
NOTES

“LOST IN TRANSLATION”: ANIME, MORAL RIGHTS, AND MARKET FAILURE

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INTRODUCTION

In June of 2004, 4Kids Entertainment announced that it had acquired the rights to distribute an English-language version of the popular Japanese anime

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(cartoon) series *One Piece* in the United States.¹ The reaction from American fans of the original Japanese version of the series – already an active and sizeable community – was both swift and, for the most part, unfavorable.² Aware that 4Kids already had a reputation for taking many liberties in adapting other Japanese anime for U.S. consumption, many fans feared that 4Kids would transform the series they knew and loved into a very different and markedly inferior work.³

The fans' concerns were not unfounded. When 4Kids released its English-language adaptation of *One Piece* (conventionally referred to as a “dub” or “dubbed version”), 4Kids heavily edited the series in the process of adapting it for Western children's consumption.⁴ Japanese cultural references, such as the use of Japanese writing, were eliminated.⁵ The appearance of blood or bruising – which one would expect to be quite common in a story about the adventures of pirates – was erased.⁶ 4Kids digitally altered all firearms to appear relatively innocuous or reminiscent of a child's toy gun.⁷ The company also transformed cigarettes into lollipops or erased them without explanation.⁸ Curiously, sometimes the cigarette smoke emanating from a character's mouth inexplicably remained.⁹ In addition to these and other edits, 4Kids eliminated a significant number of episodes, including whole story arcs, and often

¹ Press Release, 4Kids Entertainment, Inc., 4Kids Entertainment Unveils All-New FOX BOX for Fall '04 (June 8, 2004), <http://www.animenewsnetwork.com/press-release/2004-09-01/4kids-entertainment-announces-new-lineup-for-fox-box-fall-2004>.

² For a representative Internet message board posting, see Posting of HAX to Anime News Network Forum, <http://www.animenewsnetwork.com/bbs/phpBB2/viewtopic.php?t=7665&postdays=0&postorder=asc&start=30> (June 8, 2004, 15:09 EST) (“This truly sickens me to my core. If the series is ruined, I will be boycotting it. [E]-mails have already been sent expressign [sic] my distaste for their decision[.]”). Not all of the postings to this forum were uniformly condemnatory, however; some fans appeared ready to take a more hopeful “wait and see” approach. See Posting of Louie-kun to Anime News Network Forum, <http://www.animenewsnetwork.com/bbs/phpBB2/viewtopic.php?t=7665&postdays=0&postorder=asc&start=60> (June 8, 2004, 18:09 EST) (“I'm just gonna hold off until 4[K]ids actually says something about the [DVD]s, instead of going berserk and calling 4[K]ids the antichrist. . . . Just take a deep breath, and relax.”).

³ See Posting of Hotaru to Anime News Network Forum, <http://www.animenewsnetwork.com/bbs/phpBB2/viewtopic.php?t=7665&postdays=0&postorder=asc&start=45> (June 8, 2004, 16:44 EST).

⁴ See generally *One Piece Episode Comparisons – Differences Between the English and Japanese Anime: Excluded Edits*, http://opguide.bravehost.com/excluded_edits.shtml (last visited Apr. 22, 2008).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

smashed the events of multiple episodes into one.¹⁰ As one might have expected, fans of the original Japanese version were not at all pleased with 4Kids's editorial decisions.¹¹ Apparently, 4Kids was similarly disappointed with the success of the finished product. After it had already dubbed 104 English episodes, 4Kids announced it would discontinue its dub of *One Piece*.¹² In April 2007, the producer of *One Piece*, Toei Animation, announced that FUNimation, another company specializing in the English adaptation and distribution of Japanese anime (conventionally referred to as a "dub company"), would take over the *One Piece* dub.¹³

This turn of events is not unprecedented in the history of the distribution of Japanese anime in the United States market. Many other anime series have faced similarly severe editing by U.S. dub companies adapting the series for Western consumption, and fans have had similarly negative reactions to the finished products.¹⁴ In fact, Toei, the producers of *One Piece*, faced a virtually identical situation in the 1990s regarding the adaptation and distribution of the phenomenally popular series *Dragonball Z*. Distributed by Saban Entertainment in association with FUNimation,¹⁵ the series yielded an English dubbed version that fans heavily criticized.¹⁶ As with *One Piece*, *Dragonball Z* was eventually relicensed and redubbed after FUNimation ended its

¹⁰ See One Piece Episode Comparisons – Differences Between the English and Japanese Anime: Episode List, http://opguide.bravehost.com/episode_list.shtml (last visited Apr. 22, 2008).

¹¹ See John Oppliger, *Ask John: Does One Piece Still Have a Future in America?*, ANIMINATION, Apr. 12, 2007, <http://www.animation.net/news/askjohn.php?id=1536> ("The authentic Japanese One Piece is an absorbing, humorous adventure series. 4Kids' One Piece is a blatantly artificial and shameless commodity constructed by committee and totally out of touch with the show's true audience and the show's original charm.").

¹² *4Kids Cancels One Piece Production*, ANIME NEWS NETWORK, Dec. 6, 2006, <http://www.animenewsnetwork.com/news/2006-12-06/4kids-cancels-one-piece-production>.

¹³ See Luke Campbell, *FUNimation Acquires One Piece License*, ANIME DISTRICT, Apr. 15, 2007, <http://www.animedistrict.com/news.php?id=220>.

¹⁴ See generally Sean Leonard, *Celebrating Two Decades of Unlawful Progress: Fan Distribution, Proselytization Commons, and the Explosive Growth of Japanese Animation*, 12 UCLA ENT. L. REV. 189, 198 (2005) (discussing early releases of heavily edited dubs of anime series released in the United States); Chris Bourke, *End of Anime: English Dubs*, ANIME NEWS NETWORK, Aug. 9, 1998, <http://www.animenewsnetwork.com/editorial/1998-08-09>.

¹⁵ FUNimation's CEO reported that he and his company "wanted to release a more true to the original dub straight to video, [but] he and his company's decisions were primarily dictated by Saban, who was their distributor to the syndication networks." John Allen, *Dragonball, Z*, GT Interviews: Bruce Faulconer, <http://www.myfavoritegames.com/dragonball-z/Info/Interviews/Interviews-BruceFaulconer.htm> (last visited Apr. 22, 2008).

¹⁶ *Dragon Ball Z Encyclopedia II: Censorship Issues*, http://www.experiencefestival.com/a/Dragon_Ball_Z_-_Censorship_Issues/id/4996560 (last visited Apr. 22, 2008).

association with Saban.¹⁷ Apparently Toei did not learn from its past mistakes, and it remains to be seen whether Toei will repeat this error again in the future.

This Note argues that situations like those just described are economically wasteful and result from a failure in the private licensing market for anime which the law should attempt to remedy by formulating legal rules that appropriately channel the dub companies' incentives. The analysis and discussion proceed as follows. Parts I and II provide helpful background information on the identities of the major actors in the anime licensing market and the nature of the interests involved in conflicts over editing anime to adapt it for U.S. consumption. Part III speculates as to why Japanese creators sometimes fall victim to these market failures, while Part IV argues that the law should intervene to preserve the integrity of licensed anime cartoon series distributed in the American market. Part V considers exempting as a fair use, in limited circumstances, unauthorized translations as a means of better channeling the incentives of the creators and their licensees to avoid these market failures. The final section concludes and considers the implications of this Note's proposed fair use standard.

