ACHIEVING THE COPYRIGHT EQUILIBRIUM: HOW FAIR USE LAW CAN PROTECT JAPANESE PARODY AND *DOJINSHI*

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I. INTRODUCTION

The film industry as a whole is without question an important contributor to the United States economy, given that its revenue comprises three percent of the country's GDP for goods and services.[1] With Hollywood films also serving as one of America's major exports, the U.S. film industry has a prominent presence throughout the world. Similarly, Japan considers the animation and manga (the Japanese term for comic books) industry as one of the important players in the Japanese economy.[2] Manga comprises around thirty percent of the Japanese printing industry[3] and over seventy percent of electronic book sales in Japan.[4] Popular animation series, often based on original manga, boost sales of character products in neighboring industries, including video games and action figures.[5] The Japanese anime and manga industry is a star player in the Japanese economy, just as the film industry is in the U.S.

Many Japanese believed that the industry was being threatened while Japan was negotiating to be part of the Trans-Pacific Partnership (TPP) agreement, a multilateral trade agreement signed by twelve Pacific Rim countries including the U.S. and Japan in October, 2015.[6] To comply with the agreement, Japan needed to enact a law allowing the Japanese police to file criminal copyright infringement complaints in cases of commercial copyright piracy without the copyright holder's

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1. *The Government Released Its First Official Measure of How Arts and Culture Affect the Economy*, HOLLYWOOD REP. (Dec. 5, 2013, 9:02 AM), http://www.hollywoodreporter.com/news/hollywood-creative-industries-add-504-662691.

2. *See* KEIZAI SANGYŌSHŌ [MINISTRY OF ECONOMY, TRADE AND INDUSTRY], BUNKA SANGYŌ RIKKOKU NI MUKETE [TOWARDS THE ESTABLISHMENT OF A STRONG PRESENCE IN THE CONTENT INDUSTRY] 6, 15-18, 22-23 (2010), http://www.meti.go.jp/policy/mono_info_service/mono/creative/bunkasangyou.pdf (Japan). The Ministry of Economy, Trade and Industry of Japan had adopted an unofficial slogan "Cool Japan" to express its commitment to promote Japan's soft power including the popularity of anime and manga contents both domestically and overseas. *See* Kazuaki Nagata, *Exporting Culture via "Cool Japan,"* JAPAN TIMES (May 15, 2012), http://www.japantimes.co.jp/news/2012/05/15/reference/exporting-culture-via-cool-japan/#.WJaGDtlrldU.

3. SHUPPAN KAGAKU KENKYŪJO & ZENKOKU SHUPPAN KYŌKAI, SHUPPAN SHIHYŌ NENPŌ [ANNUAL REPORT ON THE PUBLICATION MARKET] 222 (2016) (Japan).

4. *Id.* at 16.

5. *See* TZE-YUE HU, FRAMES OF ANIME CULTURE AND IMAGE BUILDING 113 (2010); Salil Mehra, *Copyright and Comics in Japan: Does Law Explain Why All the Cartoons My Kid Watches Are Japanese Imports?*, 55 RUTGERS L. REV. 155, 158 (2002).

6. William Mauldin, *U.S. Reaches Trans-Pacific Partnership Trade Deal with 11 Pacific Nations*, WALL ST. J. (Oct. 5, 2015, 5:12 PM), http://www.wsj.com/articles/u-s-reaches-trade-deal-with-11-pacific-nations-1444046867.

initiation.[7] Although one might think that copyright holders would welcome such a law, it created a unique problem within Japan's anime and manga industry. It has been argued that the manner by which the law defines the scope of piracy could affect the creation of parody works because Japan does not recognize parody as an exception to copyright infringement like many other countries, including the United States.[8] They feared that enforcement of such a law would discourage the creation of parodies in Japan,[9] which are often based on popular anime and manga series.[10] They further argued that because parody is believed to play an important role in Japan's anime and manga industry, this potential chilling effect on parody creations could undermine the success of the whole industry.[11] For that reason, many Japanese parody creators actively supported the idea to introduce a fair use provision that is modeled on U.S. fair use law.

However, their fear turned out to be unwarranted because the Cabinet Secretariat, when submitting the bill to amend the Japanese Copyright Act to the Japanese House of Representatives, specifically stated that the scope of piracy will not include secondary works such as Japanese parodies.[12] As a result, the argument to adopt fair use law was not brought up during the 190th session of the Diet, after which the bill was approved by the Cabinet.[13] Even though the newly created criminal copyright law might not significantly affect the creation of parody, the TPP agreement could still impose a negative effect because of its overly protective characteristics for copyright owners. For example, the agreement requires Japan to extend its copyright term from fifty years *post mortem auctoris* (p.m.a.) to seventy years p.m.a.[14] It also requires Japan to provide statutory damages to copyright in-

7. Trans-Pacific Partnership Agreement art. 18.77, *opened for signature* Feb. 4, 2016 [hereinafter TPP Agreement], https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text.

8. Mehra, *supra* note 5, at 175-76.

9. *Urgent Appeal on TPP Intellectual Property Provisions*, Japan Forum for the Intellectual Property Aspects and Transparency of TTP (last visited Feb. 9, 2017), http://thinktppip.jp/?page_id=713&lang=en.

10. Mehra, *supra* note 5, at 164.

11. *See* discussion *infra* Part II.A.

12. Naikaku Kanbō [Cabinet Secretariat], Kantaiheiyō Pâtonâshippu-Kyōtei no Teiketsu ni Tomonau Kankei-Hōritsu no Seibi ni Kansuru Hōritsu-an no Gaiyō [Summary of Bill for the Establishment of Relevant Laws to Accompany the Ratification of the Trans-Pacific Partnership], 3 (2016), http://www.cas.go.jp/jp/houan/160308/siryou1.pdf (Japan).

13. *Development of Copyright Protection Policies for Advanced Information and Communication Networks*, Copyright Res. & Info. Ctr. (Oct. 2016), http://www.cric.or.jp/english/csj/csj3.html.

14. *See* TPP Agreement, *supra* note 7, art. 18.63.

fringement,[15] which is known as a major cause behind increases in the number of copyright lawsuits and damages awarded.[16] Most problematic is that the Intellectual Property (IP) chapter of the agreement, primarily based on the U.S. proposal, omits important safe-harbor rules and exceptions that the U.S. Copyright Act makes available to individual defendants.[17] While these changes will certainly strengthen the protection for copyright owners, copyright protection should also take account of the public's interest in free access to preexisting works, as all creations employ preexisting materials to some extent.[18] If the access to preexisting works is unduly restricted, it would inhibit the overall creation of expressive works, including parodies.

Although the Trump Administration's withdrawal from the TPP made it less likely that the original agreement will stand between the remaining partner countries, it is still possible that the U.S. will attempt to impose a bilateral agreement against Japan that is similar to the TPP agreement in the future. In such a case, pro-copyright owner provisions of the TPP agreement could be included in the bilateral agreement, a possibility that Japan should not disregard. In the case where the TPP agreement takes effect in any form—whether through multi-lateral partnership or bilateral partnership, Japan should adopt a fair use provision modeled on U.S. fair use doctrine[19] in order to protect parody creations.[20]

A fair use provision will serve to maintain a balance between protecting the interests of copyright owners and allowing free access to existing copyrighted materials that encourages parody creations. In fact, prior to the entrance to the TPP agreement, Japan had considered the adoption of a fair use exception into its Copyright Act for

15. *See id.* art. 18.74.

