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## Of Otakus and Fansubs: A Critical Look at Anime Online in Light of Current Issues in Copyright law

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### Abstract

*The advent of digital technology and increased global connectivity has, to put it mildly, caused some ripples for the entertainment industry specifically and copyright law generally. In the aftermath, many are searching for new ways to incorporate the benefits of digital copies and the internet while minimizing the harms. To some, the anime industry and its fans offer examples of how an industry can benefit and even grow from allowing copyright infringement. This article examines the anime industry in-depth with this suggestion in mind and places the industry among current copyright policy debates, such as those suggested by Lawrence Lessig.*

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<sup>+</sup> This article is available in book form. Readers in the United States who would like a copy may purchase directly from Lulu.com at <http://www.lulu.com/content/200908>. Readers outside of the US may request a copy directly from the author by contacting him at jordan at twitchgamer dot net.

“*Sailor Moon is like a gateway drug*”<sup>1</sup>

- Janet Varela, referring to her daughter’s new obsession with anime

“*Too many otaku are just wanting fansubs for a cheap anime fix*”<sup>2</sup>

- Rei-kun, member of fansubbers Kodocha Anime, describing digisubs

### **1. Introduction: Between Dojinshi and P2P**

The excesses of copyright law—from the legalities of peer-to-peer (p2p) networks to the intrusion of copyright law into the human body—have been a topic of great recent interest to both the legal world and the general public.<sup>3</sup> Scholars, such as Lawrence Lessig, have been propelled into celebrity for their work discussing the perceived excess and illogic of certain aspects of modern copyright law.<sup>4</sup> Under the term *Free Culture*, Lessig states that the re-working of culture—remix—is necessary to cultural growth, and that a healthy public domain and freedom from burdensome copyright restrictions facilitates this process.<sup>5</sup> He points to the hindrances in a digital world that copyright laws pose for creative works that, while technically infringing, should perhaps be valued and allowed.<sup>6</sup> Certain features of digital technologies and the internet,<sup>7</sup> according to Lessig, can permit greater restrictions on remix than were allowed in the past.<sup>8</sup> He puts forth the theory that by rigidly applying our copyright laws to the new digital environment we increase the restrictions on remix and thus threaten this Free Culture.<sup>9</sup>

Lessig and other legal scholars such as Mehra have pointed to *dojinshi* in Japan as an example of how permitting more “remix” can contribute to a vibrant cultural

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<sup>1</sup> Melissa Hung, *Tooned Into Anime* Houston Press (Texas) (Aug. 2, 2001).

<sup>2</sup> Holly Kolodziejczak, *The Volatile World of Fansubs: An Inside Peek!* Animefringe Online Magazine @: <<http://www.animefringe.com/magazine/01.07/feature/2/index.php3>>

<sup>3</sup> See e.g., the recent case and associated commentary over peer-to-peer (p2p) file sharing in the U.S. Supreme Court, *MGM Studios v. Grokster, Ltd.*, 125 S. Ct. 2764 (2005); Marisa Kakoulas, *The Great Tattoo Controversy*, December 8, 2003, BMEzine @: <<http://www.bmezine.com/news/guest/20031208.html>> (concerning copyright in tattoos).

<sup>4</sup> Lessig was recently featured in the hit US television show *The West Wing*. See Lawrence Lessig, *West Wing Lessons* February 10, 2005 @: <<http://www.lessig.org/blog/archives/002421.shtml>> (Lessig’s blog entry on the show); NBC, *The West Wing*, @: <[http://www.nbc.com/The\\_West\\_Wing/index.html](http://www.nbc.com/The_West_Wing/index.html)> (official site). Though they haven’t appeared on prime-time network television, Siva Vaidhyanathan and Jessica Litman are both popular authors in this area that have reached a non-legal audience.

<sup>5</sup> Lawrence Lessig, *Free Culture: how big media uses technology and the law to lock down culture and control creativity* (Penguin Books 2004) [hereafter *Free Culture*].

<sup>6</sup> See e.g., Lawrence Lessig, *The Future of Ideas: the fate of the commons in a connected world* (Vintage Books 2001) [hereafter *The Future of Ideas*]; Lessig, *Free Culture*.

<sup>7</sup> For capitalization of the word “internet”, see Tony Long, *It’s Just the ‘internet’ Now*, Wired News (Aug. 16 2004) @: <<http://www.wired.com/news/culture/0,1284,64596,00.html>>

<sup>8</sup> Lessig, *Free Culture* at 161 (“This change in the effective force of the law is caused by a change in the ease with which it can be enforced”).

<sup>9</sup> Lessig, *Free Culture*.

industry.<sup>10</sup> Dojinshi refers to self-published *manga* (Japanese comics) that involve famous characters created by someone other than the character's creator, i.e., fan fiction.<sup>11</sup> So for example, a dojinshi author will take a popular character such as Harry Potter and create new adventures for the young sorcerer.<sup>12</sup> Unlike other jurisdictions such as the United States—what commentators such as Lessig point to—fans in Japan are free to create dojinshi through a combination of custom and certain features of the Japanese legal system.<sup>13</sup> Because of this freedom, the dojinshi business has grown enormously, to the point where some artists make a living off producing dojinshi. Comiket, a twice-yearly comic convention in Tokyo, attracts a massive 350,000 fans and artists to buy, sell, and trade dojinshi in one place.<sup>14</sup>

Dojinshi-like practices are, of course, not isolated to Japan. In the west, *Star Wars* and *Star Trek* fans (among many others) routinely produce fan fiction and fan films based on the shows they love.<sup>15</sup> Some of these films may even find official sanction through fan film competitions in such places as online entertainment site Atom Films.<sup>16</sup> But unless authorized, these activities usually violate copyright law.<sup>17</sup> In the west, fans of *anime*, the term for Japanese animation, behave much like fans of *Star Wars* and *Star Trek*: they “remix” the characters and ideas from the stories they watch.<sup>18</sup> Especially in the United States, avid anime fans refer to themselves as *otaku*, much like avid *Star Trek* fans refer to themselves as *Trekkies*.<sup>19</sup> Like other fans, otaku practice a wide variety of activities; all of which potentially infringe the copyright of the shows and films they love.<sup>20</sup> They create dojinshi.<sup>21</sup> They use captured graphics from shows to

<sup>10</sup> Lessig, *Free Culture* at 25-29; 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 (2002) [hereafter *Copyright and Comics in Japan*]; Sean Kirkpatrick, *Like Holding a Bird: What the Prevalence of Fansubbing Can Teach Us About the Use of Strategic Selective Copyright Enforcement*, 21 Temp. Envtl. L. & Tech. J. 131, 147-48 (2003) [hereafter *Like Holding a Bird*]. Dojinshi is also often spelled *doujinshi*. Wikipedia, *Dojinshi* @: <<http://en.wikipedia.org/wiki/Dojinshi>>

<sup>11</sup> Wikipedia, *Dojinshi*; Mehra, *Copyright and Comics in Japan*, at 155. See also Chilling Effects Clearinghouse, *FAQ about Fan Fiction*, @: <<http://www.chillingeffects.org/fanfic/faq.cgi>>

<sup>12</sup> See e.g., House of Black, *HouseOfBlack.net Doujinshi*, @: <<http://www.houseofblack.net/doujinshi/dj.html>> ; DrMM, *Addiction: A Harry Potter Doujinshi Website*, @: <<http://www.fuoko.com/doujinshi/>>

<sup>13</sup> See Lessig, *Free Culture* at 25-29; Mehra, *Copyright and Comics in Japan*. See also discussion in *The Legality of Fansubs*, *infra*.

<sup>14</sup> Wikipedia, *Comiket*, @: <<http://en.wikipedia.org/wiki/Comiket>>; Comiket, *Welcome to the Official Comic Market Site*, @: <<http://www.comiket.co.jp/>> (mostly in Japanese).

<sup>15</sup> E.g. Atom Films, *Star Wars Fan Film Awards*, @: <<http://www.atomfilms.com/af/spotlight/collections/starwars/>>; John Borland, *Star War fan films get Lucas nod*, CNET NEWS.com @: <[http://news.com.com/Star+Wars+fan+films+get+Lucas+nod/2100-1026\\_3-5683654.html](http://news.com.com/Star+Wars+fan+films+get+Lucas+nod/2100-1026_3-5683654.html)>

<sup>16</sup> Atom Films, *Star Wars Fan Film Awards*.

<sup>17</sup> See *The Legality of Fansubs*, *infra*. The exception to authorization is, of course, *fair use* or *fair dealing*.

<sup>18</sup> For a scholarly look at “participatory culture”, see Henry Jenkins, *Quentin Tarantino’s Star Wars?: Digital Cinema, Media Convergence, and Participatory Culture*, @: <<http://web.mit.edu/21fms/www/faculty/henry3/starwars.html>>

<sup>19</sup> The use of the word “otaku” in Japanese is different, but outside of Japan, most anime fans identify themselves by this term. Wikipedia, *Otaku*, @: <<http://en.wikipedia.org/wiki/Otaku>> . For more on the term, see resources collected at Lawrence Eng, *Lawmune’s Anime Page*, @: <<http://www.cjas.org/~leng/anime.htm>>

<sup>20</sup> See 17 U.S.C.S. §106 (1), (2) (2005) [reproduction and derivative work rights]; Melville Nimmer & David Nimmer, *Nimmer on Copyright* § 3.01 (Matthew Bender 2005). *Nimmer on Copyright*,. This is, of course, barring any fair use/fair dealing defenses.

<sup>21</sup> See American Comiket, @: <<http://amcomik.hakaze.com/about.html>>

create *fansites* and to make wallpaper for their computer desktops.<sup>22</sup> They attend conventions and other events dressed as characters from their favorite shows; an activity known as *cosplay*.<sup>23</sup> They create “Anime Music Videos”, or AMVs for short, which involve editing scenes from one or more anime series and setting the final product to music.<sup>24</sup>

Trekkies or *Star Wars* fans do the same activities as otaku, but one practice sets anime fans apart from other avid fans: *fansubs*. Groups of otaku 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.<sup>25</sup> 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.<sup>26</sup> 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.<sup>27</sup>

Fansubs and scanlations don’t quite match the “traditional” forms of remix that Lessig and others mention. They do not create a “new” work in the same sense as dojinshi, fan films, or AMVs because their aim is to remain faithful to the original work.<sup>28</sup> Fansubs and scanlations also compete with the original cultural product in a way that other fan films do not: 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.

Fansubs as a cultural product sit at an interesting boundary—between the dojinshi-like fan culture that authors such as Lessig want to encourage and the massive online file trading so vilified by the recording and motion picture industries.<sup>29</sup> This article

<sup>22</sup> A fansite is website by a fan. Wikipedia, *Fansite*, @: <<http://en.wikipedia.org/wiki/Fansite>>; E.g. SaiyaMan.info, *SaiyaMan.INFO Image Gallery – Bleach Wallpaper*, @: <<http://www.saiyaman.info/gallery/thumbnails.php?album=12>>

<sup>23</sup> Wikipedia, *Cosplay*, @: <<http://en.wikipedia.org/wiki/Cosplay>>; Cosplay.com, @: <<http://www.cosplay.com/>> ; Cosplay UK, @: <<http://www.cosplay.co.uk/>> Cosplay could infringe the derivative work right. See *Entertainment Research Group, Inc. v. Genesis Creative Group, Inc.* 853 F. Supp. 319 (N.D. Cal. 1994) (finding a derivative work right for 3D costume version of such advertising characters as Toucan Sam).