I. WHO'S WHO: SOME BACKGROUND ON THE U.S.-JAPANESE ANIME INDUSTRY

The creation and exploitation of anime is a multibillion dollar industry in Japan. The Japanese External Trade Organization estimated the size of the Japanese domestic anime market for feature films, TV series, and video sales to be approximately \$1.6 billion in 2003, with the value of merchandizing rights associated with the anime industry (e.g., toys, clothing, and other items featuring the series' logos or characters) estimated at over \$17.5 billion.¹⁸ The significance of the anime industry in the United States is no less impressive; "the U.S. market for anime is worth approximately \$ 4.35 billion."¹⁹

Both in Japan and in overseas markets like the United States, the main players involved in the anime industry are the creators or producers, on the one hand, and the distributors or licensees, on the other.²⁰ In Japan, anime series are often produced through production consortia, which are comprised of media companies, advertisers, sponsors, and the original authors or creators.²¹ The members of these consortia engage in cooperative joint planning for the

¹⁷ See *Dragon Ball Z (TV)* – Anime News Network, <http://www.animenewsnetwork.com/encyclopedia/anime.php?id=244> (last visited Apr. 22, 2008); The Official Dragon Ball Z Website: History of DBZ, <http://www.dragonballz.com/index.cfm?page=history> (last visited Apr. 22, 2008).

¹⁸ *Japan Animation Industry Trends*, JAPAN ECON. MONTHLY, June 2005, at 2, available at http://www.jetro.go.jp/en/market/report/pdf/2005_35_r.pdf.

¹⁹ Bianca Bosker, *Manga Mania*, WALL ST. J., Aug. 31, 2007, http://online.wsj.com/article/SB118851157811713921.html?mod=googlenews_wsj.

²⁰ *Japan Animation Industry Trends*, *supra* note 18, at 3.

²¹ *Id.* at 2.

entire franchise.²² Actual production of the series takes place in one of hundreds of production houses, the majority of which are located in Tokyo.²³ Typically, a single prime contractor, assisted by a number of subcontractors, creates the series.²⁴ The vast majority of anime produced in Japan is intended for television or home video release; “[e]nterprises that primarily produce feature anime for theater release are the exception.”²⁵

Whether distributing the finished anime series domestically or overseas, the creators or producers usually rely on third-party distributors to release their work on television or on video.²⁶ In the case of releases to overseas markets such as the United States, the production consortia grant the distributor a license to adapt the work as well as distribute it.²⁷ The distributor translates the original Japanese script for each episode of the series into English and then replaces the voice track of the show with an Anglophone voice cast.²⁸ The distributor then typically releases the new English-dubbed version of the series on television, and later to the home video market.²⁹ If the series is successful, the dub companies turn a nice profit from advertising, video, and merchandizing sales, and then pay valuable royalties to the Japanese producer-licensors.³⁰

Occupying a more uncertain place within this constellation is yet a third group of actors: the fan community in the United States. The original Japanese version of an anime series will often have a significant following in the United States before an American release is ever even contemplated.³¹ This may seem paradoxical, but a consideration of one subset of this fan community provides an explanation; “fansubbers” produce and distribute unauthorized English-subtitled versions of anime (known as “fansubs”) before an official American release.³² As other commentators have explained, fansubbers use special equipment to add in their own English subtitles to Japanese-language anime,

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *See id.* at 3.

²⁷ Frank Sanchez, Anime University – LING 102: Sub and Dub Basics, <http://www.animeinfo.org/animeu/ling102-p.html> (last visited Apr. 22, 2008).

²⁸ *Id.*

²⁹ *See* SUSAN J. NAPIER, ANIME FROM AKIRA TO PRINCESS MONONOKE: EXPERIENCING CONTEMPORARY JAPANESE ANIMATION 6 (2001); Antonia Levi, *The Americanization of Anime and Manga: Negotiating Popular Culture*, in CINEMA ANIME: CRITICAL ENGAGEMENTS WITH JAPANESE ANIMATION 43, 45-46 (Steven T. Brown ed., 2006).

³⁰ *See Japan Animation Industry Trends*, *supra* note 18, at 2.

³¹ For example, *One Piece*, discussed *supra* notes 1-13 and accompanying text, already had an American community of fans who protested vociferously as soon as 4Kids announced that it had acquired the U.S. release license. *See also* Leonard, *supra* note 14, at 216-17.

³² Leonard, *supra* note 14, at 196-97.

and often include other material, such as translators' notes and explanations of various cultural references.³³ Fansubbers then release these unauthorized translations via the Internet.³⁴ Generally, fansubbers also add provisos to their unauthorized translations "such as 'not for sale or rent' and 'cease distribution when licensed' to their works. These markers indicate that their works are not licensed, that no money should change hands for their fansubs, and that viewers should purchase the licensed products once they are available domestically."³⁵ In the same vein, most fansubbers cease their activities when a Japanese creator reaches a licensing agreement with an American dub company.³⁶

The next Part explains the nature of the legal interests that the U.S. anime industry implicates. Although the creators' and distributors' legal rights generally arise under copyright law, the legal interests most strongly affected by the editing and translation processes come under the more specialized area of "moral rights."

II. THE INTERESTS AT STAKE: MORAL RIGHTS IN ANIME

The legal and social interests of creators most at stake in the context of editing Japanese anime fall under the copyright law heading of "moral rights."³⁷ As Professor Nimmer, has explained, the concept of "moral rights" has its origins in French law and consists of "rights personal to authors, and as such viable separate and apart from the economic aspect of copyright."³⁸

A. *The Nature of Moral Rights*

Moral rights may encompass a wide variety of entitlements, including the rights of attribution and integrity.³⁹ As Professor Nimmer has explained, the attribution right is commonly thought to incorporate, at a minimum, "the [author's] right to be known as the author of his work . . . [and] the right to prevent others from falsely attributing to him the authorship of a work that he has not in fact written," although there are also "numerous variations on the

³³ *Id.* at 197.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 218.

³⁷ Some commentators have noted that the term "moral rights" is a rather poor translation of the French phrase "*le droit moral*." See, e.g., Patricia Alexander, Comment, *Moral Rights in the VARA Era*, 36 ARIZ. ST. L.J. 1471, 1472 & n.9 (2004). "The adjective 'moral' has no precise English equivalent, although 'spiritual', 'non-economic' and 'personal' convey something of the intended meaning." 3 MELVILLE B. NIMMER, NIMMER ON COPYRIGHT § 8D.01[A] (David Nimmer ed., 2007) (quoting S. RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986, at 456 (1987)) (footnotes omitted).

³⁸ NIMMER, *supra* note 37, § 8D.01[A].

