

A CRITICAL ANALYSIS OF THE SUBCULTURE OF FAN SUBBING AND SCANLATION OF JAPANESE MEDIA AND COPYRIGHT LAW

- Govind Abhijith *

ABSTRACT

This paper seeks to address the phenomenon of fan subbing and scanlation of online media notably of Japanese Anime and Manga, the unique sub-culture that has developed around it and the interrelationship of these aesthetics with our understanding of intellectual property laws. The advent of digital technology and increased global connectivity has, created a predicament for the entertainment industry specifically and copyright law generally. To some, the anime industry and its fans offer examples of how an industry can benefit and even grow from allowing copyright infringement. This lacuna if addressed properly could benefit the globalisation of the anime and Japanese entertainment industry and must not be clubbed together under a formulaic approach as is done with various other P2P file sharing data. The Author suggests ways to take a pragmatic approach while examining the moral standpoint of fansub groups, the marketing strategy for publishers and the various legal approaches that have been previously made against this often touted grey area of the copyright system.

* Graduate, B.A.LL.B (Hons.), National University of Advanced Legal Studies (NUALS), Kochi.

I. INTRODUCTION

Fan culture appears in different mediums of expression. Among the most noted and recognized in fan culture is fan-fiction. At the opposing end of the fan culture genre is fansubbing.¹ Fansubbing, otherwise known as fan-subtitled,² is defined primarily as “*an unauthorized translation in the form of subtitles.*”³ The definition, however, as it appears on many websites of fansub groups is “*a video subtitled by fans.*”⁴ There are two main styles of fansub translations: softsubs and hardsubs.

Softsubs are simple text files “*whose format depends on the exact subtitle encoding software to be used for interpretation.*”⁵ They are not encoded in the video stream of a television program or movie and as a result they can be turned on or off and edited based on preferences.⁶ Softsubs are often in plain text form and only provide a translation of the program or the movie. Hardsubs are “*video containers where subtitles have been encoded into the video stream.*”

Groups of otaku⁷ known as fansubbers translate, subtitle, and release copies of television shows and films originally broadcast or released in Japan (in Japanese) for other fans to watch. This activity is much more than simple file trading. Fansubbers subtitle these works primarily into English, but groups exist that make fansubs into Spanish, German, French, and a variety of other languages. Manga also has its own form of fansubs called scanlations, where fans scan various manga produced in Japan, digitally erase the Japanese characters, and insert English translations.

Fansubs and scanlations don’t quite match the “*traditional*” forms of remix that authors such as Lawrence Lessig and others mention.⁸ They do not create a “*new*” work in the same sense

¹ Rebecca Tushnet, *Payment in Credit: Copyright Law and Subcultural Creativity*, 70 SPG Law & Contemp. Probs. 135 (2007), (Accessed on Oct 10,2016) <http://scholarship.law.georgetown.edu/facpub/746/>

² Sean Leonard, *Celebrating Two Decade of Unlawful Progress: Fan Distribution, Proselytization Commons, and the Explosive Growth of Japanese Animation*, 12 UCLA Ent. L. Rev. 189, 196 (2005), (Accessed on Oct 10,2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=696402

³ Tonakai Anime and Manga, MINI DICTIONARY, (Accessed on Oct 10,2016) , <http://anime.tonakaistudio.com/dictionary.html>.

⁴ <http://www.insidescanlation.com/history/history-1-2.html> . (Accessed on Oct 10,2016)

⁵ Anime Mikome, *What is a Fansub? Hardsubs and Softsubs*, (Accessed on Oct 10,2016) , <http://anime.mikomi.org/wiki/WhatIsFansub>

⁶ Bloomsburg University Manga and Anime Club, Fansub, (Oct 10,2016) <http://www.bumac.org/index.php?page=fansub> .

⁷ Generic term for anime/ manga enthusiasts and Japanese Culture in general.

