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Reinforcing the Tower of Babel: The Impact of Copyright Law on Fansubbing

Keywords

translations, copyright law

Reinforcing the Tower of Babel: The Impact of Copyright Law on Fansubbing

by LaToya D. Rembert-Lang, J.D.¹

I. INTRODUCTION

Everyone has ingrained in their memory one line of dialogue from a television program or movie that they consider as their favorite and will remember for the rest of their lives. For me, no line has seemed to eclipse: “There’s no such thing in this world as a perfect man and a perfect woman, just a perfect love built together by an imperfect man and imperfect woman.”² This line of dialogue was not spoken in any American television program or movie, but rather, in a Korean television drama. Through the proliferation of “fansubbing,” I was able to experience and reflect on the dialogue that I now consider as one of my favorite lines of all time. This cross-cultural experience transformed my perception of world culture and broadened my horizons into a whole new realm of media and entertainment.

I am not alone in my cross-cultural experience. Chinese fans transfixed by American television shows such as “Lost” and “C.S.I.,” download the American television programs and create Chinese fansub translations in order to experience another world view on entertainment.³ Copyright law, however, threatens to distort the ability to have such a cross-cultural experience. Enforcement and illegalities established in copyright law negate the ability for individuals to have multicultural viewing experiences in foreign television programs and movies worldwide in a limited market or where no market is being exploited.

This comment examines fansubbing and the implications that copyright law has on its efforts as an endeavor. Part II provides an overview of fansubbing, its practice and its ethos. Part III discusses translations as a copyrighted work, including the history and development under copyright law. Part

IV analyzes the complexities of fansubbing practices under existing copyright law through legal analysis and how the doctrine of fair use can be utilized to protect fansubbing practices under copyright law. Part V discusses access to foreign television programs and movies, the cultural benefits of exposure to foreign works, technology implications on fansubbing, and suggests a model for reforming the perception of fansubbing. Part VI provides in closing that copyright law protects the needs of artists⁴, but does little to protect the needs of consumers. Consumers desire fan-based activities and need exposure and access to other views and dimensions on world culture. Existing copyright law limits the progression of societal access to foreign television programs and movies through fansubbing activities.

II. THE FANSUBBING PHENOMENON

Fan culture appears in different mediums of expression.⁵ Among the most noted and recognized in fan culture is fanfiction.⁶ At the opposing end of the fan culture genre is fansubbing. Fansubbing, otherwise known as fan-subtitled,⁷ is defined primarily as “an unauthorized translation . . . in the form of subtitles.”⁸ The definition, however, as it appears on many websites of fansub groups is “a video . . . subtitled by fans.”⁹ There are two main styles of fansub translations: softsubs and hardsubs.

Softsubs are simple text files “whose format depends on the exact subtitle encoding software to

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2. *Soulmate*, Korean Drama, Munhwa Broadcasting Corporation (MBC), 2006.

3. Howard W. French, *Chinese Tech Buffs Slake Thirst for U.S. TV Shows*, N.Y. Times, Aug. 9, 2006, available at http://www.nytimes.com/2006/08/09/world/asia/09china.html?_r=1&pagewanted=print.

4. This comment will use the term “artist”, which includes references to authors and copyright owners.

5. See Rebecca Tushnet, *Payment in Credit: Copyright Law and Subcultural Creativity*, 70 SPG LAW & CONTEMP. PROBS. 135 (2007).

6. See *id.* at 140. Fanfictions are “fan-created stories and artwork focusing on the relationship between the main characters.”

7. Sean Leonard, *Celebrating Two Decade of Unlawful Progress: Fan Distribution, Proselytization Commons, and the Explosive Growth of Japanese Animation*, 12 UCLA ENT. L. REV. 189, 196 (2005).

8. Tonakai Anime and Manga, *Mini Dictionary*, <http://anime.tonakaistudio.com/dictionary.html> (last visited August 29, 2010).

9. See WithS2 Written in the Heavens Subbing Squad, <http://withs2.com/fansubbing> (last visited October 14, 2010). See also SARS Fansubs <http://www.sars-fansubs.com/faqs#2> (last visited August 29, 2010).

be used for [interpretation].”¹⁰ They are not encoded in the video stream of a television program or movie and as a result they can be turned on or off and edited based on preferences.¹¹ Softsubs are often in plain text form and only provide a translation of the program or the movie. Hardsubs are “video containers where subtitles have been encoded into the video stream.”¹² The hardsub format will often have graphic fonts that change color to reflect the opening and closing credits, dialogue of different characters, song lyrics and cultural context.

The practice of fansubbing is conducted by either an individual, a group of individuals collectively known as fansub groups,¹³ or through community translations teams. Fansub groups are composed of persons who work together focused on the translation of one language for multiple foreign television programs and movies. Fansub groups recruit staff composed of volunteers who serve in various roles as either: “Coordinators,” “Translators,” “Timers,” “Editors,” and “Spot Translators.”¹⁴ A community translation team offers the opportunity for any individual to assist with providing translations and is formed based around a common interest in a specific television program or movie. An individual can assist with contributions to either add translations or to improve upon existing translations to a television program or movie. Community translation teams also work with an individual or team, designated as the Moderator, over a channel for a specified television program or movie in order to police what fansub translations are provided. Additional persons on community translation teams, known as Segmenters, provide proper fansub translation timings to the dialogue provided in the television program or movie. In community translations, unlike fansub groups, fans who view the television program or movie are often invited to provide a running commentary and interactive dialogue on the work.¹⁵

10. Anime Mikome, *What is a Fansub? Hardsubs and Softsubs*, <http://anime.mikomi.org/wiki/WhatIsFansub> (last visited October 14, 2010).

11. Bloomsburg University Manga and Anime Club, *Fansub*, <http://www.bumac.org/index.php?page=fansub> (last visited October 14, 2010)

12. *Id.*

13. The use of the term “fansub group” will also include references to the categories of individuals conducting fansub translations and community translation teams, where explicit mentions of both categories are not provided.

14. See WithS2, *supra* note 9.

15. See Viikii, www.viikii.net (last visited October 14, 2010).

The fansubbing process is intense. At least eleven critical steps must occur before a final version of either the television program or movie is released. These steps include: “(1) Raw acquisition,” “(2) Translation,” “(3) Rough Timing,” “(4) Edit,” “(5) Fine Timing,” “(6) Translation check,” “(7) Typesetting,” “(8) Quality Control,” “(9) Encoding,” “(10) Distribution,” and “(11) Release.”¹⁶ The amount of prep time for each step can range from a few hours to up to twelve hours depending on the role and task.¹⁷

A. *The Fansubbing Ethos*

“Fansub[translations] are made for fans, by fans, and not for commercial purposes.”¹⁸ No profits are involved in fansubbing.¹⁹ Many fansub translations boldly display within the translated text of the television program or movie that it is not for sale. Selling fansub translations is frowned upon in the fansubbing community and is considered bootlegging.²⁰ There are, however, live streaming websites and torrent sites that have fansub translations of television programs and movies and accept donations as gifts for running their websites.²¹

The inherent goal in fansubbing is to get access

[viikii.net](http://www.viikii.net) is an example of a community translation environment and also evidence of the actual running commentary across the video screen in all of the television programs and movies that are available. Many use the commentary section as a means of voicing appreciation for the diligence of the community translation team in producing fast subs of the work (which is often much faster than the fansub group versions) and also share in the angst and anticipation of viewing another episode of their favorite television program or movie.