³⁹ *Id.*

attribution right.”⁴⁰ By comparison, the author’s right of integrity, a “distinct categor[y] that comprise[s] the classic *droit moral*,” has been defined as “the [author’s] right to prevent others from making deforming changes in his work.”⁴¹

The fundamental principle underlying moral rights is that an author has the right to communicate with her audience through her work, which is an extension of her being and personality.⁴² One of the main purposes of the right of integrity is to allow the author to protect the integrity of the *message* that underlies her work.⁴³ In the context of an animated television series, a creator may communicate her message to the audience through the series’s plot or narrative, but that is not necessarily her only means of communication. Creators often use other, less obvious means to communicate their intended messages and themes. For example, violence in anime is often not merely gratuitous, but rather drives the characters’ personal development.⁴⁴ Violence in anime may also demonstrate certain features of the human condition, such as war, that the author hopes to highlight and subtly comment upon.⁴⁵ The elimination of such content might not result in a loss of any narrative integrity, in the sense that most viewers will still be able to understand what is going on in the series and what the various characters are doing. However, for certain anime series, the elimination of such content would significantly alter the quality of the author’s message, or diminish its power. Viewers might also be left unsure why the characters undertake the actions they do, since much of the characters’ depth and personal motivations may be lost.

Similarly, the removal of non-Western cultural references implicates concerns related not only to the right of integrity but also attribution. Insofar as the entire work is an outgrowth of its author, the Japanese cultural references in most anime represent a distinct facet of the author’s identity: her national identity. The removal of these cultural references might effectively

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See Edward J. Damich, *The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors*, 23 GA. L. REV. 1, 27 (1988).

⁴³ See *id.* at 4.

⁴⁴ See, e.g., *One Piece: Survive! Bellemere, the Mother, and Nami’s Family!* (Fuji TV television broadcast Aug. 9, 2000) (featuring the murder of a character’s family by pirates, which is the source of that character’s animosity toward pirates); *One Piece: The Past of the Three Swords! The Promise Between Zoro and Kuina* (Fuji TV television broadcast Mar. 22, 2000) (featuring the sudden death of a character’s childhood friend, which heightens that character’s sense of his own mortality and contributes to his generally reckless behavior). For a more detailed discussion of the role of violence and similarly disturbing content in anime, see generally NAPIER, *supra* note 29.

⁴⁵ See, e.g., *Gundam SEED: Divine Thunder* (TBS television broadcast June 21, 2003) (featuring a futuristic army executing its helpless opponents as the latter attempt to surrender, in an apparent effort to demonstrate the dehumanizing effect of war on its participants).

strip the author of an important aspect of her persona, and might also garble or diminish the author's attempt to communicate the nature of her culture to the audience. These less obvious means of communication often include the very content that dub companies are fond of discarding,⁴⁶ and for which U.S. law offers little protection.⁴⁷

B. *The Status of Moral Rights Under U.S. and International Law*

Article 6bis of the Berne Convention, to which both the United States and Japan are signatories, requires all member states to provide at least some protection for the moral rights of authors.⁴⁸ However, the moral rights requirements of the Berne Convention do not create any private right of action,⁴⁹ and moral rights receive comparatively narrow protection under U.S. copyright law through the Visual Artists Rights Act of 1990 ("VARA").⁵⁰

Under VARA, the author of a "work of visual art" has the right "to claim authorship of that work, and . . . to prevent the use of his or her name as the author of any work of visual art which he or she did not create."⁵¹ The author of a work of visual art also possesses "the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation."⁵² More importantly, such authors have the right "to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right."⁵³ Moreover, the moral rights that VARA protects belong solely to the author of a work of visual art, "whether or not the author is the copyright owner,"⁵⁴ and such rights "may not be transferred, but those rights may be

⁴⁶ See, e.g., *supra* notes 4-11 and accompanying text.

⁴⁷ See *infra* notes 62-63 and accompanying text.

⁴⁸ Berne Convention for the Protection of Literary and Artistic Works art. 6bis(1), amended Sept. 28, 1979, S. Treaty Doc. No. 99-27, 1161 U.N.T.S. 36 [hereinafter Berne Convention] ("Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.").

⁴⁹ NIMMER, *supra* note 37, § 1.12[A].

⁵⁰ See 17 U.S.C. § 106A(a)(3)(A) (2000). Many commentators have doubted whether the United States is in full compliance with its Berne Convention obligations with respect to the protection of moral rights. See, e.g., NIMMER, *supra* note 37, § 8D.02[D][1].

⁵¹ *Id.* § 106A(a)(1).

⁵² *Id.* § 106A(a)(2).

⁵³ *Id.* § 106A(a)(3).

⁵⁴ *Id.* § 106A(b).

waived if the author expressly agrees to such waiver in a written instrument signed by the author.”⁵⁵

In addition, U.S. copyright law has long provided authors with the exclusive right to prepare derivative works.⁵⁶ The definition of a “derivative work” is quite broad, encompassing any “work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.”⁵⁷ Although the derivative work right is usually considered part of the author’s economic rights, rather than her moral rights, many courts and commentators have noted that taking a broad view of the derivative work right may allow an author to protect many of the same interests as the moral right of integrity.⁵⁸ The U.S. Senate concurred in this characterization of the derivative work right when it updated much of U.S. copyright law in an attempt to bring it into compliance with the Berne Convention. The Senate concluded that the enactment of *sui generis* moral rights protections was unnecessary because federal and state statutes and the common law sufficiently protected the author’s right to object to the distortion of his work.⁵⁹

Unfortunately, VARA’s statutory definition of a “work of visual art” is very narrow, and expressly excludes “motion pictures” or “audiovisual works” like anime series.⁶⁰ VARA’s provisions therefore do not apply in this context. Furthermore, once the creators have licensed their derivative work right to a dub company without restricting the latter’s right to edit the series, then such licenses can generally be revoked or rescinded only according to the licensing agreement’s terms.⁶¹ Though the common law of unfair competition may

⁵⁵ *Id.* § 106A(e)(1). The statute also specifies that:

Ownership of the rights conferred by [VARA] with respect to a work of visual art is distinct from ownership of any copy of that work, or of a copyright or any exclusive right under a copyright in that work. Transfer of ownership of any copy of a work of visual art, or of a copyright or any exclusive right under a copyright, shall not constitute a waiver of the rights conferred by [VARA].

Id. § 106A(e)(2).

⁵⁶ *Id.* § 106(2).

⁵⁷ *Id.* § 101.

⁵⁸ See, e.g., *Lee v. A.R.T. Co.*, 125 F.3d 580, 582-83 (7th Cir. 1997) (criticizing *Mirage Editions, Inc. v. A.R.T. Co.*, 856 F.2d 1341 (9th Cir. 1988)); JULIE E. COHEN ET AL., *COPYRIGHT IN A GLOBAL INFORMATION ECONOMY* 408 (2d ed. 2006) (presenting the moral right of integrity as analogous to the derivative work right).

⁵⁹ S. REP. NO. 100-352, at 9-10 (1988), as reprinted in 1988 U.S.C.C.A.N. 3706, 3714-15.

⁶⁰ 17 U.S.C. § 101.

