Copyright and Comics in Japan: Does Law Explain Why All the Cartoons My Kid Watches Are Japanese Imports?

by
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SUMMARY: The growth and development of a major Japanese export – comics and related products, including animated cartoons and so-called "character goods" such as trading cards, lunchboxes, etc. – has occurred simultaneously with the development of large, openly held markets for what would appear to be books and products that infringe copyrightholders' interest in these well-known characters. While many infringers are judgment-proof small timers, those who operate the markets and bookstores that trade these wares are often for-profit and even publicly-traded corporations. While actions for both infringement and contributory infringement are clearly winnable under existing Japanese law, up until now they have been rare. It appears that for a variety of reasons – such as reputational consequences and relatively low "reasonable royalty" damage awards – it does not make rational sense to bring these suits. Interestingly, many observers believe that the vibrancy of these markets for infringement has created numerous innovations and fostered the emergence of talented artists who have benefitted the industry as a whole. I make a case that the relatively weak legal regime in Japan, noted widely elsewhere, has by chance solved a collective action problem and prevented the interests of a few copyrightholders from inhibiting the growth and development of the industry as a whole.

> "If Disney took hints from 'The Jungle Emperor' [by the cartoonist Osamu Tezuka in making Disney's "The Lion King,"] our founder, the late Osamu Tezuka, would be very pleased by it. Rather than filing a claim, we would be very happy to know that Disney people saw Tezuka's work."
>
> --Takayuki Matsutani, President, Tezuka Productions[2]

Imagine this: One hundred fifty thousand people per day exchanging their own personal copies of the copyrighted works of others with impunity. The exchanges are facilitated by a "killer app" of a forum making it obvious to everyone interested where to

[1]Assistant Professor, Temple Law School. This is a work-in-progress; please do not cite or redisseminate without permission. All errors are of course mine.

[2] *See* C. Burress, "Uproar Over 'The Lion King'—Disney Film Similar to Work from Japan, *The San Francisco Chronicle*, July 11, 1994, A1.

go to make such exchanges. And the copyright holders seem apparently either powerless or unwilling to stop it.[3]

The last days of Napster?[4] Well, possibly. But this description also fits the largest of several annual marketplaces[5] for the sale of *dōjinshi*, which are Japanese *manga* (roughly, comic books or graphic novels) written by authors using the well-known characters of another, more famous, author.[6]

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[3] *See* T. Shimizu, "*Shonichi jyū-gō bannin ga raijyō shita komiketto"* (150,000 People Attend Comiket on First Day), *Mainichi Shimbun* (Aug. 10, 2001) (also mentioning that 11,000 displayed their works) (also available at <http://www.mainichi.co.jp/life/hobby/game/news/news/2001/08/10-1.html> (visited on June 1, 2002). The largest of such events is held twice-yearly at the Tokyo Big Sight [sic], Japan's largest dedicated convention center. *See* http://www.bigsight.or.jp/english/facility_e/index.html; http://www.comiket.co.jp/ (both visited on June 10, 2002). The association that organizes the event estimated the number of attendees at 480,000 over three days. *Komiketto 61 Catalog,* p. 27 (Comic Market 60 After Report) (Komiket: 2001).

[4] *See, e.g., A & M Records* v. *Napster, Inc.*, 2000 WL 1009483 (N.D.Cal. 2000) (stating that "there is evidence that Napster anticipate[d] proudly that more than 70 million users by the end of the year 2000 will be on Napster in some fashion or another"). While it is unclear how that figure was calculated, or what it represents, 70 million divided by 365 days is slightly less than 200,000 per day.

[5]Some of which occur outside Japan. *See, e.g., "Kosubure-kai, nichi-kan yūkō sōuru no manga matsuri suteiji kazaru"* (Seoul's Manga Festival Takes the Stage Amdist Japan-Korea Amity and 'Cos-Play' [the practice of fans dressing up in their costume as their favorite comic or animated cartoon character]), *Asahi Shimbun (*August 5, 2001) (describing amateur manga festival in South Korea featuring the sale of *dōjinshi*).

[6]The term *dōjinshi* is used in this article to refer to *manga* featuring characters that were not originally created by the author. This is a common current use of the term, which originally referred to works, including works other than *manga*, for distribution within a specific association or society. S. Kinsella, "Amateur Manga Subculture and the *Otaku* Panic," Journal of Japanese Studies (1998). Although *dōjinshi* has been used to refer to manga (often produced for sale) by "amateur" authors, the majority of such "amateur manga" are in fact based on characters which first appeared in previously published works. *Id.* at [8]. Although the leading (nonlegal) commentator on the subject uses the term "parody manga," to describe amateur manga based on previously published work, I have avoided the use of that term because much of this manga would not qualify for the legal definition of "parody" as commonly understood by American lawyers (see *infra,* nn.[118-22] and surrounding text) and because Japanese commentators writing from a legal point of view seem to use the term "parody" and "*dōjinshi*" as different arguments

To an American observer this might appear to be mean that a fairly high level of mass infringement of copyright is tolerated in Japan. Given the increasingly protectionist trends in U.S. courts,[7] this Japanese example seems quite odd. Additionally, the contrast with the U.S. sharpens in light of the widely-held perception that "fair use" – permissible borrowing of the copyrighted expressions of others – is being "contracted," "attacked" and "eroded" in the U.S.[8]

One could perhaps surmise that such activities are permitted because they are only on the fringe, involving a few comic book "foamers."[9] But that would understate the

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for a kind of Japanese "fair use." *See* Y. Yonezawa, Manga to chōsakuken: Parodei to inyō to dōjinshi to (Manga and copyright: Parody, quotation and dōjinshi) (president of the Comiket Comic Market describing "parody" and "dōjinshi" as alternative ways to reconcile with copyright infringement law) (Tokyo: Comiketto 2001).

[7]*See, e.g.,* N. Netanel, "Locating Copyright Within the First Amendment Skein," 54 Stan. L. Rev. 1, 13 (2002) (discussing case involving use of characters from Margaret Mitchell's *Gone with the Wind* and stating that "as a result of legislative and judicial expansions, today's capacious copyright bears scant resemblance to the narrowly tailored, short-term right in force" in 1970); R. Ku, "The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology," 69 U. Chi. L. Rev. 263 (stating that recent high-profile court decisions, including those involving Napster and the cracking of DeCSS copyright protection encryption, have "turn[ed] upon the perceived importance of copyright and Congress's determination that copyright owners should have the right to exploit any and all markets for copies").

[8]J. Litman, *Digital Copyright*, p. 83-84 (noting "campaign to contract the fair use privilege"); J. Boyle, "The First Amendment and Cyberspace: The Clinton Years," 63 L. & Contemp. Probs. 337, 343 (2000) (listing "attack on fair use . . . in the digital context" as one of a number of recent intellectual property developments with First Amendment implications); D. Nimmer, "A Riff On Fair Use In The Digital Millennium Copyright Act," 148 U. Pa. L. Rev. 673, 718 (2000) (pointing out concern that "digital technology . . . could be exploited to erode fair use").

[9]The Anglo-American slang term "foamer" (originally applied to those who obsessively engaged in trainspotting, *see, e.g.,* D. Haldane, "Admittedly They Have One-Track Minds," *Los Angeles* Times, Aug. 12, 1996, A1, but now applied more widely to those with any compulsive hobby) may be the best translation of the Japanese term *otaku*, which was originally applied to *manga* fans whose hobbies became somewhat manic, *see, e.g.,* S. Kinsella, *Adult Manga,* pp. 128-130 (discussing origin of word as meaning "nerd," but developing both positive humorous associations akin to "hippies of the 1970s" as well as negative associations after an infamous murder by an obsessive manga

importance of *manga* in Japan, as both an industry and a form of expression. Approximately 40% of all the written material published in Japan is *manga*.[10] Annual sales approach $5 billion – or roughly one-third of the entire revenue of the Japanese publishing industry.[11] Conventions at which so-called "amateurs" sell their work "are the largest mass public gatherings in contemporary Japan."[12] While not every such on-the-spot sales convention (*dōjinshi sokubaikai*) draws 150,000 people per day, they are near-weekly events.[13] And the *manga* medium on which the *dōjinshi* draw has been described as "*the* popular cultural form of postmodern Japan."[14] But these derivative works are for sale not only at the conventions, but also at chain bookstores – even those of a publicly-traded corporation.[15] Perhaps inevitably, the creators of this work have

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fan); F. Schodt, *Dreamland Japan,* pp. 45-46 (Berkeley: Stone Bridge 1996) (discussing origin of word in excessive formality – the term *otaku* is also a formal way of saying "you" – of individuals who spent too much time at home with *manga* and not enough outside socializing). Like the English term "foamer," *otaku* is now applied more broadly to crazed fans of other genres. *See, e.g.,* R. Mead, "Shopping Rebellion," *The New Yorker,* p. 107 (Mar. 18, 2002) (stating that "[*o*]*taku* originally referred to a category of young Japanese men who were fixated on *manga* . . . . [t]he word is now [also] used to describe someone with a fanatical interest in computers or fashion").

[10] *See 2000 White Paper of Ministry of Education, Science, Sports and Culture* (available at < http://wwwwp.mext.go.jp/eky2000/index-28.html#ss2.1.2.2.6>) (visited June 1, 2002).

[11] *See* N. Gaouette, "Get your manga here: An ancient Japanese art form - book-length comic strips - is catching on in the US," *The Christian Science Monitor,* p. 13, Jan. 8, 1999 (reporting sales of near $5 billion of *manga* in Japan in 1998).

[12] S. Kinsella, "Amateur Manga Subculture and the *Otaku* Panic," 24 Journal of Japanese Studies 289, 297 (1998).

[13] As the advertisements in the catalog/program of the largest such sales convention makes clear, smaller such events occur near almost weekly throughout Japan. *Comic Market Catalog 61*, pp. 915-44 (containing 240 ads, overwhelmingly for *dōjinshi sokubaikai*).

[14] A. Allison, *Permitted and Prohibited Desires*, p. 57 (Westview: 1996).

[15] Such as the *manga* bookstore chain Mandarake. *See* S. Kinsella, *supra* n.[12], "Amateur Manga Movement," *supra* n. [12], p. 298 (describing the emergence of Mandarake and other similar bookstores catering to "amateur" manga artists who create *dōjinshi*. Mandarake is a publicly traded company in Japan, *see*

established sales outposts on the Internet as well.[16] And *manga* and its kissing cousin *anime* (animated cartoons) have been recognized as the foundation for new media industries of increasing economic importance, such as computer games.[17]

In addition to being serious business, *manga* also represents an important form of expression. The Japanese themselves are taking these forms increasingly seriously – both as a cultural property and as a subject for academic study.[18] And the influence of the form is increasingly felt abroad.[19]

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http://profile.yahoo.co.jp/biz/fundamental/2652.html (company profile by Yahoo!) (visited June 26, 2002) (listing "*dōjinshi*" as one of the lines of business of the corporation), with overseas branches and an Internet site that also sells *dōjinshi*, *see* http://www.mandarake.co.jp/zin/index.html (visited June 26, 2002).

[16] A recent search turned up 1600 *dōjinshi* titles for auction over a 10-day period on Yahoo Japan Auctions, the most popular Internet auction site in Japan. *See* http://search.auctions.yahoo.co.jp/search?sb=desc,cat&desc=%c6%b1%bf%cd%bb%ef&cat=2084005146&auccat=2084005146&acc=jp&apg=1&f=0x12&s1=end&o1=d&alocale=0jp&abatch=0&escrow=0&buynow=0 (search for *dōjinshi* 同人誌) (June 26, 2002). Such comics based on characters originally created by another author were also marketed on eBay Japan during the period that that company operated in Japan. Interview with General Counsel [Etsuo Doi] of eBay Japan, June 25, 2002.

[17] *See MEXT White Paper 2000*, *supra* n.[10] (describing "*manga*" and "animation," together with film, as "the foundation for new media arts" and stating that "as such, it will be necessary to further their promotion").

[18] *See* Nihon manga gakkai hossoku-e—kyōto seikadai ni jimukyoku (Towards the start of a Japanese Manga Studies institute--A secretariat is established at Kyoto's Seika University), *Asahi Shimbun* (July 10, 2001) (also available at http://www.asahi.com/culture/bunka/K2001070902894.html) (visited June 1, 2002); Nihon manga gakkai hossoku—Ariya kenkyusha chūshin ni (Researcher Ariya's focus is the start of Japanese Manga Studies), *Asahi Shimbun* (July 31, 2001) (also available at < http://www.asahi.com/culture/bunka/K2001073100730.html) (visited June 1, 2002). *See also* MEXT White Paper, *supra* n.[10], (stating that Japanese "*manga* is becoming recognized as an important form of modern expression" and noting the "strong interest in Japanese *manga* and *anime* [animated cartoons] overseas").

[19] *See id.* (noting the "strong interest in Japanese *manga* and *anime* [animated cartoons] overseas") ; *see also* N. Gaouette, *supra* n.[11].

As a result, it would be hard to dismiss the tolerance of *dōjinshi* as a minor trend in an obscure field.[20] True, there is the traditional Western perception that Asian countries take a loose view of protecting Western intellectual property. However, Japan would appear to have different incentives as a clear exporter of *manga* and *anime*.[21]

This article attempts to explain why the *dōjinshi* phenomenon survives in Japan, while noting the contrasting sensibilities of U.S. copyright enforcement, particularly fair use. American observers have tended to view fair use and economic efficiency in different ways. Some see fair use as an attempt to mirror economically efficient deals that copyright holders would make in the absence of transaction costs.[22] Others see it as promoting goals of public debate and cultural interaction that go beyond economic

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[20] Indeed, the success of the *dōjinshi* market has not gone without notice in Japan. *See, e.g., "Netto ōkushon: Manga dōjinshi tenji sokubaikai tsukōshō ga takane torihiki"* (Net auction: passes for entry to festival of displaying, buying and selling *dōjinshi* of *manga* trade for high prices), *Mainichi Shimbun*, July 2, 2001 (describing controversial Internet sales for 10,000 to 50,000 yen – roughly $80 to $400 – of passes distributed to festival volunteers and exhibitioners that allow festivalgoers to skip lines as long as 50,000 people at the opening of the Comiket *dōjinshi* festival in Tokyo); "*Ganponyasan ga tsukuru katsuretsu"* (A proprietor-prepared cutlet), *Asahi WebWatch*, August 14, 2001 (*Natsu no comiketto mo owarimashite, konnen mo sugoi hitode datta naa, to omoisdasu, otaku-oyaji no natsu yasumi. De mo, sonna dōjinshi sekai no seikyō o minagara, shikashi comikku no sekai ni mo hitathitato, henka no nami ga otozurete iru yō na ki mo suru wake de arimasu)* (The summer's Comiket festival has ended, with the nerd's summer holiday drawing a great crowd, as I recollect. Yet, seeing this kind of success for the *dōjinshi* world, while the [professional] comic world languishes, gives me a feeling that waves of change are arriving.).

[21] *See* MEXT White Paper, *supra* n.[10].

[22] *See* P. Goldstein, "Copyright and Its Substitutes," 1997 Wisc. L. Rev. 865, 867 (1997) (noting that "[w]ith the cost of previously burdensome contract negotiations reduced electronically almost to zero, the economic rationale for fair use doctrine will disappear in those instances where the doctrine's only justification is to overcome the problem of transaction costs"); T. Bell, "Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine," 76 N.C. Rev. 557 (1998) (stating that "as a response to market failure, the fair use doctrine can and should give way in the face of the effective enforcement of authors' rights through automated rights management").

efficiency.[23] Less pronounced is the concept that fair use can actually foster productive industry; the *dōjinshi* phenomenon suggests that, at least in some contexts, a certain level of fair use may help generate an economically efficient level of collective action.[24]

The model of copyright that suggests that more protection yields more innovation inexorably has drawn some criticism.[25] But critics so far appear to lack a good economic example to justify their contention that overprotection can have negative consequences.[26] Some have suggested that the incentive to create in the U.S. may not actually be tightly

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[23]*See* J. Litman, *Digital Copyright*, pp 83-84 (describing traditional "common forumulation explain[ing] that reasonable appropriations of protected works [as fair use] werepermissible when they advanced the public interest without inflicting unacceptably grave damage on the copyright owner", and in contrast to "implied assent" view that fair use doctrine mirrors uses that copyright owner would be likely to allow but which transaction costs make licensing difficult).