⁸ LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY (Bloomsbury Academic 2008)

as *dojinshi*⁹, fan films, or *AMVs*¹⁰ because their aim is to remain faithful to the original work. Fansubs and scanlations also compete with the original cultural product in a way that other fan films do not i.e., they have the potential to replace market need for official (licensed) translations. This competition may impact the ability for Japanese companies to license their anime in markets such as the United States and, if licensed, for these distributors to make a profit. Fansubs thus resemble the debate over peer-to-peer file trading; where potential consumers can easily find free replacements on the internet for products traditionally sold only in stores and other authorized channels.

Fansubbing is a long drawn out process which involves voluntary group coordinated effort and time. Fansub groups recruit staff composed of volunteers who serve in various roles as either: “*Coordinators*,” “*Translators*,” “*Timers*,” “*Editors*,” and “*Spot Translators*.”¹¹ In community translations, unlike fansub groups, fans who view the television program or movie are often invited to provide a running commentary and interactive dialogue on the work.

II. HISTORY AND GROWTH

Fansubs existed before the internet even entered popular consciousness.¹² In the past, fans ordered VHS tapes or laserdiscs from Japan, routinely paid for translations, and used expensive specialized equipment to insert subtitles onto a finished videocassette. Fansubbers distributed or traded the finished videocassette tapes to others, but because of the time and cost involved of mailing out a physical medium, distribution was limited. Anime clubs at universities often worked together to produce fansubs, which they then copied between clubs and placed in a club library for member use. At one time fansubs were virtually the only way that fans could watch (and understand) anime.¹³ Anime was mostly known only to a select crowd of people with access to and knowledge of fansub groups. Without any major distributors of anime in the global market, fansubbers were not competing with licensed companies, and a significant, relatively underground, market for anime began to develop.

⁹ Manga based fan-fiction

¹⁰ Anime Music Videos

¹¹ <http://www.insidescanlation.com/backgrounds/terminology.html>. Accessed on 10.10.2016.

¹² Anthony Faiola, *Empire of Cool: Country's Culture Becomes Its Biggest Export*, WASHINGTON POST A1 (Dec. 27, 2003), (Accessed on Oct 10,2016), <http://asianpopandmedia.blogspot.in/2007/04/japans-empire-of-cool.html>.

¹³ Melissa Hung, *Tooned Into Anime*, HOUSTON PRESS (Texas) (Aug. 2, 2001), (Accessed on Oct 10,2016), <http://www.houstonpress.com/news/tooned-in-to-anime-6560904>.

III. FANSUBBING ETHOS

Fansub translations are made for fans, by fans, and not for commercial purposes. No profits are involved in fansubbing.¹⁴ Many fansub translations boldly display within the translated text of the television program or movie that it is not for sale. Selling fansub translations is frowned upon in the fansubbing community and is considered bootlegging.¹⁵ The inherent goal in fansubbing is to get access and increase exposure to unlicensed foreign television programs and movies. The majority of fansubbers only work with unlicensed foreign television programs and movies that have not aired in their native country. Fansubbers understand that once licensing occurs, the distribution of the fansub translations for the television program or movie will cease. Once a domestic company licenses a title, fansubbers request that all previous distributions of the fansub translations for the foreign television program or movie cease, be destroyed and permanently deleted, and if they enjoyed the television program or movie to go out and buy it.¹⁶ Exceptions are made, however, to continue the fansub translation if the licensed product will be heavily edited or localized.

Understanding the basics of fansubbing are important; yet, the principles surrounding rights and protection to the translation of works have cultivated a perception that has contributed to the current dynamic for fansubbing practices in copyright law.¹⁷

The implementation of the Berne Convention for the Protection of Literary and Artistic Works (“**Berne Convention**”) in 1886 defined the rights artists had to their translations.¹⁸ The 1908 amendment of the Berne Convention formally included the right of translation in the reproduction right. Article 8 of the Berne Convention expressly provides: “*Artists of literary and artistic works . . . shall enjoy the exclusive right of making and of authorizing the translation of their works throughout the term of protection of their rights in original works.*” Literary and artistic works is expansively defined under the Berne Convention.¹⁹