⁶¹ *But cf. id.* § 203(a)(1), (3) (allowing an author to terminate the exclusive or nonexclusive grant or license of a copyright during a five-year period at the end of thirty-five years from the date of the execution of the grant).

provide some protection for the right of integrity or attribution,⁶² it appears to provide no protection unless the degree of alteration is substantial, such that the edited version of the work is so distorted that it makes no sense or leaves the viewer confused.⁶³ Thus, there seems to be little the creators could do in retrospect to vindicate their moral rights interests in the integrity of the work once they have granted the dub companies a broad or unrestricted right to edit the original material. The more interesting question, however, is why the creators do not protect these interests prospectively, by bargaining for limited editing rights in advance, to avoid potentially wasteful relicensing transactions like those discussed above.⁶⁴ That question is the subject of the next section.

III. MARKET FAILURE: WHY JAPANESE CREATORS SELL THEIR INTEGRITY (RIGHTS)

It is difficult to explain why or how situations like the *One Piece* debacle arise in the first place. The end result – relicensing of the right to dub and distribute the Japanese series in the United States to a different company following an unsatisfactory performance from the first dub – is undeniably wasteful for everyone involved. The Japanese creators, having already gone through the trouble of negotiating one licensing arrangement, must start over and go through the entire process again. They incur the same transaction costs that they did the first time around: search costs to find a new licensee, legal fees for negotiating and drafting an agreement, and time and opportunity costs. The first licensee, which produced the poorly edited dub, has wasted time and money producing a disappointing product that ultimately failed. Finally, the second licensee begins its efforts to dub and distribute the series at a significant disadvantage, as it must now expend extra time and promotional resources distinguishing its product from any taint associated with the first dub.⁶⁵

⁶² See *Gilliam v. Am. Broad. Cos.*, 538 F.2d 14, 24-25 (2d Cir. 1976) (finding that an artist whose work has been mutilated or distorted may seek redress under section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a) (2000)). Recently, however, the continuing vitality of *Gilliam* has been called into serious doubt. See *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 32-37 (2003) (rejecting a claim for nonattribution and reverse passing-off under section 43(a) of the Lanham Act without addressing the validity of *Gilliam*); NIMMER, *supra* note 37, § 8D.04[A][2]; Michael Landau, *Dastar v. Twentieth Century Fox: The Need for Stronger Protection of Attribution Rights in the United States*, 61 N.Y.U. ANN. SURV. AM. L. 273, 297 (2005). But see Justin Hughes, *American Moral Rights and the Dastar Opinion*, 2007 UTAH L. REV. 659, 692-95 (arguing that *Gilliam* and *Dastar* are distinguishable).

⁶³ See, e.g., *Choe v. Fordham Univ. Sch. of Law*, 920 F. Supp. 44, 48-49 (S.D.N.Y. 1995); *Playboy Enters. v. Dumas*, 831 F. Supp. 295, 316-17 (S.D.N.Y. 1993); *Lish v. Harper's Magazine Found.*, 807 F. Supp. 1090, 1107-08 (S.D.N.Y. 1992); *Jaeger v. Am. Int'l Pictures, Inc.*, 330 F. Supp. 274, 280 (S.D.N.Y. 1971).

⁶⁴ See notes 12-17 and accompanying text.

⁶⁵ The Japanese creators also bear these reputational costs, albeit somewhat indirectly. If the first dub has created a lingering negative impression of the series, the second dub is less

Given this assessment, it is difficult to explain why many Japanese creators grant licenses to dub companies that significantly undermine the series's chance of success by alienating fans and viewers through extensive editing. In economic terms, there seems to be a failure in the market for anime licensing.⁶⁶ The failure is not that license agreements are not being produced, but rather that license agreements that preserve the integrity of the licensed work are being *underproduced*, while license agreements that facilitate the mutilation of the work are being *overproduced*.⁶⁷ Parties are entering into licensing arrangements like those between Toei and 4Kids, or between Toei and Saban, at a greater rate than is optimal. The switch to FUNimation in both cases was as good as an admission on Toei's part that its previous agreements were not an optimal allocation of its copyright resources. The precise reasons for this market failure are difficult to discern, but the nature of the market suggests a few possibilities.

A. *Information*

Market failures commonly occur when information is difficult to obtain or potentially unreliable.⁶⁸ Thus, one possible explanation for this apparent failure in the anime licensing market is that, when viewed *ex ante*, the economic risks associated with allowing the dub company broad editing rights are difficult to predict with accuracy, because they cannot predict how many liberties the dub company will take or how these changes will be received. The creators, although rational, may fail to adequately account for these risks in their licensing decisions.

The creators might also have poor information regarding the fair value of their interests in integrity, since the immediate benefit of maintaining the work's integrity is primarily more psychic than financial in nature, and is difficult to express in a dollar amount. Even though the integrity of the creators' work may have real worth to them, the difficulty of putting a dollar value on that worth may lead the creators to misjudge the amount of increased royalty payments they ought to demand from the dub companies in order to forego the protection of that right. In effect, because creators can be relatively sure of the economic value of royalty payments, while they must be necessarily

likely to be profitable, and thus the creators will collect fewer royalties. These reputational costs may also adversely affect the success of any other series the creators wish to license for U.S. distribution. See Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 104-05 (1997).

⁶⁶ See Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1613 (1982).

⁶⁷ *Cf. id.* The kind of market failure discussed herein differs from that which Professor Gordon discusses. In the context of anime editing rights, the arguable market failure is that the market *facilitates* or encourages undesirable consensual exchanges, not that it *precludes* desirable ones from happening.

⁶⁸ *Id.* at 1607-08.

unsure of the economic value of their interests in integrity, creators may sell away those interests for too little. A related concern is that many creators might be unsure of the full extent of their integrity rights under U.S. law, and thus may be at a disadvantage in contracting.⁶⁹

However, while the inadequacy of information and the difficulty of valuing economic risks or benefits may contribute to market failure in individual cases, it does not fully account for the repetition of the same failure in subsequent transactions. Even if risks and benefits are difficult to value with precision when viewed *ex ante*, one can often arrive at a rough approximation of their value that can be refined over the course of many licensing transactions as more information becomes available. One would thus expect that the creators – especially those, like Toei, who have encountered this problem more than once – would eventually learn from these mistakes, and that the market for overseas anime licensing would adjust accordingly to protect the integrity of the licensed series. Similarly, any lack of sophistication regarding U.S. intellectual property law could be easily remedied by hiring U.S. counsel, and one would expect the creators to become savvier with regard to U.S. law with each completed transaction. However, as the *One Piece* debacle and others like it illustrate, this appears not to be happening.

B. *Bargaining Power and Negotiation Dynamics*

In the licensing market for anime, Japanese creators approach the bargaining table with a significant advantage. The dub company cannot adapt the series and distribute it in the United States without first placating the creators who own the exclusive adaptation and distribution rights.⁷⁰ However, even though the Japanese creators and copyright owners have considerable leverage at the negotiation table, the dub companies also have considerable bargaining power of their own, which they may deploy in order to resist the inclusion of a strict no-editing proviso.