[24]Interestingly, some U.S. courts have justified fair use's recognition of parody as a justification for unlicensed use of a copyrighted work on the grounds that copyright holder authors are unlikely to license uses that injure their ego even given the profitability of doing so. *See, e.g., Campbell* v. *Acuff-Rose Music, Inc.*, 510 U.S. 569, 592 (noting that the "unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market"). This logic comes fairly close to the concept that authors cannot be presumed to act rationally and thus without fair use a market failure would result.

[25]*See, e.g.,* J. Cohen, "*Lochner* in Cyberspace: The New Economic Orthodoxy Of 'Rights Management,'" 97 Mich. L. Rev. 462 (1998).

[26]*See* Boyle, pp. 39-43 (contrasting intellectual property lawyers' theoretical treatment of information as a "commodity" versus more nuanced approach of information economics and stating that "[t]he empirical evidence, of which there is surprisingly little, seems to . . . at least cast doubt on current assumptions about the level of international intellectual property protection necessary to promote research and innovation") ; *see also* Ku, *supra* n.[7] at 299 (stating that "[i]t would appear that the economic arguments for increased copyright protection are difficult to refute short of arguing over whether existing levels of incentives and availability of content are sufficient--an argument with no clear answer"); Y. Benkler, "An Unhurried View of Private Ordering in Information Transactions," 53 Vand L. Rev. 2063, 2063 (2000) (noting lack of empirical evidence and stating that "[w]e are . . . embracing this new legal framework [of a perfectly enclosed infromation environment] for information production and exchange on faith").

linked to U.S. copyright law at all.[27] Additionally, commentators have suggested fashion and cuisine as examples that innovation can flourish in an industry with less enforcement for intellectual property rights than is obtainable under American copyright law.[28] However, the coexistence of the robust Japanese *manga* industry with the *dōjinshi* phenomenon is a stronger example. You have to eat or wear clothing; you do not have to read comic books. Indeed, there is evidence that the *manga* industry and the *dōjinshi* markets do not merely coexist; rather, they appear to provide benefits to each other.[29]

Given that there are clear laws against copyright infringement in Japan, it appears that *dōjinshi* can survive and even thrive because the current Japanese system is largely underpinned by norms among artists that are bolstered by the lower profitability of litigating in the Japanese system. It is quite possible that this collective understanding could be eroded by attempts to formally "legalize" these relationships, or changes in legal institutions that alter the profitability of lawsuits. However, the Japanese experience could have important lessons for those thinking about the value of American fair use.

Section I describes the importance and history of *manga* and *anime* in Japan. Section II discusses the issues of character copyrightability and fair use in the United States and Japan. Section III discusses the possible reasons why "infringement" such as *dōjinshi* appears to be tolerated in Japan, followed by Section IV, which discusses the implications of the Japanese result, and a brief conclusion.

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[27]*See* Ku, *supra* n.[7] at 305 (stating that "[w]ith regard to music, the exclusive rights created by copyright cannot be justified as a necessary, or even the most efficient, means of encouraging creation").
[28]J. Litman, *Digital Copyright*, pp. 105-06 (describing lack of copyright protection for chefs and clothes designers).
[29]*See* nn.[179-194] and surrounding text.

I. Manga, Anime and Dōjinshi in Japan

Japan has long been notable for its graphic arts. As early as the 9th century, Japanese Buddhist priests drew caricaturized sketches of themselves as a form of diversion, often with a humorous or satirical tone.[30] By the twelfth century, Japanese artists had produced "narrative picture scrolls" portraying anthropomorphic animal characters.[31] And like today's manga, these scrolls sometimes dealt with off-color matter.[32]

The Development of the Mainstream Manga *and* Anime *Industries*

The development of modern Japanese manga involved both this native artistry[33] as well as imported influences. In particular, the Western form of printed cartoons in bound paper volumes appears to have been introduced to Japan by English traders in the late 19th century.[34] By early in the postwar period, Japan had developed an industry featuring cheap, mass-produced cartoon books.[35]

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[30] *See Chōju giga,* H. Okudaira ed. (Tokyo: Iwasaki Bijutsusha 1968) (annotated reproduction of surviving *Toba-e,* scrolls of anthropomorphic animal caricatures, dating to as early as the 12th century); *see also* A. Allison, *Permitted and Prohibited Desires*, p. 57 (1996).

[31] *See* J. Lent, *Illustrating Asia*, p. 2.

[32] *Id.* (describing scrolls illustrating "farting contests" and "phallic contests"); Allison, *supra* n.[30] (describing self-portraits of monks with "engorged penises").

[33] *Id.* (describing *ukiyō-e* (woodblock print) artist Ōka Shimboku as having possibly created the world's "first cartoon book" by binding together prints in 1702).

[34] In the late 19th century, a number of Japanese cartoon books collectively referred to as *ponchi* were published. S. Isao, "Red Comic Books: The Origins of Modern Japanese *Manga*," in *Illustrating Asia*, J. Lent, Ed., p. 137 (Honolulu: U. of Hawaii, 2001). The name *ponchi* appears to come from the magazines echoing the title of the renowned British humor and cartoon journal *Punch*, which ran from 1841 to 1992. I. Shimizu, *Manga no rekishi* (The History of Manga) (Tokyo: Iwanami Shoten, 1991), p. 27 ("igirisujin" "ga sōkan shita manga zasshi 'Jyaapan Panchi' no eikyō wo ukete, jiykyoku fūshiga wo imi suru 'ponchi' to iu kotoba ga hayaridashi, Meiji ni hairu to sore ha bunmei kaika no fūchō no naka de, ippanteki na manga wo imi suru kotoba to shite fukyū") ("from the influence of the manga magazine Japan Punch, published by an

No story of the development of manga would be complete without reference to Osamu Tezuka. Commonly described as the "father" or "god" of manga, he is credited with tremendous influence in the creation of the serialized storytelling *manga* that has come to dominate the medium in postwar Japan.[36] He also pioneered a broad range of comic books, from science fiction stories to romantic comic-novels aimed at a young girls' readership.[37]

In addition to his legacy as the "father of manga," Tezuka also fostered the development of the related field of animated cartoons, or *anime*, which became Japan's first major cartoon export to the United States. By 1965, his series "Astro Boy" and "Kimba the White Lion" had run on network television in the United States (retitled and dubbed in English).[38] The latter drew more recent attention due to the similarities

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Englishman in Japan, it became fashionable to call cartoons lampooning particular situations 'ponchi,' and, amidst the cultural flowering at the dawn of the Meiji era [1868-1912], this became the common word for manga generally") *See also* T. Craig, *Japan Pop!*, p. 8 (Armonk, NY: Sharpe 2000) (describing "Japanese comic artists" as having "taken a physical form imported from the West, combined it with a centuries-old Japanese tradition of narrative art and illustrated humor, and added important innovations of their own to create what amounts to a totally new genre").

[35]*See* I. Shimizu, *"Manga shōnen" to akahon manga – sengo manga no tanjō*," ("Youth manga" and red manga – the birth of postwar manga) (Tokyo: Tōsui shobōsha 1989); *see also* Shimizu, *Manga no rekishi, supra* n.[34] ("Tezuka Osamu no bawai mo, 'Shintakarajima' ya 'Chiteikoku no kaijin' nado, Shōwa nijyū nendai no tankōbon no hotondo ha Osaka no akahon manga shuppansha kara dasareta mono de atta.") (noting that in the case of Tezuka Osamu [the Father of Manga] as well, [his famous works such as] New Treasure Island and Mystery Men of the Underground Nation were for the most part published in serial volumes in the decade following the war's end by Osaka publishing companies specializing in cheap comic books called "Red Manga"); Isao, *supra* n.[34], pp. 141-47.

[36]*See* I. Shimizu, *Manga no rekishi*, pp. 176-77.

[37]*See* F. Schodt, *Manga Manga!* (Tokyo: Kodansha 1983), p. 96 (describing Tezuka Osamu's 1953 *Ribon no Kishi* as "the beginning of girls' comics in their modern format").

[38]H. Deneroff, "Fred Ladd: An Interview," *Animation World Magazine*, Aug. 8, 1996 (available at http://www.awn.com/mag/issue1.5/articles/deneroffladd1.5.html) (visited

between it and Disney's subsequent animated feature "The Lion King."[39] This success paved the way for a trend of increasing Japanese *anime* exports.[40]

Besides introducing Japanese cartoons 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.[41] Additionally, to further leverage the revenue from each set of drawings, he began to sell various licenses to consumer products companies for the use of his animation characters on merchandise – a practice we now take for granted.

Subsequently, other examples of *manga* and *anime* have been exported, both to the U.S. and other countries.[42] Additionally, American animators and cartoonists have been quite explicit about the influence of their Japanese counterparts on the current American cartoon "revival."[43] And in Japan as well, the importance of *manga* and *anime*

June 14, 2002) (describing the manner in which the works of Tezuka were found, licensed and reworked for the NBC Television in the U.S.).

[39]*See* C. Burress, "Uproar Over 'The Lion King'—Disney Film Similar to Work from Japan, *The San Francisco Chronicle*, July 11, 1994, A1. Of course, both bear more than a little resemblance to Shakespeare's *Hamlet*.

[40]*See* J. Considine, "Toon in Tomorrow; Japanimation," *Baltimore Sun*, 1H, Apr. 14, 1986 (describing "exponential" growth, though from a small base number, of American imports of Japanese animation, beginning with works including Osamu Tezuka's "Astro Boy").

[41]Shiraishi, in *Illustrating Asia*, J. Lent, Ed. (Honolulu: U. of Hawaii, 2001), at 298.

[42]*See id.* at 300-303 (describing the impact of the animated cartoon Doraemon throughout Asia).

[43]*See, e.g.,* "Japanimation: World Laps Up Japan's New Culture," *Asahi Shimbun* (Dec. 30, 1999) (quoting directors of the film "The Matrix" on their desire to reproduce *anime*-style effects); LEXIS transcript of NPR's Morning Edition, Jan. 24, 2002 (interview with director of film "Monsters, Inc," who stated that Japanese animation is "having an impact on us as the filmmakers. And I have friends at Disney who see those and go, 'Wow, we're, like, falling way behind here. We need to catch up to these guys in terms of the complexity and in story telling and imagery, you know.' I think it's really great that it's just creating a more diverse field, and it really is only limited by, you know, the creators'

as both a cultural and economic export is increasingly recognized, not just in and of themselves, but also because of their spin-off effects in growing industries such as video gaming.[44]

The Rise of Dōjinshi

The focus of this article is not so much on the Japanese cartoon industry itself, or even its exports, but rather on the fairly discrete phenomenon of its coexistence with markets for *dōjinshi*. The term *dōjinshi* is used in this article to refer to *manga* featuring characters that were not originally created by the author. This is a common current use of the term, which originally referred to works, including works other than *manga*, such as poetry or short stories, for distribution within a specific association or society.[45] 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" are in fact based on characters that have already been published previously.[46] Although the leading American (nonlegal) commentator on the subject uses the term "parody manga," to describe amateur manga based on previously published work, I have avoided the use of that term because much of this manga would not qualify for the legal definition of "parody" as commonly understood by American (and probably

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imaginations.")

[44] *See*, e.g., R. Matsumoto, "Manga wa kyodai na yushutsuhin to naru" (Manga is becoming a huge export) *Voice,* March 2001 (describing the impact that Japan's deep and diverse array of manga are starting to have outside Japan).
[45] S. Kinsella, "Amateur Manga Subculture and the *Otaku* Panic," Journal of Japanese Studies (1998).
[46] *Id.* at [8] (describing *manga* using "borrowed" characters outnumbering "original" *manga* by a 4:1 ratio by 1989 at the largest *dōjinshi* market).

Japanese) lawyers[47] and because Japanese commentators writing from a legal point of view seem to use the term "parody" and "*dōjinshi*" as related arguments for a kind of Japanese "fair use."[48]

Starting in the 1970s, organized markets for the sale of *dōjinshi* emerged.[49] 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.[50] By 2001, the number of visitors was over 450,000.[51]

The works for sale often use fairly close graphical copies of characters that originally have appeared elsewhere (see Figure 1). These derivative works can be produced quite cheaply and in rudimentary fashion through the use of photocopiers.[52] However, many works for sale are quite sophisticated products created with the help of small printing houses.[53]

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[47] (see *infra,* nn.[118-22] and surrounding text)
[48] *See* Y. Yonezawa, Manga to chōsakuken: Parodei to inyō to dōjinshi to (Manga and copyright: Parody, quotation and dōjinshi) (president of the Comiket Comic Market describing "parody" and "dōjinshi" as alternative ways to reconcile with copyright infringement law) (Tokyo: Comiketto 2001).
[49] *See* Shimizu, *supra* n.[36] at pp.192-93 ("Komikku ya anime no dōjinshi o hanbai suru shijō to shite komikku maaketto (komiketto) ga Showa gojyūnendai ni tōjō shi, shiroto mo seisaku shita komikku wo hanbai dekiru jidai to natte kita") (The Comic Market (Comiket) where sales of manga and anime dōjinshi are made appeared in the decade after 1975, making it an era where amateurs can also sell the *manga* they produce).
[50] *See* Shimizu, pp. 192-93.
[51] *See supra* n.[3].
[52] *See, e.g., Manga dōjinshi no trukurikata* (Tokyo: Grafikusha 2000) p. 6-11 (describing, in *manga* naturally, how to create dōjinshi using a photocopier ("kopiihon no tsukurikata")). It should be noted that this may well violate Japan's Copyright Law by its explicit terms. *See* Copyright Law Art. 30 (stating that "private use" of copyrighted material is not applicable "where such reproduction is made by means of automatic reproducing machines"); *see also infra* Section [II].
[53] *Id.,* p. 27 (describing various methods of printing including offset, mimeograph and the use of computer desktop publishing); *see also* S. Kinsella, "Japanese Subculture in the 1990s: *Otaku* and the Amateur Manga Movement," 24 J. Japanese Studs. 289, 294

While the justification is occasionally heard that *dōjinshi* are non-commercial, that would appear to be hard to reconcile with several facts. First, the Japanese calendar is littered with sales conventions of *dōjinshi*. While not every such event fills Japan's largest convention center with 150,000 people per day,[54] the fact remains that there are probably millions of *dōjinshi* purchasers. Some of these conventions are run by for-profit firms,[55] and even those that are not may serve as useful fora for other profit making enterprises.[56] Additionally, the total dollar sales of the largest of these markets exceeds $15 million per day – which does not include the price of the $10 catalog/program guide that virtually ever attendee must buy in order to make some sense of the gigantic, overcrowded marketplace.[57] Finally, the how-to manuals on creating *dōjinshi* are pretty clear on the sales motive for individuals getting involved in the "hobby"[58]; successful

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(describing the emergence of small printing companies that targeted the *dōjinshi* artist market).

[54]However, even the less-attended Winter *dōjinshi* convention held by the Comiket organization was expected to draw 200,000 attendees and 60,000 sellers over two days. *Comiketto Catalog 61*, p. 897 (Comiket: 2001) (afterword to catalog/directory to convention held at Tokyo Big Sight [sic] December 29 and 30, 2001, entitled "Heiwa jya naku natchyatta yo, mattaku ero sansei tero hatai" (Peacetime's over! Support eroticism, oppose terrorism.).

[55]For example, Super Comic City is the largest of a series of Comic City *dōjinshi* markets that a for-profit firm organizaes throughout Japan in different major cities. Schodt, *Dreamland Japan*, *supra* n.[9], pp.36-37.

[56]The Comic Market, or Comiketto, "is ostensibly a voluntary, non-profit making organization," S. Kinsella, "Amateur Manga Movement," *supra* n.[12], p. 297, but for-profit printing companies and art supply firms make sure to appear there, Schodt, *Dreamland Japan,* p. 38.

[57] *See* Schodt, *Dreamland Japan*, p. 43.

[58] As their titles make clear. *See*, *e.g., Manga dōjinshi seisaku toranomaki: mezase! Kanbai, Zōsatsu, chūmoku sareru dōjinshi o tsukuritai!* (Take aim! The key to making manga dōjinshi: I want to make dōjinshi that will get attention, sell out, and have multiple print runs) (Tokyo: Gurafikusha 2001) (http://www.amazon.co.jp/exec/obidos/ASIN/4766112474/ref=sr_aps_d_1_1/249-4617901-0233115) (visited June 12, 2002), and *Manga dojinshi, anime, gema, gezu jyōze na urikata tsukurikata (*How to skillfully make and sell manga dōjinshi, anime, games

dōjinshi artists can sell 6,000 copies of an individual book at more than $5 each – not quite the level of profitability of a best-selling novel, but not a mere hobby either.[59]

Similarly, while there are wishful suggestions that *dōjinshi* is a kind of parody and deserves comparable treatment as parody does in the U.S.,[60] it appears to be a distinct concept, as the following sections discuss.[61]

II. Copyrights and Cartoon Characters in the U.S. and Japan

Both the United States and Japan have lucrative publishing industries. So it should be of little surprise that both have a well-developed set of copyright regulations. The two nations' regulations bear close resemblance, with a few important differences.