¹⁴ Bloomsburg University ,Manga and Anime Club, supra note 11

¹⁵ Anime News Network, Fansubs, (Accessed on Oct 10,2016) , <http://www.animenewsnetwork.com/encyclopedia/lexicon.php?id=63>

¹⁶ Andy Kent, Japanese *Animation Legality and Ethics FAQ, Ethical Considerations*, (Accessed on Oct 10,2016) <http://avatarhr.tripod.com/legalfaq.html>

¹⁷ LaToya D. Rembert-Lang, “*Reinforcing the Tower of Babel: The Impact of Copyright Law on Fansubbing*”., (Oct 10,2016), <http://digitalcommons.wcl.american.edu/ipbrief/vol2/iss2/3>.

¹⁸ Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, as revised by Paris on July 24, 1971 and amended in 1979, S. Treaty Doc. No. 99-27 (1986), (Accessed Oct 10,2016) http://www.wipo.int/treaties/en/text.jsp?file_id=283698

¹⁹ (stating that literary and artistic works includes “dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works. . . . works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works. . . . works of applied art;

Early European copyright law during the eighteenth and nineteenth century permitted translations of artists' works without any formal permission requirements on use. Case law supported the right, and the ability, to make translations of artists' works. In the English Chancery court case of *Burnett v. Chetwood*²⁰, the court held that the publication of a translation under the then current copyright statute, the Statute of Anne, was not unlawful. In the King's Bench case of *Millar v. Taylor*²¹, the court recognized the translation of a work is a separate entity that specifically creates a new work. Artists were not granted rights in translations of their works in the United Kingdom until the Copyright Act 1911.²² Early copyright law in the United States shared the original English interpretation that the translation right in an artist's work was a separate entity, essentially creating a new work. The case of *Stowe v. Thomas*²³ held the translation of "*Uncle Tom's Cabin*" was not a copy under copyright law, and no infringement was found.

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

In the United States—the frame of reference for most online discussion of fansub legality—copyright law construes translations as "*derivative works*". Derivative works are any work "*based upon one or more preexisting works*." Fansub groups also infringe the right to reproduction by copying the original source material. By distributing the work to others, fansub groups violate the right to distribution. Each fansub therefore represents at least three violations of copyright law.

Within Japan, fansubs could potentially be within the law because the Japanese take a more relaxed attitude towards some aspects of copyright law and include private use and non-profit exceptions into their law.²⁴ These exceptions work as a counter to the exclusive rights mentioned above. The Japanese legal system may also, as a practical matter, discourage litigation

illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.")

²⁰ 35 Eng. Rep. 1008-9 (1721)

²¹ 98 Eng. Rep. 201

²² Copyright Act, 1911, (Accessed Oct 10, 2016) ,<http://www.legislation.gov.uk/ukpga/Geo5/1-2/46/enacted>

²³ 23 F. Cas. 201

²⁴Sean Kirkpatrick, *Like Holding a Bird: What the Prevalence of Fansubbing Can Teach Us About the Use of Strategic Selective Copyright Enforcement*, 21 Temp. Envtl. L. & Tech. J. 131, pg139-40

towards fansub groups within Japan, thus giving a more concrete reason why fansubbers can breathe easier when a show has not been licensed outside of Japan. But fansubs are aimed at, and primarily affect, the non-Japanese market, and therefore this article concentrates on non-Japanese law. Outside of Japan, issues such as notice or work-for-hire doctrines may complicate suits by foreign authors. However, foreign authors such as Japanese anime producers still enjoy the right to authorize translations, reproductions, and distributions as a baseline right in jurisdictions such as the United States. These are the rights that distributors outside of Japan license from Japanese companies and artists.²⁵