16. See Infusion Fansub Newbie Guide, <http://www.lolikon.org/guide.html> (last visited August 29, 2010). The Raw Acquisition-get the video of the episode that you want; Translation-Episode is watched a few times to translate into understandable English; Rough Timing-Insert dialogue lines into script form via timing; Edit-The editor of the script of dialogue; Fine Timing-Make sure that subtitles are removed during scene changes; Typesetting-Choosing what fonts are appropriate for dialogue; Quality Control-For typos, spelling mistakes, etc.; Encoding-Video files with the final subtitles applied (this is for a hardsub format); Distribution-Given to a group of individuals who then share with others; Release-Distributors prepare the file for viewers to download and obtain.

17. *Id.*

18. Bloomsburg University Manga and Anime Club, *supra* note 11.

19. See WithS2, *supra* note 9.

20. See Anime News Network, *Fansub*, <http://www.animenewsnetwork.com/encyclopedia/lexicon.php?id=63> (last visited October 14, 2010).

21. See Aja-Aja, www.aja-aja.com (last visited October 14, 2010) (Membership is only accessible with a donation that is made based on the discretion of the website moderator); www.d-addicts.com (last visited October 14, 2010) (No donation is required to access the torrents).

and increase exposure to unlicensed foreign television programs and movies.²² The majority of fansubbers only work with unlicensed foreign television programs and movies that have not aired in their native country. Fansubbers understand that once licensing occurs, the distribution of the fansub translations for the television program or movie will cease.²³ Once a domestic company licenses a title, fansubbers request that all previous distributions of the fansub translations for the foreign television program or movie cease, be destroyed and permanently deleted, and if they enjoyed the television program or movie to go out and buy it.²⁴ Exceptions are made, however, to continue the fansub translation if the licensed product will be heavily edited or localized.²⁵

The fansubbing process for distribution has occurred in various formats over the years.²⁶ Present technology for fansub distribution occurs through a process known as digisubbing. A digisub, known otherwise as a “digital fansub,”²⁷ is an “unauthorized translation . . . in the form of a subtitled digital video, usually distributed over a computer network in the form of a DivX-coded avi-file.”²⁸ Digisubs are distributed through either BitTorrent or Internet Relay Chat Direct Client Connection (IRC DCC) servers.²⁹ There is a discord among fansub groups over the use

of digisubs.³⁰ The ability of fansub groups to create of cheap, high quality digital subs, which are produced by some fansub groups, leads many to feel that there is no incentive to purchase a licensed copy of the television program or movie, if available.³¹

Understanding the basics of fansubbing are important; yet, the principles surrounding rights and protection to the translation of works have cultivated a perception that has contributed to the current dynamic for fansubbing practices in copyright law.

III. THE LOST AND FOUND IN TRANSLATION

The first known work subject to any form of translation was the Bible, which was translated in 1522.³² Prior to 1886 there was no formal copyright protection for the rights of artists, including rights to translations of their works. The implementation of the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) in 1886 defined the rights artists had to their translations.³³ The 1908 amendment of the Berne Convention formally included the right of translation in the reproduction right.³⁴ Article 8 of the Berne Convention expressly provides: “Artists of literary and artistic works . . . shall enjoy the exclusive right of making and of authorizing the translation of their works throughout the term of protection of their rights in original works.”³⁵ Literary and artistic works is expansively defined under the Berne Convention.³⁶ Early copyright law in Europe and the United States did not adopt the international interpretation on the rights of artists and did not

22. Astronerdboy, *What is a Fansub?*, Anime Mikome, <http://anime.mikomi.org/wiki/WhatsFansub> (last visited October 14, 2010);. *See also*, *Noypi Fansubs*, http://fansub.d-addicts.com/Noypi_Fansubs (last visited October 14, 2010).

23. *Id.*

24. Andy Kent, *Japanese Animation Legality and Ethics FAQ*, Ethical Considerations, <http://avatarhr.tripod.com/legalfaq.html> (last visited October 14, 2010).

25. Bloomsburg University Manga and Anime Club, *supra* note 11. Localized is a concept that will be discussed in Part IV of this comment.

26. Fansubbing distribution began with Anime and occurred by copying episodes on videotapes in low quality formats. Early fansubbers would rely on local residents to record and send copies of various anime on VHS tapes to various anime clubs. The anime clubs would provide fansub translations of the anime on VHS tapes and then provide them to fansub distributors which would sell them to fans. VHS quality was poor, expensive and difficult to reproduce. Fansubbing distribution evolved with the creation of the computer and the ability to use “high speed Internet access, desktop video editing and DVD ripping.” The modern process for fansub distribution is now almost exclusively done by digisubbing. *See Evolution of the fansub*, Fansub, Allexperts.com, <http://en.allexperts.com/e/f/fa/fansub.htm> (last visited October 14, 2010). *See also*, Leonard, *supra* note 7, at 198-200.

27. Everything2, *digisub*, <http://everything2.com/title/digisub> (last visited October 14, 2010).

28. Tonakai Anime and Manga, *Mini Dictionary*, <http://anime.tonakaistudio.com/dictionary.html> (last visited October 14, 2010).

29. *Id.*

30. *See* Bloomsburg University Manga and Anime Club, *supra* note 9.

31. *Id.* Digisubbing can produce HD quality sub translations, which in appearance are equivalent as the original television shows or movies.

32. Eric Ketzan, *Rebuilding Babel: Copyright and the Future of Online Machine Translation*, 9 TUL. J. TECH. & INTELL. PROP. 205, 207 (2007).

33. Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, as revised by Paris on July 24, 1971 and amended in 1979, S. Treaty Doc. No. 99-27 (1986), *available at* http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P138_25087 [hereinafter Berne Convention]. *See also* Ketzan, *supra* note 32, at 208.

34. Berne Convention, *supra* note 33, Ketzan, *supra* note 32 at 209.

35. Berne Convention, *supra* note 33.

36. *Id.* (stating that literary and artistic works includes “dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works. . . . works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works. . . . works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.”)

provide translation rights.