<sup>24</sup> Wikipedia, *Anime Music Video*, @: <[http://en.wikipedia.org/wiki/Anime\\_music\\_video](http://en.wikipedia.org/wiki/Anime_music_video)>; Anime Music Videos .Org, @: <<http://www.animemusicvideos.org/home/home.php>> For a legal analysis involving AMVs, see *Like Holding a Bird*.

<sup>25</sup> Wikipedia, *Fansub*, @: <<http://en.wikipedia.org/wiki/Fansubs>>

<sup>26</sup> See e.g., AnimeCollection.de, @: <<http://www.animecollection.de/>> (German); Kaze Fansub, @: <<http://www.kaze-fansub.com.ar/>> (Spanish); Animeka, @: <<http://www.animeka.com/fansub/index.html>> (French); a.scarywater.net, *BitTorrent Files for [datebayo] Anime*, @: <<http://a.scarywater.net/db/>> (showing Brazilian Portuguese and Hebrew translations).

<sup>27</sup> Wikipedia, *Scanlation*, <<http://en.wikipedia.org/wiki/Scanlation>> Scanlation is formed by combining “scan” and “translation”.

<sup>28</sup> Though they can be “new” in the copyright sense and eligible for copyright. See Nimmer, 3.01. In the US, unauthorized (infringing) translations would be denied copyright. 17 U.S.C.S. §103(a) (2005); Nimmer, § 3.06.

<sup>29</sup> E.g. ZDNet, *Peer-to-Peer News*, @: <[http://news.zdnet.com/2038-9588\\_22-0-topic.html?id=6237&name=Peer+to+peer](http://news.zdnet.com/2038-9588_22-0-topic.html?id=6237&name=Peer+to+peer)> (Collection of stories related to p2p, most of which deal with RIAA and MPAA lawsuits).

situates fansubs along this boundary, and critically analyzes some of the differences between the anime industry and the litigious response of the recording and motion picture industries. Because the U.S. market for anime is more established than the manga market and thus offers more concrete examples, this article concentrates on fansubs rather than scanlations. Fansubs also have more history to draw from—scanlations only became practical after low-cost digital scanners were freely available.<sup>30</sup> Fans often use whether or not a work has been licensed in the U.S. market as a key requirement in whether they feel that they are justified in creating fansubs, and thus this article leans towards a U.S.-centric approach.

Section 2 of this article gives an overview of the process of fansubbing. Section 2.1 gives a brief history of fansubbing, and section 2.2 looks at the fansub production process. Section 3 goes on to discuss the legality of fansubs. Section 4 helps to clarify the unique problems that licensed distributors of anime face by comparing fansubs to another controversial movement in copyright law—free and open source software (FOSS). Unlike some other areas of online copyright infringement, fansub groups and some of their audiences actively think about the ethics of what they do. Section 5 relates some of these attitudes towards fansubbing within the community.

After grounding the discussion with these sections, the remainder of this article examines the anime industry's unique relationship with fansubbers in the context of the suggestion that it represents a new policy model for online copyright. Section 6 compares this relationship to the current trends in p2p file trading—specifically the litigious response of the recording and motion picture industries. Section 7 concludes by stating that it is too soon to claim the anime industry as a victory for alternative business models incorporating what most would think of as widespread copyright infringement. Because of the relative lack of formal enquiry into the anime industry, section 7 also suggests some points for future studies on the subject.

## **2. Fansub production**

Otaku create fansubs because they love anime—in fact, most love all things Japanese.<sup>31</sup> Otaku are not alone: Mainstream interest in Japanese culture has risen to the point that “[b]usiness leaders and government officials are now referring to Japan's ‘gross national cool’ as a new engine for economic growth and societal buoyancy.”<sup>32</sup> This love of anime drives the production process of fansubs. Fansub groups do not receive compensation for their efforts and often spend long hours subbing a series.<sup>33</sup>

Fansubs predate BitTorrent, broadband, the dotcom boom and bust, and even the World Wide Web. Section 2.1 briefly looks at the history of fansubs and the impact of

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<sup>30</sup> See Jeff Yang, *Manga Nation: No longer an obscure cult art form, Japanese comics are becoming as American as apuru pai*, SF Gate (June 14, 2004). @: <<http://www.sfgate.com/cgi-bin/article.cgi?file=/gate/archive/2004/06/14/manganation.DTL>> [hereafter *Manga Nation*].

<sup>31</sup> Why fans devote so much time to certain activities is probably a part of human nature. For some insight into this phenomenon, see Eben Moglen, *The dotCommunist Manifesto* @: <<http://moglen.law.columbia.edu/publications/dcm.html>> and Ian Condry, *Cultures of music piracy: An ethnographic comparison of the US and Japan*, 7(3) *Intl. J Cultural Studies* 343. (“[I]t is important to recognize that few musician's efforts can be simply explained by a desire to make money.” at 347).

<sup>32</sup> Anthony Faiola, *Empire of Cool: Country's Culture Becomes Its Biggest Export*, Washington Post A1 (Dec. 27, 2003).

<sup>33</sup> Though the turnaround on a single episode may only be 20 hours or less (possibly divided up between multiple people), fansubbers often commit to subbing an entire series. See Section 2.1, *infra*.

digital technology has had on fansubbers and the anime industry. In order to help get an idea of the scope of fansubbing, Section 2.2 describes the manufacturing process of a modern digital fansub.

## 2.1 A (brief) history

As hinted at earlier, fansubs existed before the internet even entered popular consciousness.<sup>34</sup> 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.<sup>35</sup> 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.<sup>36</sup> At least one group distributed their fansubs and those of others on videocassette on a large scale, and even took prepayment by PayPal of the shipping costs.<sup>37</sup> 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.<sup>38</sup>

At one time fansubs were virtually the only way that fans could watch (and understand) anime.<sup>39</sup> Anime was mostly known only to a select crowd of people with access to and knowledge of fansub groups.<sup>40</sup> Without any major distributors of anime in the U.S. market, fansubbers were not competing with licensed companies, and a significant, relatively underground, market for anime began to develop.<sup>41</sup>

Times, of course, changed. Forward-looking companies such as A.D. Vision (later ADV Films) saw the potential of anime and started importing titles into the United States, and eventually Europe.<sup>42</sup> A customer base built on fansubs exploded.<sup>43</sup> As one distributor representative has stated: “The largest video market was porn. Now it’s anime.”<sup>44</sup> The internet also expanded at the same time as the growth of anime into the consciousness of the world.

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<sup>34</sup> Sean Leonard, *Progress Against the Law: Fan Distribution, Copyright, and the Explosive Growth of Japanese Animation* (Sept. 12, 2004), § 3.8 @: <<http://web.mit.edu/seantek/www/papers/progress-columns.pdf>> (tracing first fansub to 1986). As Leonard demonstrates, anime fans were growing at a steady pace even before fansubs—they would just watch the raw animation without understanding the speech. Id at § 3.2.

<sup>35</sup> See AnimeSuki Forums, *Paying for Translation*, *supra*; Vortex Fansubs and M.B.M. Productions, *How to Fansub F.A.Q.*, @: <[http://www.fansubber.net/fansub\\_f\\_a\\_q.htm](http://www.fansubber.net/fansub_f_a_q.htm)>; For a look at the technology of fansubbing circa 1997, see Anthony Herana, *The Fansub FAQ*, Fansubs.net @: <<http://www.fansubs.net/view.php3?page=techfaq>>

<sup>36</sup> See Vortex Fansubs and M.B.M. Productions, *How to Fansub F.A.Q.*; Fansubs.net, *The Fansubber and Distro List*, @: <<http://www.fansubs.net/view.php3?page=fndl>> (A list, apparently circa 2000, of groups that distributed by VHS).

<sup>37</sup> See Kodocha, *Kodocha Anime FAQ* (describing the use of sophisticated duplication equipment and the use of PayPal for recouping the costs). As discussed *infra*, fansub ethics only allow for recovery of costs so most groups only asked for postage and the cost of the tape.

<sup>38</sup> Melissa Hung, *Tooned Into Anime*, Houston Press (Texas) (Aug. 2, 2001).

<sup>39</sup> Hung, *Tooned into Anime*. See Leonard at § 3.2 (discussing prevalence of anime before translations were available).

<sup>40</sup> See Leonard at § 3.7.1 (characterizing a switch from a closed to an open *proselytization commons*, see *infra*).

<sup>41</sup> See Leonard at § 3.

<sup>42</sup> Hung, *Tooned into Anime*.

<sup>43</sup> Anime has reached the point where there is even a cable channel devoted to anime programming. Anime Network @: <<http://www.theanimenetwork.com/>>

<sup>44</sup> Hung, *Tooned into Anime*.

Perhaps anime grew even more because of the internet—geeky fans were able to connect and network over long distances.<sup>45</sup> But as with the music industry, the benefits of digital technology and the internet brought problems.<sup>46</sup> Fansubbers started to take advantage of faster computers that allowed them to subtitle anime without the need for expensive, specialized equipment.<sup>47</sup> This made it easier for more people to fansub because of the lower cost barriers to becoming a fansubber. The internet also meant that fans could meet from around the world, thus making it more likely that fansub groups would form.

Today, groups now make digital video files instead of videocassettes. The last fansubbers to still use cassettes closed their doors in 2002.<sup>48</sup> It is a familiar story. This new style of fansubs, often called *digisubs*, doesn't have the built in technological limits of analog cassettes and often results in a better quality picture. Fansubbed videocassettes offered a poor quality picture and sound that encouraged fans to buy the licensed product when it came out and also limited the number of copies that could be made from a single original cassette (or from 2<sup>nd</sup> and 3<sup>rd</sup> generation cassettes).<sup>49</sup> Digisubs offer a quality comparable to official (DVD) releases and the ability to make limitless copies. Broadband connections mean that now otaku can easily get fansub releases from the comfort of their home—no waiting on the mail and someone with a day job to get around to sending your cassette. This makes it more likely that more otaku will acquire more fansubs. The music and motion picture industries have faced similar concerns with their products: Fans can get digital versions of music and movies easily and for free over the internet. Digisubs place the anime industry in much the same boat as the motion picture or music industries, and so their mutual situations invites comparison.<sup>50</sup>

## 2.2 Dissection of a modern fansub

Fansub groups can get very sophisticated. Groups often have “Help Wanted” sections where they advertise jobs with the group.<sup>51</sup> Some groups maintain a certain level of brand identification and even have “subsidiaries” that release other genres of anime, typically adult-oriented material, often called *hentai*, under a different label.<sup>52</sup>

As one can imagine, producing a fansub does not simply entail clicking a few buttons. The process can involve a significant amount of time and energy. Groups often spread this work over several people, though some fansub groups consist of a single

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<sup>45</sup> Leonard refers to the idea of a connected network of fans seeking to promote something as a *proselytization commons*. The massive tape trading that took place before the internet through the fan group C/FO he terms a *closed proselytization commons* with the post-internet model as an *open proselytization commons*. § 3.7.1, § 3.9.2

<sup>46</sup> See Holly Kolodziejczak, *The Volatile World of Fansubs: An Inside Peek!*, Animefringe Online Magazine @: <<http://www.animefringe.com/magazine/01.07/feature/2/index.php3>> [One fansubber's discussion of this change].

<sup>47</sup> Compare Vortex Fansubs and M.B.M. Productions, *How to Fansub F.A.Q.*; with *Infusion*.