For infringements outside of Japan, it is no small wonder that Japanese companies do not bother with the expense of enforcing a right against a group whose infringement affects a distant market with a different legal system. The convenience and efficiency of leaving enforcement to licensed distributors when and if a show gets licensed makes more sense—licensed distributors have direct physical access to counsel and courts in the affected jurisdiction, a familiarity with the law, and an increased financial incentive to pursue infringers. Fansub groups therefore have more to fear once a show has been licensed.²⁶

Anime fans also behave differently than the typical peer-to-peer (“P2P”) music and movie file sharer. As mentioned, fansubbers widely consider what they do as ethical and accordingly fansub groups are relatively open about who they are and what they do. Groups make freely available links to files and instructions on how to obtain fansubs. Most, if not all, fansub groups have a web site where they disseminate information about the shows they are subbing and release announcements. These sites also make tracking down individuals working on these projects easier. Lack of enforcement is certainly not because of lack of knowledge of where to find fansubbers, and their openness sets fansub groups apart from other file traders.

IV. INTERNATIONAL COPYRIGHT LAW AND FAN SUBBING

Under existing copyright law, fansubbing is illegal and viewed as “*illicit access to art without properly compensating artists*,”²⁷ because many individuals view fansubs without ever purchasing the work of the author. If the work is never licensed, the artist never receives any profit from

²⁵ Hatcher, Jordan S., *Of Otaku and Fansubs: A Critical Look at Anime Online in Light of Current Issues in Copyright Law*. Script-ed, Vol. 2, No. 4, 2005. (Accessed Oct 10, 2016), <https://ssrn.com/abstract=871098>

²⁶ Elisabeth Watson, *Whose Digital Manga is it Anyway?*, PUBLISHING TRENDS, (Accessed on 14.10.2016), <http://www.publishingtrends.com/2012/03/whose-digital-manga-is-it-anyway-publishers-vs-scanlation/>.

²⁷ *Ask John: What are Fansubs?*, NewsBlog, AnimeNation, (last visited 14.10.2016) <http://www.animeNation.net/blog/2001/12/27/ask-john-what-are-fansubs/>

viewing the work. Some fansub groups have acknowledged it is illegal.²⁸ Within the first few hours of airing, fans download the television program or movie, and have begun the translating process for public distribution worldwide. Fansubbing is a violation of International copyright law.²⁹

Laws governing international copyright law include: The Berne Convention, the Uruguay Round Agreements Act (“URAA”),³⁰ and the Universal Copyright Convention (“UCC”).³¹ The Berne Convention and the URAA require copyright protection of a copyrighted work to be extended within a party state or provided to a party national of a state. Article V of the UCC explicitly declares the right of translation to artists by stating: “*copyright shall include the exclusive right of the author to make, publish, and authorize the making and publication of translations of works. . . .*”

Beyond translation rights, international laws provide a type of protection that is available only in a limited respect in the United States - moral rights. Moral rights consist of a “*bundle of rights*”,³² with the most central rights being attribution and integrity. Attribution is the right to claim authorship in a work and “*the right to prevent others from falsely attributing to him the authorship of a work that he has not in fact written.*”³³ Integrity is defined as the artist’s right “*to prevent any deforming or mutilating changes to his work*”; the public presentation of which would “*injure the author’s honor or reputation.*”³⁴ Moral rights were included in the Berne Convention in 1928.

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

²⁸ lafnear, Dattebayo FAQ, Dattebayo Fansubs, (last visited October 10,2016) [http:// dattebayo.com/faq.aspx](http://dattebayo.com/faq.aspx) . “Downloading fansubs, regardless of their license status is illegal in United States and various other countries. United States Code Title 17 does not allow distribution of copyrighted work by anyone except the copyright owner, and while others may claim that subtitling and distributing . . . fits under the ‘fair use’ exception, it most certainly does not.”

²⁹ *Berne Convention, supra note 33*. The original work of authors is taken and translated in their entirety by fansub groups without deference to the author’s translation rights.

³⁰ The Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994).