Early European copyright law during the eighteenth and nineteenth century permitted translations of artists' works without any formal permission requirements on use.³⁷ Case law supported the right, and the ability, to make translations of artists' works. In the English Chancery court case of *Burnett v. Chetwood*, the court held that the publication of a translation under the then current copyright statute, the Statute of Anne, was not unlawful.³⁸ In the King's Bench case of *Millar v. Taylor*, the court recognized the translation of a work is a separate entity that specifically creates a new work.³⁹ Artists were not granted rights in translations of their works in the United Kingdom until the Copyright Act 1911.⁴⁰ Early copyright law in the United States shared the original English interpretation that the translation right in an artist's work was a separate entity, essentially creating a new work. The case of *Stowe v. Thomas* held the translation of "Uncle Tom's Cabin" was not a copy under copyright law, and no infringement was found.⁴¹ The perception that translations were not infringements on copyrights, however, would not remain. In the Copyright Act of 1870, Congress explicitly overturned the *Stowe* ruling by providing that "[a]uthors may reserve the right to dramatize or to translate their own works."⁴² This right was further enhanced under the Copyright Act of 1909.⁴³ Under the current copyright law, the

37. *Id.*

38. 35 Eng. Rep. 1008-9 (1721). In an interesting form of dicta, the court noted the time and commitment involved in translating a work by stating: "[t]hat though a translation might not be the same with the reprinting of the original, on account that the translator has bestowed his care and pains upon it, and so [is] not within the prohibition of the act. . . ." *Id.*

39. 98 Eng. Rep. 201, 201 (via Ketzan) (1769) (explicitly providing that "[c]ertainly *bona fide imitations, translations, and abridgements* are different; and in respect of the property, may be considered as *new works*: but *colourable and fraudulent variations* will not do.").

40. Copyright Act, 1911, 1&2 Geo.V., c. 46.

41. 23 F. Cas. 201 (C.C.E.D.Pa. 1853). Harriet Beecher Stowe, as author, brought a claim for infringement against a publisher for an unauthorized German translation of her work, "Uncle Tom's Cabin." The court stated: "The claim of literary property, therefore, after publication, cannot be in the ideas, sentiments, or the creations, of the imagination of the poet or novelist as disserved from the language, idiom, style, or the outward semblance and exhibition of them. His exclusive property in the creation of his mind, cannot be vested in the author as abstractions, but only in the concrete form which he has given them, and the language in which he has clothed them." *Id.*

42. Copyright Act of 1870, § 86 16 Stat. 198 (1870).

43. Copyright Act of 1909, §1(b) 35 Stat. 1075 (1909). ("To translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work . . .")

Copyright Act of 1976, an author's right to translation now has protection as a "derivative work."⁴⁴

The historical interpretation of translation rights for artists shifted from valuing the labor and effort expended in providing translations, to an enhancement of statutory protection for an artist's exclusive right to translate their works. This new form of protection for artists lacks a perception of a proper balance between protecting artists' rights and recognizing the social value of translations for certain works. Consideration of balancing test between the translation rights of artists and the social value of translations is needed to comprehend the role and importance of fansubbing.

IV. CHALLENGING THE LEGALITIES OF COPYRIGHT

Under existing copyright law, fansubbing is illegal and viewed as "illicit access to art without properly compensating artists,"⁴⁵ because many individuals view fansubs without ever purchasing the work of the author. If the work is never licensed, the artist never receives any profit from viewing the work. Some fansub groups have acknowledged it is illegal.⁴⁶ Within the first few hours of airing, fans download the television program or movie, and have begun the translating process for public distribution worldwide. Fansubbing is a violation of both International and United States copyright law.⁴⁷

A. *The International Perspective*

Laws governing international copyright law include: The Berne Convention, as discussed in Part III,⁴⁸ the Uruguay Round Agreements Act

44. Copyright Act of 1976, Pub. L. 94-553, §102, 90 Stat. 2541 (encompassing §103: "The subject matter of copyright as specified by Section 102 includes compilations and derivative works. . . ." A "derivative work" is defined as "a work based upon one or more preexisting works, such as a translation . . .").

45. *Ask John: What are Fansubs?*, NewsBlog, AnimeNation, <http://www.animation.net/blog/2001/12/27/ask-john-what-are-fansubs/> (last visited October 14, 2010).

46. See lafnear, *Dattebayo FAQ*, dattebayo fansubs, <http://dattebayo.com/faq.aspx> (last visited October 14, 2010).

"Downloading fansubs, regardless of their license status is illegal in United States and various other countries. United States Code Title 17 does not allow distribution of copyrighted work by anyone except the copyright owner, and while others may claim that subtitling and distributing . . . fits under the 'fair use' exception, it most certainly does not."

47. See, e.g. Copyright Act of 1976 at §102. See also Berne Convention, *supra* note 33. The original work of authors is taken and translated in their entirety by fansub groups without deference to the author's translation rights.

48. Berne Convention, *supra* note 33.

(URAA),⁴⁹ and the Universal Copyright Convention (UCC).⁵⁰ The Berne Convention and the URAA require copyright protection of a copyrighted work to be extended within a party state or provided to a party national of a state.⁵¹ Article V of the UCC explicitly declares the right of translation to artists by stating: “[c]opyright shall include the exclusive right of the author to make, publish, and authorize the making and publication of translations of works. . . .”⁵² Beyond translation rights, international laws provide a type of protection that is available only in a limited respect in the United States - moral rights.

Moral rights consist of a “bundle of rights,”⁵³ with the most central rights being attribution and integrity.⁵⁴ Attribution is the right to claim authorship in a work⁵⁵ and “[t]he right to prevent others from falsely attributing to him the authorship of a work that he has not in fact written.”⁵⁶ Integrity is defined as the artist’s right “to prevent any deforming or mutilating changes to his work”;⁵⁷ the public presentation of which would “injure [the author’s] honor or reputation.”⁵⁸ Moral rights were included in the Berne Convention in 1928.⁵⁹

49. The Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994).

50. Universal Copyright Convention, revised, Paris, July 24, 1971, 6 U.S.T. 2731, 216 U.N.T.S. 132 (1952). *available at* http://portal.unesco.org/en/ev.php-URL_ID=15381&URL_DO=DO_TOPIC&URL_SECTION=201.html.

51. Sean Kirkpatrick, *Like Holding a Bird: What the Prevalence of Fansubbing Can Teach Us About the Use of Strategic Selective Copyright Enforcement*, 21 TEMP. ENVTL. L. & TECH. J. 131, 137-138 (2006).

52. Universal Copyright Convention, *supra* note 52.

53. Cassandra Spangler, *The Integrity Right of an MP3: How the Introduction of Moral Rights into U.S. Law Can Help Combat Illegal Peer-to-Peer Music File Sharing*, 39 SETON HALL L. REV. 1299, 1302 (2009) (quoting Kathryn A. Kelley, *Moral Rights and the First Amendment: Putting Honor Before Free Speech*, 11 U. MIAMI ENT. & SPORTS L. REV. 211, 211 (1994)).

54. Spangler, *supra* note 55, at 1302.

55. *Id.*

56. Joshua M. Daniels, “Lost in Translation”: *Anime, Moral Rights, and Market Failure*, 88 B.U. L. REV. 709, 714 (2008) (quoting 3 Melville B. Nimmer, *Nimmer on Copyright*, §8D.01[A] (2007)).

57. Spangler, *supra* note 55, at 1302 (quoting *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 81 (2d Cir. 1995)).