A. Copyright and Cartoon Characters in the U.S.

The United States Constitution provides authority for Congress to create "limited duration" monopolies to encourage "authors" to pursue "the useful arts."[62] Accordingly, the Copyright Act confers a monopoly of limited duration on copyright holders. This

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and goods) (Tokyo: Yamashita Shoten 1998) (http://www.amazon.co.jp/exec/obidos/ASIN/489712073X/ref=sr_aps_d_1_1/249-4617901-0233115) .

[59]Schodt, *Dreamland Japan*, p. 42.

[60] *See infra* nn.118-22 and surrounding text.

[61]*See Manga to chōsakuken: Parodei to inyō to dōjinshi to* (Manga and copyright: Parody, quotation and dōjinshi), Y. Yonezawa, ed. (Tokyo: Comiketto 2001) (including symposium discussion of *dōjinshi* in parallel with concepts such as parody and fair use of quoations).

[62]U.S. Const. Art. I, Section 8 (stating that "The Congress shall have power . . . To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries").

right is generally conceived as applying to the author's "expression" of his or her ideas, as opposed to the ideas themselves.[63]

In general, the Copyright Act's monopoly grant is believed to create incentives for creativity. Of course, monopolies have long been a concern of the law, and they continue to be so. Much of the debate about such monopolies concerns the proper balance between two dueling public interests: the goal of providing incentives for creativity and the desire to alleviate the harms – both economic and noneconomic – that copyright monopolies produce.[64]

The standard view is that copyright protects the *expression* of an idea, and not the idea itself, and that this harmonizes the dueling public interests at stake. This "idea/expression" division theoretically allows for the common interest in shared ideas to coexist with incentives for the creativity embodied in a particular individual's expression of those ideas. This concept is not without critics. Some point out that the balance between the public and private interests at stake has become overweighted in the latter direction.[65] One critique of existing copyright doctrine focuses not so much on where the balance should be placed, but rather on the degree to which copyright is essentially

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[63]*See* Melville B. Nimmer **&** David Nimmer, Nimmer on Copyright § 13.03[B][3], at 13-68 to -73 (2001) (discussing idea-expression dichotomy generally).

[64]*See, e.g.,* M. Rourke, "Drawing the Boundary Between Copyright and Contract: Copyright Preemption of Software License Terms," 45 Duke L. J. 479, 535 (stating that "[t]he fair use doctrine is an essential part" of "striking a balance between providing an incentive to create through the grant of a limited statutory monopoly in the form of copyright and maintaining the free flow of the information on which such creativity is built).

[65]*See* J. Litman, *Digital Copyright*, pp. 144-45 (discussing legislative process of Digital Millenium Copyright Act as weighted in favor of copyright holders with strong lobby for rent-seeking, to the disadvantage of public interest in fair use).

misgrounded as a doctrine.[66] Still another focuses on the degree to which copyright policy no longer makes sense with respect to technological changes that undercut its economic justification.[67]

In addition, the doctrine of "fair use" has alleviated to a degree the tension between the battling public interests surrounding copyright. Increasingly, however, commentators have been suggesting that technology is undermining the ability of fair use to play this role.[68] They frequently voice concern for fair use as being increasingly threatened.[69]

Despite the current controversies that exist concerning the scope of copyright protection generally, commentators often portray the copyright protection of cartoon characters in the U.S. as an easy case.[70] This is particularly true when the protection of

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[66]*See* J. Boyle, *Shamans, Software & Spleens* (Harvard: 1996), p. 58-60 (describing how the "romantic vision of authorship and the distinction between idea and expression appeared to provide a conceptual basis and a moral justification for intellectual property" and questioning the overall soundness of this as an an exclusive framework for policy).
[67]*See* R. Ku, *supra* n.[7] at 305 (arguing that digital distribution makes incentives for redistribution unnecessary and analytically severable from incentives for creativity).
[68]*See, e.g.,* L. Lessig, *The Future of Ideas*, pp. 180-82 (2001) (describing how technology make greater control possible that threatens even permissible uses due to fear of liability); D. Carr, "Ripped, Mixed-Up and Burned," *The Nation*, Jun. 16, 2002 (describing proposed bill that states that "antipiracy technology will have to be placed inside every piece of consumer electronics--from home stereos to computers--which will make it essentially impossible to copy any digital media" and suggesting that this "will mean the effective end of fair use" as consumers have come to know it). Of course, some conceive of fair use as a doctrine designed to mirror what copyright holders *would have* permitted in the absence of transaction costs; as technology alleviates the transaction costs involved for copyright holders to regulate the use of their monopolies, these commentators view it as natural and beneficial that the scope of fair use should decline. *See supra* n.[22].
[69]*See supra* n.[8].
[70] *See, e.g.,* Nimmer on Copyright, § 2.12 (stating that "[a] character is most readily protectible where both the original work and the copied work consist of cartoons or other graphic representations").

cartoons characters is compared to literary or live-action characters.[71] The graphic depiction of a character has been held to make it more "detailed," and so more clearly make it worthy of copyright protection.[72]

The standard for whether one can borrow a copyrighted cartoon character is the same standard that generally applies to "fair use" under the U.S. Copyright Act more generally. Section 107 sets forth four nonexclusive factors by which such a use should be analyzed. Among these factors are "the purpose and character of the use," including whether the use is of a commercial nature; the "nature of the copyrighted work," "the amount and substantiality of the portion used in relation to the copyrighted work as a whole," and "the effect of the use upon the potential market for or value of the copyrighted work."[73] If the balance of these and other relevant factors so instructs, an otherwise infringing use of a cartoon character should be permitted.

However, two cases involving graphic characters suggest that the use of a copyrighted cartoon character may be hard to fit within the "fair use" doctrine. Despite

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[71] *See id.* (suggesting that "cartoons or other graphic representations" are more easily protected than literary "word portraits"). *See also Walt Disney Prods.* v. *Air Pirates*, 581 F.2d 751, 755 (9th Cir. 1978) (stating that "while many literary characters may embody little more than an unprotected idea, a comic book character, which has physical as well as conceptual qualities, is more likley to contain some unique elements of expression" and therefore receive copyright protection).

[72] *See, e.g., Disney Prods.* v. *Air Pirates,* 581 F.2d 751, 755 (9th Cir. 1978) (noting that it is "difficult to delineate distinctively a literary character," but "[w]hen the author can add a visual image . . . the difficulty is reduced"); *Detective Comics* v. *Bruns Publications*, 111 F.2d 432, 433 (2d Cir. 1940) (applying test of relative "delineation" of characters to whether comic book character "Wonderman" infringed "Superman" and concluding that the latter was copyrightable "[s]o far as the pictorial representations and verbal desscriptions of 'Superman' are not a mere delineation of a benevolent Hercules, but embody an arrangement of incidents and literary expressions original with the author").

[73] U.S. Copyright Act, 17 U.S.C. Section 107(1-4).

Supreme Court authority for a broad reading for parody,[74] the Ninth Circuit – a particularly important jurisdiction for copyright cases – has concluded that the portrayal of Disney characters as drug-using, promiscuous hippies in an "alternative" comic book did not suffice to qualify as fair use despite the potential for parody embodied therein.[75] Where more than a "reasonable caricature" was used, and instead the characters' images were copied "in their entirety," the use could not be justified as fair use.[76] Similarly, a recent case affirmed a rejection of a fair use defense where the borrower created a character using a hat that resembled that of The Cat in the Hat by Dr. Seuss (see Figure 2).[77] The offending work was a rhyming rendition of the O.J. Simpson trial done in the style of the famous children's book.[78] The court also concluded that the borrower could not claim to have created the social useful aspects of parody that assist a defense of fair use where the offending work did not at least in part target the original work as opposed to its general style, the genre of art to which it belongs, or society as a whole.[79] Thus, while fair use may be a possibility with respect to American cartoon characters, courts have rejected such defenses for works that would appear to have some satirical content.[80]

That is not to say that, in the U.S., no one but the creator of a cartoon character can use that character. Certainly, from time-to-time American cartoonists have used each

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[74]*See Cambell* v. *Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994).
[75]*Air Pirates,* 581 F.2d at 758.
[76]*Id.* at 757-58.
[77]*See Dr. Seuss Enters.* v. *Penguin Books USA, Inc.*, 109 F.3d 1394, 1999 (9th Cir. 1997) (concluding that lower court's "findings that Penguin and Dove infringed on Seuss' copyrights are not clearly erroneous").
[78]*Id.*
[79]*Id.*, 109 F.3d at 1400-1401.
[80]Of course, there are ways for a creator to try to protect a cartoon character other than copyright law, although there are issues of fit in terms of how congruent the protection is with the aims of the copyright holder. [cite Miami Ent. J. Litman re Disney].

other's characters – although these incidents are usually rare, attention-getting – and the product of explicit agreements. For example, "The Great Comics Switcheroonie of 1997" involved 46 leading U.S. cartoonists' use of each other's characters on April 1, 1997.[81] This took place pursuant to an explicit agreement with ground rules,[82] on April Fools' Day,[83] and characters of cartoonists who did not wish to participate were not used.[84] Similarly, the use of Warner Brothers animated cartoon characters such as Wile E. Coyote and Daffy Duck in the Disney animated film "Who Framed Roger Rabbit?" was also done pursuant to an explicit agreement between the companies under which Warner Brothers could monitor the appearance and behavior of the characters.[85] Finally, copyrighted characters are sometimes acquired with other corporate property in mergers or asset sales and then used in new works.[86]

Of course, strong protection for American cartoon characters could explain why there is virtually no American counterpart for large-scale *dōjinshi* marketplaces. Fair use doctrines such as parody that apply to copyright more generally could argue for a more narrow, targeted scope for allowing cartoonists to use others' characters *without* a license,

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[81] 4/1/97 St. Petersburg Times 5D 1997 WL 6189764. A similar cartoon "crossover" took place in a 4-issue limited series issued jointly by agreement by the two leading U.S. comic book publishers, Marvel and D.C. Comics, in which their characters fought each other. 12/4/95 Peoria J. Star C1 1995 WL 3264280.
[82] 4/1/97 Baton Rouge Advoc. 10A 1997 WL 7239093.
[83] April 1 is traditionally the unofficial American holiday of "April Fools' Day," a day on which, among other hijinks, newspapers print ersatz stories in the name of humor.
[84] 4/1/97 St. Petersburg Times 5D 1997 WL 6189764 (noting that the authors of "Peanuts," "Curtis," "Marmaduke," and "Cathy" declined to participate).
[85] 6/19/88 Wash. Post G01 1988 WL 2046147
[86] *See, e.g.,* T. Loos, "When Superheroes Sue: The Second Career of Birdman," *The New York Times*, Jul. 7, 2002 (describing how cartoon superheroes Space Ghost and Birdman, created by the Hanna-Barbera company in the 1960s, have been acquired and recycled by the Cartoon Network, a unit of AOL Time-Warner, for use as a talk-show host and the protaganist in a lawyer show, repsectively).

explicit or otherwise. And there have been such uses.[87] However, it is important to note that many, if not most, *dōjinshi* in Japan are *not* parodies – at least not in the legal sense of the word "parody" – of the original cartoon work. As noted previously, some *dōjinshi* follow closely in the vein of the original, while others highlight and develop particular aspects that were present in the original, and still others takes characters from the original and use them in a manner that the original would not have.[88] In a postmodern, literary-criticism sense, to portray a particular cartoon character with different traits than in the original, or to elevate the role of a particular character versus the original, could be seen as a kind of criticism; however, this is not the kind of critique that U.S. legal doctrine has traditionally recognized.[89] Instead, caselaw has generally required that for an incidence

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[87]J. Litman, 11 U. Miami Ent. & Sports L. Rev 429 (1994) (describing "Bloom County" creator Berke Breathed's use of "Mortimer Mouse," an long-ago Disney character, to lampoon what Breathed saw as the overbearing corporate greed of the modern Disney Corporation).

[88]*See* S. Kinsella, *supra* n.[12], 24 J. Japanese Studs. At 301 (describing creation of stories with borrowed characters with sexual themes that may not be present in the original); F. Schodt, *Dreamland Japan*, pp 37-38 (describing several types of *dōjinshi*, including "novels with *manga*-like themes").

[89] *See Walt Disney* v. *Air Pirates,* 581 F.2d 751, 756 (9th Cir. 1978) (rejecting fair use defense on basis of parody for "underground comic book" featuring "depiction of the Disney characters as active members of a free thinking, promiscuous, drug ingesting counterculture" where purported parodist "took more than was necessary" "by copying the images" of the Disney characters "in their entirety"); *Dr. Seuss Enters.*, 109 F.3d at 1401 (distinguishing "hold[ing] Dr. Seuss' style up to ridicule" which would constitute parody in the court's view, from "broadly mimic[ing] Dr. Seuss' characteristic style . . . 'to get attention' or maybe even 'to avoid the drudgery in working up something fresh'"). Of course, some have argued that the American doctrine of "fair use" *should* be broadened to include works that use an appropriated character in a way that evokes a different response than the original work, but is not parody in the sense of being satirical criticism of the original work. *See, e.g.,* L. Davidow, "Copyright Protection for Fictional Characters: A Trademark-Based Approach to Replace *Nichols*," 8 Colum. J. of Art and the Law 513, 561 (1984); D. London, "Toon Town: Do Cartoon Crossovers Merit Fair Use Protection," 38 B.C. L. Rev. 145 (1996) (arguing that policy interest in criticsm through parody, together with "fair use" as interpreted by Supreme Court in *Cambell* v.

of infringement to be excused on the grounds of parody, the infringing use must form a "criticism" of the original work.[90]

By and large, there does not seem to be a significant existing market for *dōjinshi* or similar comic publications in the United States. That is, not only is there not a significant amount of sales of publications in which cartoonists use characters created by others, in the rare circumstances in which this does take place, it is pursuant to explicit agreement among the copyright holders or else is clearly done as a parody in order to level criticism.[91] Unlike *dōjinshi* in Japan, it does not appear that there is significant American commerce in unlicensed use of the cartoon characters of others.[92]

Acuff-Rose Music, Inc. should "allow a cartoonist to appropriate another cartoonist's protected characters for crossover use in a cartoon strip").

[90]*See, e.g., Dr. Seuss Enters,* 109 F.3d at 1401; J. Litman, "Mickey Mouse Emeritus," 11 U. Miami Enter. & Sports L. J. 429, 429 (1994) (describing cartoonist's Berke Brethed's criticism of Disney's litigiousness by using "Mortimer Mouse," Mickey's brother).

[91]It is beyond the scope of this Article to determine why the use of other authors' cartoon characters does not occur more often in the United States, even if explicit agreements would be required. Several possible justifications could be profferred, including the costs of negotiating such agreements and the difficulty of apportioning gains from such works, but these do not seem altogether convincing. U.S. courts have suggested that authors would, perhaps irrationally, reject hypothetical licenses for parodies due to ego. *See Campbell* v. *Acuff-Rose Music, Inc.*, 510 U.S. at 592 (noting unlikelihood that authors would license parodies that held them up to ridicule). It could also be that allowing *dōjinshi* is completely inefficient, but that appears belied by the relatively greater vibrancy of the Japanese industry. *See* infra section [IV].

[92]Indeed, there is evidence that the copyright holders exercise fairly strict control even over uses that may not be commercial. *See, e.g.,* L. Lessig, *The Future of Ideas,* p. 182 (2001) (describing "story of fans of *The Simpsons* who find themselves summoned to court when their *Simpsons* fan [Internet] pages are discovered by [computer agents] of the television network Fox," because of Fox's position that "[t]he fans are not allowed . . . to collect friends and strangers around these images of Bart Simpson and his dad").