³¹ Universal Copyright Convention, revised, Paris, July 24, 1971, 6 U.S.T. 2731, 216 U.N.T.S. 132 (1952). available at [http:// portal.unesco.org/en/ev.php-URL_ID=15381&URL_DO=DO_TOPIC&URL_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=15381&URL_DO=DO_TOPIC&URL_SECTION=201.html).

³² Cassandra Spangler, *The Integrity Right of an MP3: How the Introduction of Moral Rights into U.S. Law Can Help Combat Illegal Peer-to-Peer Music File Sharing*, 39 Seton Hall L. Rev. 1299, 1302 (2009). (last visited October 10,2016) <http://scholarship.shu.edu/shlr/vol39/iss4/7/>.

³³ Joshua M. Daniels, “*Lost in Translation*”: *Anime, Moral Rights, and Market Failure*, 88 B.U. L. Rev. 709, 714 (2008)

³⁴ Brian T McCartney, “*Creepings*” and “*Glimmers*” of Moral Rights of Artists in American Copyright Law, 6 UCLA Ent. L. Rev. 35, 38 (1998)

Fansubbers and digerati such as Joi Ito proclaim that fansubs demonstrate the benefits of widespread copyright infringement.³⁵ Anime outside of Japan is a growing industry; an industry whose roots extend back to the days where fansubs were the only option for non-Japanese speaking fans who wanted to fully enjoy anime. As a result, one can argue that the American industry and others like it at least benefited at one time—companies like industry leader ADV wouldn't have been successful without a fansubbing-built customer base. Indeed, the founders of ADV wouldn't even have known about anime without fansubs.³⁶

Many fansub groups promote the free publicity aspect of fansubs, and distributors could see this publicity as a reason to allow fansubs. A few fansubs can help generate interest before a release, especially since fans outside of Japan won't necessarily be familiar with the manga on which many shows are based.³⁷ In a sense, fansubs could act as a substitute for television in the market outside of Japan—fans build interest by watching shows and then buy the DVDs when they come out. The comparison to television is similar to the “*try before you buy*” justification that many leechers give. Otaku feel that they need to see the first few episodes to even know if they will like a show. Fansubs may serve to get otaku “*hooked*” onto a series that can span 30 or more episodes. Because anime is more of a medium than a specific genre in Japan, Japanese companies generate a large amount of content.³⁸ Fansubs can be a way for distributors outside of Japan to sort through the content when deciding what to license.

V. PREEMINENT OPINIONS ON THE ISSUE

According to Jake T. Forbes, an editor and columnist, the work that scanlation groups in that they in no way are in “*legal grey area*” and are blatant copyright infringement. He further criticized the community for lacking the right and qualifications to know whether or not scanlation is positive or negative for the industry and the harm it caused, emphasizing the simple truth that the scanlation community is “*not*” the industry. He describes the current fandom as taking “*unfettered*” access to copyrighted works “*for granted*” due to advent of torrents and scanlations.³⁹

³⁵ Patrick Gray, Interview with Wired Magazine (Jun. 02, 2005), Joi Ito, *Fandom shows that file sharing can create “gained fans” not “lost customers”*; “*The Other Side of BitTorrent*” (Accessed on October 10, 2016)

³⁶ Melissa Hung, *Tooned Into Anime*, HOUSTON PRESS (Texas) (Aug. 2, 2001). (Accessed on Oct 10, 2016), <http://www.houstonpress.com/news/tooned-in-to-anime-6560904> ..

³⁷ Mehra, *Copyright and Comics in Japan*, 184-5. (Accessed on Oct 10, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=347620.