<sup>48</sup> Zac Bertschy, *2002 – Fansubs in Review*, Anime News Network.com (Jan. 14, 2003) @: <<http://www.animenewsnetwork.com/feature.php?id=109>>

<sup>49</sup> See Leonard at § 3.4 (discussing fans having “extremely poor” 15<sup>th</sup> to 20<sup>th</sup> generation copies).

<sup>50</sup> See *id.*

<sup>51</sup> E.g. Lunar-Anime, *Recruiting*, @: <<http://www.lunaranime.org/index.php?p=63>>

<sup>52</sup> Hentai is mostly used by Westerners this way—the Japanese rarely use hentai to describe this material. Wikipedia, Hentai @: <<http://en.wikipedia.org/wiki/Hentai>>

person.<sup>53</sup> The internet allows for a distributed production method—many contributors can be geographically distant but still work on the same project. A typical fansub release might follow the steps below:<sup>54</sup>

### 2.2.1 Raw acquisition

Fansubbers first start with an un-subtitled version of the show referred to as a *raw*.<sup>55</sup> Raws can come from *ripping* Japanese DVDs, VHS tapes, or television broadcasts.<sup>56</sup> Some internet fan groups even specialize in providing these raws to the fansub community.<sup>57</sup> For items out in stores in Japan, DVDs and videocassettes can easily be ordered from Amazon.co.jp—the Japanese Amazon.com has an English option for checkout.<sup>58</sup> But the most common source for raws is Japanese peer-to-peer networks such as Winny or Share, where a mostly Japanese audience trades content in the same way that others use Grokster or Kazaa.<sup>59</sup> Another source, especially for shows currently on air, may simply be friends in Japan that rip shows specifically for fansub groups.<sup>60</sup>

### 2.2.2 Translation

A person fluent in Japanese and English then watches the raw video and types up a time-stamped text file that resembles a screenplay.<sup>61</sup> As bilingual people willing to spend their free time translating anime are somewhat rare, some groups may even pay out of their own pockets for translation.<sup>62</sup> These translations often contain notes

<sup>53</sup> For an example of a single person group, see Chihiro, mentioned at e.g. Fansub TV Forums, *Chihiro Subs*, @: <<http://boards.fansub.tv/index.php?act=Print&client=printer&f=6&t=641>>

<sup>54</sup> ANBU, *FAQ*, @: <<http://anbudom.net/faq.php>> ; David Jao, *Linux Digital Fansubbing Guide*, (Oct. 19, 2002) @: <<http://web.archive.org/web/20040617194944/dominia.org/djao/dvdsb.ver3.html#toc3>> [from the internet archive].

<sup>55</sup> Infusion fansubbing team, *Infusion Fansubbing Newbie Guide*, (April 18<sup>th</sup>, 2003) @: <<http://www.lolikon.org/guide.html>> [hereafter *Infusion*].

<sup>56</sup> *Infusion*; ANBU *FAQ*; AnimeSuki Forums, *Raws*, @: <<http://forums.animesuki.com/showthread.php?t=3639>> Ripping is to transfer (copy) from a source into a file on a computer. See AbsoluteDestiny, *Ripping DVD Footage*, AnimeMusicVideos.Org @: <<http://www.animemusicvideos.org/guides/avtech/videogetb.html>> (explaining how to rip from DVD to make AMVs).

<sup>57</sup> E.g. L33T-RAWS @: <<http://www2.l33t-raws.org/>>; Saiyaman @: <<http://www.saiyaman.info/>> (“BT Page” section has BitTorrent files of raws). Though many aspects of fansubs relate to the warez scene, this practice is strikingly similar. See Wikipedia, *Warez*, @: <<http://en.wikipedia.org/wiki/Warez>>

<sup>58</sup> Amazon.co.jp @: <<http://www.amazon.co.jp>>. Note that the preferred format used to be laserdisc. See Hung, *Tooned into Anime*; Kodocha, *Kodocha Anime FAQ*, @: <<http://web.archive.org/web/20020916084547/http://animemetropolis.com/kodocha/faq.html>> (from the Internet Archive).

<sup>59</sup> See AnimeSuki Forum, *How are fansubs created?* @: <<http://forums.animesuki.com/archive/index.php/t-1296.html>> ; Wikipedia, *Share*, @: <[http://en.wikipedia.org/wiki/Share\\_%28p2p%29](http://en.wikipedia.org/wiki/Share_%28p2p%29)>; Wikipedia, *Winny*, @: <<http://en.wikipedia.org/wiki/Winny>>. Note, Winny was recently the subject of an enforcement action in Japan. *Id.*

<sup>60</sup> ANBU, *FAQ*. Note, fans could use eBay to acquire raws, but this source did not come up during my research as being mentioned very often. Perhaps language barriers discourage use of eBay to acquire raws. For a look at the ways anime came to the U.S. from 1976 to 1993, see Leonard § 3.

<sup>61</sup> *Infusion*; ANBU, *FAQ*.

<sup>62</sup> See AnimeSuki Forums, *Paying for Translation?* @: <<http://forums.animesuki.com/archive/index.php/t-26965.html>>; Kodocha, *Kodocha Anime FAQ* (for practices circa 2001/02); AnimeSuki Forums, *Translators*, @:

indicating whether lines other than speech are, for example, thoughts or a radio broadcast so that the typesetter may indicate this information via a different typeface.<sup>63</sup>

### 2.2.3 *Timing*

The script is then placed into a program such as Sub Station Alpha and matched so that the subtitles show up at the same time as the dialogue.<sup>64</sup> There is a certain art to timing; one must make sure that the viewer can easily read the text without leaving up words while characters aren't speaking.<sup>65</sup> Some groups may even go through two rounds of timing, rough timing and fine timing, with a round of editing in between.

### 2.2.4 *Editing*

The translators may not have a firm grasp of English and so groups include a round of editing that includes substantive changes for readability as well as examining grammar and spelling.<sup>66</sup> Groups may include more than one round of editing, often by multiple editors, and may also place editors at different points in the production cycle.<sup>67</sup> Groups might also include a round of translation checking, especially if the editors do not speak Japanese, in order to ensure that the editing process does not lose the original Japanese meaning.<sup>68</sup>

### 2.2.5 *Typesetting*

Typesetters pick typefaces, sizes, and styles for the dialogue text.<sup>69</sup> This process can get very creative, with different typefaces for different characters and types of dialogue.<sup>70</sup> Typesetters also insert translations of non-spoken on-screen Japanese, such as building signs, newspaper headlines, and the like.<sup>71</sup> These signs are often contextualized so that they are less noticeable, and can be made to move on the screen to seamlessly match the image.<sup>72</sup>

### 2.2.6 *Quality Control*

Fansub groups usually include a final round of editing known as quality control (QC). This process aims at correcting any errors before the group produces the final product.<sup>73</sup>

<<http://forums.animesuki.com/archive/index.php/t-123.html>> (for a discussion of the role within a fansub group).

<sup>63</sup> *Infusion*; ANBU, *FAQ*.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Infusion*. See discussion at AnimeSuki Forums, *How are fansubs created?*, @: <<http://forums.animesuki.com/archive/index.php/t-1296.html>> (especially TaMz's post on 2003-11-20).

<sup>68</sup> *Id.*

<sup>69</sup> See AnimeSuki Forums, *How do you like your fansub typesets?*, @: <<http://forums.animesuki.com/archive/index.php/t-4978.html>> (discussion of some of the specific aspects of the job).

<sup>70</sup> For some examples, see the appendix.

<sup>71</sup> *Infusion*.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*; ANBU, *FAQ*.

### 2.2.7 Encoding

Encoders take the final script and create a single subtitled video file.<sup>74</sup> Encoders may use various filters and video codecs in order to achieve high quality images in a relatively small file, with the target file size about 175 MB.<sup>75</sup> File size, encoding, and quality are all highly related, and encoders often apply various techniques to achieve a high quality image in a small file. Even with broadband, downloads need to be relatively small when compared with the size of a DVD movie (4GB+).

### 2.2.8 Distribution

Fansubbers then “release” their fansubs to fans. Distribution happens through all of the regular internet channels, including p2p services (Kazaa, eMule, etc), BitTorrent, IRC, and newsgroups.<sup>76</sup> Groups may have a specific member whose job consists of distributing and hosting the content. Fansub groups often maintain a publicly-accessible website where they announce the availabilities of these releases, in addition to information about the group.<sup>77</sup>

## 3. The legality of fansubs

Lessig essentially asks the question, “Do our laws stifle creativity and sharing to the point where it harms society?”<sup>78</sup> Some point to fansubs and anime as part of the answer to this question—when a company allows some illegal activity it actually benefits.<sup>79</sup> This article takes a closer look at that answer in order to unpack the problem. This section looks at what the laws say in order to ground any discussion about what the law *should* say.

### 3.1 Is it legal?

Unfortunately for fansubbers, copyright law does not condone their activities.<sup>80</sup> International copyright treaties such as the Berne Convention, state that its signatories (such as the United States and Japan) should grant authors the exclusive right to translation.<sup>81</sup> In the United States—the frame of reference for most online discussion

<sup>74</sup> *Id.*

<sup>75</sup> *Infusion*. In comparison, a full DVD movie with all of the features can reach 9+ gigabytes.

<sup>76</sup> See information and links collected at Animetique, *Downloading Anime Guide*, @: <<http://www.animetique.com/download.asp>>

<sup>77</sup> E.g. Lunar Anime, @: <<http://www.lunaranime.org/>>

<sup>78</sup> Others, such as Litman and Vaidhyanathan, ask this question as well.

<sup>79</sup> E.g. Joi Ito, *Fandom shows that file sharing can create “gained fans” not “lost customers”*, Joi Ito’s Web (May 10, 2005) @: <[http://joi.ito.com/archives/2005/05/10/fandom\\_shows\\_that\\_file\\_sharing\\_can\\_create\\_gained\\_fans\\_not\\_lost\\_customers.html](http://joi.ito.com/archives/2005/05/10/fandom_shows_that_file_sharing_can_create_gained_fans_not_lost_customers.html)>

<sup>80</sup> For a more exhaustive look at the legalities of fansubbing between 1976-1993, see Leonard § 4.

<sup>81</sup> *Berne Convention for the Protection of Literary and Artistic Works* Article 8 (as amended Sept. 28, 1979), @: <[http://www.wipo.int/treaties/en/ip/berne/trtdocs\\_wo001.html](http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html)> [right of translation]. Berne does contain an exception to this right for developing countries, which is of course not applicable to the United States. *Berne* Article V. A similar right and restriction is also given in the Universal Copyright Convention and TRIPS, which includes Berne. *Universal Copyright Convention* Article V (as amended July 24, 1971), @: <[http://www.unesco.org/culture/laws/copyright/html\\_eng/page1.shtml](http://www.unesco.org/culture/laws/copyright/html_eng/page1.shtml)> *Agreement on Trade Related Aspects of Intellectual Property Rights* Section 1, Article 9 (April 15, 1994), @: <[http://www.wto.org/english/tratop\\_e/trips\\_e/t\\_agm0\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm)>

of fansub legality—copyright law construes translations as “derivative works.”<sup>82</sup> Derivative works are any work “based upon one or more preexisting works.”<sup>83</sup> Fansub groups also infringe the right to reproduction by copying the original source material.<sup>84</sup> By distributing the work to others, fansub groups violate the right to distribution.<sup>85</sup> 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.<sup>86</sup> These exceptions work as a counter to the exclusive rights mentioned above. The Japanese legal system may also, as a practical matter, discourage litigation 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.<sup>87</sup> 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.<sup>88</sup> 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. 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.<sup>89</sup> 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.

