestricted and widespread conduct of the sort . . . would result in a substantially adverse impact on the *potential* market’ for the original.”<sup>354</sup> This factor is especially difficult when considering “new ways to reproduce, manipulate, and distribute copyrighted works.”<sup>355</sup> The statute’s language, using “‘potential,’ indicates that copyright law recognizes injuries to some markets that the owner has not entered,” but it does not state exactly how much protection should be given.<sup>356</sup> For perfect market substitutes, harm to the potential market is clear;

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<sup>350</sup> See *Bill Graham Archives*, 448 F.3d at 613 (finding that, even though DK reproduced the copyrighted Grateful Dead posters in their entirety, because DK’s reproduction was for historical purposes and in a reduced size, limiting their visual impact, DK’s use constituted fair use).

<sup>351</sup> See *supra* Section I.D.

<sup>352</sup> See *Bill Graham Archives*, 448 F.3d at 613 (holding that the reproductions of the copyrighted Grateful Dead posters in their entirety weighed in favor of a finding of fair use because of their transformative purpose).

<sup>353</sup> *Cf. id.*

<sup>354</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994) (emphasis added) (internal citation omitted).

<sup>355</sup> *Africa*, *supra* note 324, at 1148.

<sup>356</sup> *Id.* at 1155.

however, the picture becomes muddier when the subsequent work adds value to the original.<sup>357</sup>

*Campbell* provides a guidepost: “[t]he market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop.”<sup>358</sup> Further, a court must consider if the subsequent work would harm a market for derivative works that the creator of the original or a licensee *would* develop.<sup>359</sup> If a certain firm did not provide translated works to North America or it is not a market that the firm would reasonably pursue, then it follows that the firm could not claim that a person’s translated work caused any harm to the potential market for its copyrighted work during that time period.<sup>360</sup> Certain overseas markets not yet tapped by Japanese studios and publishers could be a potential market if the studio or publisher could provide evidence of the existence or viability of that market.<sup>361</sup> Therefore, fan-translations would affect the potential market for original translations in those markets, which favors a finding against fair use.<sup>362</sup>

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<sup>357</sup> *Id.* at 1156; *see, e.g.*, *Castle Rock Ent., Inc. v. Carol Publ’g Group, Inc.*, 150 F.3d 132 (2d Cir. 1998) (holding that the *Seinfeld Aptitude Test*, a trivia quiz book based on fictional facts, characters, and plots from the television series *Seinfeld*, was not fair use even though it was not a perfect market substitute for the show).

<sup>358</sup> *Campbell*, 510 U.S. at 592.

<sup>359</sup> *See id.*

<sup>360</sup> *See* *Cambridge Univ. Press v. Becker*, 371 F. Supp. 3d 1218, 1276 (N.D. Ga. 2016) (“As no digital market for the work existed in 2009, and Defendants’ use caused no harm to the potential market for the copyrighted book, it follows that Defendants’ unpaid use that year did not cause any harm to the potential market for the copyrighted work.”). “Plaintiffs can overcome the presumption of no market by going forward with evidence of license availability and also with evidence of a potential, future market.” *Id.* at 1234.

<sup>361</sup> *See id.* at 1276–77 (holding that because there existed no digital market for the work at the time of infringement, there was no harm to the potential market for the work and no evidence to support a future market).

<sup>362</sup> *See, e.g.*, *Castle Rock Ent., Inc.*, 150 F.3d at 145 (“Unlike parody, criticism, scholarship, news reporting, or other transformative uses, *The SAT [Seinfeld Aptitude Test]* substitutes for a derivative market that a television program copyright owner such as Castle Rock ‘would in general develop or license others to develop.’”). Translations are a derivative market that Japanese studios and publishers have developed and licensed others to develop. *See* Michael Basile, *FUNimation v. Aniplex: How Anime Licensing Works*, GIQUE (Feb. 16, 2016),

Overall, it is unlikely that translated versions of manga and anime would be eligible for the fair use defense because they are not transformative works. Moreover, each utilizes the entirety of the original work, and it would usurp a potential market for the copyright owner of the original or a derivative work. Therefore, even if Japan decided to adopt a fair use doctrine like that of the U.S. in an attempt to legitimize certain fan activities, such as doujinshi, direct translations through scanlations and fansubs would not be considered fair use and would still be infringing.