58. Spangler, *supra* note 55, at 1302 (quoting Brian T. McCartney, “Creepings” and “Glimmers” of *Moral Rights of Artists in American Copyright Law*, 6 UCLA ENT. L. REV. 35, 38 (1998)).

59. Berne Convention, *supra* note 33. Article 6bis provides: “Independently of an author’s economic rights, and even after the transfer of 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.”

International law enhances the challenges of fansubbers. Authors have significant rights and protection to control the creation of translations for their works. The rights of artists to control the quality and appearance of translations of their works should not diminish. International law, however, provides artists the ability to impose significant time delays in making a determination whether a work will be translated, particularly in the areas of television programs and movies. As a result, the translation rights of artists should be limited in scope depending on the type of work that is created.

B. The United States Perspective

Under copyright law an artist’s rights are violated when one commits an act of copyright infringement. In order for an artist to succeed on a copyright infringement claim in the United States, the artist must prove: (1) the ownership of a valid copyright, (2) an unauthorized copy of the work, and (3) the allegedly infringed work is substantially similar to the work.⁶⁰ A “derivative work” is defined as “a work based upon one or more preexisting works, such as a translation.”⁶¹ For infringement, a “derivative work must be based upon a copyrighted work.”⁶² Similar to the Berne Convention, United States copyright law provides limited moral rights protection under the Visual Artists Rights Act of 1990 (VARA).⁶³ Under VARA, the rights of attribution and integrity are applied only to works of visual art.⁶⁴ Moral rights in the United States are limited to protect only works of visual art. Fansub translations are not considered a work of visual art and are not entitled to protection under moral rights. As a result, United States copyright law protects an artist’s right to prevent fansub translations of their works based on the derivative works right. The doctrine of fair use is used as a defense to copyright infringement. As described in Title 17 of the Copyright Act of 1976, an infringing use is considered “fair use” if the work is

60. David J. Meiselman and Jeffrey I. Carton, *Successfully Defending Copyright Infringement Suits*, The Metropolitan Corporate Counsel, Feb. 1, 2009, <http://www.metrocorpocounsel.com/current.php?artType=view&artMonth=February&artYear=2009&EntryNo=9369> (last visited October 14, 2010).

61. Copyright Act of 1976, 17 U.S.C. § 101 (1976).

62. Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L. J. 651, 660 (1997), <http://www.tushnet.com/legalfictions.pdf> (last visited August 29, 2010).

63. Visual Artists Rights Act, 17 U.S.C. § 106A (1990).

64. *See id.*; *See also* Joshua M. Daniels “Lost in Translation”: *Anime, Moral Rights, and Market Failure*, 88 B.U. L. REV. 709, 716-718 (2008).

used for “criticism, comment, news reporting, teaching . . . scholarship, or research . . .”⁶⁵ Factors examined to determine whether fair use is appropriate include:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.⁶⁶

The penumbra of the fansubbing practice in copyright law is whether the practice is an infringement of an artist’s derivative rights or is a valid defense under the fair use doctrine. In order to make a valid determination of the implications of fansubbing in United States copyright law, fair use analysis must be applied. In analyzing each factor, if fansubbing qualifies as a defense under fair use, then the practice should not be considered an infringement of derivative rights.

1. Examining Factor One: Purpose and Character of the Work

In *Sony Corp. of America v. Universal City Studios, Inc.*, the Supreme Court held that it is presumptively unfair “to make copies for a commercial or profitmaking purpose.”⁶⁷ The Court further expounded, in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, that commercialism is a “separate factor that tends to weigh against a finding of fair use.”⁶⁸ In *Campbell v. Acuff-Rose Music, Inc.*, the Court added the additional element to the first factor of fair use by examining the transformative nature of the new work.⁶⁹

In applying the first factor of fair use to fansubbing, according to the fansubbing ethos, fansub translations are not commercial in nature.⁷⁰ As stated in Part II, distribution of fansub translations are free and often provide notice that the fansub translations are not to be sold or used for any commercial purpose.⁷¹ Due to the nature of fansub translations, commercialism is not a concern. Therefore, analyzing the first factor of fair use relies on determining whether fansub translations are transformative in nature.

Language translations are composed of multiple interpretations and styles.⁷² While there are no steadfast rules as to what type of translation should be used for any given text, different forms can be chosen based on the following: “the purpose of the translation, the translation team itself, [and] the receptor language audience for whom the translation is intended.”⁷³ Language translations are either “literal translations” which translate the forms “the grammatical and lexical forms of the source language”; or in the case of fansub translations, “idiomatic translations,”⁷⁴ which focus on the communication of the source language in a natural way or through slang for the subbing audience.⁷⁵ The “idiomatic translations” style of fansub translations can create a translation that is a transformative work of its own. This potential transformative nature of fansub translations requires that fansub translations should be examined on a case-by-case basis, rather than generalizing the genre as infringing activity. A majority of fansub groups offer more than dialogue translation to provide cultural and language reference notes in the fansub translations.⁷⁶ Within television program or movies, references are provided to explain the context

65. Copyright Act of 1976, 17 U.S.C. § 107 (1976).

66. *Id.*

67. 464 U.S. 417, 449 (1984).

68. 471 U.S. 539, 562 (1985).

69. 510 U.S. 569, 579 (1994) (“The central purpose of this investigation is to see . . . whether the new work merely ‘supersede[s] the objects’ of the original creation, or instead adds something new, with further purpose or different character, altering the first with new expression, meaning or message; it asks in other words, whether and to what extent the new work is

‘transformative’.”).

70. See Bloomsburg University Manga and Anime Club, *supra* note 11.

71. *Id.*

72. *Types of Translations*, SIL International formerly Summer Institute of Linguistics, <http://www.sil.org/translation/trtypes.htm> (last visited October 14, 2010).

73. *Id.*

74. *Id.*

75. Wang Song, *U.S. TV Dramas Hot in China*, Chinatoday, March 2008, <http://www.tominchina.com/main/archives/17> (last visited October 14, 2010, link no longer active) (stating that, in China, there are presently three main fansub groups where “unlike standard professional translations which are blunt in expression, the versions by the subtitling groups are full of the flavor of life. They use everyday expressions and local idioms . . . They also usually add some annotation to the dialogue, explaining cultural references like the names of American celebrities.”).