### 3.2 Moral rights

Anime artists and creators (but not necessarily producers or distributors) may have moral rights in addition to the more traditional forms of copyright such as translation, reproduction, and distribution. Generally speaking, moral rights are personal rights, rather than economic rights—though of course this line can get blurry—and thus would not necessarily apply to producers or distributors.<sup>90</sup> As one textbook states,

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<sup>82</sup> 17 U.S.C.S. § 106 (2) (2005) (granting the right “to do or authorize ... derivative works”); 17 U.S.C.S. § 101 (2005) (giving translation as an example of “derivative work”). The United Kingdom, for example, protects “adaptations”, which are defined as including translations. Copyright Designs Patents Act (CDPA) s. 21 (3)(a)(i).

<sup>83</sup> 17 U.S.C.S. § 101 (2005).

<sup>84</sup> 17 U.S.C.S. § 106 (1) (2005). The UK reproduction right also covers adaptations CDPA s21 (2).

<sup>85</sup> 17 U.S.C.S. § 106 (3) (2005); CDPA s. 18 [Infringement by issue of copies to the public].

<sup>86</sup> *Like holding a bird*, 139-40.

<sup>87</sup> *Like holding a bird*, 148-49; Lessig, *Free Culture*, 27.

<sup>88</sup> See e.g. Nimmer, § 5.09, § 7.01 *et. seq.*, § 17.01 *et. seq.*

<sup>89</sup> For a more detailed discussion of this point, see *Like Holding a Bird* at 146-49.

<sup>90</sup> Stuart K. Kauffman, *Motion Pictures, Moral Rights, and the Incentive Theory of Copyright: The Independent Film Producer as “Author”*, 17 *Cardozo Arts & Ent LJ* 749, 758 (1999); William Cornish & David Lewelyn, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*

“moral rights seek at least to protect the integrity of a work and the author’s connection to it.”<sup>91</sup> Because of the personal nature of the creative expression in a work, these rights are often framed as protecting the author’s “honor or reputation.”

The United States is not famed for extending moral rights to authors,<sup>92</sup> but other jurisdictions such as the United Kingdom have clear protections for directors (but not for other participants), and a community interested in anime.<sup>93</sup> The UK grants three different moral rights that most concern films and television shows: a right to object to derogatory treatment of a work,<sup>94</sup> a right of identification,<sup>95</sup> and a right to prevent false attribution.<sup>96</sup>

The right to object to derogatory treatment allows artists to prevent uses of their works that damage their honor or reputation.<sup>97</sup> Artists and creators could have claims under this right to object to poor translations or bad visual copies. Artists could also raise concerns resulting from their right to identification. Many Japanese artists have two versions of their name, one in Japanese and one in the Roman alphabet.<sup>98</sup> Some fansub groups do translate credits, but informal sampling suggests that most do not.<sup>99</sup> Artists could have a right to request identification with the English version of their names. Finally, if a fansub group happened to restructure the episode in a way that it appeared to originate with them rather than the original creator, this could infringe the right to prevent false attribution.

### 3.3 Fair use

In his article regarding selective copyright enforcement and fansubs, Kirkpatrick argues for a fair use defense under U.S. law for fansub activities based on the cross-cultural value of translations, the non-commercial nature of fansub groups, and the potential market enhancement for the original work.<sup>100</sup> Kirkpatrick states that “[u]sers will inevitably prefer the ease and quality of licensed versions to having to seek and download [f]ansubs, especially if they prefer dubbed versions, which [f]ansub groups cannot produce.”<sup>101</sup> Kirkpatrick however, does not consider the parallels to open source production and the full implications of modern technology discussed in the next section. The fact remains that fansubs may create a preferable product for otaku—thus decreasing any market enhancement arguments. One wonders what could be easier than a few clicks of the mouse and a few hours (or less) wait for a file to download, for free. Many video files deliver comparable picture quality and *fandubs*

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453, 5<sup>th</sup> edn (2003). Jordan S. Hatcher, *Are Auteurs really all that special? An argument against the special position of film/video directors under UK law*, forthcoming B.C. Intell. Prop. L. F. (2005).

<sup>91</sup> Cornish & Llewelyn at 453.

<sup>92</sup> See generally Nimmer § 8D *et. seq.*

<sup>93</sup> ADV Films, for instance, has an office in London. See ADV Films UK @: <<http://www.advfirms.co.uk/>>

<sup>94</sup> CDPA 1988 s 80.

<sup>95</sup> CDPA 1988 s 77.

<sup>96</sup> CDPA 1988 s 84.

<sup>97</sup> CDPA 1988 s 80 (1)(b).

<sup>98</sup> For more on the romanization of Japanese, see Wikipedia, *Romaji* @: <<http://en.wikipedia.org/wiki/Romaji>>

<sup>99</sup> [A-E & Conclave]’s translation of *Trinity Blood* includes the credits, but all other translations encountered during initial research did not.

<sup>100</sup> *Like holding a bird*, 136-53.

<sup>101</sup> *Like holding a bird* at 144.

do exist.<sup>102</sup> Technology can only increase the ability of groups to produce both dubs and better picture quality. Fans may at some point even surpass licensed distributors in the quality of their product.<sup>103</sup> These factors greatly decrease any market enhancement arguments.

In addition, the technology exists that allows fansubbers to provide subs without providing the actual video of the show.<sup>104</sup> Kirkpatrick does not address this. Providing only translations would have significantly less impact on the copyright holder and helps to separate out the translation right from the reproduction right, both of which fansubs infringe. The translation could be fair use, but the direct infringement of the reproduction and distribution rights when distributing fansubs cuts against any legal defense. The commercial “substitutability” of fansubs based on both the high quality and the potential for only distributing the translation seriously undermines any fair use defense in American law.<sup>105</sup>

A fair use defense is also too academic in actual practice.<sup>106</sup> Regardless of any potential defense, the law sufficiently tilts towards copyright holders so that they can easily use the threat of suit as enforcement. A fair use right such as the one that Kirkpatrick suggests would almost never be grounds for an early summary judgment—thus necessitating costly lawyers to defend the fair use position. Lessig relates a story in his book of a documentary filmmaker that could not make “fair use” of a brief clip of *The Simpsons* due to threat of enforcement from Fox, one of the rights-holders.<sup>107</sup> The sheer cost of defending a copyright suit makes for a powerful incentive for fansubbers to settle, especially since fansubbers make no money from their activities and are unlikely to have any assets.<sup>108</sup> In jurisdictions such as the United States statutory damages remedies mean that *each* infringement can cost up to \$150,000.<sup>109</sup> Even in jurisdictions such as the UK that don't have statutory damages, a lost suit could mean having to pay both your attorney's fees and *the other side's fees*. The physical location of many fansubbers in the United States means that U.S. law and licenses are the primary influence on fansubs.<sup>110</sup> As a result, anime companies and their licensed distributors have rights that they can both practically and legally exercise against fansubbers, even if some defenses exist.

#### **4. Parallels to free and open source software (FOSS)**

A full comparison of fansubs to the free and open source software (FOSS) movement is potentially the subject of an entirely separate article, but a brief outline of some of

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<sup>102</sup> See discussion in 4.0, *infra*.

<sup>103</sup> See Section 4.0 *infra*.

<sup>104</sup> Discussion of We Suck Fansubs and DVD Subber in Section 5.0 *infra*.

<sup>105</sup> See Nimmer at § 13.05; Gregory M. Duhl, *Old Lyrics, Knock-Off Videos, And Copycat Comic Books: The Fourth Fair Use Factor In U.S. Copyright Law*, 54 Syracuse L. Rev. 665 (2004).

<sup>106</sup> See Karl N. Llewellyn, *Bramble Bush: On our law and its study*, 9 (Oceana Publications 1951 (2d ed.)) (“[R]ights” which cannot be realized are worse than useless; they are traps of delay, expense and heartache”).

<sup>107</sup> Lessig, *Free Culture*, 95-99 (*The Simpsons* were playing on a television in the background of one of the shots).

<sup>108</sup> *Id.* See also 17 U.S.C.S. § 504 (2005).

<sup>109</sup> 17 U.S.C.S. § 504 (c)(2) (2005).

<sup>110</sup> See e.g. Dan Bednarski, *Sailor Moon Uncensored: Editorial*, *Sailor Moon Uncensored* (Aug. 13, 2000) @: <<http://www.smuncensored.com/editorial.php?article=2>>

the parallels to open source helps to frame further debate.<sup>111</sup> This section primarily examines some of the ways that fansub groups may produce better or comparable quality content through the use of open source techniques. As mentioned above, if fansub groups can produce better content than licensed distributors then there is less reason for a fair use defense. In addition, if fansubs are preferable, then licensed distributors are more likely to change their past behavior and either legally pursue fansubbers or try new business methods to take advantage of these techniques.

Free and open source software (FOSS) refers to a system where software developers openly share the human readable versions of their programs (source code) so that anyone may improve, adapt, or change a program.<sup>112</sup> Contributors and users of FOSS products do so legally through the use of various licenses such as the GPL or the Mozilla Public license.<sup>113</sup> These licenses use copyright law to enforce the openness required by the FOSS philosophy and to help ensure that these contributors and users do not violate the copyrights of others by placing various restrictions on the software.<sup>114</sup> Open source is, of course, legal, whereas fansubbing is not. However, in the world of fansubs the relative ease of obtaining raws—which act as a source code—and the ability to distribute jobs out to several people through the internet enables an open-source style philosophy and production method.

Section 2.2, Dissection of a modern fansub, helps to clarify the working model of both the open source movement and fansubs—distributed production.<sup>115</sup> Both fansub groups and open source programmers do not need to be physically located near each other in order to work together. The internet facilitates this community-style form of production by allowing communication and collaboration at great distances. Large projects can be divided into manageable pieces and multiple eyes can help catch mistakes. The end result can be better than if only one or a few people had worked on the project.<sup>116</sup>

The ease of forming a fansub group and the relatively low cost-of-entry (owning a computer) creates a sort of “free market” of fansubs, much like the competition involved in open source. With open source, any software developer can take the source code of a program and improve it. If someone doesn’t like *that* developer’s version, they can take the source code and make *their own* improvements. In the

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<sup>111</sup> For one take on the terminology between “free software” and “open source”, see Richard Stallman, *Why “Free Software” is Better than “Open Source”*, in *Free Software Free Society: Selected Essays of Richard M. Stallman* (Joshua Gay ed., Free Software Foundation 2002) [hereafter *Free Software Free Society*].

<sup>112</sup> See e.g. Stallman, *Free Software Definition*, in *Free Software Free Society* and Open Source Initiative, *The Open Source Definition*, Version 1.9 @: <<http://opensource.org/docs/definition.php>>

<sup>113</sup> Licenses available @: <<http://opensource.org/>>

<sup>114</sup> E.g. Stallman, *The GNU Project*, in *Free Software Free Society* (“Copyleft uses copyright law, but flips it over to serve the opposite of its usual purpose: instead of a means of privatizing software it becomes a means of keeping software free”).