### B. *If You Don't Like It, License It*

One seemingly obvious answer to the problem of fansubs and scanlations is to allow licensing of the works for overseas distribution and translation. Targeting differences in consumer segments through “dual distribution channels may be an effective way to reduce piracy.”<sup>363</sup> For instance, a manga publisher could utilize an online distribution channel with a reasonable upfront price, or offer the content for free, profiting from ad-based revenue, to capture those consumers who are accustomed to online piracy.<sup>364</sup> For those who are not particularly familiar with finding illegal streams of content, licensing it to Crunchyroll or Netflix would suit those consumers better.<sup>365</sup> Therefore, the way that publisher Kodansha distributes English manga through “digital-firsts”<sup>366</sup> and simulpubs ensures that it keep its overseas consumers happy while making sure to

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<https://gique.media/explained/funimation-vs-aniplex-anime-licensing-works/> (“Since [companies like FUNimation, Viz Media, and Sentai Filmworks] are unable to actually buy the rights to the shows, these western companies are instead allowed to license the anime, essentially renting the property rights, for steaming and distribution in the West.”).

<sup>363</sup> M. Khouja & H.K. Rajagopalan, *Can Piracy Lead to Higher Prices in the Music and Motion Picture Industries?*, 60 J. OPERATIONAL RSCH. SOC'Y 372, 381 (2009).

<sup>364</sup> *See id.* (discussing how content creators in the music industry could use Apple iTunes to target those consumers who are familiar with music piracy and traditional brick-and-mortar stores to sell CDs to those who are less familiar with Internet piracy).

<sup>365</sup> *See id.*

<sup>366</sup> Digital-firsts refer to the digital publishing of official English translations of titles that would not have been released otherwise. *About, supra* note 281.

capture as much of the profits as possible.<sup>367</sup> To better target the different consumer segments, publishers and studios could license the distribution and translation of their manga and anime. Professors Yasuhiro Arai and Shinya Kinukawa posit that “[w]hen the derivative markets further grow, the copyright holder will have a stronger incentive to license the copyrighted work because of potentially larger licensing revenues from the derivative markets.”<sup>368</sup> The derivative market for translations of manga and anime have grown significantly as its popularity has grown overseas.<sup>369</sup> Yet, only very recently have large licensing schemes been put into place.<sup>370</sup>

Professor Rebecca Tushnet discusses content owners’ attempts to expand licensing in order to circumvent the fair use defense, specifically the fourth factor.<sup>371</sup> Courts that have ruled in favor of the content owners stated that a licensing scheme was not dispositive for the fourth factor, but they still treated it as dispositive anyway.<sup>372</sup> However, this has been undercut by cases that only apply licensing schemes to those markets that are ““traditional, reasonable, or likely to be developed.””<sup>373</sup> Tushnet examines three examples of recent innovations to licensing arrangements: “Getty Images’ new free embedding of millions of its photos, YouTube’s Content ID, and Amazon’s Kindle Worlds . . . .”<sup>374</sup> She demonstrates that there are downsides to large-scale licensing regimes like “pervasive

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<sup>367</sup> *Id.* (“There’s an ocean of manga out there (or in Japan, anyway). Digital publishing offers us a way to release official English translations of many titles that we [might] not otherwise. It’s a way for us to offer a more diverse and robust library of manga through official channels and see what you like. So definitely let us know what’s grabbing you—or not, as the case may be.”).