76. See *Appendix-Fansub Samples*, http://www.law.ed.ac.uk/ahrc/script-ed/vol2-4/otaku_appendix.pdf (last visited October 14, 2010).

of certain dialogue, attractions and venues, or provide an expanded reference to a general colloquialism that is frequently used within the local culture or community.⁷⁷ Fansub translations that include reference and context should be recognized as having a transformative nature.

a. Cultural and Educational Benefits of Exposure

The first factor of fair use also provides a defense when the use is for “nonprofit educational purposes.”⁷⁸ To reinforce the non-commercial element, fansub translations are nonprofit.⁷⁹ Moreover, beyond its appeal as a form of entertainment, exposure to television programs and movies are educational. The learning process by viewing television programs and movies is informal, but effective.⁸⁰ Television programs provide an informal explicit learning setting where one can learn about “love, sex and relationships.”⁸¹ Educational opportunities from viewing foreign television shows and movie assist with learning the language by “[improving one’s] listening skills,”⁸² “[picking] up vocabulary and colloquial phrases”⁸³ and allowing an individual to “immerse [themselves] in a language.”⁸⁴ Viewers are able to learn cultural norms and values and discover the importance of daily interaction with respect to relationships.⁸⁵ As an example, when viewing Japanese television programs, one can learn of socio-economic status and their relationships by examining the role of Bento boxes.⁸⁶

Viewing foreign television programs and movies can also improve diplomatic relationships and influence

the creation of new works.⁸⁷ The Korean wave of programs has helped fuel relationships with Japan with an emphasis on tourism and relationships.⁸⁸ Japanese television programs have influenced Hong Kong television programs in terms of “story and plot, music, photography, [and] dialogue.”⁸⁹ Taiwanese television programs are influenced by Western culture and other parts of Asia.⁹⁰

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. The transformative nature and the educational value of foreign television programs and movies should warrant a closer examination of its application to the first factor analysis of fair use to determine its relevance in United States copyright law.

2. Examining Factor Two: The Nature of the Copyrighted Work

The second factor of a fair use analysis is the nature of a copyrighted work.⁹¹ In examining the nature of a copyrighted work, courts have considered: “(1) the scope of originality of the work; (2) the informative nature of the work; (3) the intended use of the original and the copy; (4) the availability of the work; and (5) whether the work is published or unpublished.”⁹² A work is considered original if it is “independently created by the author [and] possesses at least some minimal degree of creativity.”⁹³ The Supreme Court provides that creative works “are closer to the core of intended copyright protection.”⁹⁴ A creative work is protected under copyright law if it exists in tangible form and meets the minimal threshold requirement for creativity.⁹⁵

77. See *Basic Translator Guide*, Anime-Wiki.org, http://en.anime-wiki.org/wiki/Basic_Translator_Guide (last visited October 14, 2010).

78. Copyright Act of 1976, 17 U.S.C. §107 (1) (1976).

79. See WithS2, *supra* note 9.

80. Huei Lan Wang, PhD, *The Impact of Foreign Programs on Taiwanese Youth and the Significant Role of Media Education*, CCSE Asian Culture and History, 162 (2009), <http://www.ccsenet.org/journal/index.php/ach/article/viewFile/3084/2852> (last visited October 14, 2010).

81. *Id.*

82. *Can TV Help You Learn a Foreign Language?* <http://www.alsintl.com/blog/foreign-language-tv/> (last visited October 14, 2010).

83. *Id.*

84. *Id.*

85. Huei, *supra* note 83.

86. *Post-Bubble Culture, Closer to “Real Japan”?*, Symbolism in Japanese Dramas, <http://postbubbleculture.blogspot.com/2010/03/28/closer-to-real-japan-symbolism-in-japanese-dramas/> (last visited October 14, 2010). A bento box is a form of lunchbox in Japanese culture.

87. See Sakagami Yasuko, *TV Drama Triggers a “Korean Wave” in Japan*, Nipponia, Dec. 15, 2004, <http://web-japan.org/nipponia/nipponia31/en/trend/index.html> (last visited October 10, 2010).

88. *Id.*

89. Benjamin Wai-Ming Ng, *The Indigenization of Japanese Elements in Hong Kong TV Dramas*, New Zealand Journal of Asian Studies, 7, 3 at 154 (2005) available at http://www.nzasia.org.nz/downloads/NZJAS-Dec05/7_2_8.pdf (last visited May 13, 2010).

90. Huei Lan Wang, *supra* note 83.

91. Copyright Act of 1976, 17 U.S.C. §107(2) (1976).

92. Scott M. Martin, Jonathan Zavin, *Photocopying and the Doctrine of Fair Use Under the Copyright Act*, 317 PLI/Pat 601, 609-610 (1991) (discussing the courts various interpretations of the second fair use factor).

93. *Feist Publ’n, Inc. v. Rural Tel. Serv.*, 499 U.S. 340, 345 (1991).

94. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 585 (1994).

95. See 17 U.S.C. §102(a) (2006) (providing that “[c]opyright protection subsists . . . in original works of authorship fixed in any

Since creative works receive copyright protection, the use of creative works will be scrutinized against the fair use doctrine. The creativity of television programs and movies, as tangible creations made by artists, meet the minimum threshold requirements to receive protection as creative works.⁹⁶ An analysis of whether a work is creative does not resolve an examination of the second fair use factor; a consideration of access to the creative work must also be applied. Access to foreign television programs and movies are limited in the market. Due to market access limitations, the fansub translations of this creative work should receive some form of consideration under the fair use doctrine.

The goal in fansubbing is to bring awareness to, and get licensing for, various foreign television programs and movies.⁹⁷ Fansub groups also desire to “include programs that are commercially unviable.”⁹⁸ Commercial viability is based in large part on the production year, market appeal, and the timing component in waiting to have access to the television program or movie.⁹⁹ Unless an individual is located in a particular country and/or understands the language of a country, it is very difficult to obtain access to, or become aware of, what television programs or movies are airing in the region without some assistance. As a result of these geographical and linguistic obstacles, access to foreign television programs and movies usually occurs in one of three formats: VCDs, DVDs or the Internet.¹⁰⁰

Access to foreign television programs and movies are also limited by the process of localization. Through localization—a process of censorship, visual transformations of the foreign work, and/or dubbing—access to the original creative work is limited.¹⁰¹ The lost access to the original creative work also serves as a catalyst for fansubbing.

As a creative work, foreign television programs and movies are entitled to copyright protection. The scope

tangible medium of expression”). Therefore, creative works are required to be tangible. *See also Feist* at 346 (describing the creative requirement of a work, “the requisite level of creativity is extremely low; even a slight amount will suffice.” Works must “possess some creative spark, ‘no matter how crude, humble or obvious’ it might be.”

96. *See id.*

97. *See Astronerdboy, supra* note 22.

98. *Fansub*, Fact-Archive, <http://fact-archive.com/encyclopedia/Fansub> (last visited October 14, 2010).

99. *Id.*

100. Wang Song, *supra* note 78.

101. *See Localization v. Censorship: Fansubbing and the Search for a “Real Japan”*, <http://postbubbleculture.blogspot.com/2010/03/13/localization-vs-censorship/> (last visited October 14, 2010).

of the protection and use of creative works should be as analyzed in accordance to market access under the fair use doctrine. Fansubbing provides an opportunity to view creative works of limited access and warrants further review under copyright law.

3. Examining Factor Three: Amount and Substantiality of the Portion Used

The Supreme Court expounded upon the third factor as an examination of “the quantity and value of the materials used”¹⁰² as a test of reasonableness in purpose and relation to the copying done.¹⁰³

Fansub groups copy the original work in its entirety. The type and quality of the fansub translations can range depending on where the television program or movie is obtained, but the full embodiment of the original work is still produced. Despite the use of the entire work, fansub groups have a distinct argument for copying the work for reasonableness purposes. The intent behind copying the entire work is for the express purpose of subtitled the original work into another language that was not provided in the original work. Fansub translations for a foreign television program or movie cannot occur without full access to the original work. For that reason, the quantity of material used and the extent of copying of that material is reasonable in light of the intended use of translation.