16. *See, e.g.,* John Tehranian, *Infringement Nation: Copyright Reform and the Law/Norm Gap*, 2007 UTAH L. REV. 537, 549 (2007).

17. For more detailed discussion, *see* Jonathan Band, *The SOPA-TPP Nexus*, 28 AM. U. INT'L L. REV. 31, 58-62.

18. Glynn S. Lunney, Jr., *Reexamining Copyrights Incentives-Access Paradigm*, 49 VAND. L. REV. 483, 572; *see also* Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983, 1006 (1970). *See generally* Mehra, *supra* note 5, at 179-80 (explaining that Japanese manga and anime artists often draw characters from Japan's collective heritage).

19. 17 U.S.C. § 107 (2012).

20. Although the United Kingdom's fair dealing doctrine is also a viable candidate for a copyright exception, this article exclusively focuses on the U.S. fair use doctrine because the scope of the fair dealing doctrine is more limited than that of the fair use doctrine. As explained *infra* Part II, many Japanese "parodies" fall outside the legal definition of a parody and will not likely fall within the fair dealing categories. *Compare* Copyright, Designs and Patents Act, 1988, c. 48, §§ 29-30 (U.K.) (fair dealing defenses) *with* 17 U.S.C. § 107 (2012) (fair use defense).

several years, though its efforts never came to fruition.[21] However, the enactment of the amended Japanese Copyright Act in response to entering into the TPP agreement, or an agreement similar to the TPP agreement, creates a viable opportunity for Japan to reconsider the option to adopt a fair use exception in order to achieve equilibrium between the protection for copyright owners and the public's need to access copyrighted materials for new creations. Faced with a similar need, South Korea, whose legal system in many ways parallels that of Japan, recently enacted a fair use provision almost identical to the U.S. fair use doctrine when it entered into a free trade agreement with the United States.[22] Given the nature of the TPP agreement, Japan should follow suit and adopt a U.S.-modeled fair use exception.

This article addresses both how and why Japan should adopt U.S. fair use doctrine in its Copyright Act to protect parodies. Part II provides background information of the development of, and the relationship between, Japanese parody and copyright law. Part III explains the four factors of the U.S. fair use doctrine codified in the U.S. Copyright Act and judicial application of that doctrine. Part IV proposes how Japan should transplant the U.S. fair use doctrine into its copyright law, followed by Part V which offers the conclusion.

II. Japanese Parody Deemed as Copyright Infringement in Japan

A. The Importance of Parody for the Japanese Culture

Japan has recognized the importance of intellectual property in recent years. With the increasing popularity of Japanese manga and anime overseas,[23] Japan has formally acknowledged both manga and anime as important industries, and has begun to focus on strategically promoting these goods to international markets.[24] One reason why Japanese anime and manga are popular, both within and outside of Japan, may be because unlike American cartoons and comic books,

21. *See* Bunka Shingikai Chosakuken Bunkakai (dai 41 kai) Gijiroku Haifushiryō [The Minutes of 41st Meeting for the Council for Cultural Affairs Copyright Subdivision], Agency for Cultural Affairs (last visited Feb. 9, 2017), http://www.bunka.go.jp/seisaku/bunkashingikai/chosakuken/bunkakai/41/index.html (discussing the necessity and feasibility to adopt a general copyright exception similar to American fair use doctrine).

22. Jeojakkwonbeop [Korean Copyright Act], Act. No. 3916, Dec. 31, 1986, art. 35-3, *amended by* Act. No. 11110, Dec. 2, 2011 (S. Kor.).

23. World Intellectual Prop. Org., *The Manga Phenomenon*, WIPO Mag. (Sept. 2011), http://www.wipo.int/wipo_magazine/en/2011/05/article_0003.html.

24. Roland Kelts, *Japan Spends Millions in Order to Be Cool*, Time (July 1, 2013), http://world.time.com/2013/07/01/japan-spends-millions-in-order-to-be-cool/.

many Japanese manga and anime target adults as their audience.[25] They are often filled with elaborate and detailed drawings, accompanied by engaging and often complex plots.[26] Thus, the economic success of Japanese anime and manga is partly owed to the fact that many people, regardless of age, can enjoy them as entertainment.

The large base of Japanese artists who actively create these works, both professionally and as amateur authors, fuel the success of Japanese anime and manga. In fact, manga creations by amateur artists are visibly active in Japan, as large numbers of amateur artists are constantly competing for the opportunity to enter the professional manga industry.[27] Because only a handful of amateur manga artists can get their works commercially published, many of them privately publish what is known as "parody manga."[28] Parody manga artists often borrow characters and storylines from popular anime and manga to depict their own stories,[29] so that the artists can use the publicity of the original manga to increase the visibility of their own work. While many Japanese people refer to these works as "parodies" in Japanese, they actually do not fit the legal definition of a parody,[30] which requires the work to criticize or comment on the original.[31] Rather, these "parodies" often expand on a pre-existing work's original storyline or create derivative stories by adding new elements or characters to the original.[32] Thus, Japanese parody manga and anime

25. Hsiao-Ping Chen, *The Significance of Manga in the Identity-Construction of Young American Adults: A Lacanian Approach*, MARILYN ZURMUEHLIN WORKING PAPERS IN ART EDU., issue 1 art. 2, 2006, 2; *see also* Minoru Matsutani, *'Manga': Heart of Pop Culture,* JAPAN TIMES (May 26, 2009), http://www.japantimes.co.jp/news/2009/05/26/reference/manga-heart-of-pop-culture/#.VlUc_n4vfIU.

26. Chen, *supra* note 25, at 2.

27. *See* Rena Seiya, *The Key to the Popularity of Japanese Manga*, MANGA ARTIST/AUTEUR DE MANGA, http://www.japanese-manga-artist.com/%EF%BD%81%EF%BD%92%EF%BD%94%EF%BD%89%EF%BD%83%EF%BD%8C%EF%BD%85%EF%BC%91-the-key-to-the-popularity-of-japanese-manga/ (last visited Feb. 9, 2017).

28. I use the term '"parody"' to specifically refer to Japanese works that borrow characters and storylines from popular anime and manga to depict their own stories. "Parodies" can include legal parodies, as long as they criticize or comment on the original. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 580 (1994).

29. *See* Mehra, *supra* note 5, at 164, 175; *see also* SHARON KINSELLA, ADULT MANGA CULTURE & POWER IN CONTEMPORARY JAPANESE SOCIETY 111 (2000).

30. Mehra, *supra* note 5, at 164.

31. *See Campbell*, 510 U.S. at 580; 17 U.S.C. § 107.