³⁸ SUSAN NAPIER, *Anime from Akira to Princess Mononoke*, (Palgrave Macmillan 2001)

³⁹ Forbes, Jake (2010-03-26). “*Guest editorial: Dear Manga, You Are Broken*”, MangaBlog . (Accessed on Oct 10, 2016)

Jason Thompson, a freelance editor with deep involvement in the manga industry, stated that although manga companies never mention them, they have placed paying increasing amounts of attention towards scanlations as a means of gauging a title's popularity and the presence of a fanbase.⁴⁰ Some licensing companies, such as Del Rey Manga, Tokyopop, and Viz Media, have used the response to various scanlations as a factor in deciding which manga to license for translation and commercial release.⁴¹

During a panel on digital piracy in Comic-Con 2010, the comic and music critic and writer for Techland, Douglas Wolk, expressed concern in response to the actions of Manga Multi-national Anti-Piracy Coalition stating that he had seen the music industry “*destroy*” itself by “*alienating its most enthusiastic customer base*” in attempts to fight piracy.

VI. CONCLUSION

There are valid arguments for allowing fansub translations under the doctrine of fair use. Because fair use analysis is a copyright infringement defense, fansub translations may overcome this hurdle under copyright law, but cannot overcome other legal considerations with respect to the right to translation and the right to reproduction for authors. Fansubbing is a form of piracy activity. The act of illegally downloading television programs or movies through digisubbing or distributing through P2P networking files or in other formats is considered “*the next big craze in illegal file sharing*.”⁴² Inevitably, the activities of many fansub groups will always be at the opposing end of compliance with copyright law. Therefore, a new model of reform must be introduced to protect the needs of fansub groups while balancing and protecting the interests of artists.

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

⁴⁰ Macias, Patrick (2006-09-06). “*Fans lift J-culture over language barrier*”, THE JAPAN TIMES .

⁴¹ Jeff Yang (14 June 2004). “*No longer an obscure cult art form, Japanese comics are becoming as American as apuru pai*.”SFGate

⁴² Karla S. Lambert, *Unflagging Television Piracy: How Piracy of Japanese Television Programming in East Asia Portends Failure for a U.S. Broadcast Flag*, 84 Tex. L. Rev. 1317 (2006)

The creation of a notice of use⁴³ method not only ensures protection for authors, but also carves out protection for fansub groups that provide timely distribution of foreign television programs and movies. The notice of use method creates a translation right and allows fansub groups to have a form of copyright protection, yet also protects the rights of authors. The notice of use would require all fansub groups to send to television networks, producers, or artists of a respective television program or movie, a notice of use that specifies the intent to translate the prospective program or movie. The notice of use must be sent in the original language of the country of origin of television program or movie. The purpose and goal of this method is to place individuals on notice, and allow an informal right of translation. The notice of use should be sent as soon as possible upon the development of an interest in subbing the television program or movie, preferably prior to its public airing date. By having this formal notice, broadcasters, producers and artists are aware of which programs or movies are being subbed, and can evaluate the potential for licensing interests abroad.

The main argument opposing this concept is that the method that drives this notice of use concept of fansubbing nullification is the cause of the problem: one must blatantly disobey the canons of copyright law to comply with this theory. Moreover, carving out such an explicit exception for fansubbing may create a chilling effect on new types of media that may also want explicit protection against copyright infringement liability. Any new media type that desires to obtain protection against copyright infringement must, like fansub translations, go through the fair use analysis. Overall, the benefits of protecting a new media type, including the social considerations (educational value, cultural representation, access to the work and localization), must outweigh the potential harm against the original work.⁴⁴

The licensed anime distribution industry is coming to terms with the impact of fansubs, specifically the new digisubs, while it is undergoing a tremendous amount of growth in interest in its product. Because these two forces pull in opposite directions, it is too early to look to fansubs as an example of how continuing widespread online copyright infringement can benefit a company. But as the situation matures and as more studies into this area are conducted, the relationship will reveal a great deal about the nature of copyright in a connected digital world.

⁴³ Nathaniel T. Noda, *Copyrights Retold: How Interpretive Rights Foster Creativity and Justify Fan-Based Activities*, 20 Seton Hall J. Sports & Ent. L. 131, 142 (2010)

⁴⁴ *Sony Corp. of Am. v. Universal City Studios, Inc.*, et al., 464 U.S. 417, n.40 (1984)