4. Examining Factor Four: Effect of the Use Upon the Market

The Court in *Harper* declared that the fourth factor, “effect of the use upon the potential market for or value of the copyrighted work,” is the “single most important element of fair use.”¹⁰⁴ This factor considers the original and derivative works in the context of the potential harm to the market, and also “whether unrestricted and widespread conduct . . . would result in a substantially adverse impact on the potential market.”¹⁰⁵

The market effect of fansub translations can be examined from a variety of perspectives. Viewing each perspective as the total correlation of the market may shed some light on the role and impact of fansub translations versus licensed foreign television programs and movies in the market. The analysis for analyzing market effect requires an understanding of the market’s

102. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994) (quoting *Folsom v. Marsh*, 9 F. Cas 342, 348 (1841)).

103. *Id.* at 586.

104. *Id.*

105. *Id.* at 585 (quoting *Nimmer* §13.05[A][4]).

impact on the local country of origin of the work, the factors impacting the marketing and development of a licensed television program or movie, and the factors affecting the fansub translation itself.

First, the impact on the market from a local perspective, where the television program or movie originally airs, must be examined. Fansub groups obtain a large portion of television shows and movies through local broadcasts.¹⁰⁶ Local broadcasts display commercial advertisements during each episode.¹⁰⁷ Fansub groups will often remove the commercial advertisements from the television programs and movies.¹⁰⁸ Production costs of foreign television programs and movies are extensive and impact the overall budgets of producers based on sponsorship opportunities.¹⁰⁹ For example, in South Korea, advertisers and producers work together on product placements in television programs through sponsorships.¹¹⁰ If a sponsor is not happy with product placements, producers are required to pay a penalty.¹¹¹ Similarly, in Japan, sponsorship is a prominent aspect of all television programs. The names of the sponsors appear throughout the airing of each television program. Removing commercial advertisements can cause harm to the local market. Due to the high production costs of producing television programs and movies, sponsors may have a reduced incentive to produce commercial advertisements if the local viewership market is limited and fansub groups remove the opportunity for exposure abroad, even if it the product or service is not accessible in a foreign market. The reduced incentives and increased costs of foreign television programs and movies can impact development, future distribution and access.

Second, from a worldwide consumer perspective, the market is based on the creation of licensed television programs and movies. Since the current market of available foreign licensed television programs and movies are limited, the question becomes what information is used to determine which particular

television programs and movies should be licensed, and to which particular regions? Determining which programs and movies get licensed, and in which regions, may be based on the preexisting popularity brought to the program or movie by fansub translations, the pop culture surrounding the program or movie, or the market demand of a license request for a particular program or movie based on the request of fans.¹¹²

Third, the overall quality of a fansub translation versus the overall quality of a translation of a licensed television program or movie also has an impact on the market and its direct implications to licensed versions of the work. Factors used to compare the quality between a fansub translation and licensed television program or movie translation includes: miscellaneous features, localization, “type/quality of translation,” subbing techniques and style, “sound work,” “picture quality,” and timing of release.¹¹³ Each factor supports the notion that fansub groups are in competition with other fansub groups within the fansubbing world, and also in competition with licensed distributors.

a. Miscellaneous Features

As discussed earlier in this Part IV, fansub groups often provide cultural and translation notes in fansub translations as a miscellaneous feature not offered in licensed translated versions of the work.¹¹⁴ A licensed version, however, has the ability to offer additional incentives such as “commentary tracks, still photos . . . interviews, and collectible packaging.”¹¹⁵ In a market dynamic, depending on the desires of fans, the features

106. Kirkpatrick, *supra* note 53, at 144.

107. *Id.*

108. *See Id.* at 144.

109. *See also Is Television Going the Way of Other Obsolete Media?*, JapanToday, April 2010, <http://www.japantoday.com/category/kuchikomi/view/is-television-going-the-way-of-other-obsolete-media> (last visited October 14, 2010).

110. *See* Limb Jae-un, *Paying Off Stars Through Advertising*, JoongAng Daily, May 2005, <http://www.hancinema.net/paying-off-the-stars-through-advertising-2868.html> (last visited October 14, 2010).

111. *Id.*

112. For instance, the exclusive licensed distributor and publisher of Korean television drama programming in North America, YA Entertainment LLC, has shared through its CEO, Tom Larsen, that its decision to license television dramas in North America is based on: “[R]equests we receive from Korean TV drama ‘fans’ via email. We collect all the email requests, count them up, and rank them. When we receive a certain number of requests, our licensing team approaches the applicable TV production studios in Korea to get the USA distribution rights. From time to time a production studio will ask us to release some of their other titles as part of a ‘package deal’. So in those small cases we also release titles that are not necessarily driven by customer requests.” E-mail from Tom Larsen, CEO YA Entertainment, to LaToya Lang, (April 13, 2010, 03:39 P.M. EST) (on file with author).

113. Jordan S. Hatcher, *Of Otakus and Fansubs: A Critical Look at Anime Online in Light of Current Issues in Copyright Law*, in Script-ed, 529 (2005), <http://www.law.ed.ac.uk/ahrc/SCRIPT-ed/vol2-4/hatcher.asp> (last visited August 29, 2010).

114. *See also id.* at 529.

115. *Id.* at 528.

provided by the fansub translation and the licensed translation are valuable miscellaneous features that offer a perspective as to market preferences, especially when considering the costs associated with a licensed television program or movie.

b. Localization

Localization by licensed distributors can also have a market effect on preference for fansub translations versus licensed television programs and movies. The editing of the original foreign television program or movie to adapt to “cultural differences” or “broadcast rules or to obtain a favorable television content rating”¹¹⁶ leads fans to desire fansub translations as opposed to the licensed content of television programs and movies.¹¹⁷

c. Type/Quality of Translation

The various quality and types of translations may also impact the market. Fansub groups and licensed translations may differ in translation styles or idioms used. As a result, fans may have a preference and may migrate to a preferred style.¹¹⁸

d. Subbing Techniques and Style

As discussed in Part II, fansub groups use different font styles, graphic techniques, and cultural notes.¹¹⁹ Fansub groups also gain notoriety for their work these groups may work to trademark and develop some special techniques in this area.¹²⁰ Such techniques may impact market trends, as there may be a preference for such characteristics and styles to distinguish tone and has direct implications on the development of licensed translation versions of television programs and movies.

e. Sound Work

The quality of sound in a television program or movie may have a higher production value in a licensed television work rather than a version provided by fansub groups since access is not limited to copies from television.¹²¹ Foreign television programs and movies also produce original music soundtracks and scores—which are desired by many fans. In a market dynamic, the licensed television program or movie may have an advantage over fansub translations when sound quality

for both picture and musical composition are applied.