32. *See, e.g.*, *Sailor Moon Doujinshi*, MISS DREAM, https://missdream.org/sailor-moon-doujinshi/ (last visited Feb. 9, 2017) (exhibiting translated version of Japanese *dojinshi* featuring characters from the popular manga/anime series *Sailor Moon*).

is often not parody at all, at least in a legal sense, but rather fan-created cartoon works that are more akin to fan fiction.[33]

Although parody manga possesses many characteristics similar to fan fiction, the most significant difference is that parody manga is often sold for profit, whereas American fan-fiction works are not.[34] Japanese parody manga that are privately printed for sale are called *dojinshi*,[35] which are typically sold at large-scale, organized commercial conventions, some of which attract nearly half a million visitors.[36] The commercial short-duration spot market for *dojinshi* has continued to thrive in Japan since its debut in the 1970s.[37] Some scholars believe that the *dojinshi* market serves to develop young talent by securing a place for them to improve their skills and foster creativity while recouping some profit to support themselves.[38] For this reason, Japanese "parodies," especially *dojinshi*, are considered to be an important part of Japan's anime and manga industry.[39]

B. Japanese Copyright Law and Infringing Works

Despite the massive economic success of *dojinshi* in Japan, it would most likely be deemed copyright infringement under the Japanese Copyright Act (JCA),[40] which is similar to the American Copyright Act (ACA) in many ways.[41] First, the JCA protects creative

33. *See* Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L. REV. 651, 655 (1997) (describing that fan authors creating fan fictions borrow characters and settings for use in their own writings).

34. *Compare* Mehra, *supra* note 5, at 164 (noting that parody manga is most often produced for sale), *with* Tushnet, *supra* note 33, at 654, 664 (explaining that fan fiction is noncommercial and mostly nonprofit).

35. Mehra, *supra* note 5, at 164.

36. *See, e.g.*, COMIC MKT. PREPARATIONS COMM., WHAT IS THE COMIC MARKET? 4 (Feb. 4, 2008), http://www.comiket.co.jp/info-a/WhatIsEng080528.pdf.

37. Mehra, *supra* note 5, at 164.

38. *Id.* at 197.

39. In Japan, the anime industry is heavily affected by the manga industry because many anime works professionally created by anime studios are based on popular manga series. *See List of Films Based on Manga*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_films_based_on_manga (last visited Feb. 9, 2017).

40. Chosakukenhō [Copyright Act], Law No. 43 of 2012 (Japan) [hereinafter Japanese Copyright Law] *translated in* JAPANESE L. TRANSLATION, http://www.japaneselawtranslation.go.jp/law/detail/?ft=1&re=01&dn=1&x=49&y=20&co=01&ia=03&ky=%E8%91%97%E4%BD%9C%E6%A8%A9%E6%B3%95&page=13 (last visited Feb. 9, 2017).

41. Because both Japan and the United States are signatories to the Berne Convention and the Trade-Related Aspects of Intellectual Property Rights (TRIPs) Agreement, both countries are obligated to incorporate the minimum standards for copyright protection into their copyright law. *See generally* Berne Convention for the Protection of Literary and Artistic Works, arts. 1-21, Sept. 9, 1886, 25 U.S.T. 1341, 828 U.N.T.S. 221(revised July 24, 1971); Agreement on Trade-Related Aspects of Intellectual Property Rights art. 9, Apr. 15, 1994, 1869 U.N.T.S. 299.

expressions such as literary works and cinematographic works, similar to the ACA.[42] Second, both the JCA and ACA accord copyright owners exclusive economic rights, including the reproduction right and the right to create or authorize the creation of derivative works based on existing copyrighted works (adaptation right).[43] Third, fictional characters are protected both in Japan and the United States.[44] Thus, when a *dojinshi* artist takes characters from an original anime or manga work without the copyright holder's permission to create *dojinshi*—a secondary work—he or she would likely violate the reproduction right and the adaptation right of the copyright owner under both Japanese and U.S. law.

Despite these similarities, there are also dissimilarities between the JCA and ACA. Most notable and relevant to the creation of parodies is that the JCA does not include a general exception to copyright owners' exclusive rights, while the ACA's fair use provision offers flexible defenses to certain copying.[45] Instead, the JCA enlists a limited "laundry list" of permitted copying,[46] including copying for private use[47] and quotations for news reporting, criticism, or research.[48] These provisions are narrowly interpreted by Japanese courts, and thus, far from comparable to the American fair use doctrine.[49] Moreover, the JCA contains protection for the moral rights of the original author, including the right to preserve the work's integrity,[50] whereas American law limits moral rights protection to narrow categories of visual arts.[51] As discussed *infra* Part IV, these dissimilarities should be considered for "parody" protection.

Although the number of copyright infringement cases involving *dojinshi*, or parody in general, is relatively low in Japan, a limited

42. *See* Japanese Copyright Law, arts. 2-(1)(i), 10-(1)(vii) (providing that JCA protects production in which thoughts or sentiments are expressed in a creative way); *see also* 17 U.S.C. § 102(a) (2012).

43. *See* Japanese Copyright Law, arts. 21, 27-28; *see also* 17 U.S.C. § 106(2).

44. *See* Saikō Saibansho [Sup. Ct.] July 17, 1997, 1992 (o) no. 1443, SAIKO SAIBANSHO HANREISHŪ [SAIBANSHO WEB] *translated in* http://www.courts.go.jp/app/hanrei_en/detail?id=1484 (Japan); *see also* Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930); Warner Bros. Pictures v. Columbia Broad. Sys., 216 F.2d 945 (9th Cir. 1954).

45. 17 U.S.C. § 107.

46. Mehra, *supra* note 5, at 175-76.; Japanese Copyright Law, arts. 30-49.

47. Japanese Copyright Law, art. 30(1).

48. Japanese Copyright Law, art. 32.

49. *See, e.g.*, PETER GANEA ET AL., JAPANESE COPYRIGHT LAW: WRITINGS IN HONOUR OF GERHARD SCHRICKER 58-61 (2005).

50. Japanese Copyright Law, arts. 18-20.

51. Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089; 5128-33 (codified as amended at 17 U.S.C. §106A).

number of judicial opinions suggest that Japanese "parodies"—including *dojinshi*—most likely violate the rights of copyright owners. In 1999, a *dojinshi* artist who depicted original characters from the popular anime *Pokémon* in a sexual manner was arrested and fined for copyright infringement under criminal copyright law.[52] This incident and resulting punishment indicates that *dojinshi* potentially violates the copyright holder's economic rights. Furthermore, other cases suggest that "parodies"—both parodies in a legal sense and as *dojinshi*—may also violate the author's moral rights. In 1966, a famous alpine photographer brought a copyright infringement action against a famous political parodist called Mad Amano because he had overlaid an image of a larger-than-life Bridgestone tire onto plaintiff's black and white photograph of a snowy alpine slope in Austria.[53] Although the collage was clearly political speech that expressed the parodist's criticism about and warning of the over-development of the Alpine resorts, the Japanese Supreme Court held that Mad Amano violated the plaintiff's right to maintain the integrity of his work.[54] Similarly, a Tokyo court granted a permanent injunction to a Japanese video game company to prevent the defendant from selling videocassettes of a "parody anime" (an anime version of *dojinshi*) depicting characters of the plaintiff's popular role-playing game, *Thrilling Memorial*.[55] These cases highlight Japan's strong protection for the original authors' moral rights in the context of "parodies."

C. Dojinshi and Tolerated Uses

Despite the obvious copyright infringement issues associated with the creation of *dojinshi*, the *dojinshi* industry coexists and even thrives side-by-side with the mainstream anime and manga industry.[56] Many scholars have attempted to attribute different factors to reach a logical explanation for this odd phenomenon. One commonly cited reason is because litigation does not make economic sense in Japan, given the fact that *dojinshi* usually sell only some hundred copies for around five dollars each, making the damages amount quite low.[57] In addi-

52. Mehra, *supra* note 5, at 198.

53. Saikō Saibansho [Sup. Ct.] Mar. 28, 1980, Sho 54 (o) no. 923, SAIKO SAIBANSHO HANREISHŪ [SAIBANSHO WEB] 1, http://www.courts.go.jp/app/files/hanrei_jp/283/053283_hanrei.pdf (Japan).