<sup>368</sup> Yasuhiro Arai & Shinya Kinukawa, *Copyright Infringement as User Innovation*, 38 J. CULTURAL ECON. 131, 143 (2014).

<sup>369</sup> *See supra* Sections I.A and Part I.B.

<sup>370</sup> *Id.*

<sup>371</sup> Rebecca Tushnet, *All of This Has Happened Before and All of This Will Happen Again: Innovation in Copyright Licensing*, 29 BERKELEY TECH. L.J. 1447, 1449 (2014).

<sup>372</sup> *Id.*; *see, e.g.*, *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 930 (2d Cir. 1994) (holding that the licensing scheme in place for academic articles and journals, mainly through the Copyright Clearance Center, presented infringers with a market to obtain licenses to create their own copies, and therefore, potential licensing revenues should be considered).

<sup>373</sup> Tushnet, *supra* note 371, at 1449 (quoting *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1179 (9th Cir. 2013)).

<sup>374</sup> *Id.* at 1451.

suppression of expression, further threats to privacy and to the individual and social benefits of noncommercialized communities, and constrained competition.”<sup>375</sup> The companies used by Tushnet, however, had content licensing based through a single access point: Getty Images, YouTube (through Google), and Kindle (through Amazon).<sup>376</sup> There is no one source for manga and anime that can use a wide-scale, overarching licensing regime (yet) and thus, may not succumb to the pitfalls about which Tushnet is concerned.<sup>377</sup>

Nonetheless, there *should* be a single source through which consumers can purchase or access translated manga or anime. The Manga Anime Guardians Project<sup>378</sup> (“MAGP”) “consists of 15 Manga publishers and Anime companies in Japan” and was formed in July 2013 in response to a proposal by the Ministry of Economy, Trade, and Industry (“METI”).<sup>379</sup> MAGP’s objectives were to (1) remove pirated copies of manga and anime; (2) launch a website with links to legitimate manga and anime; and (3) promote the reading and watching of legitimate content.<sup>380</sup> With this single source for legitimate manga and anime, it is possible that Japan’s METI or CODA, through MAGP, could implement a large-scale licensing

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<sup>375</sup> *Id.* at 1482–83.

<sup>376</sup> *See, e.g., id.* at 1457–58 (describing how copyright owners that register their audio or video with YouTube are benefitted from Google’s Content ID because it scans uploaded videos for matches to registered videos and audios, giving the copyright owner the option to “run ads on the uploaded video without the permission of the uploader,” block uploads with that content, or block only full uploads).

<sup>377</sup> *See id.* at 1482–83 (“The always-license model inevitably entails pervasive suppression of expression, further threats to privacy and to the individual and social benefits of noncommercialized communities, and constrained competition.”).

<sup>378</sup> *See The Launch of the Manga-Anime Guardians Project: To Bring “Genuine Creations” to Manga-Anime Fans*, CODA (Jul. 30, 2014), <http://www.coda-cj.jp/news/detail.php?id=43> (detailing the project, its purpose, and next steps).

<sup>379</sup> Press Release, Ministry of Economy, Trade, and Industry, Protect Japanese Manga and Anime, and Create Quality Future Products: STOP ! Piracy “MAG PROJECT” Launched! (July 30, 2014), [https://www.meti.go.jp/english/press/2014/pdf/0730\\_01a.pdf](https://www.meti.go.jp/english/press/2014/pdf/0730_01a.pdf) [hereinafter METI Press Release]. Some committee members include Tezuka Productions Co., Ltd. (as explained in Section I, this is the Godfather of Manga’s production company), Studio Ghibli, Inc., Bandi Namco Games Inc., Shueisha Inc. (the same one involved in the case against Hoshinoromi from Section I.C.3), and Toei Animation Co., Ltd. *Id.*

<sup>380</sup> *Id.* MAGP has since created the website with legitimate anime and manga, and it can be found here: <http://Manga-Anime-here.com/> (in Japanese).