B. Copyright, manga, and anime in Japan

Japanese Copyright Law and Cartoon Infringement

Japan's Copyright Law ("Copyright Law") contains important differences from the U.S. Copyright Act, such as its inclusion of moral rights for authors and its lack of a generalized fair use provision.[93] However, in general, the Copyright Law and its interpretations recognize concepts that would be familiar to American lawyers. As in the United States, the Copyright Law provides a limited term monopoly to authors, artists and other creators.[94] And the justification for this protection is to create incentives for creativity.[95]

Japan has fewer intellectual property cases and fewer copyright cases than the United States.[96] But as interpreted by the Supreme Court of Japan, and by lower courts specializing in intellectual property cases,[97] Japan has interpreted its Copyright Law in ways that are not strikingly different from U.S. courts addressing similar questions. And some fairly recent judicial interpretations in Japan would appear quite negative for the existence of *dōjinshi* markets.

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[93]*See* Copyright Law, Arts. 18-20 (providing for moral rights of authors), Arts. 30-49 (providing enumerated allowances for use of subjects of copyright by others).

[94]Copyright Law, Art. 51 (stating generally that "[c]opyright shall continue to subsist until the end of a period of fifty years following the death of the author").

[95]*See* Copyright Law, Art. 1 (stating that "[t]he purpose of this Law is, by providing for the rights of authors and the rights neighboring thereon with respect to works as well as performances, phonograms, broadcasts and wire diffusions, to secure the protection of the rights of authors, etc., having regard to a just and fair exploitation of these cultural products, and thereby to contribute to the development of culture").

[96]Although Japan has only recently begun to keep statistics on copyright cases separately from intellectual property cases generally, the latter are less frequent than in the U.S. *See infra* nn.[136, 171].

[97]The Tokyo, Osaka and Nagoya district courts have specialized intellectual property divisions where parties are not necessarily required to bring their cases, but to which they are often steered by their attorneys.

The Japanese Supreme Court has made it clear that fictional graphic characters can receive copyright protection. For example, in *K.K. Matsudera* v. *King Features Syndicate Inc.,*[98] the Court confirmed that the plaintiff's expression of the cartoon character Popeye could properly form the subject of copyright, even though – echoing the idea/expression distinction familiar to U.S. lawyers – the *idea* of Popeye alone separate from the cartoons in which he appears could not receive protection.[99] The Court strongly suggested that, had the term of copyright not expired on the original publication of the character Popeye,[100] the use of design elements of Popeye, such as his pipe, muscles and

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[98]Japan Supreme Court Decision of July 17, 1997 (1992 (o) No. 1443) (available at http://courtdomino3.courts.go.jp) (available in English at http://www.softic.or.jp.en/cases/popeye.html) (both visited July 7, 2002). For a good description of the conflicting lower court opinions in this case, *see* K. Port, "Copyright Protection of Fictional Characters in Japan: The Popeye Case – It's Not Just a Mick[e]y Mouse Affair," 2 Wisc. Int'l. L. J. 205 (1988).

[99]*Id.* ("tōgai tōjyō jinbutsu ga kakareta kakkai no manga sore zore ga chōsakukenbutsu ni atari, gutaiteki na manga wo hanare, migi tōjyō jinbutsu no iwayuru kyarakutaa o motte chōsakubutsu to iu koto ha dekinai") (said personage's each appearance as drawn in a manga suffices as the subject of a copyright, but if you separated from manga, said appearing personage cannot be said to be a so-called copyrightable character).

[100]The Court made a determination which is also found in American case law, that the copyright term on a character appearing in a series of cartoons generally expires when the statutory term has run starting with the date of the original publication of the character, as opposed to having the term re-start at each appearance in the serial. *Id.* ("sono hogokikan ga manryō shite chōsakuken ga shyōmetsu shita bawai ni ha, kōzoku no manga no chōsakuken no hogokikan ga imada manryō shite inai to shite mo, mohayachōsakuken o shuchyō suru koto ga dekinai mono to iwazaru o enai"; "Nanira arata na sōsakuteki yōso wo fukumu mono de ha naku, bekko no chōsakubutsu to shite hogo subeki riyu ga nai kara de aru.") (if the copyright period [of the *manga* in which the character originally appeared] is expired, but the term is not expired on subsequent works, we must say that you cannot still claim copyright [on the character]; where new creative elements are not present, there is no reason to protect [a character's subsequent apprearances in a serial *manga*] as a separate subject of copyright). *Compare* Nimmer on Copyright, Section 2.12 ("What of the situation where an author has used the same character in a series of works, some of which works subsequently enter the public domain, while others remain protected by copyright? . . . The better view . . . would appear to be that once the copyright in the first work that contained the character enters the public domain, then it is not copyright infringement for others to copy the character in works that are otherwise

sailor uniform, together with the word "Popeye" in English and Japanese, would nonetheless constitute infringement of the plaintiff's copyright despite the relatively inexact duplication of the original drawing (see Figure 3).[101]

There is also recent Japan Supreme Court precedent for the idea that authors can control the way in which the characters they create and copyright are portrayed. In *Konami* v. *Spec Computer K.K.*, the Court considered attempts to alter the manner in which the characters in a role-playing computer game interacted.[102] The game in question, entitled *Thrilling Memorial*, was a "romance simulation game" in which the hero of the game – controlled by the human actually playing the game – enters high school and chooses a female student from whom to earn a "profession of love" by graduation day.[103] Through game play, the player/hero character must accumulate suitable characteristics and abilities to be worthy of the female student character's "profession of love."[104] The defendant in the case had imported and sold a computer memory card that downloaded parameters into the hardware of the game machine so that the player/hero could more quickly and with greater certainty obtain the "profession of love."[105] The Court concluded that the defendant's memory card constituted an infringement of the author's right to preserve the identity of work by enabling purchasers

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original with the copier, even though later works in the original series remain protected by copyright.").

[101] *Id.* (III.5.) *Compare with DC Comics, supra* n.[72] (finding infringement based on inexact copy of Superman with imporant identical details).

[102] Japan Supreme Court Decision of Feb. 13, 2001 (1999 (u) No. 955) (available at http://courtdomino3.courts.go.jp) (available in English at http://www.softic.or.jp/en/cases/Tokimemo_Sup.html) (both visited July 7, 2002).

[103] *Id.* section 1.(1).

[104] *Id.*

[105] *Id.* section 3.

of the memory card to change the storyline's development and alter the image of the character of the hero.[106]

As the *Konami* case suggests, Japan is no stranger to the notion of contributory infringement.[107] And although the Supreme Court does not explicitly refer to the specific provision of the Copyright Law violated in its brief *Konami* opinion, it affirmed a lower court opinion that made it clear that the plaintiff's argument that it should be able to preserve the identity of its work was grounded in a "moral right" provision in Article 20 of the Japanese Copyright Law.[108] And indeed, the *Konami* case suggests that this provision grants a certain ability of authors to control the portrayal of their characters, even where the work by its nature as a computer game cedes a degree of control over character and storyline development to the game player.

Thus, judicial interpretations of Japan's Copyright Law would seem to suggest that a case could be maintained against the *dōjinshi* artists and those who organize *dōjinshi* markets for copyright infringement. All the necessary pieces are there: the Copyright Law has been construed to extend to cartoon characters, it has been interpreted to confer copyright holders with control over how their characters are portrayed, and it has been read to encompass contributory infringement claims. Of course, *dōjinshi* sellers and market organizers are not oblivious to this possibility.

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[106] *Id.* sections 2, 3.
[107] *See also JASRAC* v. *Miruku*, 1624 Hanrei Jihō 131 (Osaka High Court, Feb. 27, 1997) (concluding that the owner of a karaoke bar and the lessor of the karaoke machinery are liable for copyright infringement for singing of songs by customers in the bar).
[108] *JASRAC* v. *Miruku*, 1997 (ne) No 3587 (Osaka High Court, Apr. 27, 1999) (available at www.courtdomino3.go.jp) (noting that plaintiff's argument is that Copyright Act

Attempts to reconcile dōjinshi *markets with the Copyright Law*

Those active in *dōjinshi* markets who have some familiarity with copyright law often describe the legal status of *dōjinshi* as akin to parody; this may of course be strategic. Indeed, within the *dōjinshi* markets, the terms *parodei* and *aniparo* – both of which come from the English word "parody," the latter term being a shortened form of "*ani*mation *paro*dy" – are often used to describe works that borrow characters from a mainstream *manga* or *anime* work. As a result, one might assume that *dōjinshi* are an allowable form of use for the copyrighted works of others under Japanese law. And indeed, Japanese copyright law does make an allowance for a degree of permissible "private use" of copyrighted material, where the use is personal, within a family, or within a "limited circle."[109] Of course, it may strain the reasonable interpretation of the statute to characterization a convention at which 450,000 members of the public attend and buy works using the copyrighted characters of others as "private use" within a "limited circle."[110]

As a result, arguments have been made that likens *dōjinshi* to concepts that are analogous to American "fair use." While Japan contains no broad generalized fair use

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section 20's "scope of protection" extends beyond "elements essentially characteristics of the form of a work's expression" to "all the contents of its expression plus its title").

[109]*See* Japan Copyright Law, Art. 30(1) (as amended, 2000) (stating that "[i]t shall be permissible for a user to reproduce by himself a work forming the subject matter of copyright for the purpose of his personal use, family use or other similar uses within a limited circle (hereinafter referred to as 'private use'") (parenthetical omitted) (available in English at http://www.cric.or.jp/cric_e/clj/clj.html).

[110]*See, e.g.,* H. Minami, "Copyright in Japan," in *Fair Use and Free Inquiry: Copyright Law and the New Media*, J. Lawrence and B. Timberg, eds. (New Jersey: Ablex 1989), p. 238 (stating that, pursuant to Art. 30, "users may be able to make free use of otherwise inaccessible works, such as books, motion pictures, and opera scores, in limited numbers and within a limited circle [but] [t]he publication or selling of these works to a large number of people will, however, be an infringement on the copyright").

provision like that in Section 107 of the U.S. Copyright Act,[111] Japan's Copyright Law does contain a "laundry list" of permitted use of copyrighted material.[112] In particular, the logic of "parody" has been used by those with a vested interest in the survival of the *dōjinshi* markets to categorize the works sold there. Perhaps sensing the ambiguous black-letter legal footing of the *dōjinshi* markets as "limited circles," the founder of the largest such market has written a book that attempts to place both *dōjinshi* and parody within the allowable scope for borrowing copyrighted material under Japan's copyright law, along with the concept of the fair use of "quotations."[113]

But there are a couple of problems with attempting a legal harmonization of the *dōjinshi* markets with Japan's copyright law: While the Copyright Law contains a provision explicitly allowing the use of a copyrighted work for "quotations" "compatible with fair practice" to the extent necessary for "news reporting, criticism or research," there is no similar explicit provision for *dōjinshi* or parody used outside of those contexts.[114] It is worth noting that the Japanese term for quotation, *inyō,* has been

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[111]*See* T. Newby, "What's Fair Here Is Not Fair Everywhere: Does The American Fair Use Doctrine Violate International Copyright Law?" 51 Stan. L. Rev. 1633, 1644 (1999) ("Japan lacks a broad fair use doctrine"); K. Sugiyama, "The First Parody Case in Japan," Eur. Intel. Prop. Rev. 1987, 9(10), 285, n.2 ("the Japanese Copyright Act does not contain a general fair use provision analogous to section 107 of the United States Copyright Act").

[112]*See* Japan Copyright Law, Arts. 30-49 (as amended, 2000) (available in English at http://www.cric.or.jp/cric_e/clj/clj.html).

[113]*See* Y. Yonezawa, Manga to chōsakuken: Parodei to inyō to dōjinshi to (Manga and copyright: Parody, quotation and dōjinshi) (president and founder of the Comic Market describing "parody" and "dōjinshi" as alternative ways to reconcile with copyright infringement law) (Tokyo: Comiketto 2001).

[114]*See* Copyright Law, Article 32 ("[i]t shall be permissible to make quotations from a work already made public, provided that their making is compatible with fair practice and their extent does not exceed that justified by purposes such as news reporting, criticism or research").

construed to describe not just literary works, but also pictorial works, including *manga*.[115] However, the borrowing of characters in *dōjinshi* is generally not done to criticize the original. Instead, these characters are often used to expand the existing mainstream *manga* storyline, sometimes, but not always, with respect to exaggerated or altered depictions of particular characters' sexuality.[116] While the argument has been made that this type of treatment does form a type of implicit criticism of the original work,[117] this

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[115]At least one lower court has recognized that *manga* – both pictures and captions included – can properly be covered under the term *inyō* when the views espoused in the *manga* are the subject of criticism. *See Kobayashi* v. *Uesugi*, No. 9 (u) 27869 (Tokyo Dist. Ct., Aug. 31, 1999) (available (in Japanese) at http://courtdomino2.courts.go.jp/chizai.nsf/Listview01/D784FFD99A8B5CC749256A7700082E08/?OpenDocument) (mata, manga ha, kai to bun ga fukabun ittai to natta chōsakubutsu de aru tokoro, genkoku ha, sono yō na manga ni yotte jiko no suchyō wo tenkai shite iru no de aru kara, kai jitai wo hihyō no taishyō to suru bawai ha motoyori, genkoku no shuchyō wo hihyō no taishyō to suru bawai de ate mo, hihyō no taishyō wo seikaku ni shimesu ni ha, bun nominarazu, kai ni tsuite mo inyō suru hitsuyō ga aru to iu beki de ari, kai jitai wo hihyō no taishyō to shite inai kara, kai ni tsuite inyō no hitsuyō ga nai to iu koto de ha dekinai") (furthermore, as for *manga*, where the pictures and text form an indivisible work, and so, where the plaintiff has expressed his opinion by using this kind of *manga,* where the picture is the object of criticism as a start, and the plaintiff's opinions are also the object of criticism, in order to clearly indicate the object of criticism, it must be said that, in addition to the text, it is essential that the picture must also be "quoted," it cannot be said that because the picture is not itself the object of criticism, there is no need to "quote" the picture). *See also* K. Sugiyama, "The First Parody Case in Japan," European Intellectual Property Review (1987) (stating that while "'*inyō*' in everyday Japanese is generally used with respect to literary works," "as a copyright term of art it seems more broadly applicable to other kinds of works" and describing courts' partial inclusion of pictorial works under the term).

[116]*See, e.g.,* C. Horn, "Sonoda's Eleven," in *Japan Edge*, A. Roman, ed. (2000), p. 143 (quoting renowned mainstream *manga* artist Keniichi Sonoda, who also publishes *dōjinshi* as stating, in response to the question whether "all *dōjinshi* were erotic in style" that, "no, only about seventy percent"); S. Kinsella, *Adult Manga*, p. 117 (describing popular genre of *dōjinshi* involving borrowed characters that develops homoerotic themes between leading charactrs in mainstream works).

[117]*See* S. Kinsella*, Adult Manga*, p. 117 (describing the president and founder of the Comic Market as justifying these *dōjinshi* as "an attempt to struggle with and subvert dominant culture, on the part of a generation of youth for whom mass culture, which has surrounded them from early childhood, has become their dominant reality").

postmodern conception of social criticism is not what American courts recognize as the valuable criticism of an original work with respect to the legal definition of parody.[118]

Even if the notion of criticism described above was accepted by an American court, it is clear that some other aspects of the Japanese *dōjinshi* markets clash with an American legal understanding of parody. As mentioned in the preceding section, U.S. courts' analysis of allowable parody focuses on the four factors of more generalized fair use under section 107 of the Copyright Act. The first factor involves the purpose or character of the use[119]; the criticism embodied in parody is a justification for allowing a use, but the commercial nature of such a use cuts against permitting the use. The second factor, "the nature of the copyrighted work,"[120] has often been understood to make it harder for copyright holders of "informational" works such as databases to prevent their "fair use" than holders of copyrights in "creative works" that are closer to the "core concept" of copyright protection, such as books or cartoons.[121] The third factor, "the amount and substantiality of the portion used in relation to the copyrighted work as a whole,"[122] has in the context of cartoons come to be understood to mean that a parodist is safest from prosecution when he or she uses a "caricature" of the borrowed character – just enough to conjure up the image of the target of criticism – rather than importing the graphic depiction whole.[123] As can be seen in Figure 1, Japanese *dōjinshi* makers

[118]*See, e.g., Dr. Seuss,* 109 F.3d at 1400-01.
[119]U.S. Copyright Act, section 107(1).
[120]*Id.*, section 107(2).
[121]*See, e.g., Dr. Seuss Enters.*, 109 F.3d at 1402.
[122]U.S. Copyright Act, section 107(3).
[123]*See, e.g., Air Pirates,* 581 F.2d at 756.

typically copy the depiction of the characters in fairly precise detail.[124] Finally, the fourth factor in the American understanding of parody is "the effect of the use upon the potential market for or value of the copyrighted work."[125] While one of the main observations of this article is that both mainstream *manga* and the *dōjinshi* markets have borrowed from each other and flourished, there is at least some evidence that customers do see the "edgier" *dōjinshi* as a preferable substitute for mainstream *manga*.[126]

Of course, the fact that *dōjinshi* would be unlikely to survive copyright infringement claims under American law might be irrelevant to a Japanese judge-created notion of fair use, even if such an interpretation were inspired by American law. For American observers, *dōjinshi* markets are interesting whether they represent a legal safe harbor for copying within Japanese Copyright Law, or whether they represent the nonenforcement of rights that Japanese copyright holders unambiguously possess. Regardless of whether they are tolerated because of Japanese judges or Japanese copyright holders, the question remains as to *why* a society with a lucrative mainstream cartoon industry would continue this tolerance. The following section suggestions some possible explanations.