54. *Id.*

55. Tōkyō Chihō Saibansho [Tōkyō Dist. Ct.] Aug. 30, 1999, Hei 11 (wa) no. 15575, CHITEKI ZAISAN SAIBAN REISHŪ [SAIBANREI JOHO] 1, http://www.courts.go.jp/app/files/hanrei_jp/668/013668_hanrei.pdf (Japan).

56. Mehra, *supra* note 5, at 195.

57. *Id.* at 165-66, 185-87.

tion to the economic disincentive, some professional manga artists are lenient towards *dojinshi* because they became professionals themselves after their success in the *dojinshi* market.[58] Even manga artists who have never participated in *dojinshi* activities often exhibit general tolerance towards *dojinshi*, given the industry's historical practice of "borrowing," which may be rooted in the traditions of Confucianism.[59] These reasons, coupled with the general tendency of Japanese people to avoid litigation,[60] may well explain why the number of infringement cases involving "parodies" is low.

Likewise, large corporate authors[61] do not usually take legal action against *dojinshi* authors because they believe that *dojinshi* has some positive impact on their original works.[62] Many corporate authors and copyright holders, including major publishing and entertainment companies such as Disney Japan, have attended large-scale *dojinshi* conventions to advertise their works.[63] After all, *dojinshi* authors are often enthusiastic fans of the original works, and their fans are also fans of the original.[64] Many of the original authors take the stance that they will tolerate the commercial activities of *dojinshi* authors so long as there is no obvious harm being done to the original works.[65]

However, this fragile relationship between the professional manga and anime industry, and the amateur *dojinshi* industry could be

58. Nicolle Lamerichs, *The Cultural Dynamic of Doujinshi and Cosplay: Local Anime Fandom in Japan, USA and Europe*, J. AUDIENCE & RECEPTION STUD. 154, 159 (May 2013), http://www.participations.org/Volume%2010/Issue%201/10%20Lamerichs%2010.1.pdf.

59. Confucianism is one of the theories of copyright, along with the utilitarian theory and the natural right theory, which viewed intellectual creations as the common heritage of people that was necessary for proper socialization through free access to them. Under Confucianism, copying was regarded virtuous. *See* DANIEL C.K. CHOW & EDWARD LEE, INTERNATIONAL INTELLECTUAL PROPERTY 84-85, 91 (West, 2nd ed. 2012); *see also* Mehra, *supra* note 5, at 179-80 (noting the historical practice of "borrowing" of manga characters).

60. Sean Kirkpatrick, Comment, *Like Holding a Bird: What the Prevalence of Fansubbing Can Teach Us About the Use of Strategic Selective Copyright Enforcement*, 21 TEMP. ENVTL. L. & TECH. J. 131, 148 (2003).

61. Corporations can be authors under Japanese copyright law. *See* Japanese Copyright Law, art. 15.

62. *See* Mehra, *supra* note 5, 184.

63. *See* Jun Hongo, *Comiket, Where Otaku Come to Share the Love*, JAPAN TIMES (Dec. 19, 2013), http://www.japantimes.co.jp/culture/2013/12/19/general/comiket-where-otaku-come-to-share-the-love/#.VlWQKH4vfIU; *see also* Mehra, *supra* note 5, at 184 (suggesting that mainstream manga publishers use dojinshi markets to advertise their works).

64. *See* Lamerichs, *supra* note 58, at 159 (suggesting that since dojinshi, as "amateur manga," are often created as works of love).

65. *See Urgent Appeal on TPP Intellectual Property Provisions*, *supra* note 9.

affected by Japan's obligation to comply with the TPP agreement.[66] For instance, the *Pokémon* incident occurred because Nintendo, the author of the *Pokémon* series, filed a criminal complaint for copyright infringement with the Japanese police.[67] However, after the enactment of the criminal copyright prosecution law, *anyone* could file a criminal complaint for alleged copyright infringement deemed as piracy.[68] Even though the definition of piracy is narrow enough in scope to exclude Japanese "parodies" like *dojinshi*, it is still possible that courts would, over time, expand the scope of piracy to include parodies contrary to the original intention of the drafters of the amendment. This possibility may deter the creation of such "parodies." Moreover, even if the amended Copyright Act expressly guaranteed that legal parodies and *dojinshi* fall outside the definition of piracy, strengthened protection for the interests of secondary artists is still necessary to maintain proper balance between the competing interests of the rights holder and the secondary user, which will be tilted in favor of copyright holders by the TPP Agreement. Although the actual impact of "parody" and *dojinshi* activities on the professional anime and manga industry is unknown, many Japanese people, even authors of original works, firmly believe that the success of *dojinshi* has a positive contribution to the progress of Japanese anime and manga culture.[69] Therefore, Japan should reconsider the option to adopt a fair use exception to alleviate the potential negative effects to the creation of "parodies."

66. Japan's obligation to abide by the TPP agreement is reserved until the agreement enters into effect. Kantaiheiyō Pâtonâshippu Kyōtei no Teiketsu ni Tomonau Kankeihōritsu no Seibi ni Kansuru Hōritsuan [Bill for the Establishment of Relevant Laws to Accompany the Ratification of the Trans-Pacific Partnership], SHŪGIIN [HOUSE OF REPRESENTATIVES], http://www.shugiin.go.jp/internet/itdb_gian.nsf/html/gian/honbun/houan/g19005047.htm (last visited Feb. 10, 2017) (Japan). Nevertheless, in this article, I assume that the TPP agreement or an agreement similar to the TPP agreement will take effect upon Japan in the future and discuss Japan's options. Accordingly, from this point of the article, I use the term "TPP agreement" to refer to both the original TPP agreement and an agreement similar to the original TPP agreement.

67. Mehra, *supra* note 5, at 180.

68. TPP Agreement, art. 18.77.

69. Ken Akamatsu, a Japanese professional manga artist known for a popular manga and anime series *Love Hina*, was one of the leading activists for the protection of *dojinshi*. *See* Scott Green, *Manga Author Ken Akamatsu Renews Concerns About Trade Deal's Effect on Doujinshi and Cosplay*, CRUNCHYROLL (July 27, 2015, 1:00 PM), http://www.crunchyroll.com/anime-news/2015/07/27-1/manga-author-ken-akamatsu-renews-concerns-about-trade-deals-effect-on-doujinshi-and-cosplay; *see also* Mariko Tai, *Why Cosplay Fans Fear TPP*, NIKKEI ASIAN REV. (July 25, 2015, 1:00 PM), http://asia.nikkei.com/Life-Arts/Life/Why-cosplay-fans-fear-the-TPP.

III. Overview of the U.S. Fair Use Analysis

Even without regard to the TPP agreement, Japan is still in need of broader exceptions to copyright protection because current Japanese copyright law does not protect political speech in the form of parody, as was the case with Mad Amano.[70] Some commentators argue that adopting the United Kingdom's fair dealing doctrine[71] is the better option due to both its similarity to U.S. fair use doctrine and the scope of the doctrine being limited to certain categories of works.[72] However, implementing the U.S. fair use doctrine would be more appropriate than using the U.K's fair dealing doctrine because the former better serves the policy goal of copyright.[73] Part III of this article describes the current state of the U.S. fair use doctrine, and Part IV explains how Japan can achieve its copyright policy goal through adoption of a U.S.-modeled fair use exception.