f. Picture Quality

Fansub translations and licensed television programs and movies can both produce DVD quality standard merchandise. Licensed distributors have more resources to reflect the quality of not only the picture, but the translations as well.¹²² The overall picture quality enhances the marketability of a television program or movie. Licensed distributors can have the ability to create direct implications on market dynamics; however, the extent of influence is limited to only licensed television programs or movies that are produced.

g. Timing of Release

The timing of release of a foreign television program or movie can impact a market dynamic. Licensed distributors may delay the release date of a foreign work by several months after it has aired in the country of origin.¹²³ Through fansub translations, fans are able to see the television program or movie within a few hours or days after it has originally aired in its country of origin.¹²⁴ A delay in timing, when there is a high demand for the program or movie, can impact its marketability when other means of accessibility is available. Another market dynamic to consider is the relationship of artists and distributors, their respective bargaining powers and the language constraints. Distributors of foreign works are often held to the requirements of artists, sponsors, actors and actresses and their staff.¹²⁵ Moreover, distributors may not be allowed to engage in negotiations regarding foreign marketability since the entertainment industry in some countries is based on contract clauses among the agents of actresses and actors or channels in which they work.¹²⁶ The unequal bargaining power of foreign distributors presents difficulty in participating in the global market with respect to their television programs and movies, and has direct implications on access to their television programs and movies abroad. When considering market dynamics, one must also consider the language barriers of foreign artists and distributors. Artists and distributors may not be fluent or conversant

116. *Id.* at 529.

117. *Id.*

118. *Id.*

119. *See also id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. Daniels, *supra* note 58 at 718-727.

126. *See also* Daniels, *supra* note 58, at 718-727 (specifically discussing the market failure implications on behalf of the author due to lack of information, bargaining power and negotiation dynamics, and externalities on behalf of third parties).

in the language of other countries. As a result, they are unaware of the popularity of their particular program and are often unskilled in proper translation techniques that would allow them to better negotiate the licenses of use for their television programs and movies. Interaction within the global market without the intercession of a translator presents difficulties and creates disadvantages and non-incentives for participation by foreign authors and distributors.

The market analysis of fair use suggests that fansub translations can challenge the marketability of licensed television programs and movies since there are certain aspects that present areas of direct competition. There are, however, certain components of licensed television programs and movies that are not easily duplicated by fansub translations. The quality and various styles of translations may also have implications on what substantially impacts the market. Considering the various factors and elements presented, based on the market analysis and the varying degrees of fansub translations, the marketability of a fansub translation should be determined on an individual case-by-case basis, and given greater deference if there is no accessible licensed version of the television program or movie. The examination may not warrant a fair use in favor of fansub translations, but the analysis should consider whether a feasible alternative of the television program or movie exists beyond a fansub translation.

5. Fair Use: In Conclusion

There are valid arguments for allowing fansub translations under the doctrine of fair use. Because fair use analysis is a copyright infringement defense, fansub translations may overcome this hurdle under copyright law, but cannot overcome other legal considerations with respect to the right to translation and the right to reproduction for authors.¹²⁷ Fansubbing is a form of piracy activity. The act of illegally downloading television programs or movies through digisubbing or distributing through peer-to-peer (P2P) networking files or in other formats is considered “the next big craze in illegal file sharing.”¹²⁸ Inevitably, the activities of many fansub groups will always be at the opposing end of compliance with copyright law. Therefore, a new model of reform must be introduced to protect the needs of fansub groups while balancing and protecting the interests of artists.

127. Hatcher, *supra* note 116 at 526.

128. Karla S. Lambert, *Unflagging Television Piracy: How Piracy of Japanese Television Programming in East Asia Portends Failure for a U.S. Broadcast Flag*, 84 TEX. L. REV. 1317 (2006).

V. THE SOCIETAL MODEL FOR COPYRIGHT REFORM

Fansub translations are not the only source of access to foreign television programs and movies. Licensed television programs and movies are in the market. Accessibility of a particular television program and movie, however, will vary depending on region, and will lag in timely distribution compared to the country in which it originally aired. Delayed access to foreign television programs and movies reduces the value of an interactive world dialogue that is provided by fansub translations. Although fansubbing does not fit within the modern interpretation of copyright law as an acceptable practice, the continuing expansion of language tools and increasing access to television programs and movies will continue. This growth in global communication and access capabilities means the prevalence of fansub translations and fansub groups will not diminish.

A. Web 2.0 and Beyond: Advances in Translating Venues and Access

Progress in technology has allowed for greater ease and availability for fansub translations to expand in a variety of mediums. The advent of online machine translation tools, torrents, peer-to-peer networking technology and online streaming sites, have contributed to this growth, and will enhance its developments over time.

Machine translation is the method by which a computer translates one language into another language through a series of computer processes and procedures.¹²⁹ Technological advances have created a new method of access to methods for translating text in a variety of forms.¹³⁰ As a result of these new tools and resources, translation and accessibility to foreign works is even more prevalent. Moreover, through translation tools, fans are now able to connect with their interests on a local level, explore more background on their favorite foreign celebrities, and increase exposure to other television program or movie projects the actor or actress may be working on.

Technology standards have also increased the use of torrents through peer-to-peer networking. A

129. *Collins English Dictionary*, 6th Edition, 2003, <http://www.thefreedictionary.com/machine+translation> (last visited October 14, 2010).

130. See, e.g., *Yahoo! Babel Fish*, <http://babelfish.yahoo.com/> (last visited October 14, 2010); *Translate Now!*, <http://www.foreignword.com/Tools/transnow.htm> (last visited October 14, 2010); *Worldlingo*, http://www.worldlingo.com/en/products_services/worldlingo_translator.html (last visited October 14, 2010).

torrent is a file sent through a P2P file sharing protocol, otherwise known as BitTorrent.¹³¹ To use BitTorrent, a BitTorrent client must also be used.¹³² Online streaming sites have also made fansub translations accessible. Online streaming sites provide an alternative to downloading torrents, as individuals now have the ability to view a television program or movie from a website online. As interest in foreign television programs and movies expands, online streaming sites will continue to emerge.¹³³

A new model of fansub translations has emerged that is not considered illegal and complies with existing copyright law by obtaining appropriate permission from artists and distributors prior to its public distribution. Online streaming viewership of television programs and movies, which provide fansub translations from fansub groups, are now available.¹³⁴ Copyright law compliant websites such as, Dramafever and Crunchyroll, offer English subtitled television programs with proper legal permission.¹³⁵ The Korean Broadcasting System (KBS), which is South Korea's largest television network, has also launched an American online viewing station known as KBSWORLDi.¹³⁶ The television programs provided through KBSWORLDi are current shows in South Korea that Americans can purchase based on a point system.¹³⁷ As Dramafever, Crunchyroll and KBSWORLDi have modeled, there are ways to channel the use of technological advances that would provide protection under copyright law and allow cultural educational opportunities. A majority of fansub groups, however, are not copyright law compliant, and still engage in activity that is a violation of copyright law.