<sup>115</sup> Eben Moglen, Columbia Law professor and counsel to the Free Software Foundation, refers to this idea as communist production. Eben Moglen, *The dotCommunist Manifesto*, (Jan. 2003) @: <<http://emoglen.law.columbia.edu/publications/dcm.html>>; Eben Moglen, *The dotCommunist Manifesto: How Culture Became Property and What We're Going to Do About It* (ibiblio Speaker Series (Nov. 2001) @: <<http://www.ibiblio.org/speakers/moglen/>>; Eben Moglen, *Free Software, Free Culture: After the dotCommunist Manifesto*, Open Cultures (June 2003) @: <<http://opencultures.t0.or.at/oc/stream>>

<sup>116</sup> Eric Raymond illustrates this example with the saying “Given enough eyeballs, all bugs are shallow.” Eric S. Raymond, *The Cathedral and the Bazaar* @: <<http://www.catb.org/~esr/writings/cathedral-bazaar/>>

context of anime, un-translated Japanese (raw) content acts as the source code. If a fansub group consistently turns out fansubs that the community views as sub-par, another group can easily obtain the raws (source code) and try to compete by creating their own, different, fansubs.<sup>117</sup>

Indeed, multiple groups often sub a popular series, and usually each group has its own philosophy behind subbing.<sup>118</sup> One group may prefer to use more American slang for their translations, or another group may prefer a more literal interpretation, thus giving viewers a variety of choices.<sup>119</sup> One group may focus on higher quality translations; another may focus on speed and releasing first despite known translation errors.<sup>120</sup>

One of the most important questions when comparing open source to fansubbing is whether fansubbers produce a better quality of anime than their licensed counterparts due to the open source nature of their production. In the software world, many debate the quality and cost of open source software versus closed source (proprietary) software.<sup>121</sup> Could a fansub group such as Lunar Anime produce a better series than licensed distributor and industry leader ADV? Obviously, the answer to this question directly impacts the market for licensed anime. Some possible qualitative comparisons between licensed anime and fansubs include:

- **Dubbing:** Many fans, though typically perhaps not the most avid ones, may prefer dubs (translated voice track instead of the original Japanese) instead of subs. Fandubs do exist, but groups do not produce them on the same scale as fansubs, and the quality may not be similar to commercially-produced dubs.<sup>122</sup> Future technology could however change this aspect by making fandubs easier to produce.
- **Extras:** Licensed anime often contains extras such as commentary tracks, still photos, artist interviews, and collectible packaging. Fansubs usually do not (yet) contain this material; probably because their raws originate with television broadcasts.<sup>123</sup> Technical reasons may also contribute to the lack of

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<sup>117</sup> Cost of translation / finding a translator, of course, hinders this competition. Some groups take this competition seriously, and ban forum posters for certain kinds of references to competing fansub groups. See e.g. Ayu-sama, *Newbies, please read before posting (RULES)* Anime-Keep @: <<http://www.anime-keep.org/phpBB2/viewtopic.php?t=828>>

<sup>118</sup> E.g. *Bleach*, see Appendix and Planet uLTraCarL, *Bleach Comparisons*, @: <<http://ultracarl.com/fansub/B/index.htm>> (image by image comparisons). Some fans lament that *too* many groups sub certain series when they might spend their time on something no one is doing. See Sakaki post on Oct. 7, 2004, Anime-Planet Forum, *Bleach*, @: <<http://www.anime-planet.com/forum/viewtopic.php?t=13681>>

<sup>119</sup> See Anime-Planet Forum, *Bleach*, @: <<http://www.anime-planet.com/forum/viewtopic.php?t=13681>> (discussion on the various groups subbing *Bleach*).

<sup>120</sup> See discussion of speed subbers, *infra*.

<sup>121</sup> E.g. Craig Mundie, *The Commercial Source Model* Microsoft.com @: <<http://www.microsoft.com/presspass/exec/craig/05-03sharedsource.asp>>; Robert McMillan "SCO: GPL threatens \$229B software market" *InfoWorld* (November 19, 2003) @: <[http://www.infoworld.com/article/03/11/19/HNgplthreatens\\_1.html](http://www.infoworld.com/article/03/11/19/HNgplthreatens_1.html)>

<sup>122</sup> See Crash Dub Studios, @: <<http://www.fandub.de/>> (German fandub group; dubbing, among others, *Dragon Ball Z*). See also discussion in section 3.3 *supra*.

<sup>123</sup> See "Raw Acquisition" in section 2.2, *supra*.

these materials in fansubs.<sup>124</sup> This difference helps separate out licensed anime from fansubs.

- **Editing:** Some licensed distributors edit their releases, usually for sexually-oriented material such as nudity or adult themes. This is usually the result of cultural differences, especially since American culture tends to view “cartoons” as only for children. Licensed distributors may also cut their releases to fit in with television broadcast rules<sup>125</sup> or to obtain a favorable television content rating.<sup>126</sup> For example, the Japanese version of the series *Sailor Moon*, which is popular with and aimed at young girls (*shojo* anime), contains nudity that doesn’t find its way into the U.S. version.<sup>127</sup> If fans want unedited versions of their favorite series, they may have to look towards fansubs.
- **Type/quality of translation:** As mentioned, various fansub groups may provide a range of choices for those with very specific translation preferences (e.g. use of American slang).<sup>128</sup> No licensed distributor, as yet, produces different subtitle translation styles in their releases.<sup>129</sup> In addition, some otaku believe that there have been cases where the fansubs have produced better *quality* translations, and have complained about poor editing and grammar on behalf of the licensed distributors.<sup>130</sup>
- **Innovative subbing:** Because fansub groups do not have financial bottom-lines to meet, they can try new and different subbing techniques such as using a wide variety of typefaces and inserting extra information on cultural references.<sup>131</sup> Because fansubbers want prestige within their community, they even have an incentive to be innovative in this area.<sup>132</sup>

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<sup>124</sup> Technology, such as the Matroska audio/video container, could change some of the other limitations to distributing this material, such as having DVD-like multiple audio / subtitle tracks in one container (file). Matroska, @: <<http://www.matroska.org/>>

<sup>125</sup> E.g. Federal Communications Commission, *In the Matter of Industry Guidance On the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency* File No. EB-00-IH-0089 available @: <<http://www.fcc.gov/eb/Orders/2001/fcc01090.html>> [relating the FCC’s policy and relevant caselaw concerning the 10:00PM to 6:00AM safe harbor where “indecent” broadcasting is allowed to take place.]

<sup>126</sup> See TV Parental Guidelines, *Understanding the TV Ratings*, @: <<http://www.tvguidelines.org/ratings.asp>>

<sup>127</sup> In the series, young girls transform into superheroes complete with special outfits. The girls are nude or nude-like (Barbie-doll like) during the Japanese version of this transformation sequence; this part is cut or altered in the American version. See Animeprime.com, *Sailor Moon Editing Report*, @: <<http://www.animeprime.com/reports/sm.shtml>> See also Sailor Moon Uncensored. @: <<http://www.smuncensored.com/>> (Fansite dedicated to comparing the US and Japanese versions of *Sailor Moon*).

<sup>128</sup> *Supra.* See also Planet uLTraCarL, *Bleach Comparisons*, @: <<http://ultracarl.com/fansub/B/index.htm>> (image by image comparisons).

<sup>129</sup> Backing up negative assertions can be difficult, but this author could not find any examples after extensive google searching and anime watching.

<sup>130</sup> See e.g. Lunar Forums, *Anime is Getting t3h Licensed Too much* @: <<http://www.lunarforums.org/viewtopic.php?t=1434>> Leonard refers to this as the *comparison bug*, where official releases get compared to unofficial fansubs. Leonard at 3.10.2.

<sup>131</sup> For an example of some of the fonts used, see the *Bleach* section in the appendix.

<sup>132</sup> See Leonard at 3.4 (discussing why fans would create magazines and other material at a financial loss).

- **Extra sound work:** Licensed anime may provide better quality sound because of access to professional-grade equipment and the original recordings. In addition to better quality, licensed distributors may add in extra foley work (sound effects), to make the releases more acceptable to the non-Japanese market. As one industry professional pointed out, “If a gun slides out a turret door, Americans want to hear it make a sound.”<sup>133</sup> Licensed distributors may be better situated to cater to this preference. Some fansub groups do, however, add in extra sound.<sup>134</sup> Technology could change towards making additional sound effects easier, and thus licensed distributors may lose any advantage that they retain in this area.
- **Picture quality:** Because of digital technology, fansubs *can* produce as good a picture quality as the DVDs manufactured by licensed distributors. Licensed distributors though have better access to source material, which at least means that there *may* be quality reasons why fans may want to replace their fansubs. DVDs also do not have the bandwidth and space realities that cause fansubs to encode their releases in a variety of formats and thus potentially degrade the video quality of their subs.
- **Time:** Astonishingly, some fansub groups may release a subtitled episode on the very same day as when the episode aired in Japan.<sup>135</sup> Licensed distributors can take a long time before releasing their product—always longer than a day. This delay can cause displeasure among fans eager to watch the show,<sup>136</sup> especially since most fansub groups and distributors cease to distribute or subtitle once distributors announce their license.<sup>137</sup>

It appears that, at least at the moment, licensed distributors have an advantage in areas such as dubbing, extras, sound work, and to the extent desired, more culturally-adjusted edits.<sup>138</sup> Fansubs have the advantage of speed, innovative subbing techniques, and unedited versions. Either fansub groups or licensed distributors could offer better translation quality, though the advantage may often lie with fansub groups.

The open source aspects of fansub production illustrate that, among other comparisons,<sup>139</sup> fansubs and licensed DVDs do not behave on the market in the same way as \*.mp3 files and CDs. In other words, unlike the recording and motion picture

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<sup>133</sup> Christopher Helman, *Why Grow Up?*, Forbes (Sept. 6, 2004) @: <[http://www.forbes.com/forbes/2004/0906/178\\_print.html](http://www.forbes.com/forbes/2004/0906/178_print.html)> (quoting Kevin Corcoran, ADV’s chief operating officer).

<sup>134</sup> See e.g. Holly Kolodziejczak, *The Volatile World of Fansubs: An Inside Peek!*.

<sup>135</sup> They are usually known as speed subbers. See discussion at Naruto Forums, *Is there a speed subbing group like DB for Bleach?*, @: <<http://forums.narutofan.com/archive/index.php/t-38244.html>>; dattebayo fansubs, *Dattebayo FAQ by lafneer*, @: <<http://yhbt.mine.nu/faq.aspx>> (claiming a 20 hour turn around time on *Naruto* episodes).

<sup>136</sup> E.g. various posting in Lunar Forums, *Anime is Getting t3h Licensed Too much*, @: <<http://www.lunarforums.org/viewtopic.php?t=1434>>

<sup>137</sup> See Fansub Ethics, *infra*. One could certainly argue, however, that the otaku are only made eager by fansubs.

<sup>138</sup> For more on culturally adjusted edits, see e.g. CleanFlicks @: <<http://www.cleanflicks.com/>> (company that edits out sex, violence, and profanity from movies and then rents them to the public). See also Leonard at § 3.5.

<sup>139</sup> One can also compare the possibility of alternative revenue streams between fansubs and open source: open source companies don’t charge for their product, but charge for support; anime creators could allow fansubbing and count on alternative income such as merchandising.

industries' issues with p2p and digital copies, anime distributors must deal with additional problems that parallel the debate surrounding closed source versus open source. The most important aspect of this comparison is, of course, cost. As mentioned in the opening paragraph of Section 2, fansub groups are non-profit affairs that do not charge for their work, nor do they charge for distribution. It can be difficult enough to mirror a record company such as EMI's problems and have to compete with the exact same product being available for free over the internet. But having to compete with a *better* product available for free could be impossible.<sup>140</sup>

### 5. Fansub Ethics

In another interesting twist on the stereotypical p2p "pirate" paradigm, despite (usually) acknowledging the illegality of their actions, fansubbers often actively debate the ethics of what they do.<sup>141</sup> Most fansub groups and otaku have some idea about copyright law, often quoting the Berne convention or country-specific copyright law when referring to the legality of fansubs in their websites and forum posts.<sup>142</sup> As can be expected with the internet, some get the legal issues wrong,<sup>143</sup> but often, fans get the law right.<sup>144</sup> Most openly admit that their activities break the law, but fansubbers find ethical justifications in what they do.