Under Section 107 of the U.S. Copyright Act, certain uses of copyrighted materials are permitted as fair use.[74] To determine whether an unauthorized appropriation of a copyrighted work constitutes fair use, courts analyze each case on a case-by-case basis[75] under four statutory factors:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work.[76]

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70. *See supra*, Part II.B.

71. Copyright, Designs and Patents Act, 1988, c. 48, §§ 28-30 (Eng.).

72. *Id*. The fair dealing doctrine only applies to: (1) research and private study, (2) criticism, review and news reporting, and (3) incidental inclusion of copyright material. *Id*.; *see also* Miya Sudo & Simon Newman, *Japanese Copyright Law Reform: Introduction of the Mysterious Anglo-American Fair Use Doctrine or an EU Style Divine Intervention via Competition Law?*, Intell. Prop. Q. 2014, 1, 40-70 (comparing the fair use doctrine of the U.S. with an E.U.-style approach to copyright regulation in Japan).

73. *See infra*, Parts III. & IV.

74. *See* 17 U.S.C. § 107. The preamble lists criticism, comment, news reporting, teaching, scholarship, and research as examples of permitted purposes of secondary use, but fair use is not limited to these examples. *See* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 561 (1985).

75. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577-78 (1994). The *Campbell* court states that "[t]he fair use doctrine thus 'permits and requires courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." *Id*. at 577 (quoting Stewart v. Abend, 495 U.S. 207, 236 (1990)).

76. 17 USC § 107; *see also Campbell*, 510 U.S. at 577.

These factors are interrelated, and all of them must be weighed together.[77] The following sections discuss each of the four factors and the courts' analyses under these factors.

A. The Purpose and Character of the Secondary Use

The U.S. Supreme Court in *Campbell v. Acuff-Rose Music*[78] noted that the central purpose of the assessment under the first factor is to see whether the secondary use fulfills the objective of copyright law[79]—to promote "the Progress of Science and useful Arts."[80] Thus, courts are to assess the following sub-factors in light of the copyright objective.[81] First, the statute suggestively calls for inquiry into whether the secondary use is commercial in nature[82]—i.e., whether the secondary user intended to profit from exploitation of the original work without paying a licensing fee.[83] Although secondary works created for commercial use (as opposed to noncommercial use) tend to weigh against a finding of fair use,[84] it cannot be the sole determining factor because whether the commercial nature of the secondary work affects the outcome of the fair use analysis depends on the context of each case.[85] Thus, commercialism is merely a single consideration within the first factor, and courts cannot bar a finding of fair use solely based on the commercial nature of the secondary work.[86] Additionally, if relevant, courts may account for the propriety of the nature of the secondary user's conduct, which weighs against a finding of fair use if he acquired the original work in an immoral way.[87]

The central inquiry under the first factor according to Judge Leval, an influential figure in the development of the modern fair use doctrine, is whether the new work is "transformative."[88] A secondary work can be deemed transformative if the new work adds something valuable through new expression, meaning, or message, rather than

77. *Campbell*, 510 U.S. at 578.
78. 510 U.S. 569 (1994).
79. *Id.* at 579. The *Campbell* court has adopted Judge Leval's definition of "transformative" use. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990) (discussing "transformativeness" and its significance to fair use analysis).
80. U.S. CONST. art. I, § 8, cl. 8.
81. Leval, *supra* note 79, at 1110-11.
82. 17 USC § 107(1).
83. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985).
84. *Campbell*, 510 U.S. at 584.
85. *Id.* at 585.
86. *Id.* at 584.
87. *Harper & Row*, 471 U.S. at 562.
88. Leval, *supra* note 79, at 1111.

merely superseding or free-riding off of the original work.[89] If the secondary work is transformative, this sub-factor weighs in favor of the secondary user because of the new value that the secondary use adds to the original—exactly what the fair use doctrine intends to protect "for the enrichment of society."[90] This is an important element because the more transformative the secondary work is, the less significant other factors, such as commercialism, become.[91]

What is notable about judicial analyses involving "transformative" use is that courts tend to presume the secondary work is transformative if it is a parody.[92] Although the *Campbell* Court emphasized that parody, a highly transformative work, still needs to be analyzed under the other three factors to qualify for fair use,[93] courts usually find highly-parodic works fair use. Therefore, following the *Campbell* Court's instructions, the U.S. Court of Appeals for the Eleventh Circuit held that a novel titled *The Wind Done Gone*, which retold the story of the famous novel *Gone with the Wind* from the black slaves' perspectives, was a parody and entitled to fair use defense, despite the fact that *The Wind Done Gone* took substantial portions of protected elements of the original work.[94] In contrast, the U.S. District Court for the Southern District of New York found that an unauthorized novel that depicted a sequence of the novel *Catcher in the Rye* was not parody, but rather a kind of derivative work reserved for the original author, and thus not entitled to fair use protection.[95] Accordingly, being deemed as a parody in a legal sense would significantly increase the likelihood for secondary works to be protected as fair use.

How courts determine whether the secondary work is transformative varies by jurisdiction. However, courts typically focus on the transformativeness of the secondary user's purpose in using the original work, rather than the actual content that has been added by the secondary user to create the secondary work.[96] This means that courts

89. *Campbell*, 510 U.S. at 579; *see also* Leval, *supra* note 79, at 1111. *But cf.* William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1768-79.

90. Leval, *supra* note 79, at 1111. *But cf.* Fisher, *supra* note 89, at 1768-69 (analyzing "transformativeness" as a somewhat subjective, rather than static, element).

91. *Campbell*, 510 U.S. at 579.

92. *See id.* at 583; *see also* Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2550 (2009) (reiterating the presumption that parodies have an "obvious claim to transformativeness").

93. *Campbell*, 510 U.S. at 581.

94. *See* SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1269-76 (11th Cir. 2001).

95. *See* Salinger v. Colting, 641 F. Supp. 2d 250, 256-68 (S.D.N.Y 2009).

96. R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 31 COLUM. J.L. & ARTS 467, 485 (2008).

tend to find that secondary works are transformative if the secondary user uses the underlying work for a completely different purpose than of the original author when she created the original.[97] Under this approach, courts may find transformativeness even though the secondary user has not altered the content of the original work at all, as long as the purpose is to some degree different from that of the original author.[98] Thus, the reproduction of an entire concert poster in a biography of a musical group which hosted the concert, for instance, would be transformative under this approach.[99]

On the other hand, recent cases show that more and more courts are focusing on the contents of the secondary work to determine if it is transformative. To ascertain the secondary work's transformativeness, these courts evaluate its contents, rather than focusing on its purpose.[100] Some courts went even further and conducted a side-by-side analysis, comparing aesthetic similarities between the plaintiff's and defendant's work. For example, the Second Circuit in *Cariou v. Prince*[101] concluded that, in comparing the appropriationist-defendant's collage paintings with the photographer plaintiff's original photographs side by side, the secondary works were transformative because the defendant's artworks "employ[ed] new aesthetics with creative and communicative results distinct from" the plaintiff's photographs, without giving any explanation why their aesthetics are different.[102] However, this approach has received much criticism because it allows judges to act as art critics to an extent,[103] which is precisely what Justice Holmes intended to prevent since the early development of the Supreme Court's copyright analysis.[104]

Additionally, the Second Circuit court's analysis is particularly instructive to transformativeness analysis involving parodic works or *dojinshi*. The Second Circuit has noted that although derivative works transform an original work into "a new mode of presentation," such works take expression for purposes that are not transformative.[105]

97. *Id.*

98. Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1165 (9th Cir. 2007).

99. Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 609 (2d Cir. 2006).

100. *See* Cariou v. Prince, 714 F.3d 694, 706-08 (2d Cir. 2013) (implying that the content of the secondary work is significant in determining transformativeness).

101. 714 F.3d 694 (2d Cir. 2013).

102. *Id.* at 707-08.

103. *See generally* Shoshana Rosenthal, *A Critique of the Reasonable Observer: Why Fair Use Fails to Protect Appropriation Art*, 13 COLO. TECH. L.J. 445 (2015).

104. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903).

105. Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc., 150 F.3d 132, 143 (2d Cir. 1998); *see also* Twin Peaks Prods. v. Publ'ns Int'l, Ltd., 996 F.2d 1366, 1376 (2d Cir. 1993).

Thus, according to the Second Circuit, transformative works must be more than derivative works.[106] Conversely, if a work is transformative, it is not a derivative work. Accordingly, if *dojinshi* is deemed transformative, it will not be a derivative work.

B. The Nature of the Original Work

The second fair use factor calls attention to the original work. Under this factor, courts will consider: (1) whether the underlying work is creative or factual and (2) whether the work is published or unpublished.[107] The underlying principle of this factor is that not all works are equally protected by copyright; some works are more worthy of protection than others, thus rendering fair use defenses less likely to succeed.[108]

As copyright law accords greater protection to creative works than factual works,[109] the more creative the original work is, the more it should be protected against unauthorized copying.[110] Creative works are considered to be "closer to the core of intended copyright protection" than factual works.[111] Therefore, this factor tends to weigh against a finding of fair use when the secondary use involves a creative or expressive work. Similarly, unpublished works receive greater protection than published works.[112] Publication of an original work by a third party prior to publication by the original author would seriously interfere with the author's right to decide when and whether to make the work public, so the use cannot be called fair.[113] For this reason, the fact that the original work is unpublished tends to negate the defense of fair use.[114]

However, it is important to note that because the significance of this factor tends to be affected by the other factors—especially the first factor[115]—courts generally give little weight to this second factor in their overall fair use analysis.[116] This is especially true in cases in-

106. *See Castle Rock*, 150 F.3d at 143.

107. *See id;* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586 (1994); Leval, *supra* note 79, at 1122.

108. *See Campbell*, 510 U.S. at 586.

109. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 345-48 (1991).

110. 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[A][2][a] (2015).

111. *Campbell*, 510 U.S. at 586.

112. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 564 (1985).

113. *Id.*

114. *Id.* at 551 (citing NIMMER & NIMMER, *supra* note 110, § 13.05[A][2][b]).

115. *See supra* Part III.A.

116. NIMMER & NIMMER, *supra* note 110, § 13.05[A][2][a] n.136.2.

volving parody because parodies "almost invariably copy publicly known, expressive works."[117]

C. *The Amount and Substantiality of the Portion Used*

The third factor asks whether the amount and substantiality of the secondary use is justified by the purpose for the copying.[118] Courts look at both quantity and quality of the portion used in relation to the copyrighted work as a whole.[119] The portion taken must be "no more than necessary" to serve the legitimate purpose of the secondary work.[120] The extent of permissible copying varies depending on the analysis of the first factor: "the purpose and character" of the secondary use.[121] Generally, the more transformative the secondary work, the more reasonable a taking of a large and substantial portion of the original becomes.[122] Furthermore, this factor may also be influenced by the analysis of the fourth factor, which considers the danger of adverse market impact on the original work.[123] It is more difficult to justify a taking of even a small portion of a work if there is danger of market substitution.[124] Therefore, an extensive copying could qualify as fair use if there is strong justification and no adverse market impact.[125] This notion is well illustrated in *Perfect 10, Inc. v. Amazon .com, Inc.*,[126] where the Ninth Circuit held that Google's thumbnail reproduction of Perfect 10's full images fell under fair use because it was transformative; it altered the artistic expression to improve access to information on the internet, which served the public's interest, and the danger that Google's reduced-size images would supersede Perfect 10's cell phone download use of the images was "incidental."[127]

Courts seem to primarily focus on the degree of transformativeness of the secondary work to determine how much of and when a taking is reasonable in a given context. Some courts strictly apply this

117. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586 (1994).

118. *Id.*; Leval, *supra* note 79, at 1123.

119. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 564 (1985).

120. Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc., 150 F.3d 132, 144 (2d Cir. 1998) (citing *Campbell*, 510 U.S. at 588-89).

121. *See* Cariou v. Prince, 714 F.3d 694, 710 (2d Cir. 2013) (referencing Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 613 (2d Cir. 2006)).

122. *See* Leval, *supra* note 79, at 1122.

123. *Id.* at 1123; Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 (1994) (citing *id*. at 1110-11); *see infra* Part III.D.

124. *See Harper & Row*, 471 U.S. at 565-66.

125. Leval, *supra* note 79, at 1123 (interpreting *Harper & Row*, 471 U.S. at 565).

126. 508 F.3d 1146 (9th Cir. 2007).

127. *Id*. at 1165-67.

standard when the degree of transformativeness of the secondary work is low, finding any copying that is more than necessary to serve the transformative purpose against the secondary user.[128] For example, in *Warner Bros. Entm't Inc. v. RDR Books*,[129] the court conducted a detailed inquiry into whether the amount and value of the portion used was reasonable in relation to the transformative purpose of creating a complete reference guide to the original *Harry Potter* series that took creative expressions from the official companion book.[130] Because the purpose of each of these books were very similar, the court assumed that any borrowing for purposes more than reporting fictional facts was reserved for the original author.[131]

On the other hand, courts generally employ a lenient standard for this factor when a highly transformative work is involved, especially in cases of parody. The *Campbell* Court noted that to serve the parodic purpose of the secondary work, it must copy enough to "conjure up" the original to make its target recognizable.[132] According to the Court, taking the most distinctive or memorable features—the "heart" of the original—does not make the copying excessive if it is necessary for the parodist to make sure the audience will know which work was parodied.[133] Thus, the *Campbell* Court held that the defendant's copying of the opening riff and the first line of the plaintiff's song "Oh, Pretty Woman" —allegedly the "heart" of the song—was necessary to create the parody because it most readily "conjures up" the original song in the listener's mind.[134] Once enough has been taken to assure identification, any further taking must specifically serve the parodic goal of the secondary work.[135] Courts are to balance the substantiality of the parodic purpose against the portion copied, while also taking into account any danger of the parody serving as a substitute for the original.[136] In summary, although copying cannot be excessive in relation to the purpose and character of the parody, fairly modest amounts of copying are generally allowed for parodies.[137]

128. *See* Warner Bros. Entm't, Inc. v. RDR Books, 575 F. Supp. 2d 513, 546-49 (S.D.N.Y. 2008).