regime similar to those in Tushnet's study.<sup>381</sup> One difficulty with MAGP's website was that its content catalogue was not very inclusive, with many popular series missing.<sup>382</sup> Now, however, if an individual tried to enter the website, they would be shocked to discover that the domain is no longer dedicated to legitimate sources of anime and manga, but is devoted to "online and in-store casino games,"<sup>383</sup> with a particular focus on anime-based casino games.<sup>384</sup>

Therefore, the first step towards widespread licensing would be to re-establish MAGP's website as dedicated specifically to combat the piracy of manga and anime by providing a large catalogue of manga and anime that is continuously updated with popular series. This would provide an alternative to stepping into the pirate domain for popular titles or new episodes/chapters, thus reducing the leak from the industries. Moreover, in the U.S., expanding licensing has "the potential to make the 'effect on the market' factor of fair use analysis weigh inevitably in favor of a plaintiff because a copyright owner operating a licensing scheme could simply assert that it would have received a licensing fee had the defendant not made its unauthorized use."<sup>385</sup> Thus, if Japan were to ever institute a fair use doctrine, like the U.S., the licensing regime would serve to protect the copyright holders in the fair use analysis.<sup>386</sup>

Moreover, Japanese studios and publishers could simply make obtaining licenses simpler for fans. If MAGP could generate enough excitement from content owners for their project so that large

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<sup>381</sup> See, e.g., Tushnet, *supra* note 371, at 1467–69 (introducing the licensing arrangements and operations of Kindle Worlds through Amazon's website).

<sup>382</sup> Emily Schendl, Note, *Japanese Anime and Manga Copyright Reform*, 15 WASH. U. GLOB. STUD. L. REV. 631, 648 (2016).

<sup>383</sup> MANGA ANIME HERE, <http://manga-anime-here.com/> (last visited Jan. 4, 2021).

<sup>384</sup> There are slot machines based on the hugely popular anime, manga, and live action movie *Ghost in the Shell*. *Shimabukuro Takara, Top 8 Anime Casino Games*, MANGA ANIME HERE (Dec. 25, 2020), <http://manga-anime-here.com/%e3%83%96%e3%83%ad%e3%82%b0/>.

<sup>385</sup> Tushnet, *supra* note 371, 1449; see, e.g., *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 929–31 (2d Cir. 1994) (holding that the presence of a licensing scheme was not dispositive but continuing as though it was).

<sup>386</sup> See *Am. Geophysical Union*, 60 F.3d at 930 (holding that, because of the presence of a functional licensing regime, the photocopying of an individual academic article was not fair use).

industry players joined,<sup>387</sup> then it should be possible to develop a website like the previous MAGP website for licensing manga and anime. Further, there could be a subsection of the website devoted to fan translations of different languages, which are first accepted by the production companies before posting in lieu of formal licensing. Through the addition of a fan-based translation subsection, fans could access the manga and anime faster through legal channels instead of resorting to illegal sites for content. Additionally, by having the Japanese production companies accept the translations, MAGP could ensure that the translations are correct and capture the message of the original, an important issue for publishers and studios. Ultimately, licensing may not be a perfect solution to fansubs, scanlations, and their distributions. Notwithstanding licensing's shortcomings, under the studios' and publishers' control, it would allow them to profit from these activities while satisfying the overseas demand and mitigating online piracy.

In this solution exists an interesting problem: if licensing would allow studios and publishers to profit from overseas markets, why are firms not doing it? It seems irrational to have profit-oriented firms decide to not attempt to enter a lucrative market.<sup>388</sup> It may be that these firms are not entirely profit-oriented. Studios and publishers create, own, and distribute creative works; thus, their inactivity with regards to licensing could be grounded in concerns about artistic vision and control.<sup>389</sup> A licensing regime would likely decrease the content holder's control over its product, and even more so when a translation is involved.<sup>390</sup> This studio or publisher may not have enough comprehension of the translated language to be able to ensure that artistic vision remains intact or it may not have enough

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<sup>387</sup> See METI Press Release, *supra* note 379 (listing the content owners on the Committee and those who endorsed and supported the original MAGP in 2013).