Fansub groups often justify their existence based on their belief that, despite being technically illegal, their fansubs help to build interest in a show and generate income for the show's producers: a "no harm, no foul" argument. In this way, fansubs act as a form of advertising; one that can be used to prove interest in order to encourage licensing outside of Japan. From the "Official Policy Statement" of We Suck Fansubs:

*The sole goal of the group is the promotion of particular anime series to [E]nglish-speaking audiences not normally within the broadcast area for those series, in the hope that persons who enjoy those series will purchase their DVDs and/or other related materials, leading to increased revenue for the creators of that work and the continued prosperity of the anime industry.*<sup>145</sup>

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<sup>140</sup> This is similar to a closed-source software company's problems, where they must compete with both pirated copies and open source software.

<sup>141</sup> Additional points of analysis include Jessica Litman's suggestion that copyright law track the understanding of the general public. Jessica Litman, *Revising Copyright Law for the Information Age*, 75 Or. L. Rev. 19 (1996). For a look at ethics in the warez sector, see Alf Rehn, *Ordered Misbehavior – The Structuring of an Illegal Endeavor* Pink Machine Papers #12 (March 2003).

<sup>142</sup> E.g. ANBU, *FAQ* (quoting both Berne and the US Code); AnimeSuki Forum, *Legal issues concerning fansubbing*, @: <<http://conversion.animesuki.com/BurningBoard/thread.php?threadid=1921>> (referring to TRIPS and EU law).

<sup>143</sup> E.g., AnimeSuki, *Licensed Anime*, @: <<http://www.animesuki.com/doc.php/licensed/>> (confusing civil and criminal law); Jen Bomford, *What you see isn't what you get*, Sequential Tart @: <[http://www.sequentialtart.com/archive/jan01/ao\\_1200\\_3.shtml](http://www.sequentialtart.com/archive/jan01/ao_1200_3.shtml)> (stating that fansubs are legal until licensed in North America).

<sup>144</sup> E.g. ANBU, *FAQ* (correctly stating that fansubs infringe both the reproduction and derivative work right).

<sup>145</sup> We Suck Fansubs, *We Suck Fansubs' Official Policy Statement*, @: <<http://www.lavalyn.org/policy.html>>

We Suck is only one of many groups that base their argument for fansubbing around promotional value.<sup>146</sup> As part of this view, We Suck drops titles once they have been released on DVD in the domestic Japanese market.<sup>147</sup> These Japanese-released titles usually don't come with English translations, and so We Suck provides their translations in a specific format so that end-users can purchase the DVDs from Japan and use software such as DVD Subber to insert We Suck's subtitles onto the Japanese DVD.

We Suck's policy of dropping after *Japanese* DVD sales begin fits into a minority. Most fansub groups stop subbing or distributing once licensed in North America.<sup>148</sup> In order to stay within these ethical boundaries, groups show a high level of interest in the licensing activities of anime distributors. They closely watch for license announcements and even create web sites dedicated to outlining certain licensing deals, such as the Disney-Tokuma deal involving such anime classics as *My Neighbor Totoro* and *Kiki's Delivery Service*.<sup>149</sup>

Fansubbers show concern for anime creators and distributors. One particular point that gets repeated is that fansub downloaders—commonly called leechers—should go out and replace their fansubs with licensed DVD releases once they are available.<sup>150</sup> They want to make sure that artists “get to eat”, mainly so that they can continue to produce the shows that otaku love.<sup>151</sup> Under this view, replacing fansubs with their licensed counterparts helps guarantee revenue to the creators and thus makes fansubs ethically acceptable. The new digisubs brought the problem of a high degree of substitutability, as mentioned in section 2.0. Correspondingly, some altogether shun this new style of fansubs as unethical because they are “too good”. One former fansubber stated that “[t]he next generation is pretty irreverent. They don't care what the company says. They have a bad mentality because they are trying to compete with the company.”<sup>152</sup>

Other common justifications (mostly from leechers) are lack of funds and lack of accessibility. Fans say they buy what they can and few licensed distributors may exist in countries such as Norway or Holland.<sup>153</sup> Some fans use the fact that a series isn't licensed in their country as a justification for continuing to distribute fansubs after the fansub group responsible has asked everyone to stop—usually based on the announcement of a U.S. distributor.<sup>154</sup> Other fans recognize that the dedication

<sup>146</sup> E.g. lamer\_de, Anime Keep (April 13, 2005) (post on homepage) @: <<http://www.anime-keep.org/>> “We hope that the 2 episodes we released were enough to convince you that this OVA [straight-to-video] is a unique work and deserves to be bought if you like out-of-the-ordinary anime. As always, please stop the distribution of our encodes immediately.” (screenshot on file with author).

<sup>147</sup> This means that We Suck does not sub straight-to-video titles (OVAs).

<sup>148</sup> E.g. AnimeSuki, *Licensed Anime*, @: <<http://www.animesuki.com/doc.php/licensed/>> (distributor); Anime-Keep, *Newbies, please READ before posting (RULES)*, @: <<http://www.anime-keep.org/phpBB2/viewtopic.php?t=828>> (fansub group).

<sup>149</sup> E.g. Nausicaa.net, *The Disney-Tokuma Deal*, (Sept. 10, 2003) @: <<http://www.nausicaa.net/miyazaki/disney/>> *My Neighbor Totoro* (Studio Ghibli 1988) and *Kiki's Delivery Service* (Studio Ghibli 1989).

<sup>150</sup> See e.g. DoA-guy's posting on Feb 24, 2005 12:00 am in Lunar Forums, *Anime is Getting t3h Licensed Too much*.

<sup>151</sup> Id at Square721bt's post.

<sup>152</sup> Shoko Oono, former fansubber and ADV employee. Hung, *Tooned into Anime*.

<sup>153</sup> E.g. Naruto Forums, *Please Help!!!!!!*, @: <<http://forums.narutofan.com/archive/index.php/t-23062.html>> (various posts).

<sup>154</sup> E.g. AnimeSuki, *Licensed Anime* @: <<http://animesuki.com/doc.php/licensed/>> [stating that okay to distribute non-English fansubs after announcement of U.S. license].

involved in keeping up with a series, and don't want to start collecting until they know a series is worth it.<sup>155</sup> Leechers want to check out shows for free online before spending money on DVDs. This is similar to the "try before you buy" promotional aspect of fansubs. This theory though, only justifies downloading or subbing a few shows at the beginning of a series, and does not justify wholesale fansubbing or downloading.

Lest this paint too rosy of a picture of willingly compliant fansubbers and their leechers, other leechers and fansub groups simply don't care about the law or ethics of the situation.<sup>156</sup> Enough do, however, to achieve what appears to be a level of compliance not seen in other areas of the p2p debate.<sup>157</sup> The current ethical climate for fansubs means that licensed distributors get some degree of willing compliance without even having to send letters or file lawsuits—they just have to announce a U.S. license.

## **6. The industry relationship with fansubs**

Fansub ethics complement the needs of the anime industry—titles are less available after announcing a license. This section delves deeper into relationship between the industry and fansubs to see if it reveals possible alternatives to the litigious strategies of the recording and motion picture industries. Section 6.1 quickly compares fansubs to the motion picture and recording industries. The next two sections, 6.2 and 6.3, look at the possible benefits and harms of fansubbing to licensed distributors. Section 6.4 posits that the industry could be held captive by various factors, which could also explain the lack of enforcement. Finally, Section 6.5 gives some observations on the various factors involved with fansubbing.

### **6.1 Fansubs vs. the RIAA and the MPAA**

Once licensed in the United States, an anime distributor fits into the same paradigm as the recording and motion picture industries and their battles with p2p—users freely trade unauthorized copies on the internet and thereby arguably undercut licensed sales and uses.<sup>158</sup> The U.S.-based trade groups, the Recording Industry Association of America (RIAA) and the Motion Picture Association of America (MPAA) and their member companies have been the most vocal and litigious opponents to online sharing. Licensed anime distributors, however, react quite differently from the RIAA and the MPAA. There seems to be limited enforcement beyond announcing licenses and sending informal letters to fansub groups and distributors that the company now holds a license.<sup>159</sup> Unlike others, American anime distributors don't seem to use

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<sup>155</sup> See 6.2, *infra*.

<sup>156</sup> See Naruto Forums, *Please Help!!!!!!*, (various posts).

<sup>157</sup> There is at least a distinction for anime that fans make once someone is trying to sell it through traditional retailers, while for music, fans don't even attempt to stop when the CDs are for sale at a music store. See Condry.

<sup>158</sup> For a study arguing that file sharing does not harm sales, see Felix Oberholzer & Koleman Strumpf, *The Effect of File-sharing on Record Sales: An Empirical Analysis*, @: <[http://www.unc.edu/~cigar/papers/FileSharing\\_March2004.pdf](http://www.unc.edu/~cigar/papers/FileSharing_March2004.pdf)>.

<sup>159</sup> The tone of these letters, from this author's searches, appears relatively informal. See Animesuki, *Removal of Media Factory Works* @: <<http://animesuki.com/doc.php/legal/mediafactory.html>>; Ryuta Shiiki, *Warning* January 1999 @: <<http://members.tripod.com/~AnimeWest/News.html>> [email from Sony Entertainment executive to AnimeWest requesting them to stop subbing *Rurouni Kenshin*]

formal (statutory) notice-and-take-down notices under the Digital Millennium Copyright Act (DMCA), and have not engaged in lawsuits against online distributors.<sup>160</sup> Licensed distributors of anime in the United States seem to rely mostly on the ethics of fansubbers rather than on strictly legal remedies.

Perhaps in keeping with a more informal relationship with fansubbers, licensed distributors often send representatives to anime conventions (cons). At these conventions, representatives often comment about the ethics of fansubbing and how fansubs should be discontinued—essentially a public relations campaign against infringement.<sup>161</sup> These efforts mirror the publicity and educational campaigns of the recording and motion picture industries.<sup>162</sup>

Anime fans also behave differently than the typical 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. Many groups digitally insert credits for all fansub group members that worked on the show—including the raw provider.<sup>163</sup> While these names may be an internet alias, from an enforcement standpoint this practice helps identify and track fansub groups and their works.<sup>164</sup> Groups make freely available links to files and instructions on how to obtain fansubs.<sup>165</sup> Most, if not all, fansub groups have a web site where they disseminate information about the shows they are subbing and release announcements.<sup>166</sup> 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.

## 6.2 An industry that benefits?

Fansubbers and digerati such as Joi Ito proclaim that fansubs demonstrate the benefits of widespread copyright infringement.<sup>167</sup> Anime outside of Japan is a growing

<sup>160</sup> John Borland, *Anxious times in the cartoon underground*, CNET News.com @: <[http://news.com.com/Anxious+times+in+the+cartoon+underground/2100-1026\\_3-5557177.html](http://news.com.com/Anxious+times+in+the+cartoon+underground/2100-1026_3-5557177.html)> (“We certainly haven’t prosecuted anybody doing the file sharing” Chad Kime, director of marketing for Geneon Entertainment); For more on notice-and-take-down, see Section 6.5, *infra*.