129. 575 F. Supp. 2d 513 (S.D.N.Y. 2008).

130. *Id.* at 546-49.

131. *Id.* at 548-49.

132. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 588 (1994).

133. *Id.*

134. *Id.*

135. SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1271 (11th Cir. 2001).

136. *See Campbell*, 510 U.S. at 588-89.

137. *See SunTrust Bank*, 268 F.3d at 1273-74.

D. The Effect of the Secondary Work upon the Value of the Original Work

The last factor is "the effect of the use upon the potential market for or value of the copyrighted work."[138] The main focus here is the danger of market substitution, not mere harm to the market for the original work.[139] This is provided that copying to criticize the original work, which would likely harm the market for the original, is a typical example of fair use.[140] Courts must also consider whether "unrestricted and widespread conduct of the sort" by the secondary user would result in "a substantially adverse impact on the potential market" for the original.[141] Furthermore, courts must take account of not only any potential harm to the original, but also of harm to the market for derivative works.[142] This inquiry is only as to the market in which the original author would generally develop or license others to develop.[143] The *Campbell* Court noted that the protectable derivative market does not include the market for criticism, including parody, because of the unlikelihood that original authors will license critical reviews or lampoons of their works.[144] Some courts have acknowledged that this is the most important factor of all four;[145] however, other courts take a contrary stance, based on the *Campbell* Court's recognition that "[a]ll [factors] are to be explored, and the results weighed together, in light of the purposes of copyright."[146]

The fourth factor is even more interrelated with the first factor because the degree to which the secondary work is transformative affects the likelihood of market substitution.[147] Some courts, especially the Second Circuit, are of the opinion that if the secondary work is transformative, there is no apparent danger of market substitution because it targets different markets.[148] Notably, the Second Circuit has established that if the secondary work is transformative, it is not a

138. 17 U.S.C. § 107(4).

139. *See Campbell*, 510 U.S. at 591-93.

140. 17 U.S.C. § 107(preamble).

141. *Campbell*, 510 U.S. at 590 (quoting NIMMER & NIMMER, *supra* note 110, § 13.05[A][4]).

142. *Id.* (quoting Harper & Row Pub., Inc. v. Nation Enters., 471 U.S. 539, 568 (1985)).

143. *Id*. at 592.

144. *Id.*

145. *Harper & Row*, 471 U.S. at 566.

146. Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc., 150 F.3d 132, 145 (2d Cir. 1998) (quoting *Campbell*, 510 U.S. at 578).

147. *See Campbell*, 510 U.S. at 591.

148. *See id*.; Cariou v. Prince, 714 F.3d 694, 704 (2d Cir. 2013) (quoting *Castle Rock*, 150 F.3d at 145).

derivative work.[149] For example, the *Cariou* court found this factor in favor of the appropriationist who transformed the plaintiff's black and white photographs depicting the "natural beauty of Rastafarians and their surrounding environs" into "hectic and provocative" color collage works placed on canvas because they were marketed towards entirely different audiences.[150] Thus, transformative works are generally found to pose little risk of market substitution for the original and its derivative works, and the Second Circuit will most likely find this factor in favor of the secondary user when the secondary work is transformative.

IV. How Japan Should Adopt Fair Use to Maximize the Protection for "Parody"

Japan should introduce a fair use provision to promote its copyright goal: "to contribute to the development of culture."[151] In doing so, Japan should adopt the four statutory factors stipulated in the ACA to capture the spirit of the permitted uses under the U.S. fair use doctrine. U.S. courts have developed these four factors over the centuries to balance authors' economic incentives to create works and the public's interest in accessing existing expressions upon which they can expand new creations[152] in order to achieve the goal of promoting "the Progress of Science and Useful Arts."[153] As the JCA aims for a similar goal, adopting the four factors of the U.S. fair use doctrine would benefit Japan in achieving its copyright goal.

Some people might argue that U.S. copyright law's utilitarian goal is different from Japan's "author's right" approach,[154] and thus

149. *See supra* Part III.A.

150. *Cariou*, 714 F.3d at 706, 709.

151. JCA Article 1 provides its purpose as follows:

> [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.

Japanese Copyright Law, art. 1.

152. Judge Joseph Story first established in *Folsom v. Marsh* the four fair use factors, which were encoded into the current Copyright Act. *See* Folsom v. Marsh, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841); *see also* 17 U.S.C. § 107 (2012).

153. U.S. Const. art. I, § 8, cl. 8.

154. The United States' copyright theory is the utilitarian approach, which provides authors with financial incentives through copyright to create new works that serve a larger end for the public good, whereas continental European countries' approach is based on the tradition of "author's right" (*droit d'auteur*), which deems that author's rights extend to their creations as a matter of natural right. Chow & Lee, *supra* note 59, at 84-85. Japan, on the other hand, has adopted the "author's right" approach. Ganea et al., *supra* note 49, at 11.

the U.S. fair use doctrine would not be enough "to secure the protection of the rights of the authors."[155] However, the fact that U.S. copyright law does not protect the "author's rights" or moral rights[156] does not mean that adopting a U.S.-modeled fair use exception into the JCA would jeopardize Japan's moral rights protection. First, Japan has adopted the dualistic approach,[157] which clearly distinguishes between economic rights on the one hand, and moral rights on the other.[158] Thus, changing the level of economic rights protection would not significantly affect moral rights protection. In fact, as previously discussed, Japan's moral rights protection is already strong.[159] Moreover, the language of JCA Article 1 clearly suggests that "the development of culture" is the ultimate end and "the protection of the rights of authors, etc." is a means to achieve that end.[160] Therefore, the JCA has an objective similar to that of the ACA, which is benefitting society as a whole,[161] and an adoption of a U.S.-modeled fair use exception will help ensure that the JCA can achieve that goal.

Although each of the four factors of the U.S. fair use doctrine should be adopted by Japan, minor adjustments need to be made in order to make them work effectively within Japanese copyright law. I propose the following three adjustments described in the subsequent sections.

A. Japan Should Incorporate "Transformative Use" as a Sub-Factor into the First Prong of the Fair Use Factors.

One key adjustment that should be made to the U.S. fair use doctrine is to incorporate "transformative use" as a sub-factor under the first factor, because the transformativeness of the secondary work should be the central consideration in fair use analysis.[162] As the fair use exception aims to promote new creations that benefit the advancement of arts and culture,[163] the secondary work must be sufficiently transformative so that it can be considered as a new creation,

155. Japanese Copyright Law, art. 1.

156. *See* GANEA ET AL., *supra* note 49, at 11-12.

157. *Id*. at 12. In contrast, the monistic approach links authors' moral rights and economic rights to a non-separable bundle of rights. *Id*.

158. *Id.*

159. *See supra* Part II.B.

160. By placing the word "thereby" preceding the phrase "to contribute to the development of culture," JCA suggests that contribution to "the development of culture" is its ultimate purpose. *See* Japanese Copyright Law, art. 1.

161. *See* Leval, *supra* note 79, at 1109, 1136.

162. *See id*. at 1111.

163. *See id*.; Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578, n.10 (1994).

not merely a derivative work that "supersede[s]" the original work.[164] This does not mean that transformativeness is the only element that needs to be considered under the first factor; other elements such as commercialism[165] are also relevant to the first factor. However, considering that the degree of the transformative use affects the weights given to other factors,[166] the proposed fair use exception should reflect the importance of the transformative use. Therefore, Japan should stipulate transformative use as a sub-factor under the first factor.