2. Carving out Protection for Fansubbing

Though a majority of fansubbing activity violates copyright law, it brings educational and global market exposure to foreign television programs and movies. The social benefits that result from fansubbing activities outweigh any of the potential damages that could emerge because of copyright infringement and should entitle the activity to some form of protection under copyright law. This form of protection, fansubbing nullification,¹³⁸ would engender market growth distribution for foreign television programs and movies where it is currently lacking from a worldwide standpoint. Fansubbing nullification provides protection for fansub groups by ignoring the activity as a violation of copyright law, and instead relies on its benefits of providing educational value and global market exposure. *Outlining Fansubbing Protection*

In order to obtain basic fansubbing protection, fansubbers must reaffirm a commitment to their ethos. Fansubbers must uphold a standard of non-commercialism, and if a television program or movie occupies the market, the fansub group must respectively remove all access to the licensed television program or movie immediately and place notifications on their website requiring consumers to destroy all copies and to support the licensed versions.

The creation of a notice of use¹³⁹ method not only ensures protection for authors, but also carves out protection for fansub groups that provide timely distribution of foreign television programs and movies. The notice of use method creates a translation right and allows fansub groups to have a form of copyright protection, yet also protects the rights of authors. The

131. See *Torrent and BitTorrent*, Techterms.com, <http://www.techterms.com/definition/torrent> (last visited October 14, 2010).

132. See *id.*

133. See, e.g., Mysoju, <http://www.mysoju.com/> (last visited May 13, 2010); Dramacrazy, <http://www.dramacrazy.net/>, (last visited August 29, 2010); Viikii, *supra* note 15.

134. See *id.*

135. See Dramafever, <http://www.dramafever.com/about.html> (last visited October 14, 2010). See also Crunchyroll, <http://www.crunchyroll.com/> (last visited October 15, 2010).

136. KBSWORLDi, http://www.kbsworldi.com/default_eng.aspx (last visited on October 14, 2010).

137. Each television program episode is allocated a certain number of points to watch, or a standard package amount to watch the entire series. Americans are able to choose how many points they want to buy based on a standard amount or based according to their television viewing preference.

138. See *Re: Anime Rants*, Derklier.com, <http://newsgroups.derkeiler.com/Archive/Rec/rec.arts.anime.misc/2009-08/msg00327.html> (last visited October 14, 2010).

139. See Nathaniel T. Noda, *Copyrights Retold: How Interpretive Rights Foster Creativity and Justify Fan-Based Activities*, 20 SETON HALL J. SPORTS & ENT. L. 131, 142 (2010) (providing a similar discussion based on "interpretive rights". "When an author places his or her original creative work in the stream of public consciousness, he or she implicitly cedes to the public certain rights of interpretation.") See also Daniels, *supra* note 58 at 726-743, (discussing an anime compulsory license); Lisa A. Zakolski, J.D., §199 *Obtaining license to publish translation*, 18 Am Jur 2d Copyright and Literary Property §199 (discusses that a contracting state of the UCC "may pass legislation providing that if an author fails to publish or authorize the publication of a translation of the author's work into the language in general use in the contracting state may obtain a nonexclusive license to publish such translation if he or she meets certain requirements"). The goal of this comment is not to require fansub groups to obtain a license, since licensing would create a cost component and legitimate fansub translations are nonprofit.

notice of use would require all fansub groups to send to television networks, producers, or artists of a respective television program or movie, a notice of use that specifies the intent to translate the prospective program or movie. The notice of use must be sent in the original language of the country of origin of television program or movie. The purpose and goal of this method is to place individuals on notice, and allow an informal right of translation. The notice of use should be sent as soon as possible upon the development of an interest in subbing the television program or movie, preferably prior to its public airing date. By having this formal notice, broadcasters, producers and artists are aware of which programs or movies are being subbed, and can evaluate the potential for licensing interests abroad.

The notice of use for a translation right can be provided to fansub groups in a variety of circumstances. For example, allowing fansub groups to have translation and downloading rights to a television program or movie until the artist chooses to provide a translation, or, the artist may choose not to provide a translation, and instead rely solely on the use of the fansub translation as the translated version of the work. Through this method, if authors, producers and television networks want to expand to the online viewing model, similar to the model utilized by Dramafever, they have tools and resources from individuals who could assist in providing quality translations services that fans enjoy.¹⁴⁰

There are arguments in opposition to this notice of use concept. The main argument opposing this concept is that the method that drives this notice of use concept of fansubbing nullification is the cause of the problem: one must blatantly disobey the canons of copyright law to comply with this theory. Moreover, carving out such an explicit exception for fansubbing may create a chilling effect on new types of media that may also want explicit protection against copyright infringement liability. Any new media type that desires to obtain protection against copyright infringement must, like fansub translations, go through the fair use analysis. Overall, the benefits of protecting a new media type, including the social considerations (educational value, cultural representation, access to the work and localization), must outweigh the potential harm against the original work.¹⁴¹

140. Dramafever uses subs that have been translated by WithS2 Fansub group.

141. See *Sony Corp. of Am. v. Universal City Studios, Inc., et al.*, 464 U.S. 417, n.40 (1984) (“Congress has plainly instructed us that fair use analysis calls for a sensitive balancing of interests.”).

VI. CONCLUSION: PIERCING THE VEIL OF TRANSLATION AND CULTURE

Copyright law takes great care in protecting the needs of the author, but does not take into account the needs of the consumer.¹⁴² Television programs and movies have been eschewed merely as forms of entertainment. Although they are entertaining; television programs and movies are a vehicle to understand the “culture, society, and all else human in the world’s industrial economies.”¹⁴³ Globalization is not defined by tangible borders. The internet has forged a new medium to accessing world culture. Fansub translations continue to spread the notion of globalization in an entertaining and educational setting.

Under existing copyright law, fansub group practices may commit two wrongs—copyright infringement (if not subject to the defense of fair use) and piracy. The framework, however, of copyright law should be fluid and adapt to the needs of not only the author, but also to the consumer. Fan-based activities are a strong consumer desire. Specifically, among these fan-based activities is fansubbing. Though fansubbing has been cultivated as a wrong, copyright law has the tools to formulate it into a positive, legal activity. In an era plagued by terrorism, building a bridge to new cultural understandings is an important endeavor.

My favorite line of all time was through a fansub translation of a Korean television drama. Although there may have been literal context that was lost in translation, the context of the final English version still resonated with me and in my memory. Perhaps there are other great lines out there that I may want to add to my repertoire. Through fansubbing, I have the ability. This ability is stifled under current copyright law. Copyright law needs to offer protection to fansubbing. It is only then that society as a whole evolves and appreciates the world in which we all live in.

142. Joseph P. Liu, *Copyright Law’s Theory of the Consumer*, 44 Bos. COLLEGE L. REV. 397 (2003).

143. Johanna Blakley, *Entertainment Goes Global: Mass Culture in a Transforming World*, The Norman Lear Center, January 2001, <http://www.learcenter.org/pdf/EntGlobal.pdf> (last visited October 14, 2010).