<sup>161</sup> E.g., Anime on DVD.com, *Licensing: Hosted by Jerry Chu, David Williams, and Mark MacKinnon*, @: <<http://web.archive.org/web/20040604032416/http://www.animeondvd.com/press/conventions/2003/ab2003Licensing.php>> (internet archive).

<sup>162</sup> E.g. RIAA, *Issues: Copyright Education Efforts*, @: <<http://www.riaa.com/issues/education/default.asp>>

<sup>163</sup> See Appendix.

<sup>164</sup> Compare to the warez scene, where high level users connect over highly-encrypted darknets. See Jeff Howe, *The Shadow Internet*, Wired 13.01 @: <<http://www.wired.com/wired/archive/13.01/topsite.html>>; Wikipedia, *Warez*. For more on darknets, see Peter Biddle, Paul England, Marcus Peinado & Bryan Willman, *The Darknet and the Future of Content Distribution*, Microsoft Corporation @: <<http://crypto.stanford.edu/DRM2002/darknet5.doc>>

<sup>165</sup> E.g. a.scarywater.net, @: <<http://a.scarywater.net/>> (links to torrent files, which admittedly are trackers and not the files themselves) For a look at the legalities of BitTorrent in Europe, see Bob Rietjens, *Give and Ye Shall Receive! The Copyright Implications of BitTorrent* 2:3 *SCRIPT-ed* 364 (2005) @: <<http://www.law.ed.ac.uk/ahrb/script-ed/vol2-3/torrent.asp>>; Gotwoot Evolution, *A little guide to downloading anime on IRC for newbies*, @: <<http://www.gotwoot.net/ircnewb.doc>>

<sup>166</sup> E.g. Bleach-Society, @: <<http://bleach-society.com/index.php>>

<sup>167</sup> Joi Ito, *Fandom shows that file sharing can create “gained fans” not “lost customers”*, *supra*; Patrick Gray, *The Other Side of BitTorrent* Wired (Jun. 02, 2005) @: <<http://www.wired.com/news/digiwood/0,1412,67641,00.html>> Leonard makes a similar argument,

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.<sup>168</sup> 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.<sup>169</sup> Indeed, the founders of ADV wouldn't even have known about anime without fansubs.<sup>170</sup>

While building a customer base may no longer be a need in the United States, it certainly factors in when considering other countries. The English-language fansubs produced by fans aimed at the American market, of course, serve all parts of the English-reading world. In addition, English, either as a first or second language, is more widely known than Japanese, and so many fansub groups that translate into languages such as Turkish use the English fansub as a base for their translations.<sup>171</sup> Continuing to allow at least some English-language fansubs could be a way to expand the market for distributors intent on markets outside the U.S., whether English speaking or not.

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.<sup>172</sup> 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. And since regularly buying a series can be quite a commitment—\$30 USD per 3 or 4 episodes—then one can understand their reluctance to start buying a series without some idea about whether they like it. 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.<sup>173</sup> Fansubs can be a way for distributors outside of Japan to sort through the content when deciding what to license. Manga distributors have even more Japanese content to sort through. One American manga distributor has said about scanlations:

*Frankly, I find it kind of flattering, not threatening[.] To be honest, I believe that if the music industry had used downloading and file sharing properly, it would have increased their business, not eaten into it. And, hey, if you get 2,000 fans saying they want a book you've never heard of, well, you gotta go out and get it.*<sup>174</sup>

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but limits it to the 1977-1993 framework, and as a result concentrates mostly on the tape trading that took place before fansubs. See Leonard § 4, § 5.

<sup>168</sup> See Leonard § 3.

<sup>169</sup> See Leonard at § 3.11.1.

<sup>170</sup> Hung, *Tooned into Anime*.

<sup>171</sup> E.g. AnimeSuki Forum, *First Turkish fansubbing group*, @: <<http://forums.animesuki.com/showthread.php?t=34103>>

<sup>172</sup> Mehra, *Copyright and Comics in Japan*, 184-5 (arguing for promotional aspects of dojinshi).

<sup>173</sup> Napier, *Anime from Akira to Princess Mononoke*.

<sup>174</sup> Steve Kleckner, of TokyoPop quoted in *Manga Nation*.

Not only can fansubs help distributors sort through the large amounts of material, but fansubs can also draw attention to titles that distributors would otherwise ignore. Some titles dealing with homosexually-oriented material (commonly known as *yaoi* or *yuri*<sup>175</sup>) or titles aimed at young girls (*shojo*)<sup>176</sup> may be overlooked due to the perception that American audiences are mostly straight males. *Fushigi Yuugi*, is a shojo anime that is widely acknowledged to have been licensed in the United States solely because of fansubs.<sup>177</sup>

To a lesser extent, fansubs can also help identify talented translators and subtitlers to the licensed distributor community.<sup>178</sup> This benefit of fansubbing would seem too attenuated to be much of an incentive—translators can easily be thoroughly interviewed and subbers given training.<sup>179</sup> Identifying new talent fits more into the creative industries, such as the relationship between dojinshi and manga, where talented artists can be harder to find.<sup>180</sup>

Already completed fansubs inevitably circulate after a licensing announcement. Licensed distributors may also benefit from not pursuing these post-licensing announcement distributors. The distributor already gets a significant amount of compliance once they announce the license, and going after the remaining distributors may simply be a cost/benefit issue—more compliance may be too costly or even impossible given the nature of the internet. But licensed distributors may benefit from allowing already-existing fansubs to circulate in order to help maintain interest in the show between the license announcement and the official DVD release. Jenkins has maintained that fan activities helped build and maintain interest in the Star Wars series during the long wait between *Return of the Jedi* (1983) and *The Phantom Menace* (1999).<sup>181</sup> Similarly, licensed distributors may maintain interest in a series while they prepare their official release by not actively going after post-announcement file traders and still know that their work isn't getting distributed as much as it was before.

### 6.3 Some of the realities of fansubbing

Despite these potential benefits, fansubbing does have a negative side. The American industry has matured to a point where licensed distributors know their market and negotiate licenses far in advance—canceling out any need for fansubs to bring titles to their attention. Anecdotal evidence suggests that Japanese companies are starting to negotiate the non-Japanese distribution rights before the show has even aired in Japan.<sup>182</sup> U.S. distributors have even started to co-produce series in Japan, thus

<sup>175</sup> Yaoi and Yuri are a bit different than being simply homosexual, but Western audiences are likely to see them as such. See Wikipedia, *Yaoi*, @: <<http://en.wikipedia.org/wiki/Yaoi>> (male-male); Wikipedia, *Yuri*, @: <<http://en.wikipedia.org/wiki/Yuri>> (female-female). For an example of a Yaoi series, see *Loveless*, fansubbed by We Suck, *supra*.

<sup>176</sup> Wikipedia, *Shojo* @: <<http://en.wikipedia.org/wiki/Shojo>>

<sup>177</sup> Bomford, *What you see isn't what you get*.

<sup>178</sup> Hung, *Tooned into anime*.

<sup>179</sup> Leonard does note that “[f]or some, fansubbing was their [fansubbers] only way of showing the industry that they had the ability to work.” Leonard at § 3.10.5.

<sup>180</sup> See Mehra, *Copyright and Comics in Japan*, 183-4.

<sup>181</sup> Jenkins, *Quentin Tarantino's Star Wars*; Charles Cooper, ‘*Star Wars*’ and the fracas over fan films, CNET NEWS.com (May 2, 2005) @: <[http://news.com.com/Star+Wars+and+the+fracas+over+fan+films/2008-7337\\_3-5690595.html](http://news.com.com/Star+Wars+and+the+fracas+over+fan+films/2008-7337_3-5690595.html)>

<sup>182</sup> See Anime on DVD.com, *Licensing: Hosted by Jerry Chu, David Williams, and Mark MacKinnon*.

guaranteeing that the U.S. license rights have already been assigned. For example, Urban Vision, owner of the rights to the widely popular (and classic) *Ninja Scroll* movie, helped produce and create a new TV series in Japan based on the film.<sup>183</sup>

As discussed, fansubs have reached the point in quality that fans don't necessarily need to replace their fansubs with licensed releases. The increased quality of digisubs has an even darker aspect than simple lost sales. Not all fansubs recipients adhere to the ethical code of not making any money. Fansubs can find their way into counterfeit DVDs and VCDs in markets such Hong Kong or Malaysia. Individuals or groups may burn fansubs onto DVDs or acquire Asian counterfeits and auction them on eBay in any market.<sup>184</sup> Fansubbers, therefore, may unwillingly play a role in more traditional forms of counterfeiting and piracy.<sup>185</sup>

Fansubbers have realized that their efforts may be sold on eBay or pressed into counterfeits in Asia, and try to combat this by including disclaimers in their subs. Fansub groups usually insert these disclaimers such as "Not for Sale, Rent, or Ebay".<sup>186</sup> Disclaimers such as these could help cut down on some illicit sales, as consumers would be made aware of the source of their DVDs. Of course these disclaimers could potentially be edited out.<sup>187</sup> It is important to note though that distributors with a focus on the North American and European markets would likely not be as concerned with Asian-based counterfeits, as they have no presence there. EBay, however, is an area of online commerce that could significantly affect profits because of sales of Asian counterfeits to customers in these markets through the internet.

#### 6.4 A captive industry?

Rather than championing the fansub/licensed distributor relationship as an example of the benefits of widespread copyright infringement, one could look at the industry as held hostage by the internet and their otaku-consumers. One reason for this situation may, of course, be money. Internet enforcement is difficult and costly and the RIAA/MPAA response involves lots of lawyers. Lawyers mean money—money that the younger anime industry may not have or want to spend.<sup>188</sup> Lack of enforcement because of lack of funds does not imply that these companies condone or tolerate fansubbing.

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<sup>183</sup> Christopher Macdonald, *Unethical Fansubbers*, Anime News Network.com (June 8, 2003) @: <<http://www.animenewsnetwork.com/editorial.php?id=43>>

<sup>184</sup> E.g. Anime Digital, *The Pirate Anime FAQ*, @: <<http://www.digital.anime.org.uk/piratefaq.html>> The Jazz Mesengers, *Bootleg FAQ* @: <<http://www.jazzmess.com/merch/bootlegfaq.html>> During the author's searches of eBay, he found several DVDs that fit the descriptions found in the two sources above. He has even encountered one of these pirated copies from an acquaintance.

<sup>185</sup> For a comparison of Fansubs to Bootlegs in a handy chart, see Leonard § 3.10.4.

<sup>186</sup> E.g. [A-E Conclave] *Trinity Blood* Episode 1.

<sup>187</sup> See Leonard at § 3.10.4.

<sup>188</sup> See *Like holding a bird* 146-47 (stating that most Japanese animation studios "function[] on extremely tight budgets."). A full profit margin comparison between MPAA members and anime distributors is outside the scope of this article, and probably impossible due to the improbability of gaining access to these records. See discussion at Joi Ito, *Fandom shows that file sharing can create "gained fans" not "lost customers"*. For some thoughts on the profitability of ADV Films, see Helman, *Why Grow Up*; AnimeSuki Forum, *Some Concrete Numbers on Licensing Costs, Among Other Things in Forbes Article*, @: <<http://forums.animesuki.com/showthread.php?t=19516>>

Another reason for lack of enforcement may be fear over the response by fans. By attacking fans directly, the RIAA and the MPAA may have made themselves the “ideal nemesis”.<sup>189</sup> This gives fans trading files online a moral basis; they are fighting the “evil” RIAA or MPAA.<sup>190</sup> Otaku would likely have the same feelings towards licensed distributors if distributors filed suits against individuals. In fact, given the amicable relationship that currently exists between licensed distributors and fansub groups, suing fans could be seen as an act of betrayal and therefore magnify the displeasure felt by fans. Fans could increase their use of fansubs or not buy replacements out of dislike or outrage over lawsuits. Lawsuits could even have a greater negative impact on sales than fansubs themselves.