B. Japan Should Codify the Definition of "Transformative Use" in the First Prong of the Fair Use Factors.

Most importantly, the new fair use exception should codify the definition of "transformative" use in its provision. This codification is important because it distinguishes transformative works from derivative works. As already discussed in Part III.D., the line-drawing between transformative works and mere derivative works affects the fourth factor because the risk of market substitution includes potential harm to the derivative work market that the original authors "would in general develop or license others to develop."[167] Furthermore, the degree of transformativeness of the secondary work would also affect the reasonable amount and quality of permitted copying.[168] Therefore, defining "transformative" use within the proposed fair use provision would substantially affect the analysis of other fair use factors.

Moreover, this distinction between transformative works and derivative works is particularly important for Japan because of its strong protection of moral rights, especially the author's right of integrity. When the secondary work is merely a derivative work of the original, the original author's right of integrity extends to the derivative work.[169] Thus, a creation of a derivative work based on a pre-existing work without the original author's permission—which is often the case of *dojinshi*—will constitute infringement on his or her integrity right if the creation constitutes a "distortion, mutilation, or other modification" against the author's will.[170] On the other hand, when the secondary work is transformative, the original author's right of

164. Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4901).
165. 17 U.S.C. § 107(1).
166. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).
167. *Id.* at 592.
168. *See supra* Part III.C.
169. *See* Japanese Copyright Law, arts. 20, 28.
170. *Id.* art. 20.

integrity arguably does not extend to the transformative work because it is no longer the author's work. This distinction would have a significant implication for *dojinshi* because Japanese courts have indicated that *dojinshi* most likely infringes upon the original author's right of integrity.[171] Therefore, if the proposed fair use exception properly defines a "transformative" use, it could also resolve the issue associated with the JCA's strong protection for the author's right of integrity without amending its moral rights provisions.

For these reasons, the definition of a transformative work should differentiate transformative works from derivative works to ensure the protection of "parodies" including *dojinshi*. *Dojinshi* typically are unauthorized derivative works for sale that exploit expressive works,[172] which would lead to the second and fourth factors being weighed against the *dojinshi* creator. Thus, it is critical for *dojinshi* to be deemed as a transformative work to escape infringement liability.

Taking account of this concern, Japan should adopt the definition of a transformative work as a secondary work that adds a "new meaning, message, or purpose"[173] to the copyrighted work, and which also falls outside the scope of derivative works. Under current Japanese law, a derivative work is a creation that has adopted pre-existing material and includes newly-added creative elements.[174] Under this definition, a movie based on a novel is a derivative work because it is an adaptation of the original novel with new creations such as the actors' performances, music, and depictions of the novel's "sentiments and thoughts."[175] However, it is not a "transformative" work under the proposed definition because the movie's purpose is not transformative—contrarily, its purpose is to re-cast the elements of the original novel through different media in such a way that it accurately represents the world of the original novel. Nor does the movie add new meaning or message to the original novel; it merely traces the original meaning or message in a different media. As demonstrated, the proposed definition effectively distinguishes transformative works from derivative works.

Importantly, the proposed definition could cover parodies and *dojinshi* as transformative works, which qualify them as fair use, assuming that they do not "supersede" the original works and the copy-

171. *See supra* Part II.B.

172. *See supra* Part II.A.

173. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

174. *See* GANEA ET AL., *supra* note 49, at 57.

175. *Id.*

ing is reasonable.[176] Under this assumption, legal parodies most likely qualify as fair use because they use the original work for a new purpose and message, namely to criticize or comment on the original.[177] Thus, a *dojinshi* that uses original characters to depict the original story from a new perspective, offering a new interpretation of the original work, could be protected as parody.[178] Other types of *dojinshi* could qualify as transformative works if, for example, they depict the original characters in a new storyline that falls under a different genre from that of the original. It arguably adds new message and meaning to the original as it draws interactions and emotional exchanges between the characters placed in new settings and perspectives. Moreover, it is unlikely to "supersede" the original work because as an entirely new work, it would unlikely act as a substitute for the original or its derivative works. Thus, qualifying "parodies" and *dojinshi* will likely be protected under this proposed definition.

C. *The Fair Use Provision Should Explicitly Prohibit Judges from Evaluating the Artistic Worth of the Secondary Work.*

In addition, the provision concerning the transformative use should explicitly state that Japanese courts should only determine (1) whether a new meaning, message, or purpose can be reasonably perceived from circumstantial evidence[179] and (2) whether that meaning, message, or purpose will help "to contribute to the development of culture."[180] This will prevent Japanese courts from playing the role of an art critic to subjectively determine whether the new work is artistically different from the original. Under this instruction, courts are to objectively determine whether the alleged legitimate purpose can be reasonably perceived from circumstantial evidence, including the secondary work itself. Courts ought not to focus on the value of the new elements added by the secondary users to determine whether the new work is transformative. This would prevent courts from conducting a side-by-side comparison of the two creations, which requires expertise in the subject matter of the works in order to fairly determine whether the secondary work adds something of significance or value. These aforementioned adjustments, coupled with the proposed instruction, effectively assist Japanese courts in objectively determining whether

176. *See supra* Parts III.C. & D.

177. *See Campbell*, 510 U.S. at 581-83.

178. *See* SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1269-71 (11th Cir. 2001).

179. *Campbell*, 510 U.S. at 582. This approach parallels the *Campbell* Court's reasonable observer approach to determine whether the secondary work is a parody. *Id*.

180. Japanese Copyright Law, art. 1.

the secondary use at issue is a legitimate fair use that contributes to the "development of culture."

V. Conclusion

Japan needs to adopt a U.S.-modeled fair use exception to mitigate the possible chilling effect on "parodies" that would likely be created through Japan's compliance with the TPP Agreement. Japan's entrance into the agreement will tilt the balance of its copyright protection towards the overprotection of authors and copyright owners,[181] which could create a chilling effect on all creations of secondary works. This stunted growth of new creations would not only undermine Japan's "development of culture,"[182] but also could ultimately affect Japan's so-called "gross national cool"[183] because "parodies" are one of the important pillars of Japan's soft power.[184] Excessive protection for copyright owners' exclusive rights must be avoided because that is not the goal of copyright law. We must always remember that the ultimate objective of Japanese copyright law is to promote "the development of culture." We must also remember that all new creations are based on pre-existing materials, whether they are unprotected ideas or protectable expressions. Thus, we need to ensure that enough materials are left for future creators upon which they can build new creations.

As evidenced in Japan's cultural history, free flow of information enhances artists' inspiration and creativity, resulting in active creations that are essential to achieve Japan's copyright objective.[185] The fair use exception proposed in this article will properly strike the balance of protection between the rights of copyright owners and the public interest in having a society rich in arts and culture. This will necessarily protect the deserving "parodies" and *dojinshi* that contribute to Japan's "development of culture."

181. *See supra* Part I.

182. Japanese Copyright Law, art. 1.

183. Douglas McGray, *Japan's Gross National Cool*, Foreign Pol'y (Nov. 11, 2008), http://foreignpolicy.com/2009/11/11/japans-gross-national-cool/.

184. *See supra* Part II.A.

185. *See supra* Part II.