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[124]I have selected ads for characters that are fairly familiar to an American audience. Most of the ads in a typical Comic Market catalog are for chracters that are more familiar to Japanese readers – and they are generally rendered close to the original in a meticulous detail.

[125]U.S. Copyright Act, section 107(4).

[126]*See, e.g.,* M. Thorn, "Girls and Women Getting Out of Hand," in *Japan Edge*, A. Roman ed., p. 140 (cultural anthropologist describing fans of particular genres of *dōjinshi* as giving a standard response that they prefer them to mainstream *manga* because the romantic storylines in the latter are "boring because they are predictable"); *infra* n.[172] and surrounding text (translated ad copy from the website of a publicly-traded *manga* bookstore's online *dōjinshi* storefront, describing *dōjinshi* as a more entertaining alternative to mainstream works).

III. So if Japan Has Copyright Law, Then Why Are There Dōjinshi and Dōjinshi Markets?

As the foregoing section suggests, Japan's Copyright Law largely resembles the U.S. Copyright Act in important ways. And in recent years, commentators have become convinced that U.S. copyright holders have successfully obtained greater protection against both direct and contributory infringers.[127] Which leads to a significant question: Why do Japanese copyright holders on *manga* and *anime* tolerate mass markets in which apparently infringing works are bought and sold in huge quantities?

Is it in the culture?

One possible explanation for why markets for *dōjinshi* can thrive in Japan is that cultural norms and values inhibit *manga* and *anime* artists from pressing their legal rights to prevent the infringement of their works. This is a variant on the thesis that the Japanese are culturally averse to litigation.[128] The implication of this concept is that the manga artist is willing to forgo making a decision – bringing a lawsuit – that is economically advantageous to herself personally due to her "culture."

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[127]*See* Y. Benkler, "Free as the Air to Common Use," 74 N.Y.U. L. Rev. 354 (1999) (arguing that this trend rises to constitutional concern); Note, "The Criminalization of Copyright Infringement in the Digital Era," 112 Harv. L. Rev. 1705 (describing "lobbying effort that has prompted the passage of the new laws protecting copyright owners" to the relative exclusion of public interests). Indeed, the debate seems to focus on whether the increase in protection is good or bad, not questioning whether such an increase has actually occurred.

[128]*See* T. Kawashima, "Dispute Resolution in Contemporary Japan," in *Law in Japan: The Legal Order in a Changing Society*, ed. Arthur Taylor von Mehren (Cambridge: Harvard University Press, 1963), p. 41 (arguing that out of respect for nonlegal norms and desire for societal harmony, potential Japanese plaintiffs avoid judicial resolution).

The development of manga suggests that "borrowing" characters may have at least historically been an accepted practice among artists. The development of cheap, mass-produced comic books in postwar Japan was accompanied with a high degree of imitation.[129] During the 1940s and 1950s, a mass industry grew up in which it was common to publish comics that used others' characters – or even real people such as famous athletes or actors.[130]

Manga and anime artists often draw characters from Japan's collective heritage. For example, some fairly successful *anime*, including the motion picture *Princess Mononoke* and the highly successful *Dragonball* series draw heavily on characters prominent in Asian religion.[131] Given this degree of character borrowing, one might conclude that the conception of authorship may well differ in the world of *manga* and *anime* from the idea of "romantic authorship" that has dominated thought about copyright in the West.[132] However, it should be noted that there is also a tradition in the U.S. of drawing on European folklore and 19th century fiction.[133]

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[129]S. Isao, *supra* n.[34], at 141 (stating that "[w]hen a work became a hit," a "variant" "would show up," and describing a number of books that echoed the characters or storylines of more popular works).

[130]*Id.* at 142-44.

[131]"Mononoke" is the name for the "natural spirit of inanimate objects in Shintoism." L. Dobson, "Ise! Shinto's Mecca," *The Weekender*, Jan. 25, 2002 (available at http://www.weekender.co.jp/new/020125/feature-ise-020125.html) (visited June 14, 2002). The character Son Goku in the "Dragonball" series is based on Sun Wu-kong, the "Monkey King" of Chinese folklore, Craig, *supra* n.[34] at 16; Sun Wu-kong, and other characters in Dragonball are based on characters from the Hindu epic Ramayana.

[132]*See* J. Boyle, *supra* n.[66], pp. 59-60.

[133]Some famous American cartoons are themselves based on characters from European folktales and literature that have long since entered the public domain. *See* C. Sprigman, "The Mouse That Ate the Public Domain," *Writ,* No. 83 (March 5, 2002) (available at http://writ.news.findlaw.com/commentary/20020305_sprigman.html) (visited June 19, 2002) (observing that "[c]ultural giants borrow, and so do corporate giants" and noting that "[i]ronically, many of Disney's animated films are based on Nineteenth Century

Of course, the fact that copying or borrowing has been common does not necessarily mean it is a universally accepted norm. In one attention-getting incident, Nintendo, the copyright holder for the Pokemon series, made a criminal declaration under Japan's Copyright Law. This led the Kyoto Prefectural police to open an investigation and, in January 1999, arrest an author selling a *dōjinshi* series in which several Pokemon characters were depicted in a pornographic manner.[134] The author, whose chief reaction to the arrest seemed to be surprise, served 22 days in jail and paid a fine of about $800.[135]

This well-publicized incident was noteworthy in several respects. First, it was apparently rare enough to make major news, and indeed, to become a bit of a *cause celebre*. Second, it appears not to have to have led to more such arrests involving more *dōjinshi*. Indeed, the *dōjinshi* marketplaces have continued to grow even after the arrest.

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public domain works, including *Snow White and the Seven Dwarfs*, *Cinderella*, *Pinocchio*, *The Hunchback of Notre Dame*, *Alice in Wonderland*, and *The Jungle Book*.")

[134]"Pikachu *dōjinshi* na henshin dame" alteration of Pikachu in *dōjinshi* a violation), *Asahi Shimbun*, January 14, 1999 (reporting the arrest on copyright infringement charges of an artist who attempted to sell a 29-page dōjinshi work for Yen 900 [roughly 7 dollars] based on a popular character from the Nintendo series Pokemon by mailing handbills to the members of a dōjinshi association offering the work for sale; a Nintendo spokesman said that even though the number of copies were small, the company could not overlook the fact that the pornographic contents of the work were "destructive" of the Pokemon image); "Mudan de pokemon shiyō manga hanbai de onna o taiho," (Woman arrested for selling manga using Pokemon without permission), *Sankei Shimbun*, January 14, 1999 (describing the arrest under the copyright law of an artist whose adult manga depicted obscene acts).

[135]The artist described herself as being "shocked" by her arrest, in an account published in an online manga news publication. *See* "Sakusha jishin no koe" (The artist's own voice), in Nihchiyo Shuppan (available at http://www.nitiyo.com/zine/poke/poke19990212.htm) (discussing how she thought it incredible that she would be incarcerated for 22 days for this incident) (visited June 10, 2002); "Iken o kikasete kudasai – sakusha no koe 2," (Hear my side—The artist's own voice 2), in Nichiyo Shuppan (stating that she continues to be in a state of shock concerning the incident) (available at http://www.nitiyo.com/zine/poke/poke19990212.htm) .

Finally, the "Pokemon Dōjinshi Incident," as it became known,[136] leads to the following question concerning a cultural explanation for the permission of *dōjinshi*: Why Nintendo and not other copyright holders? In other words, is there some reason why Nintendo decided that they were not bound by hypothetical cultural norms? Nintendo's own corporate statements, unsurprisingly, give no hint of rejecting any cultural norm. Rather, they were grounded in setting forth Nintendo's (or its lawyers') own view of the appropriate legal scope of *dōjinshi*.[137] In particular, Nintendo, through its spokesperson, indicated that it believed that circulation among a limited circle might be allowable, but that the publication and sale of hundreds of copies – which is standard at *dōjinshi* conventions – exceeded that safe harbor.[138]

However, this incident does suggest that there might be another reason to doubt the "cultural" hypothesis for why *dōjinshi* are by-and-large permitted by copyright holders. It is sometimes suggested that artists and publishers "do not want to alienate their customer base," and so they decline to prosecute *dōjinshi* sellers because of the negative reputational consequences. But copyright interests can be transferred by characters' creators, and the prosecution of *dōjinshi* may not represent much "reputational" loss to companies whose primary interest in the characters are products

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[136] *See Manga to Chōsakuken*, *supra* n.[113], p. 8 (preface by Y. Yonezawa, president of the Comic Market, describing the Pokemon *Dōjinshi* Incident).

[137] *See* "*Nintendo no komento*" (Nintendo's comments) in Nichiyo Shuppan, Apr. 8, 1999 (available at http://www.nitiyo.com/zine/poke/poke19990408.htm) (last visited July 10, 2002) (reporting Nintendo corporate position that the sale of d*ōjinshi* at to large numbers of people at various *dōjinshi* markets exceeds the permissible "private use" allowable under Japan's Copyright Law) ("samazama no ibento ga teikiteki ni kaisai sare, hutokuteitasū no hitobito no aida de, *dōjinshi* ya guzu ga baibai sarete iru you na jyōkyō . . . ha, chōsakukenhō jō yurusareru 'shiteki shiyō' no hani wo akiraka ni koete ori, chōsakuken no songai ni atarimasu")

[138] *See Id.* Apparently, this was Nintendo's view of section 30 of the Copyright Law.

(such as video games) other than manga, to the extent that the customer base is different. Indeed, given the cross-promotion of the same characters among *manga*, *anime*, and video games, as well as consumer products, it is not rare for there to be multiple parties with interests in the same character.[139]

A tacit agreement?

Another way to explain the existence of *dōjinshi* and *dōjinshi* markets is that it may in some way be "efficient" to avoid legal resolution of these claims. That is, there may be an economic rationale for *manga* and *anime* artists to forgo pressing legal claims for infringement. This argument could take either an individual or a collective action form. For an individual, it might be that the risk of personal loss might exceed the gain from bringing an infringement action, even in the absence of any collective benefits that accrue to the wider community of artists.

Alternatively, there might be a collective economic rationality that would lead *manga* and *anime* artists to forgo bringing legal actions for infringement. One hypothesis is that *all* manga artists may be better off collectively if they forgo their *individual* self-interest and decide not to press their legal rights. This is essentially a prisoner's dilemma solved.

To be sure, observers have noted several reasons why professional cartoonists might tolerate the *dōjinshi* markets. However, most of these seem to arguments that the

[139]*See* Shimizu, *Manga no rekishi*, p. 195 ("Shuppansha to terebikyoku ha rigai ga ichi shi, sono ninki comikku o meguru chosakuken wo sakusha mo fukumu sansha de kyōyū suru to iu bawai ga mezurashiku naku natte kita.") ("It has become not unconmmon for publishers and television broadcasters to cooperate in their common interest, and together

industry as a whole benefits collectively from the *dōjinshi* markets. That is, they are not arguments that each individual professional *manga* or *anime* artists themselves benefits from these markets.

For example, *manga* artists in Japan also sometimes use each others' characters without explicit permission; that is, professional cartoonists sometimes put on their *dōjinshi* hats.[140] So it might be thought as some degree of reciprocal infringement. However, not all *dōjinshi* authors are professional cartoonists, which means the gains from infringement would be shared with nonprofessionals who would not be reciprocating in the same manner. Further asymmetry to the gains from "reciprocal infringement" stems from the fact that some professional cartoonists' characters are far more likely to be "borrowed" than others.[141]

Another potential justification is that the industry benefits because the *dōjinshi* markets are a useful way for the industry to discover new artistic talent. While this does appear logical, there is some disagreement about how useful these markets really are for

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with the manga artist included, jointly own the copyright on popular *manga* amongst the three of them.").

[140]Correspondence with patent attorney and *dōjinshi* legal expert Yūichiro Ishii (stating that there are usually no explicit agreements or licenses by copyright holders allowing the use of their characters) (on file with author); *see also* C. Horn, "Sonoda's Eleven," in *Japan Edge: The Insider's Guide to Japanese Pop Subculture*," A. Roman, ed. (Cadence: 1999) (describing the journal *Chosen Ame*, sold at *dōjinshi* markets and edited by Kenichi Sonoda, as having contributors who are mostly "well-known professionals").

[141]The Catalog/Program of the Comic Market is semi-organized by graphics illustrating the character being used on the cover of a *dōjinshi*, so that it is quite clear that some characters are more popular subjects than others, at least for cover art, because they take up more pages of the catalog. *See Komiketto Catalog 61* (Comiket: 2001. *See also* Kinsella, "Amateur Manga Subculture and the *Otaku* Panic," 24 Journal of Japanese Studies at 301 (1998) (stating that "leading boys' manga stories serialized in commercial magazines," such as "Dragon Ball" are particularly popular sources for borrowings).

talent development.[142] But certainly, tolerance of the creation and sale of *dōjinshi* has opened up the field of cartooning to a much wider scope of artists.[143]

While more producers could yield a more vibrant industry, it is unclear how mainstream, established *manga* or *anime* artists could directly benefit by *lowering* the barriers to entering the profession. Indeed, it would seem to be directly contrary to their immediate individual self-interest, as well as their collective interests as a profession.[144] Although they have not so far organized against the *dōjinshi* markets, professional *manga* artists have shown a willingness to organize as a profession to oppose industry developments that they perceive to threaten their livelihood.[145] And there is evidence that, because it is easier to make new versions of already developed *manga* stories than to

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[142]*Compare* Schodt, *Dreamland Japan*, p. 42 ("several of today's popular mainstream [*manga*] stars . . .either once worked in, or emerged from, the *dōjinshi* market") *with* S. Kinsella, "Pro Establishment Manga: Pop-Culture and the Balance of Power in Japan," 21 Media, Culture and Society 567 (1999) (stating that "during the nineties" "the amateur manga medium, which had released cohorts of leading manga artists during the 1970s, was no longer thought of as a rich source of exploitable ideas and artists for manga magazine publishers").

[143]I. Shimizu, *Manga no rekishi*, p. 192 ("shiroto mo seisaku shita komikku wo hanbai dekiru jidai to natte kita") (We have entered an era where nonprofessionals can also sell the comics they create.).

[144]There is a significant literature on the incentives for professionals to try to create and enhance barriers to entry into their trades, much of it centering on government regulation. *See, e.g.,* G. Stigler, "The Theory of Economic Regulation," 2 Bell J. Econ. 3 (1971). However, the desirability of barriers to entry presumably exists whether or not state regulation becomes involved.

[145]*See* "Shinkoshoten shokku—kuwaru shuppan" (New used-bookstore shock—changing publishing), *Asahi Shimbun*, June 3, 2001 (available at http://www.asahi.com/culture/bunka/K2001060300232.html) (visited July 10, 2002) (describing how the 254-member "21st Century Committee of Comics Authors Thinking About Copyright" had formed and placed ads in *manga* magazines opposing the widespread sale of their works at rapidly increasing numbers of used bookstores because it undercuts their royalties due to Japan's judicially-created first sale doctrine); *see also* "'Shinkoshyoten no mondai' ni kangaeyō" (statement of the Copyright Section of the Japan Cartoonists' Association) (available at

create new characters and scenarios that work, tolerance of *dōjinshi* artists and markets does indeed serve to lower entry barriers to the profession.[146]

Additionally, it could be argued that the *dōjinshi* markets provide a promotional opportunity for the mainstream *manga* industry. Several of Japan's large mainstream *manga* publishers, such as Kodansha and Shogakukan use *dōjinshi* markets for their own advertisement.[147] And they are certainly not unaware of the role their copyrighted characters play in the *dōjinshi* market: One Kodansha ad states that "Many characters were born in Kodansha *manga* magazines."[148] Thus, at some level, major publishers have a knowing, cooperative relationship with *dōjinshi* activity. This serves as at least some evidence that tolerance of *dōjinshi* may be understood as an unspoken agreement that serves to promote the industry as a whole.