<sup>388</sup> See Masuda et al., *supra* note 37.

<sup>389</sup> This can be further evidenced by the heightened importance of moral rights in the Japanese Copyright Act, especially compared to the U.S. Compare Japanese Copyright Act, *supra* note 176, art. 18–20 with 17 U.S.C. § 106A (1990).

<sup>390</sup> See Brienza, *supra* note 283, at 391–92 (“[T]he transnational coordination required the loss of control for one or more parties, and last but not least the intensive labor required, together make simultaneous lay down appealing to publishers both in Japan and abroad primarily for potential short-cycle frontlist titles.”). “Simultaneous lay down” refers to “the release of a new book at the same time everywhere.” *Id.* at 390.

resources to do so. Moreover, translating and any further monitoring of the content may cost the firm more than it might earn in overseas income, especially for smaller studios and publishers that have limited works for niche markets.<sup>391</sup> Firms may not necessarily lack the information necessary to determine which titles to license because the Internet provides these firms ample data regarding the demands of the overseas markets. However, the monitoring costs of overseas demands through a variety of avenues, including social media forums, are too costly for some firms to undertake. Further research is required to better understand and respond to this licensing puzzle.

#### CONCLUSION

While the Internet has allowed the world to become smaller and more connected, anime and manga are still defined by tangible borders.<sup>392</sup> Despite the constantly increasing demand for anime and manga by overseas consumers, Japanese studios and publishers have been slow to capture these markets, with large names in streaming coming to the realization of their value only in the last few years.<sup>393</sup> Therefore, fans have relied on one another to access the content they desperately desire, even when it means breaking the law.<sup>394</sup> Although attempting to foster and grow the communities surrounding manga and anime, fan activities are also bleeding the industries, with the possibility of killing them.<sup>395</sup>

Instead of recognizing and seizing these expansive markets and hungry consumers, Japanese manga publishers have turned to the National Diet to pass expanded copyright protections for manga piracy.<sup>396</sup> There will be many problems with enforcing this Japanese Copyright Amendment, mainly because of the technology involved. If plaintiff-studios or publishers cannot accurately identify those who are uploading hyperlinks or downloading pirated material, then the Japanese Copyright Amendment will be a failed attempt at trying

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<sup>391</sup> *See id.* at 392.

<sup>392</sup> *See supra* Section I.

<sup>393</sup> *See supra* Section I.A and Section I.B.

<sup>394</sup> *See supra* Section I.D.

<sup>395</sup> *See supra* Section I.C.3.

<sup>396</sup> *See supra* Section II.B.2.

to protect a precious industry.<sup>397</sup> Further, there is a delicate balance that publishers must find between combatting the piracy of their content and the remind effect<sup>398</sup> that piracy has on completed series.<sup>399</sup>

Traditional content providers should be looking outside of copyright protection in order to combat the piracy of their works, especially through licensing. Licensing would allow the content providers to maintain control over the works, and thereby profit from them, while foreign fans would be able to access the content without turning to pirated sources.<sup>400</sup> With increased licensing and a single-source distributor, like MAGP's former website, it would be possible to satisfy both the consumers' desire for manga and anime, without risking criminal penalties for illegal downloads<sup>401</sup> and the traditional content providers' need for profits.<sup>402</sup> The Internet has permanently shifted the balance of power to the point where not even copyright could shift it back. It is time that the industries took a new approach to save themselves.

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<sup>397</sup> See *supra* Section III.A.

<sup>398</sup> See *supra* Section III.B.

<sup>399</sup> See *id.*

<sup>400</sup> See *supra* Section IV.B.

<sup>401</sup> See *supra* Section II.B.2.ii.

<sup>402</sup> See *supra* Section I.C.3.