In addition, lawsuits may draw unwanted attention to fansubs. The RIAA made the national press with their suits against file sharers and businesses like Napster and thus increased their popularity. If the distributors filed suits they would likely receive a large amount of press.<sup>191</sup> Lawsuits or even more formal action, such as DMCA take-down letters, may serve to make fansubs *more* prevalent rather than less by increasing awareness of the phenomenon among non-otaku.<sup>192</sup>

One other possible alternative for lack of formal enforcement may lie in the level of sophistication of the anime industry. Anime distributors do not appear to currently have an industry group to coordinate policy on fansubs.<sup>193</sup> This may mean that individual companies are afraid to act out against fansubs, because to do so would be to drive business to their competitors. Individual distributors could therefore be captive to market pressures from competitors.

## 6.5 Some observations

Fansubbers make no money off of their efforts and thus do not offer a “deep pocket” for lawsuits. If the industry decided to go the litigation route, the best that the industry can do is spend large sums of money on attorneys to slow down fansub practices. But unlike other areas of the p2p debate, inhibiting fansubs could possibly have a greater effect on stopping unauthorized activity. Fansubs act as the gateway for all non-Japanese speaking fans—the licensed distributor’s prime market. Unlike the situation with the RIAA and the MPAA, anime creators and distributors have a chance to stop or drive underground a major source of unauthorized internet material. Because fansubs require more than ripping and encoding—subbers must translate and subtitle—more formal enforcement could have a significant impact. This feature makes the fansub/distributor relationship an important indicator of the future of internet-based modes of distribution.

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<sup>189</sup> Stacey M. Lantagne, *The Morality of MP3S: The Failure of the Recording Industry’s Plan of Attack*, 18 Harv. J. Law & Tech. 269, 285 (2004).

<sup>190</sup> Id.

<sup>191</sup> See Borland, *Anxious times in the cartoon underground* (example of press over a single letter).

<sup>192</sup> Jenelise Pulliam, *Today Denver... Tomorrow, the World*, Go-Go Magazine (Vol. 3, Issue 1) @: <<http://www.gogomagazine.com/0301/coverstory.html>>

<sup>193</sup> There was at one time an enforcement initiative called (J)apanese (A)nimation (I)ndustry (L)egal (E)nforcement (D)ivision (J.A.I.L.E.D), though it does not appear to exist today. Right Stuf, *History of Anime in the U.S. : Fans, Fansubs, and J.A.I.L.E.D* @: <[http://www.rightstuf.com/resource/us\\_fans.shtml](http://www.rightstuf.com/resource/us_fans.shtml)>

Since the anime market is at a relatively young stage, one explanation for lessened enforcement may also be simply the lack of industry knowledge of the tools available to them. Distributors may not realize the full breadth of tools that may help decrease unwanted fansubs, such as DMCA notice-and-take-down letters.<sup>194</sup> DMCA letters allow copyright holders to request the removal of internet content by sending a relatively simple letter to the Internet Service Provider (ISP) hosting the material.<sup>195</sup>

Licensed anime distributors could possibly use tools such as DMCA letters without risking harm. The industry could use these letters to try to remove sites that continue to distribute and fansub titles after the distributor has announced their license. Post-announcement use would be less likely to upset the fansub community because it would comport with the majority of fansub ethics. It would be interesting to see if companies have considered this option; if they have, then this would imply sanction and help eliminate lack of industry sophistication as an explanation.<sup>196</sup>

The formation of an industry group would certainly have an impact on the relationship with fansubs. An industry group could shift some of the blame from the individual companies in any attempts to stop fansubs and their subsequent distribution. The RIAA and MPAA member companies may have benefited from this “blame-shifting”. An industry group could help coordinate policy and shift some of the focus from individual members. Existing MPAA members, such as Disney, have already entered into the anime market, and it will be interesting to compare their future activities with other (non-MPAA) distributors. Disney licensed most of Hayao Miyazaki’s films, which include the wildly popular *Spirited Away*, *Princess Mononoke*, and the recently released *Howl’s Moving Castle*.<sup>197</sup> Disney also works with the MPAA in stopping online file sharing, and would likely take a rather dim view of fansubbing. Fansub groups may start to face more legal challenges if heavy-handed players like Disney continue to move into the anime market.

More knowledge on the timing of license announcements by distributors would also reveal the nature of their relationship with fansub groups. If distributors were waiting to announce their licenses until a certain number of fansubs had been released, this could imply sanction of fansub activities. Some statistical analysis on timing of announcements and subsequent sales could also map out important contours in the relationship between unauthorized online distribution and the licensed distribution industry.

## **7. Conclusion**

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

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<sup>194</sup> A search of Google and the Cease and Desist database at Chilling Effects does not reveal any formal DMCA letters aimed at fansub groups. See Chilling Effects Clearinghouse, *Search the Database*, @: <<http://chillingeffects.org/search.cgi>> The ease of putting up these letters on the internet suggests that if companies were using DMCA letters they would find their way onto the net.

<sup>195</sup> 17 U.S.C.S. §512(k) (2005).

<sup>196</sup> Any analysis of this would have to take into account the perceived effectiveness of DMCA letters.

<sup>197</sup> A.O. Scott, *Where the Wild Things Are: The Miyazaki Menagerie*, The New York Times (June 12, 2005) @: <<http://www.nytimes.com/2005/06/12/movies/12scot.html>>

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. At the moment, anime distributors may just be between the proverbial “rock and a hard place” and not necessarily developing a new business model based around widespread copyright infringement.

The licensed anime industry at least appears to be pretty innovative in this area. Licensed distributors in the past have taken relatively novel approaches to fansubs. One distributor, in the days of video, offered a discount to anyone that sent in a copy of a fansub videocassette.<sup>198</sup> In the world of digital copies, this specific response is, of course, unworkable. But there may be other creative solutions, and the anime industry may prove to be very forward thinking. Indeed, a new company recently opened its doors with the intent of using fansub groups to legally translate and subtitle new anime releases.<sup>199</sup> As the site states, it gives fansubbers the “chance to turn pro”.<sup>200</sup>

Another important aspect of the situation with fansubs that remains un-discussed in this article is the impact on the original Japanese creators. In the past, the lack of any reaction from the Japanese anime industry has been seen by some as condoning fansubs.<sup>201</sup> But considerations such as the private copying exemption under Japanese law, difficulties within the Japanese legal system, practical issues in the structure of the Japanese anime industry, and the realities of trying to enforce copyrights throughout the world may be what inhibits Japanese companies from going after fansubbers. As the Japanese learn the value of their “gross national cool”, they may start to find ways to work around these issues. The fansub community was recently shocked to receive letters from a Tokyo law firm representing Media Factory asking them to stop subbing and distributing all Media Factory content.<sup>202</sup> Could this mark a sea change in the relationship between fansubs and the content industry? It is still too early to tell.

## 8. Glossary

**AMV** – Anime Music Video. Anime clips edited to music.

**Anime** –Japanese animation. More of a type of media (like using watercolor) than a specific genre, anime can be anything from programs aimed at children to sexually explicit content.

**BitTorrent** – type of p2p file sharing program where downloaders must also upload.

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<sup>198</sup> Right Stuf had an amnesty program from *Irresponsible Captain Tylor*. Chris Beveridge, *Saturday Report Otakon 2000*, Anime on DVD (Aug. 5, 2000) @: <<http://www.animeondvd.com/conitem.php?item=162>>; USA Anime and Manga Report, *USA Anime and Manga Release Dates #21 August – 1997*, @: <<http://www.mindspring.com/~cowpunk1/OldRev1997.html#anchor122165>> (copy of press release).

<sup>199</sup> International Anime Distribution, @: <<http://www.animedist.com/index.php>>

<sup>200</sup> International Anime Distribution, *About IAD* @: <<http://www.animedist.com/about.php>> (internal quotes omitted).

<sup>201</sup> Borland, *Anxious times in the cartoon underground*.

<sup>202</sup> *Id.* Animesuki, *Removal of Media Factory Works* @: <<http://animesuki.com/doc.php/legal/mediafactory.html>>

**Comiket** – Comic Market or CM. The world’s largest comic convention that meets twice a year in Tokyo, Japan.

**Con** – short for convention. A fan gathering.

**Cosplay** – formed by combining “costume” and “play”. Cosplayers dress up as their favorite anime (or other) characters and attend events such as cons.

**Digisub** – formed by combining “digital” and “subtitled”. Fansubs using digital technology as opposed to using specialized analog equipment such as videocassettes.

**Dojinshi** – (doujinshi) Japanese fan comics. Dojinshi usually involve characters or settings from popular works in new or different situations. See also *fanfiction*.

**Dub** – Where the original language track is erased and replaced with an English-translation (or other) language track.

**Fanfiction** – (fanfic) fiction by fans of a show or movie using themes, character, or settings from the show. See also *dojinshi*.

**Fansub** – formed by combining “fan” and “subtitled”. Shows translated and subtitled by fans and then released onto the internet.

**Fandub** – formed by combining “fan” and “dubbed”. A version of a show where fans translate and insert their own voice track over the original Japanese.

**Hentai** – term commonly used outside of Japan to refer to explicit sex but within Japan to refer to sexually-charged content.

**IRC** – Internet Relay Chat. A chat program that allows users to transfer files. One of the original ways that anime fans received anime over the internet.

**Leecher** – term commonly used for downloaders, typically ones in p2p networks that download files without sharing any.

**Manga** – Japanese comic books. Like *anime*, manga is more of a type of media than a specific genre.

**MPAA** – Motion Picture Association of America. Industry lobby famous for attacking file sharing.

**Newsgroups** – (USENET) a “world-wide distributed discussion system” that allows users to send and download files. One of the original ways that fansubs were traded on the net.

**Otaku** – term used primarily outside of Japan by anime fans in reference to themselves. Within Japan the term can be somewhat derogatory.

**OVA** – Original Video Animation. Straight-to-video titles.

**p2p** – short for peer-to-peer. A type of network where users connect directly to each other. Facilitates online trading of large files between individuals.

**Raw** – term used for the subtitled and unedited version of a film or television show.

**RIAA** – Recording Industry Association of America. Industry lobby famous for legally attacking online file sharing.

**Rip** – to transfer (copy) from a source into a file on a computer, such as CD to mp3, or a DVD to .avi.

**Scanlation** – formed by combining “scan” and “translation”. Digital versions of Japanese manga (scans) where fans have digitally erased the Japanese text and replaced it with a (usually) English translation.

**Shojo** – anime aimed at young girls.

**Shonen** – anime aimed at young boys.

**Speed subber** – a fansub group or individual who specializes in speed rather than quality for their translations. Speed subbers have been known to create a fansub for a show within a day of it being aired in Japan.

**Sub** – short for subtitle.

**VCD** – Video Compact Disc. A format for storing video (MPEG1) on a compact disc.

**Warez** – is a derivative of “softwares” and indicates illegally traded software.

**Yaoi** – male-male sexual or romantic content.

**Yuri** – female-female sexual or romantic content.