However, the problem with the aforementioned arguments is that while they make sense on an industry-wide level, they do not explain why individual *manga* or *anime* artists or corporate owners refrain from bringing infringement lawsuits when they have a particularly valuable piece of intellectual property.[149] Understandably, there are reasons to believe that *dōjinshi* activity, on the whole, actually fosters greater demand and more

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http://www.nihonmangakakyokai.or.jp/news_1_3.htm) (visited July 10, 2002) (stating intent to press this opposition as a reform of the Copyright Law).

[146]*See* S. Kinsella, "Amateur Manga Movement," *supra* n.[12], at pp. 303-04 (reporting the results of a small random survey, in which one-third of respondents stated that it was easier for them to write and understand *dōjinshi* – that is, *manga* based on the characters of professional artists than "original" amateur *manga*).

[147]*See, e.g.,* Komiketto Catalog 61, pp, 818-19 (ads for Kodansha and Shogakukan respectively.

[148]*Id.*, p. 818 ("Kodansha no komikkushi kara tanjō shita kazu ōku no kyarakutaa."). According to its Hoover's on-line capsule description, the privately-held Kodansha is the "largest publishing firm in Japan." *See* http://www.hoovers.com/co/capsule/3/0,2163,56003,00.html (visited July 9, 2002).

innovation in the *manga* and *anime* industry. Nevertheless, this does not explain what would prevent an individual manga artist from prosecuting those who infringe his or her work, to his or her individual gain. That is, there is no obvious "enforcer" to prevent "cheating" on this communal deal.

On the other hand, if judges were unwilling to allow such suits, or were only willing to provide token assistance, that in and of itself might have a similar impact that an "enforcer" could. And while it might not be by design, as the next section suggests, there is some evidence that the legal system in Japan may act to frustrate potential "defectors."

[149]That is, in the absence of a system of cross-payments throughout the industry based on *dōjinshi* usage, of which there is no evidence.

The incentive to litigate

Compared to the United States, litigation in Japan makes less economic sense relative to other means of resolving disputes. As has been described amply elsewhere, [150] the design of the legal system in Japan inhibits litigation.[151] Lawyers are few,[152] and there are other institutional barriers to litigation, including delay.[153] As a result, it has been argued that Japanese are compelled to handle their disputes through other means.[154]

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[150]*See, e.g.,* John O. Haley, The Myth of the Reluctant Litigant, 4 J. Japanese Stud. 359 (1978) (suggesting that low litigation rates in Japan stem from the availability of informal dispute resolution mechanisms and structural factors preventing courts from offering adequate relief); J. Mark Ramseyer, "The Costs of the Consensual Myth," 94 Yale L. J. 604, 609 (1985) (observing that "nonlitigious ethos and the institutional barriers to litigation are mutually reinforcing rather than mutually exclusive"); Galanter, "Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society," 31 UCLA 4, 59 (1983) (stating that [t]he real check on Japanese litigation is the deliberate limitation of institutional capacity; the number of courts and lawyers is kept small").

[151]Although a number of facets of the Japanese legal system are currently undergoing reevaluation. *See, e.g., See* Recommendations of the Justice System Reform Council - For a Justice System to Support Japan in the 21st Century, Jun. 12, 2001 (available in English at http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html) (last visited July 20, 2002).

[152]Or at least, legally-trained personnel who may represent others in litigation are relatively few. J. Ramseyer & M. Nakazato, *Japanese Law,* pp. 6-13 (16,000 litigators, though many more legally-trained non-litigators exist).

[153]*See, e.g.,* J. Haley, "The Myth of the Reluctant Litigant," 4 J. Japanese Studs. 359 (1978) (describing institutional barriers including scarcity of lawyers, judges and prolonged litigation). *But see* Ramseyer and Nakazato, *supra* n. [32], p. 140 (describing how, although trials take longer in Japan due to discontinuous hearings, the time from filing to judgment is comparable to the United States).

[154]*See, e.g.,* C. Milhaupt and M. West, "The Dark Side of Private Ordering," 67 U. Chi. L. Rev. 41, 70-71 (2000) (corporate governance handled by racketeers – perhaps not for general shareholder benefit – rather than shareholder litigation); J. Ramseyer and M. Nakazato, "The Rational Litigant: Settlement Amunts and Verdict Rates in Japan," 18 J. Legal Stud. 263 (1989) (families of fatal accident victims settle claims due to legal rules that make settlement a relatively more profitable choice); F. Upham, *Law and Social Change in Postwar Japan* (Harvard: 1987) (human rights, pollution and other cases involving important issues of social justice are channeled by institutional design away from courts and towards bureaucratic negotiation).

Not surprisingly, just as litigation is less common in Japan than the U.S.,[155] so too is intellectual property litigation.[156]

Additionally, there is some evidence that the damages a copyright holder might recover in Japan will likely be considerably lower than they would be in the United States. Although direct comparisons are difficult, two cases are particularly interesting. In the 1990s, the Japanese business newspaper Nihon Keizai Shimbun filed copyright claims in both New York and Tokyo, against a company that abstracted, translated and redisseminated a number of the newspaper's stories.[157] In 1992, the Tokyo District Court awarded the newspaper 9900 yen, or roughly $800 for the infringement of 11 articles, plus litigation costs.[158] After the newspaper started to file periodic copyright registration of its news articles in August 1997, it filed suit against the same defendant, for the same type of infringement, but in New York rather than Tokyo. The Second Circuit upheld an

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[155]Of course, the United States is not the only basis for comparison. *See* J. Haley, "Dispute Resolution in Japan: Lessons in Autonomy," 17 CAN.-U.S. L.J. 443, 444 (1991) (noting that "[a]lthough litigation rates in Japan are low compared with some industrial democracies, particularly the United States, they are higher than others, especially the Scandinavian states").

[156]In 1996, the United States reported over 6,000 cases involving intellectual property infringement claims filed in the federal courts. Bureau of Justice Statistics, U.S. Dept. of Justice, Judicial Bus. of the U.S. Courts, Report of the Director, tbl. C-2A at p. 140 (1996). By contrast, the Japanese figure for 1996 appears to be less than one-tenth that despite having roughly one-half the population of the United States, although both the Japanese and U.S. figures are increasing, *see* Y. Kumakura, "Quicker and Less Expensive Enforcement of Patents: Japanese Courts," p. 1 (available at http://www.law.washington.edu/casrip/Symposium/Number5/pub5atcl5.pdf) (visited July 7, 2002). It appears that Japanese courts have not until quite recently broken out the number of copyright infringement actions separate from all intellectual property infringement actions.

[157]*See, e.g., Nihon Keizai Shimbun* v. *Comline Bus. Data, Inc.*, 166 F.3d 65, 69 (1999).

[158]*Nihon Keizai Shimbun* v. *Comline*, No. 4 (u) 2085 (Tokyo District Court, February 18, 1994) (available in Japanese at http://courtdomino3.courts.go.jp).

award of statutory damages for 22 infringed articles for a total of $220,000, plus attorneys fees of $200,000, for a total award of $420,000.[159]

While one hesitates to characterize a damages system based on essentially one experiment, there is evidence that damage awards are so low that it pays to infringe. For example, in the Thrillling Memorial video game case discussed above, although the defendant was judged liable for infringement, the damage award was about one-third less than the total sales of the offending memory card, which might not disincentivize infringers, depending on their profit margin.[160] And obviously, injunctive relief leaves an infringer free to sell until the injunction issues. Indeed, the tendency for Japanese courts to make damage awards for infringement that allow the infringer to potentially make a profit has been noted in patent cases, [161] although that rubric is being reexamined.[162]

However, even if larger damages were obtainable, there is still the question of collecting the damages award. It is difficult to get a sense of the wealth of *dōjinshi* authors, although a high proportion of them are students,[163] and so collecting a significant

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[159]*Id.,* 166 F.3d at 69, 74.

[160]*Konami* v. *Spec Computer K.K.* (Osaka High Court, Apr. 27, 1999) (awarding damges of Yen 1.146 million, plus one-fifth of litigation costs, but reciting that defendant sold 522 units at Yen 2980 per unit, implying a total revenue of over Yen 1.5 million). Given the low costs of producing marginal units of software, one might wonder whether the defendant actually still profited from this judgment.

[161]T. Takenaka, "Patent Infringement Damages in Japan and the United States: Will Increased Patent Infringement Damage Awards Revive the Japanese Economy?" 2 Washington University Journal of Law and Policy 309, 324 (2000) (stating that before 1998 "Japanese courts ha[d] awarded damages in the form of reasonable royalty [that the infringer would have had to pay] in more than fifty percent of all cases, and ha[d] awarded damages in the form of lost profits [of the patent holder] in less than ten percent of all cases").

[162]*Id.* at 354 (describing how revision in relevant statute plus changes in procedure and institutions for intellectual property cases may alter this tendency).

[163]*See* S. Kinsella, *Adult Manga*, pp. 110-11 (stating that "[a]lthough no statistis have been recorded" "young Japanese from low-income backgrounds . . . are the majority

judgment may be difficult. However, not all who create *dōjinshi* are students, and indeed, some are professional authors of mainstream *manga* as well.[164]

In addition, to civil damages actions and injunctive relief, both Japan and United States have criminal penalties available to deter copyright infringement.[165] However, only Japanese copyright law makes such a public prosecution explicitly unavailable unless the copyright holder makes a complaint.[166] Of course, in practice a criminal prosecution may be unlikely anywhere without some sort of complaint by the copyright holder. But by requiring the copyright holder to take the initiative for criminal penalties to apply, Japanese law explicitly forces the copyright holder to take a step that may hurt a manga's or an artist's reputation with fans, particularly given the existing baseline of *dōjinshi* permission.[167]

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participants of [the] Comic Market" but also noting that in the late 1980s, artists from "privileged backgrounds" including "students of elite universities" began to become involved).

[164]*See infra* n.[139-41].

[165] *Compare* 18 USC 2319 (providing for up to 5 years imprisonment plus fines for a first offense involving at least 10 copies with a value of at least $2500); 17 USC 506 (stating that the offense must be "willful") *with* Copyright Law Articles 119 to 121 (providing for up to 3 years imprisonment plus fines). Note that the Copyright Law's criminal penalties for "any person who infringes" explicitly "exclude[s] those who reproduce by themselves works . . . for the purpose of private use as mentioned in Article 30, paragraph (1)." Article 30 makes it "permissible for a user to reproduce by himself a work forming the subject matter of copyright for the purpose of his personal use, family use or similar uses within a *limited circle*") (paranthetical omitted and italics added).

[166] Copyright Law Article 123(1) (stating that "the prosecution shall take place only upon the complaint of the injured person").

[167]Even without considering endowment effects that may make *manga* fans more protective of "rights" that they perceive they already have, the overall tolerance of *dōjinshi* means that artists who might "break" with the general pattern of tolerance would be likely to stick out and bear costs asymmetrically with the benefits that may accrue across the industry to chilling infringement. Given the existing norm, litigation or prosecution might draw attention to them that would outweigh the possible gains from success. *See* E. Posner, *Law and Social Norms,* pp. 26-27 (Cambridge: Harvard 2000)

Reputational costs and benefits can impact the specific incentives of the individual artist. It is possible that the creators of cartoon characters believe that *dōjinshi* activity actually serves to promote their work.[168] In particular, *dōjinshi* often reinterpret popular works in attention-getting ways that might not be the author's normal style.[169] While it no doubt brings attention to any work to be the target of imitators, it is far from clear that such attention makes up for the possible displacement of sales by imitators. Nor is it clear that the loss of control over how a character is portrayed or perceived is a positive development. Nonetheless, this argument does relate to the specific incentives faced by particular *manga* or *anime* artists individually, as opposed to the overall industry as a whole. And together with the weak incentives to litigate in the Japanese system, it suggests that *manga* artists may rationally decide not to litigate notwithstanding the likelihood of success on the merits suggested by existing favorable judicial interpretations of the Copyright Law.

This set of incentives could of course change, and small modifications in the cost-benefit analysis individuals face can lead to significant shifts in their willingness to litigate.[170] Shifts that make litigation cheaper and damage awards greater, or that reduce the benefits of tolerating *dōjinshi* should make copyright holders more willing to bring actions for infringement. Whether these developments will actually occur remains to be

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(describing behavior designed to signal type as opposed to behavior based on taste or individual optimization in isolation).

[168]*See* Correspondence with patent attorney Yuichiro Ishii (on file with author).

[169]S. Kinsella, "Amateur Manga Movement," *supra* n.[12] at pp. 301-02; F. Schodt, *Dreamland Japan*, p. 42.

[170]*See, e.g.,* M. West, "Why Shareholders Sue: The Evidence from Japan," 30 J. Leg. Studs. 351 (2001) (discussing increase in shareholder litigation after rule regarding filing fee made them easier to bring); M. West, The Pricing of Shareholders Derivative Actions

seen, although what limited evidence exists does suggest that copyright infringement actions are increasing.[171]

IV. Why Does This Matter to Americans?

> *Recent mainstream manga are boring. Haven't you felt that way before? Sure, there are lots of interesting works. But something's missing. Haven't you felt that way before? There probably isn't a mainstream manga book anywhere that, if I make a lucky guess and choose it, will make me laugh and give me heartfelt enjoyment.*
>
> Dōjinshi *are not books that will sell 1,000,000 copies; they are books that will sell 100 copies. They are books that will give 100 people deeply felt enjoyment. As everyone can seek something that responds to their diverse needs, we have gradually ended up reading* dōjinshi.
>
> . . .
>
> *It's essential that there be a "place" where you can browse through and buy* dōjinshi. *Up until now, the* dōjinshi *market conventions have played*

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in Japan and the United States, 88 Nw. U. L. Rev. 1436 (1994) (discussing rarity of shareholder derivative actions before change in standing rule had major impact).

[171] [What little statistical information is available does seem to bear out the idea that copyright cases are becoming a greater share of a growing number of intellectual property cases. The Tokyo District Court's Intellectual Property Division, one of three courts of first impression that specialize in such cases in Japan, has seen its court filings grow from [153] in 1995 to [175] in 1998 and over 300 in 2001. This court did not keep statistics on copyright cases separately from other IP cases until 2001; but copyright cases filed in Tokyo District Court have grown from [19%] of filings in 2001 to [25%] of all filings so far in 2002. Of course, most of these cases are unlikely to concern *dōjinshi* – but these figures do mark an upward trend in copyright cases generally. Report of Tokyo District Court Intellectual Property Division, 2002.

this role. However, we believe that it's not sufficient to entrust them with this role alone.[172]

So goes the ad copy on the website of a publicly-traded chain of *manga* bookstores that has decided to enter the business of selling *dōjinshi*. Whether the increasing involvement of mainstream *manga* bookstores and the inevitable Internet sales[173] will upset the existing equilibrium of "tolerated" infringement is anyone's guess. But the future of *dōjinshi* is perhaps not as important to the American observer as its present.

What do I mean by that? Well, the existence of a moderate level of allowable infringement of *manga* characters suggests that several truisms that animate the American debate over copyright and fair use may require reexamination. First, the idea that "more" protection leads to "better" intellectual property products or increased innovation in a lockstep, linear fashion, may not be entirely accurate. Second, the preservation of a common sphere may advance the industry as a whole, even though it may not necessarily be in the interests of individual rights holders. Finally, some level of commercial exploitation by borrowers may be useful to foster innovation.

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[172]From the webpage of the publicly traded corporation Mandarake, Inc.'s *dōjsinhi* department – a section entitled "Why we handle *dōjinshi*.". The corporation has been described as emblematic of Japan's recent ability to export media and "cultural" products. D. McGray, "Japan's gross national cool," *Foreign Policy* (May 1, 2002) , p. 44 (describing "a network of shops across Japan and a listing on the Nikkei Stock Index" plus a plan for global expansion with stores existing in Los Angeles and Bologna, Italy).

When "more" protection is not better.

Imperfect protection of intellectual property is supposed to yield underproduction of intellectual property, or so one popular model goes.[174] While this argument is most prominent in the analysis of patent law, it has also been extended into arguments surrounding copyright law.[175] The flip side of this maxim is that "more protection" – that is, if we stamp out infringement or other uses that erode authors' incentives – leads inexorably to "more authorship."