One source of leverage for the dub companies is that they have something the Japanese creators want: the creators wish to release their work to the potentially lucrative U.S. market and presumably it is cheaper for the creators to license the dub to the dub companies than it would be to produce their own dub. Thus, the relationship between the Japanese creators and the dub companies may be loosely described as one of mutual dependence.⁷¹ Not

⁶⁹ See *Japan Animation Industry Trends*, *supra* note 18, at 7.

⁷⁰ Although the creators' works were first authored or fixed in Japan, they still enjoy copyright protection under U.S. law. 17 U.S.C. § 104(b)(2) (2000); *see also id.* § 101 (defining "treaty party" and "international agreement").

⁷¹ It is, however, possible that the Japanese creators are not as economically dependent on the dub companies' services as the dub companies are on the creators' permission. Unlike the dub companies, who have structured much of their business around the adaptation of foreign television programs for the U.S. market, *see, e.g.*, About ADV Films, <http://www.advfilm.com/about-adv-films.aspx> (last visited Apr. 22, 2008); FUNimation:

every Japanese copyright owner is willing to sacrifice a potentially lucrative U.S. market for the principle of moral rights.⁷² Thus, the ability to walk away from the table may be of limited value in negotiating the terms of a license agreement with the dub companies.

The legal, regulatory, and market-based constraints under which the U.S. dub companies operate constitute a second source of bargaining power. Japanese anime series generally tend to incorporate content that an American audience might find objectionable, such as depictions of blood, violence, harsh language, and sexual themes or innuendo.⁷³ At the same time, the dub companies that wish to broadcast the dub on television, or exhibit it via cable or satellite transmission,⁷⁴ must operate within a complex legal and regulatory framework under the jurisdiction of the Federal Communications Commission ("FCC"). This regulatory framework censors what the FCC deems to be inappropriate content, using heavy fines to punish violators.⁷⁵ Specifically, the FCC has taken a relatively strict position against the broadcast or transmission

Our Shows, http://www.funimation.com/f_index.cfm?page=props (last visited Apr. 22, 2008), the Japanese companies could solely look to the domestic Japanese market for profit. However, since there is substantial profit to be realized in the U.S. market in the form of royalties and merchandizing, it is also likely that the creators view the potential benefits of a U.S. release as far too great to be foregone.

⁷² Miyazaki Hayao, however, is a notable exception. Following the 1986 release of his animated film, *Nausicaä of the Valley of the Wind*, as the heavily edited *Warriors of the Wind* in the United States, Miyazaki refused to release his films in western markets for more than a decade. He finally agreed to release his films through Disney on the condition that Disney may not delete or substantially alter any of the original footage. Laura Miller, *Wizard of Light and Shadow*, SALON.COM, July 10, 2003, <http://dir.salon.com/story/ent/movies/feature/2003/07/10/miyazaki/index.html>; see also Xan Brooks, *A God Among Animators*, THE GUARDIAN UNLIMITED, Sept. 14, 2005, <http://film.guardian.co.uk/interview/interviewpages/0,6737,1569689,00.html>.

⁷³ See Leonard, *supra* note 14, at 194-95, 198. The difference may stem in part from the fact that Japanese culture appears to have different sensibilities than American culture with regard to what level of sexual or violent content is appropriate for young audiences. See *id.* at 194-95.

⁷⁴ This does not appear to be a problem for dub companies or Japanese creators who only contemplate the release of an anime television series to the home video market. However, it seems reasonable to assume that, insofar as the television or cable exhibition of the anime series represents an effective form of marketing the home video release, it is probably only a relative minority of dub companies and creators who are willing to completely ignore the opportunities which television or cable have to offer.

⁷⁵ See generally CHARLES D. FERRIS & FRANK W. LLOYD, TELECOMMUNICATIONS REGULATION: CABLE, BROADCASTING, SATELLITE, AND THE INTERNET ¶ 3.16 (2007) (discussing the FCC's regulation of indecent or obscene content). The broadcast of obscene or indecent material is also a criminal offense under federal law. 18 U.S.C. § 1464 (2000); 47 C.F.R. § 73.3999 (2007).

of content which features vulgar language,⁷⁶ nudity or sexual themes,⁷⁷ and, to a lesser degree, violence.⁷⁸

In addition, market forces supplement the federal government's content-based restrictions on broadcast or cable entertainment. The dub companies often market the dub primarily, if not exclusively, to young children and teenagers. The parents of these children may exercise substantial control over their children's viewing and spending habits. Many parents may be unwilling to allow their young children to watch any television programming which contains even modest amounts of blood, violence, or sexual innuendo, regardless of whether the FCC sanctions its dissemination.⁷⁹ Parents may also refuse to allow their child to buy or to receive merchandise from a television

⁷⁶ See *FCC v. Pacifica Found.*, 438 U.S. 726, 742-51 (1978) (upholding the FCC's action against a radio station which broadcast George Carlin's "Filthy Words" monologue as permissible under the First Amendment and the applicable statutory scheme).

⁷⁷ See *In re Indust. Guidance on the Comm'n's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 F.C.C.R. 7999, 8002-15 (2001).

⁷⁸ The FCC does not currently treat violent content under its general indecency rubric and does not fine broadcasters or the providers of cable programming for content on the basis of violence, rather than sexual explicitness or vulgarity. See authorities cited *supra* notes 76-77. However, federal law has attempted to regulate violent content indirectly. In the Telecommunications Act of 1996, Congress mandated the development of a content rating system for television programming. See Telecommunications Act of 1996, Pub. L. No. 104-104, § 551(b)-(e), 110 Stat. 56, 140-42 (codified as amended in scattered sections of 47 U.S.C.); see also *In re Implementation of Section 551 of the Telecomms. Act of 1996: Video Programming Ratings*, 13 F.C.C.R. 8232, 8246-47 (1998) (accepting the "TV Parental Guidelines" submitted by private industry as an acceptable voluntary rating system). Furthermore, the FCC requires that nearly all televisions manufactured in the United States or shipped in interstate commerce "be equipped with a feature designed to enable viewers to block display of all programs with a common rating," commonly known as "V-chip" technology. 47 U.S.C. § 303(x) (2000); *In re Technical Requirements to Enable Blocking of Video Programming based on Program Ratings: Implementation of Sections 551(c), (d), and (e) of the Telecomms. Act of 1996*, 13 F.C.C.R. 11248, 11255-56 (1998); see also 47 U.S.C. § 330(c). Thus, the federal regulatory scheme works to regulate the transmission of violent content over broadcast and cable television indirectly by facilitating parental censorship.