Of course, this prediction has been questioned before. Examples such as cuisine and fashion innovation have been suggested to demonstrate that innovation can endure without copyright protection.[176] But the Japanese cartoon industry seems particularly striking, especially in comparison to its American counterpart.

The prediction that creativity cannot flourish without protection, and that more protection yields more creativity, seems particularly turned on its head with respect to *manga* and *anime*. The cartoon industry in Japan appears vibrant both domestically and as an export engine, despite the tolerance for *dōjinshi*-style infringing uses of its characters. As noted before, *manga* represents close to 40% of all reading material

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[173]*See supra* n.[172]; *Manga dōjinshi seisaku* (Tokyo: Grafikususha 2001) ("*HP de urou*!") (let's sell [*dōjinshi*] on our [Internet] home pages).
[174]*See, e.g.,* J. Litman, *Digital Copyright*, pp. 101-08 (describing this model).
[175]*See, e.g.,* P. Goldstein, "Copyright," 38 Journal of the Copyright Society of the U.S.A. 109, 110 (1991) (stating that "[c]opyright is about sustaining the conditions of creativity that enable an individual to craft *out of thin air* an *Appalachian Spring,* a *Sun Also Rises*, a *Citizen Kane*"). *But see, e.g.,* J. Boyle, *Shamans, Software and Spleens*, p. 57 (Harvard: 1996) (noting that such works are "*not* crafted out of thin air") (emphasis in original); J. Litman, *Digital Copyright*, pp. 80-81 (Prometheus: 2001) (critiquing ascendant "economic model of copyright law, whereby copyright provides an economic incentive for the creation and distribution of original works of authorship" and under which model "any increase in the scope or subject matter or duration of copyright will cause an increase in authorship").

published in Japan. In absolute terms, the consumption of *manga* has been growing fairly steadily, doubling over the past twenty years (see Figure 4).[177]

The increasing prominence of the Japanese cartoon industry as an exporter also seems to undermine the assertion that *more* protection must always be better. Despite the fact that no comparable market of "infringing" products such as *dōjinshi* appears to coexist with the U.S. cartoon industry, it would be hard to maintain that Japan "under" produces relative to the U.S. Instead, the balance of trade seems to favor Japan over the U.S. in the cartoon industry. Japanese animation programs are pervasive on several American television networks.[178] By contrast, American cartoons are virtually absent on Japanese television – despite the relative prominence of other American-made programming.[179]

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[176]*See* J. Litman, *Digital Copyright*, *supra* n.[175], pp. 105-06.

[177]The publishing industry's trade association reports a growth in total *manga* circulation from [1.1 billion in 1980] to slightly over [2 billion in 1990] and just over [2.2 billion] in 1995. *Shuppan nenkan* (Tokyo: Shuppan Nyūsu).

[178]Among among these Japanese imports is the most popular program on American children's television. *See* J. Rutenberg, "Violence Finds a Niche in Children's Cartoons," *The New York Times*, section 1, page 1, Jan. 28, 2001 (stating that "on any given day, anime-style programs may hold the majority of the time slots on the after-school and Saturday morning schedules of the WB and the Cartoon Network . . . and Fox," including "a dozen Japanese anime programs" among which was "the most popular program in all of children's TV," entitled "Pokemon")

[179]A search of the tv listings (online) of the major Japanese terrestrial broacasters, NHK ("General" channel), NTV, Fuji Television and Asahi Television turned up zero American cartoons during the week June 27 to July 3, although one could have watched many American programs, including "Will and Grace" (NHK), a broadcast of the Broadway musical "Swing!" (Fuji) and any number of movies. In the past, the American cartoon show "PowerPuff Girls" has been aired on Japanese terrestrial broadcast (that is, nonsatellite, noncable) television, and American cartoons, such as South Park and The Simpsons, are broadcast on cable or satellite television to Japan, which are less common than they are in U.S. households; however, there are 80 domestically produced anime programs on Japanese broadcast TV. *See* http://www.animerica-mag.com/features/10.03/column_oshiguchi_10.03.html (interview with the manager of a major *manga* chain bookstore in Japan) (visited on June 28, 2002).

Of course, these programs are dubbed in English, and so American viewers may not even realize they are watching Japanese animation.[180] And dubbing may allow *anime* to make a smoother transition as an export than translated *manga*. Nonetheless, *manga* have also become a growing Japanese export to the United States.

Indeed, what data exists seem to confirm that Japanese print *manga* are considerably more popular in the United States than American comic books are in Japan.[181] This is despite the fact that many other American media exports, such as TV shows and movies, are popular in Japan, and despite the fact that there are almost certainly more Japanese who read English than Americans who read Japanese.[182] While some short American newspaper comic strips have succeeded in Japan, popular American comic books, even though translated, have not been historically viable.[183] Indeed, despite Japan's much larger consumption of cartoon works, at one point in the early 1990s, no

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[180]F. Schodt, *Manga Manga! The World of Japanese Comics*, p. 155 (Kodansha: 1983 (with 1997 revisions)) (noting that "[m]ost American TV viewers are not even aware they are watching Japanese animation, let alone animation based on Japanese comics").

[181]While some might object that this is a function of Japanese readers' greater ability to handle English relative to Americans' ability to read Japanese, in practice much of the exported material is translated, just as virtually all animated cartoons on television are dubbed.

[182]Consider that, according to the American Institute for Foreign Study, in 1998-99 Japanese studying in the U.S. outnumbered Americans studying in Japan by more than 20:1 in absolute terms (not per capita), *see* Executive Summary (available at http://www.aifs.org/aifsfoundation/execsum.htm) (last visited July 25, 2002) and that English is a mandatory subject in Japanese high schools.

[183]*See* F. Schodt, *Manga Manga! The World of Japanese Comics*, p. 154 (Kodansha: 1983 (with 1997 revisions)) (noting that some "American newspapers' comic strips—particularly *Blondie* and *Peanuts*" have succeeded in Japan, but "popular American comic books like *Superman* and *Captain America* . . . have never really been commercially viable" even "when translated").

American comic books were published in Japan.[184] In contrast, by that time a surge in American imports of Japanese anime and manga was well under way, and Americans were purchasing between $5 and $10 million of Japanese *manga* per year.[185] This trend has continued: by 1999, over $85 million of Japanese manga were translated and republished in the United States.[186]

If the Japanese industry were moribund due to weak incentives for creativity, one might expect the statistics to be reversed. After all, Japan is hardly a closed market for American cultural products, and in some cases, such as motion pictures, a critical revenue component.[187] Of course, one could argue that the factor endowments of Japan and the United States are different – that is, Japan may be more fertile ground for *manga* and *anime* than some other societies. In fact, some Japanese manga artists do in fact appear to believe that the Japanese have an innate national ability to tell stories and draw cartoons, or that Japan has a culture that makes the artist more "free" to realize his or her

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[184]"Marvel to Take Spider-Man and U.S. Superhero Friends to Japan," Bloomberg News, Jan. 18, 1993 (stating that "there are no American comic books published in Japan as yet").

[185] T. Rosenblum, "Labels Fill Demand For Adult Cartoons; Japanese Imports Lead U.S. 'Anime' Boom," *Billboard*, Oct. 9, 1993. *See also* F. Schodt, *Dreamland Japan* (Bekerley: SBP 1996) (reporting estimates that, by 1995, sales of Japanese comic books in America were somewhere between $5 and $10 million, and that home video sales of anime had reached $50 million).

[186]B. Fulford, "Anime Opens on Main Street," *Forbes*, Oct. 18, 1999, p. 58 (stating that "Japanese comic books are also catching on here, with two sellers, Viz Communications and Dark Horse Comics, controlling 17% of the $500 million U.S. market").

[187]*See* D. Paiva, "Disney treads lightly with 'Pearl Harbor' ads," *Chicago Sun-Times*, May 20, 2001, p. 27 (noting signficant changes made to World War II film because "Japan traditionally account[s] for 25 to 30 percent" of the revenue of Hollywood films).

vision.[188] It is also possible to find similar themes of Japanese exceptionalism in less sensationalistic arguments that "culture" drives the spending of minors.[189]

However, arguments about culture do not really bear up to scrutiny, either. After all, the modern cartoon form entered Japan as a Western import during the early Meiji era in the 19th century – a time when Japan should have been at its most "Japanese," having been a largely closed society for a quarter of a millennium.[190] And arguments about the relative "freedom" to create overlook the fact that more complete control by copyright holders assists efforts at censorship.[191] At any rate, the notion that "culture" is a black

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[188] *See* R. Matsumoto, "Manga wa kyodai na yushutsuhin to naru" (Manga is becoming a huge export), *Voice*, March 2001, p. 61 ("nihonjin ha zōzōryoku yutaka na minzoku de aru") (arguing that Japanese ability to create interesting *manga* springs from a native Japanese creativity, according to the creater of "Space Cruiser Yamato" a Japanese animated cartoon that was televised as "Star Blazers" in the U.S.); K. Kusaka and Y. Ishikawa, "Nihon manga ga sekai o kaeru," (Japan's manga will change the world), *Voice*, November 2000, p. 154, at 160 ("Isshinkyō da to dō shite mo majime ni natte shimau. Tashinkyō ha, umi ni ha umi no kamisama, yama ni ha yama no kamisama ga ite, genri gensoku ga nan tori atte mo ii.") (according to Kusaka, an author and futurist, Japanese polytheism encourages a tolerance that makes artists feel free to create manga); *see also* M. Furniss, "Dreamland Japan: Manga's Paradise," *Animation World News*, July 1, 1997 (available at http://www.awn.com/mag/issue2.4/awm2.4pages/2.4furnissmanga.html) (visited June 14, 2002) (author of *Dreamland Japan* setting forth these ideas in an interview with an American university professor).

[189] *Id.* (stating, without reference to, e.g., American children's disposable income, that Japanese custom under which the average child receives gift of $600 cash at New Year's provides a "children's culture" boost to the manga market).

[190] *See* Shimizu, *supra* n.[34], pp. 29-31 (describing how British traders introduced the modern print cartoon form into Japan as early as 1862).

[191] M. Furniss, "Dreamland Japan: Manga's Paradise," *Animation World News*, July 1, 1997 (available at http://www.awn.com/mag/issue2.4/awm2.4pages/2.4furnissmanga.html) (visited June 14, 2002) (describing the vibrancy of Japanese manga versus U.S. comics as due in part to the overweening control exercised by U.S. publishers in self-censorship efforts beginning in the 1950s, from which the U.S. industry "has never recovered"). The determination of whether censorship derives from endogenous (within the industry, based on incentives) or exogenous (from outside the industry, based on factors not generated by the industry) sources, is beyond the scope of this article, and is likely a false dichotomy.

box that drives the development media industries like Japan's *manga*, rather than something changeable that exists in feedback with legal and social rules, is probably oversimplistic.

The preservation of a commons can enhance overall industry creativity.

The argument that creativity may be served by the preservation of a common sphere against gradually encroaching copyright protection is not a new one.[192] Indeed, echoing the different – but also relevant – sheep-centric allegory made famous by Garrett Hardin,[193] the increase in American copyright protection has been described as a modern-day "enclosure movement."[194] Prominent among the critiques of the "enclosure" of the common sphere created by increasing copyright protection is that freedom of expression is ultimately being curtailed. That is, there is a public benefit of a constitutional dimension that is being undercut due to misconceptions about the nature of authorship,[195]

[192]*See, e.g.,* R. Brown, Advertising and the Public Interest: Legal Protection of Trade Symbols, 57 Yale L.J. 1165, 1206 (1948) (observing that "[i]n an acquisitive society, the drive for monopoly advantage is a very powerful pressure. Unchecked, it would no doubt patent the wheel, copyright the alphabet, and register the sun and moon as exclusive trade-marks").
[193]G.Hardin, "The Tragedy of the Commons," 162 Science 1243 (1968) (describing socially suboptimal overgrazing that results when sheep owners follow their individual incentives concerning grazing on a common area).
[194]*See* Y. Benkler, "Free as the Air to Common Use: First Amendment Constraints on the Enclosure of the Public Domain," 74 N.Y.U. L. Rev. 354, 355 (declaring that "[w]e are in the midst of an enclosure movement in our information environment"); N. Netanel, "Market Hierarchy and Copyright in Our System of Free Expression," 53 Vand. L. Rev. 1879, 1904 (2000) (describing "copyright-centered enclosure of what was once free use and public domain"); J. Boyle, "Fencing Off Ideas," *Daedalus*, Spring 2002.
[195]Boyle, *supra* n.[66], at pp. 58-60.

the need for copyright protection to foster it,[196] and the legislative power of copyright holders.[197]

Although one could find evidence that links the tolerance of *dōjinshi* to a greater sphere of free expression in Japanese cartoons,[198] perhaps even more interesting is that the tolerance of *dōjinshi* coexists with a vibrant, innovative, and (perhaps most importantly) profitable *manga* and *anime* industry. To extend the metaphor, it is not clear that the *dōjinshi* peasants thrive from the weakness of Japanese enclosures at the *expense* of property owners. Rather – although perhaps carrying the pastoral metaphor a bit too far – the property owners and their *sheep* appear to thrive along with the peasants despite the relatively weak enclosures.

The mechanism by which both the formal *manga* industry as a whole and the *dōjinshi* authors thrive simultaneously is not entirely clear. But as discussed previously, the *dōjinshi* markets can provide several benefits to the *manga* industry collectively, even though these advantages might not accrue to the individual authors whose characters are being borrowed. The *dōjinshi* market may provide a source for new talented *manga* artists that the industry can use.[199] Additionally, the existence of *dōjinshi* may serve to promote the works of the copyright holders.[200]

Perhaps most notably, by offering works that arguably "push the envelope" more than the works of the formal *manga* industry, *dōjinshi* may produce examples of

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[196]Ku, *supra* n. [7], at pp. 299-300.
[197]*See* C. Edwin Baker, "First Amendment Limits on Copyright," 55 Vand. L. Rev. 891, 949 (2002) (stating that "history arguably illustrates the public's weakness and the commercial media and publishing industry's strength in the legislative arena, at least in the copyright context").
[198]*See* S. Kinsella, "Amateur Manga Movement," *supra* n.[12].
[199]*See supra* nn.[143-145] and surrounding text.

innovation that create new opportunities for the entire industry.[201] Indeed, mainstream manga publishing companies have in the past brought the styles and ideas of "hot" subcultures into their own product lines.[202] New genres fostered by the *dōjinshi* markets – genres that are often quite risqué – have been at times been adopted by mainstream commercial manga publishers.[203] And while some of these genres do draw morals-based objections,[204] others have become acceptable enough to be the subject of commerce by

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[200]*See supra* nn.[146-148] and surrounding text.
[201]The point that *dōjinshi* have pioneered many new (and often shocking) genres of *manga* that now exist as submarkets is often repeated in the cultural studies literature surrounding *dōjinshi*. *See infra* nn.[202-205] and surrounding text.
[202]*See, e.g.,* S. Kinsella, *Adult Manga* (University of Hawaii: 2000), p. 135 (describing how, in the 1960s, "[p]ublishing companies actively recruited the most innovative and often radical artists to work for their magazines").
[203]Examples of such genres include *lolicom* and *yaoi.* The former term comes from the Japanese term for "Lolita complex," a genre of *manga* produced for largely for a male audience that centers on an idealized, "young girlish heroine with large eyes and a childish but voluptuous figure." *See* S. Kinsella, *Adult Manga*, pp. 121-22, 135 (describing how this genre was popularized in the 1980s at *dōjinshi* markets and how the manga artist Kenichi Sonoda has "helped to create and establish a more acceptable form of *Lolicom* manga which has gained a limited degree of acceptability with the editors of large publishing companies"); C. Horn, *supra* n.[140] (describing Sonoda's work). The latter term reputedly derives from an acronym for a phrase meaning "no climax, no meaning, no resolution" (yama nashi, imi nashi, ochi nashi), or perhaps less literally and in screenwriting terms, "no arc"; this genre aims for a female audience and focuses on homoerotic relationships among idealized young men. M. Thorn, "Girls and Women Getting Out of Hand: The Pleasures and Politics of Japan's Amateur Comics Community," p. 139, in *Japan Edge*, A. Roman, ed. (Cadence: 1999) (paper by cultural anthropologist decribing how this genre became "dominant theme" in *dōjinshi* for young women in the 1980s); F. Schodt, *Dreamland Japan*, p. 210 (discussing incorporation of *yaoi* elements into the work of professional manga artist Morizono Milk); S. Kinsella, *Adult Manga*, pp. 150-51 (describing how Morizono Milk's work was issued by the major publisher Kōdansha before being discontinued despite popularity due to pressure from such sources as local PTA groups and local politicians).
[204]*See id.,* p. 151.

major corporations.[205] This coöpting of innovations introduced by *dōjinshi* artists has continued up to the present.[206]

Of course, these benefits, including innovation, come at a price. The tolerance of the "borrowing" of popular characters lowers the barrier to entry for the *dōjinshi* artists by relieving them of the somewhat more difficult chore of creating original characters.[207] It also makes it easier for *dōjinshi* work to catch on with readers, who do not have to invest the effort of learning the "backstory" of new characters.[208] By lowering the barriers to entry into the business of selling comics, the tolerance for *dōjinshi* borrowing of characters must to some extent disadvantage the original artists as copyright holders and professionals. But, as we have seen, the benefits to the industry as a whole likely outweigh this cost.