⁷⁹ Indeed, a significant intended consequence of the FCC's legally mandated V-chip regime, see discussion *supra* note 78 and sources cited therein, is that parents have the power to block objectionable programming from entering the home, by programming their televisions to lock out any program with, for example, a "TV-14" or higher rating. Even if it is not per se unlawful to broadcast cartoons with violent content, such programming will receive a stronger content rating under the TV Parental Guidelines, and consequently, may reach a significantly smaller audience than would tamer programming. This result may ultimately mean less revenue for the dub company and for the creators. Cf. *Halicki v. United Artists Commcn's, Inc.*, 812 F.2d 1213, 1213-14 (9th Cir. 1987).

show they find objectionable, and may even lobby Congress or the FCC to impose tougher content-based restrictions on such programming.⁸⁰

Other, relatively unobjectionable content may be quite difficult to market to an American audience for different reasons. For example, American viewers may be generally unfamiliar with the many Japanese cultural references inhabiting the typical anime television series, and may be confused by the presence of foreign foods, like *onigiri*,⁸¹ or figures from Japanese myth or folklore, such as the *kirin*⁸² or *tanuki*.⁸³ It may be impossible for the dub companies to fully explain these unfamiliar cultural references in the course of the regular broadcast by incorporating the explanation into the characters' dialogue. The possibility of viewer confusion raises the related concern that the viewers' understanding and enjoyment of the series may be significantly diminished. As a result, there is a danger that viewers will be more put off than intrigued by these unfamiliar features and may turn to more familiar programming.

Because of the legal, regulatory and practical constraints on the dub companies' ability to air certain content on American broadcast and cable television, the dub companies might claim their hands are tied with respect to editing rights, and that objectionable or unmarketable content must be edited in order to suitably adapt the series to American tastes and sensibilities. The fact that these constraints are industry-wide further adds to the dub companies' bargaining leverage. Unless the Japanese creators are willing to forego the U.S. cable and television broadcast market by releasing their work directly to the home video market,⁸⁴ it is less likely the creators will be able to find a dub company who would be willing to produce a dub without the ability to edit the series to conform to the demands of the law and the market.

On the other hand, there are many dub companies out there who do specialize primarily or almost exclusively in releases to the home video market. This fact can be rather easily confirmed by comparing the titles which

⁸⁰ A number of activist groups, composed in large part of parent-activists and conservative or religious groups, have already dedicated themselves to this cause. See, e.g., Morality in Media, Inc., <http://www.moralityinmedia.org/> (last visited Apr. 22, 2007); Parents Television Council – Because Our Children Are Watching, <http://www.parentstv.org/> (last visited Apr. 22, 2008).

⁸¹ *Onigiri*, or rice balls, are a common Japanese delicacy; for more information and instructions on preparing *onigiri*, see Just Bento: Onigiri on Parade, <http://justbento.com/handbook/bento-basics/onigiri-on-parade-guide-onigiri-omusubi-rice-ball-shapes-types-and-fun> (last visited May 2, 2008).

⁸² For more information on *kirin*, a unicorn-like figure of Chinese origin, see The Obakemono Project: Kirin, <http://www.obakemono.com/obake/kirin/> (last visited May 2, 2008).

⁸³ For more information on *tanuki*, a common mischievous character of Japanese folklore based on the indigenous raccoon dog, see The Obakemono Project: Tanuki, <http://www.obakemono.com/obake/tanuki/> (last visited May 2, 2008).

⁸⁴ See discussion *supra* note 74.

these companies have released on home video – conveniently located in the Anime section of any Best Buy or similar store – with the weekly TV and cable programming schedule.⁸⁵ Though a number of highly popular series have been shown on cable or broadcast television⁸⁶ in addition to being released on home video, such is typically not the case for anime series released for U.S. distribution; far more anime series are released through the home video market than are shown on broadcast or cable television. Assuming this distribution strategy, the persuasiveness of many of the dub companies' arguments for why they must aggressively adapt the series seems to diminish if not evaporate. Additionally, one would expect any divergence between U.S. and Japanese sensibilities regarding the content of anime, which would support the dub companies' probable rationale for greater editing rights, to have decreased, since in recent years Japanese companies producing anime titles "have increasingly borne overseas markets in mind from the outset."⁸⁷ Thus, to the extent the previously discussed dynamics characterize anime licensing transactions, these dynamics might not be as important as they seem in explaining the creators' behavior.

C. Externalities

The most likely reason why licensing negotiations turn out the way they do for series like *One Piece* is that there are unaccounted for externalities that distort the incentives of the contracting parties. Externalities exist whenever at least some of the costs or benefits generated by a transaction are borne by third parties who are uninvolved with the transaction.⁸⁸ Externalities often lead to market failure.⁸⁹ In the case of external benefits, socially valuable transactions may be blocked because the parties fail to account for the valuable external

⁸⁵ See also Anime News Network, Encyclopedia Anime, <http://www.animenewsnetwork.com/encyclopedia/anime.php> (last visited Apr. 22, 2008) (providing broadcast and video release information for all anime series and movies).

⁸⁶ A casual glance at most any local programming schedule reveals that cable is a more typical outlet for anime series than television because of cable programming's comparatively lighter programming restrictions. See FERRIS & LLOYD, *supra* note 75, ¶ 8.08 (discussing the "uncertain foundation" of the FCC's efforts to regulate obscene or indecent cable programming). Typically, these series are also shown very late in the evening to alleviate regulatory and parental concerns that young children will be exposed to adult themes; for example, as of this writing, new U.S. episodes of *Bleach* currently air on the Cartoon Network at 1:00 A.M. on Sundays.

⁸⁷ *Japan Animation Industry Trends*, *supra* note 18, at 7.

⁸⁸ Cf. Gordon, *supra* note 66, at 1607.

⁸⁹ Externalities do not necessarily lead to market failure, however. If the parties, upon internalizing all the externalities generated by the transaction, would find that the cost of correcting for the externalities would be higher than suffering whatever loss is caused by the externalities themselves, then the presence of the externalities is unlikely to affect the parties' incentives or behavior, and thus there will be no market failure. Cf. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 3.10, at 71 (6th ed. 2003).

benefits that the transaction will yield, but which they will not personally enjoy.⁹⁰ In the case of external costs, socially harmful transactions are often encouraged because the parties fail to account for the harm the transaction will inflict on third parties, but which the original parties will not directly bear.⁹¹ In order for consensual transactions in the private market to lead to an efficient allocation of resources, the parties to the transaction must be made to account for all the costs and benefits the transaction will produce. Unless they take external costs or benefits into account, the parties' estimations of whether the transaction is in their own self-interest will not necessarily correspond with whether the transaction will be in the public interest.⁹²

External costs or benefits exist in the anime licensing markets with respect to the amount of editing that the creators allow, and that the dub companies actually undertake. The amount and intensity of discontent many viewers and fans exhibit with respect to heavily edited dubs suggests the preservation of an anime series's integrity has some value. At the very least, such preservation yields psychic benefits – which are admittedly difficult to measure with precision – for fans of the original Japanese version, who enjoy seeing the dub remain true to the original.⁹³ However, it is quite possible that some Japanese anime creators assign little or no worth to their own moral rights interests, caring almost exclusively about receiving the best monetary royalty. It may also be the case that many dub companies derive no psychic benefits at all from their efforts in adapting the series, and are indifferent whether the dub is true to the original version or so heavily edited as to constitute an entirely different work, as long as the dub companies receive more in revenue than they paid for the license. Assuming this description is accurate, any benefit from preserving the integrity of the series will be essentially external to both the creators and the dub companies. Such benefits are instead enjoyed mainly by fans and viewers, none of whom are parties to the licensing agreement or invited to participate in those negotiations.

Because the benefits are external to both the creators and the dub companies, both are likely to undervalue the need for restrictions on the amount of editing the dub companies can undertake. One could just as easily describe the problem in terms of external costs; in negotiating an agreement that allows the dub companies a relatively free hand when it comes to editing, the parties to the transaction are imposing psychic costs on fans of the original version, which they themselves will not incur.⁹⁴ Were the parties made to take

⁹⁰ ROBERT S. PINDYCK & DANIEL L. RUBINFELD, MICROECONOMICS 650-51 (4th ed. 1998).

⁹¹ *Id.* at 648-50.

⁹² See Gordon, *supra* note 66, at 1607.

⁹³ See Hansmann & Santilli, *supra* note 65, at 105-07.

⁹⁴ The fact that the costs involved are difficult to measure in monetary terms does not prove they are not economically significant. See *infra* notes 97-101 and accompanying text. In general, economists care about the allocation of resources, including time or mental

account of these external costs and benefits, the cost a dub company would have to pay for a license with unrestricted editing rights would likely increase, resulting in fewer such agreements being negotiated.⁹⁵ But because of the market failure created by these unaccounted-for externalities, it may be that these broad licenses are being negotiated at a higher rate than is socially optimal.

IV. CORRECTING FOR MARKET FAILURE: FAIR USE AS PROTECTION FOR MORAL RIGHTS

One might question whether these situations are really “problems” in need of solutions. After all, the Japanese creators have perfect ownership of the anime series they produce. If these creators have not seen fit to insist upon stronger protection for the integrity of their work in overseas licensing, on what ground can American anime fans, the main group that these distorted dubs seem to annoy, possibly complain? Why should the creators, or the law, take heed of their complaints?

The best response is that even if the creators could not care less about the objections of anime fans, there is adequate reason for the law to care, insofar as these objections bespeak the existence of a failure or inefficiency within the anime licensing market. Although the creators are commonly thought of as those with the strongest interest in preserving the integrity of their work,⁹⁶ they are not the only ones with such an interest. Indeed, at least some commentators have argued that society as a whole has an economically significant interest in maintaining the integrity of the works of art that its artists produce.⁹⁷ As Professors Hansmann and Santilli have explained, one source of the public’s interest in protecting the integrity of works of art “is that great works of art often become important elements in a community’s culture: other works of art are created in response to them, and they become common

quietude, whether or not those resources can be precisely measured in dollars, and whether or not money changes hands. See POSNER, *supra* note 89, § 1.1, at 7.

⁹⁵ It is not necessarily true that such agreements would never happen. There could be cases where the total external costs imposed by such agreements on fans and viewers are still less than the internal benefits the licensing transaction generates. One example might be the licensing and mutilation of a marginally popular anime series; perhaps there are fans and viewers out there who would object if they were consulted, but there are likely so few of them that the creators and the dub companies could theoretically compensate them with the benefits generated by the licensing agreement. The result in such a case is not market failure, but rather a Kaldor-Hicks efficient transaction. See POSNER, *supra* note 89, § 1.2, at 13-16. However, series like *One Piece* are unlikely to fall into that category. The relicensing transaction suggests the first licensing agreement was not the most efficient allocation of resources, perhaps because of the failure to account for the external costs the transaction generated.

⁹⁶ See Hansmann & Santilli, *supra* note 65, at 102-05.

⁹⁷ *Id.* at 105-07.

reference points or icons that are widely shared in social communication.”⁹⁸ Arguably, anime is potentially as significant a medium of artistic expression as any other, despite the fact that it is often intended for mass consumption;⁹⁹ it has as much potential to inspire expression or to provoke response as any other cinematic work. The public’s interest in the integrity of such works may be substantial, since “[t]he loss or alteration of such works would . . . be costly to the community at large, depriving that community, as it were, of a widely used part of its previously shared vocabulary.”¹⁰⁰

To the extent any members of the public, such as anime fans or casual viewers, place any value on the integrity of the anime series, a licensing agreement that leads to the loss of that integrity destroys that value. Even if neither the creators of the anime nor the dub companies have any interest in the integrity of the work, this does not mean that the mutilation of that work is costless. On the contrary, the creators and the dub companies are imposing the external costs of their bargain on at least some members of the public. The costs in the context of anime licensing are almost entirely psychic, rather than financial, in nature, but that does not make them less significant in economic terms.¹⁰¹ This is essentially the same problem, economically speaking, as that involving a polluter who enjoys the lucrative benefits of his industrial activities while exposing others to their environmental costs; the dub companies here are engaging in a sort of “artistic pollution.”¹⁰²

If the benefits generated by the licensing transaction are less than the external costs that others are forced to bear, then the transaction is inefficient because it destroys social value rather than enhances it.¹⁰³ Even if the creators and the dub companies have little interest in the external costs of their

⁹⁸ *Id.* at 106; see also Roberta Rosenthal Kwall, *The Author as Steward for “Limited Times,”* 88 B.U. L. REV. 685, 689 (2008) (book review) (“[A]uthors ‘do not create in a social vacuum’ but rather ‘are influenced by special circumstances, collective and personal social and cultural experiences, and other endless untraceable processes’” (quoting LIOR ZEMER, *THE IDEA OF AUTHORSHIP IN COPYRIGHT* 112 (2007))).

⁹⁹ One should also note the longstanding principle of American copyright law that the law ought not discriminate as to the level of protection afforded a work on the basis of its perceived artistic merit, since “[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.” *Bleistein v. Donaldson Lithographic Co.*, 188 U.S. 239, 251 (1903).

¹⁰⁰ Hansmann & Santilli, *supra* note 65, at 106.

¹⁰¹ Indeed, almost all of the benefit derived from any work of art will be psychic in nature, namely the enjoyment one derives from experiencing the work, or the prestige one captures for oneself by claiming ownership over it. The market value of an original Jackson Pollock painting, for example, is generally not attributable to its utility as a cleaning rag or as kindling.

¹⁰² See PINDYCK & RUBINFELD, *supra* note 90, at 648-50; POSNER, *supra* note 89, § 13.5, at 390-95.

¹⁰³ See PINDYCK & RUBINFELD, *supra* note 90, at 650.

licensing agreement, the law should have great interest in such costs, and should step in to correct the inefficiency by ensuring that the incentives of the creators and the dub companies are properly channeled into value-enhancing transactions.