Optimal fair use could require the allowance of "commercial" activity.

Perhaps critical to the ability of the *dōjinshi* markets to function is their coexistence with a degree of commercial activity. While some participants seem keenly aware of their strategic incentives to portray these markets as noncommercial,[209] the fact remains that profit-making does factor into the overall operation of these markets. Some

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[205]Interview of Etsuo Doi, eBay Japan chief counsel (distinguishing between the *lolicom* genre, which eBay deemed to have become acceptable for commerce on its website at the turn of the millenium, and others which were not).
[206]*See* F. Schodt, *supra n.*[9], *Dreamland Japan*, p. 110 (stating that "many of the most interesting trends in Japanese comics come from outside the mainstream industry, from the *dōjinshi* wold, from erotic comics, and from the underground").
[207]S. Kinsella, *Adult Manga*, pp. 119-20.
[208]*Id.*
[209]*See* Komiketto 61 Catalog, p. 15 (stating *in English* in the one English page amongst 1000-plus page Japanese book– and in a section without a Japanese counterpart – "[m]ost

dōjinshi markets are held by for-profit corporations.[210] Other for-profit businesses, such as printing companies, publishing software companies, *manga* bookstores and mainstream *manga* publishers, all use *dōjinshi* markets for advertising.[211] And the *dōjinshi* artists themselves do aim to make sales of their products.[212]

Indeed, for such a market to become viable enough that *dōjinshi* artists would invest the time, effort and money to create the often quite-polished products they produce, a certain amount of "commercialization" may well be necessary. Those who distribute creative work to mass audiences incur fixed costs that they need to recoup; they require a certain level of profitability to give them incentive to make these investments, apart from any financial incentive for creators to create.[213] Even with help from the Internet, for products such as comic books by unknown authors, hand-on access to sample copies (*mihon*) may require physical meetings at rented convention centers.[214]

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dōjinshi-circles are not here for profit [but] are here to enjoy the communication with other participants").

[210]*See* Schodt, *supra* n.[9], p. 36.

[211]*See supra* nn.[146-48] and surrounding text.

[212]*See supra* n.[38].

[213]At least one commentator has suggested that technology may alter this rationale for copyright protection. R. Ku, "The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology," 69 U. Chi. L. Rev. 263, 267-68 (2002) (arguing that "the economics of digital technology require the unbunding of the public's interests in the creation and distribution of digital works).

[214]Indeed, of more concern than copyright infringement to the Comic Market organizers may be public decency laws. *See* "Heiwa jya naku nattchatta yo—mattaku ero sansei tero hantai" (Peace has come to an end! Everyone support eroticism, oppose terrorism!) (essay apparently written by anonymous *dojinshi* market organizer under pseudonym Mister S.) (describing ongoing lawsuits concerning damages for allowing minors to view sample copies of erotic amateur manga but keenly aware of lower penalties in Japan ("kore ga nihon de yokatta na. [m]aa jinseibō ni furitaku nakattara zehi yamete okinasai," which roughly translates as "Isn't it great to be a Japanese? [Judge:]'Oh dear, if you do not want to waste your life, please stop.'") compared to the U.S. ("speedo handan de . . . amerika de ha bakkin san oku nen toka ni nattan dashi," roughly "a quick American judgment delivering a fine of 3 million yen for example").

That plus the high-quality offset printing that is *de rigeur* for the works on sale may require a certain level of participation by profit-making entities.

This "corporate" aspect of *dōjinshi* and the *dōjinshi* markets may leave some observers questioning the argument that *dōjinshi* deserves exemption from copyright restrictions because is pure noncommercial artistic innovation. But in a broader view, the profitable coexistence of *manga* and *anime* with *dōjinshi* may suggest that the commercial nature of a work that "borrows" from another copyrighted work should not necessarily give rise to negative presumptions against allowing that borrowing. To the extent that the policy goal is one of an efficient level of creativity and innovation, and not simply preservation of economic benefits for an "original" artist, the interrelationship of the *dōjinshi* and mainstream markets may suggest the "commercial" nature of those making "fair use" of copyrighted works might be more properly treated as a balance than as giving rise to negative inferences.[215]

[215]The degree to which a "commercial" nature somehow negates an otherwise permissible fair use of copyrighted material has been a source of controversy in U.S. courts. *Compare Campbell* v. *Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994) (rejecting lower court approach "giving virtually dispositive weight to the commercial nature of [a] parody" and stating that "the statute makes clear that the commercial . . . purpose of a work is only one element of the" inquiry) *with Sony Corp.* v. *Universal*, 464 U.S. 417 (1984) (stating that "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright"); *Dr. Seuss Enters.,* 109 F.3d at 1403 (stating that "[b]ecause, on the facts presented . . . use of The Cat in the Hat original was nontransformative, and admittedly commercial, we conclude that market substitution is at least more certain, and market harm may be more readily inferred").

Conclusion: Pikachú and the Berne Convention

In writing about Japan, there is always the danger of suggesting that normally logical rules do not apply.[216] My point is not that Japan is an alternate universe of copyright protection, an intellectual property Bizarro world, if you will.[217] Instead, the coexistence of Japan's mainstream cartoon publishing industries' with the *dōjinshi* market illustrates that the proper balance between copyright and fair use may be examined via real-world examples of thriving industries, not just economic theory or noneconomic public interest justifications.

Similarly, in writing about any other nation's legal and social arrangements, there is always the danger of exaggerating the degree to which it truly operates distinctly from our own. After all, we live in an age of increasing global economic and legal interdependence. In copyright, as in other areas, international agreements exist that impact former notions of sovereignty.[218]

One example may illustrate how economic logic animates how Japan is like the U.S., and how the U.S. affects Japan. The *dōjinshi* world was shocked by the headline-grabbing arrest on criminal copyright infringement charges in January 1999 of a woman who had sold works in which the Nintendo Corporation's Pokemon characters were

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[216]*See, e.g.,* J. Mark Ramseyer, "Learning to Love Japan: Social Norms and Market IncentiveS," 31 San Diego L. Rev. 263, 263 (1994) (observing that "[w]ithin law schools, we tend to use Japan . . . to argue that economic incentives need not matter").
[217]*See, e.g.,* J. Siegel, *Superman: Tales of the Bizarro World* (Diamond: 2000) (tales of a cube-shaped planet where alarm clocks dictate when to go to sleep and ugliness is beautiful).
[218]*See, e.g.,* K. Aoki, "(Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship," 48 Stan. L. Rev. 1293, 1313 (1996) (noting that attempts were made to justify nineteenth century copyright treaties with then-existing notions of sovereignty by avoiding concept of reciprocity).

engaged in sexual activity.[219] Due to earlier crackdowns on public decency,[220] the question raised in Japan was whether this was an arrest that truly was animated by public decency or by economic concerns by the Nintendo Corporation, the copyright holder, to stamp out use of its characters.[221]

Perhaps only the collective mind of Nintendo can know the true answer.[222] But there are at least three interesting facts about this incident. First, the arrest came after Nintendo became aware of and complained to Kyoto prefectural police about the offending works in late 1998. Second, the complaint came after a 1998 judicial decision in the United States – where Pokemon had become the number one rated syndicated children's television show, and the focus of a Christmas 1998 marketing bonanza[223] – that categorized the scope of a foreign copyright holder's rights under the Berne Convention as a matter of foreign law.[224] Thus, there was the potential that Nintendo's phenomenal American success could be threatened by a hypothetical U.S. court's

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[219]This received a high degree of newspaper coverage in Japan. *See supra* n.[134]; *see also Manga to Chōsakuken*, *supra* n.[134], p. 8 (noting that this arrest caught the attention of those who produced *dōjinshi* in Japan).

[220]*See* S. Kinsella, *Adult Manga*, pp. 141-50 (detailing the early 1990s censorship "movement against manga," both mainstream and *dōjinshi*, that was aimed at works considered obscene).

[221]*See, e.g.,* "Kono jiken ha adaruto mondai dake de ha nai," (This incident is not just an "adult" problem) in *Nichiyo Shuppan*, Feb. 1, 1999 (available at http://www.nitiyo.com/zine/poke/poke19990201.htm) (last visited on July 12, 2002).

[222]Although Nintendo did supply, through a spokesman, a statement voicing the theory that Japanese law permitted distribution of *dōjinshi* within limited circles of people, but that the large-scale conventions such as the Comic Market went beyond that and were impermissible infringement. *See supra* n.[178].

[223]*See* 12/10/98 LATIMES C1. After it became a network show, it became the highest-rated children's television show in America. *See* "Violence," NY Times, *supra* n. [137].

[224]*See Itar-Tass* (2d Cir. 1998) (where Russian intellectual property owner sued alleged U.S. infringer, distinguishing between the question of infringement, to be treated under U.S. law, and the actual scope of the copyholder's rights, to be determined under Russian law).

conclusion about the relatively limited scope of copyright protection in Japan for cartoon characters, based on the existence of widespread *dōjinshi* publishing.

The last interesting fact is that the *dōjinshi* markets have continued to thrive in the following three years after what became popularly known in Japan as "the Pokemon *dōjinshi* Case." These markets continue to feature publications using characters borrowed from mainstream works. In other words, why did only Pokemon object enough to instigate a prosecution?

It would not be surprising if the tolerance of *dōjinshi* markets in Japan changed as Japanese copyright holders became more invested in U.S. markets. In our increasingly connected world, trying to maintain different levels of regulation can be like trying to prevent water from seeking its own level. But the story of how the *dōjinshi* markets and mainstream *manga* flourished and borrowed from each other during the last quarter of the 20th century can at least provide a cautionary tale against adopting the conclusion that more protection is always better.

Figure 1. On the left are illustrations advertising *dōjinshi* for sale by artists at a December 2001 convention in Tokyo. On the right are officially-licensed versions of the same characters "Terriermon" of the Japanese-produced series "Digimon" (taken from the Fox broadcasting network website) and "Buttercup" of "The PowerPuff Girls," one of the few American animated series to appear on Japanese broadcast television (taken from the Cartoon Network website).

Figure 2. At left is the use the court found to be infringing in *Dr. Seuss Enters.* v. *Penguin Books USA*; at right is The Cat in the Hat as he appears on the cover of the eponymous children's book. (From *id.*, 109 F.3d 1394, 1407-08 (9th Cir. 1997).)

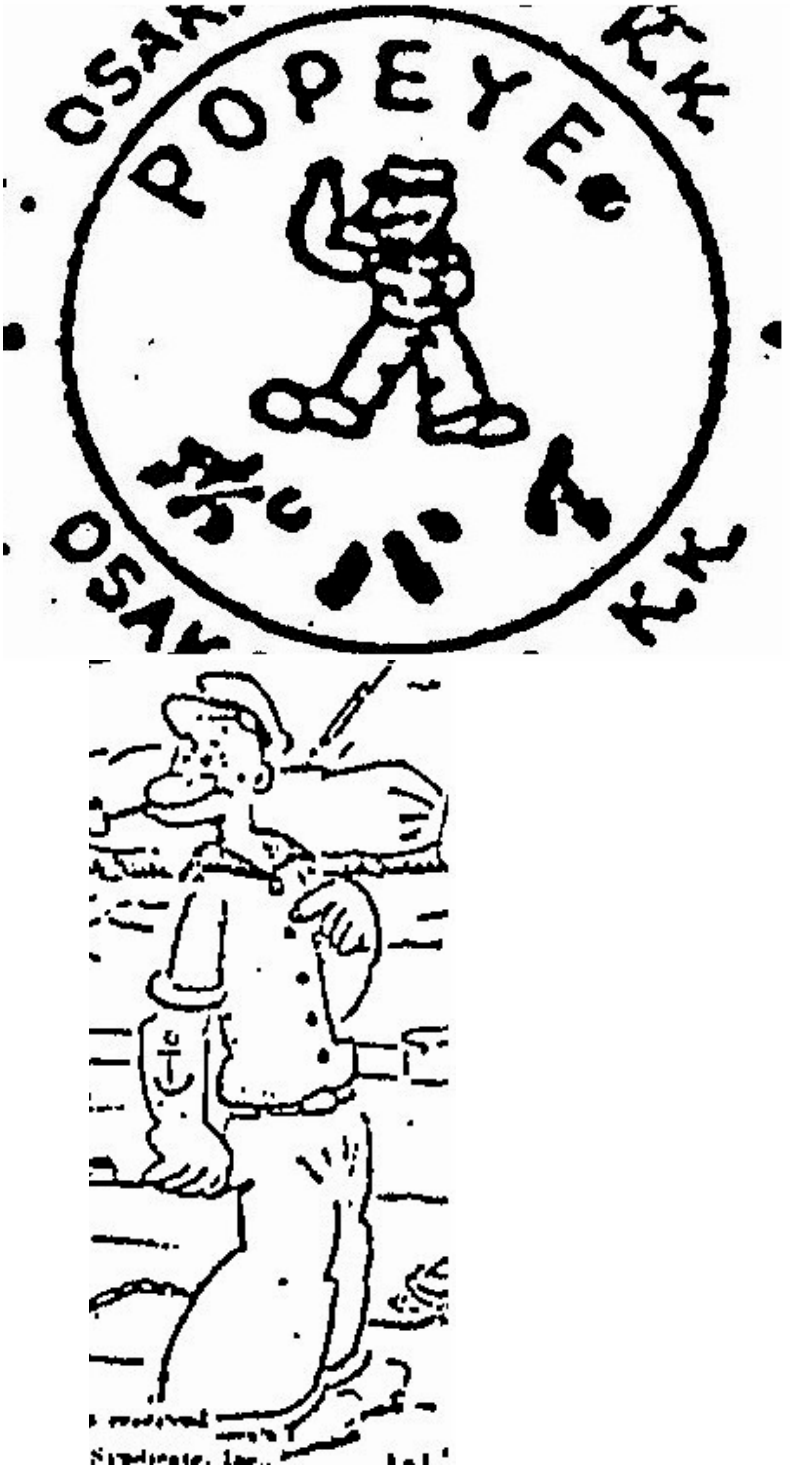

Figure 3. At top is Popeye as used by the infringer in *K.K. Matsudera* v. *King Features Syndicate Inc*., and at bottom is Popeye as he first appeared in a published comic strip. (From Japan Supreme Court Decision of July 17, 1997 (1992 (o) No. 1443) (available at http://courtdomino3.courts.go.jp) (available in English at http://www.softic.or.jp.en/cases/popeye.html) (both visited July 7, 2002).)

Year	"Official" Manga Industry Circulation	Attendance at largest *dōjinshi* sales convention	Dollar value of manga exports to United States
1975	800 million	600 people	n.a.
1980	1100	n.a.	n.a.
1985	1500	n.a.	n.a.
1990	2000	220,000	n.a.
1995	2300	n.a.	$5-10 million
2000	[x]	480,000 (2001)	$85 million (1999)

Figure 4. Trend data for the Japanese comic industry. "Official" Manga Industry circulation taken from [Shuppan Nenkan]. [Attendance figures for 1975 from S. Kinsella, *Adult Manga*, p. 106; for 1990 from I. Shimizu, *Manga no Rekishi*, pp. 192-93; for 2001 *Comic Market* 61 ("Comic Market 60 After Report"). [*Comic Market 46 Catalog*, pp. 14-15 (Comiket: 1994)]. Dollar value of U.S. *manga* consumption are rough estimates from F. Schodt, *Dreamland Japan*, p. 338 (Bekerley: SBP 1996) (for 1995) and B. Fulford, "Anime Opens on Main Street," *Forbes*, Oct. 18, 1999, p. 58 (for 1999).