The existence of market failure in markets for copyright entitlements is not unheard of.¹⁰⁴ The existence of market failure here makes moot any consideration of the creators' legal means of stopping dub companies from aggressively editing their work, as the creators might not be willing to exercise those options, even though they are able to do so. Correcting the market failure will instead require the law to supply a rule that accounts for the existing externalities in the anime licensing market without having a deleterious effect on the normal functioning of that market. In the fair use context, Professor Gordon has conceived a three-part test that should be satisfied before a person can claim the fair use doctrine's protection.¹⁰⁵ This Note adopts the same test to evaluate the desirability of a legal response to the problem of market failure in the anime licensing market. First, there must actually be a market failure in need of correction;¹⁰⁶ second, the use of the copyright entitlement allowed by any proposed legal rule must generate more value than the use that would be arrived at through a consensual transaction, notwithstanding the existence of market failure;¹⁰⁷ and third, any proposed rule must not substantially eliminate the copyright owners' incentives to create or disseminate the work at issue.¹⁰⁸

A. *Choosing the Form of Correction: Settling on "Fair Use"*

Though Professor Gordon focuses on explaining the fair use doctrine in particular, there are potentially many ways of correcting copyright market failures.¹⁰⁹ However, the means of correcting for market failure must be selected with particular care to the effect those means might have on the incentives of the creators and the dub companies to produce or disseminate the anime works at issue.¹¹⁰ There is a particularly strong reason to be careful when dealing with a market, like that for anime licenses, which seems to be experiencing only a partial or "intermediate" market failure,¹¹¹ wherein the market succeeds at producing anime licensing through consensual transfers, but fails insofar as those licenses underprotect the interests that third parties have in the integrity of the licensed work.¹¹² Adopting a legal response that

¹⁰⁴ See generally Gordon, *supra* note 66, at 1613-14.

¹⁰⁵ See *id.* at 1601, 1614.

¹⁰⁶ *Id.* at 1614-15.

¹⁰⁷ *Id.* at 1615-18.

¹⁰⁸ *Id.* at 1618-22.

¹⁰⁹ See *id.* at 1622-24.

¹¹⁰ See *id.* at 1619-22.

¹¹¹ See *id.* at 1618.

¹¹² See *supra* notes 1-17 and accompanying text.

underprotects the creators' or the dub companies' interests in the work could have the unintended and undesirable consequence of turning a curable intermediate market failure into a total market failure,¹¹³ throwing the proverbial baby out with the bathwater.¹¹⁴

1. Government Taxation or Regulation

One common method of curing market failure resulting from the presence of externalities is through government taxation or regulation. In the case of external benefits, the government imposes a tax on all those who enjoy the benefit and thus eliminates the problem of free-riding by optimizing the level of external benefits over that which could be achieved in the absence of government intervention.¹¹⁵ In the case of external costs, a tax levied on the activities that impose costs on others forces the actor to internalize those costs, making his harmful activities more expensive to him, in turn causing him to reduce the level or intensity of his activities to one which is socially optimal.¹¹⁶

The source of the market failure in the anime licensing market appears to derive mainly from the presence of externalities, which cause the creators and the dub companies to fail to consider the effects that their editing decisions will have on uninvolved third parties.¹¹⁷ Thus, it makes sense to consider taxation or regulation as a possible curative measure. However, powerful concerns, most of them related to the First Amendment, militate against relying on government taxation or regulation as an appropriate response to the problem. Allowing the state to sit in judgment of licensed anime series – to determine how much editing is too much, or what penalty should be imposed for particular changes – is no doubt a troubling prospect that should give everyone great pause; “[a] democratic society demands decentralized and diverse creation in the intellectual sphere; freedom from state control is essential lest freedom of expression be curtailed by fear of governmental reprisal.”¹¹⁸ In short, public regulation or taxation appears to be a cure that would be far worse than the disease. A more preferable curative measure should refrain from giving government too prominent a role in the ordinary functioning of the anime licensing market.

¹¹³ Professor Gordon distinguishes a total market failure as one which prevents a socially beneficial transaction from ever happening, such as where prohibitively high transaction costs prevent the copyright owner from negotiating a license with any potential licensees. Gordon, *supra* note 66, at 1618. An intermediate or partial case of market failure, on the other hand, is one where the failure prevents only some socially beneficial transactions from occurring. *Id.*

¹¹⁴ *See id.* at 1618-19.

¹¹⁵ *See id.* at 1611.

¹¹⁶ *See* PINDYCK & RUBINFELD, *supra* note 90, at 651-53.

¹¹⁷ *See supra* notes 1-17 and accompanying text.

¹¹⁸ Gordon, *supra* note 66, at 1612.

2. Compulsory Licensing

An alternative means of curing market failure would be to limit the power of the creators or the dub companies to veto those transactions. This goal can be achieved directly by changing the way in which the law protects the entitlement at issue, the copyright in the anime work. Like most property, copyright is protected by what Calabresi and Melamed famously described as a “property rule.”¹¹⁹ The law protects the entitlement by mandating that anyone “who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller.”¹²⁰ However, “property rules” are not the law’s only means of protecting entitlements; they may also be protected by “liability rules,” which allow another to “destroy the initial entitlement if he is willing to pay an objectively determined value for it.”¹²¹ For example, our copyright system already establishes a system of compulsory licensing that serves to prevent or cure market failures in certain contexts, such as that of non-dramatic musical recording.¹²² Compulsory licensing protects copyright entitlements with a “liability rule.” The owner of a music copyright cannot prevent a follow-on recording artist from recording a “cover” of a previously released song,¹²³ but the follow-on artist must pay a predetermined reasonable royalty.¹²⁴

In the anime licensing context, the replacement of the usual “property rule” protecting the copyright in the anime work with a “liability rule,” such as a compulsory licensing scheme, has the potential to correct the market failure with respect to editing rights while also preserving economic incentives to create or disseminate. A compulsory licensing scheme could ensure that a socially valuable use of the anime works, such as a dub that preserves the integrity of the original, could not be blocked by the preexisting licensing

¹¹⁹ See generally Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) (discussing how the law seeks to solve economic problems by providing different levels of protection for certain legal entitlements).

¹²⁰ *Id.* at 1092. Property rules allow “each of the parties [to] say how much the entitlement is worth to him, and gives the seller a veto if the buyer does not offer enough.” *Id.*

¹²¹ *Id.* Calabresi and Melamed also discuss the option of protecting entitlements by making them inalienable, or imposing a legal rule that forbids the transfer or destruction of the entitlement under any circumstances, notwithstanding the existence of consent. *Id.* at 1092-93. However, inalienability would seem a poor fit for the present context, for the obvious reason that a rule of inalienability does not correct market failure but prohibits the existence of a market. This result is contrary to a fundamental goal of our copyright system: to facilitate the efficient exploitation of copyrights through consensual market transactions. See, e.g., 17 U.S.C. § 201(d) (2000) (providing for transferability and alienability of copyright ownership); Gordon, *supra* note 66, at 1612-13.

¹²² See 17 U.S.C. § 115.

¹²³ *Id.* § 115(a).

¹²⁴ *Id.* § 115(c).

agreement. In addition, compulsory licensing would ensure reasonable royalties are paid to the creators or to the dub companies so that they will have an incentive to continue their activities.¹²⁵ The compensation awarded under a compulsory licensing regime “might carry far less economic and social costs than would rules that force a choice between forbidding all involuntary transfers or leaving involuntary transferors without a remedy.”¹²⁶

However, imposing a compulsory licensing regime in the context of anime licensing is highly undesirable for several reasons. First, for reasons mostly related to institutional competence, compulsory licensing has usually been adopted as a legislative solution rather than a judicial one.¹²⁷ As many have observed, however, the legislative process, especially in the copyright context, is one typically dominated by major players in the copyright industries;¹²⁸ in the past, Congress has thus tended to have more solicitude for the needs and interests of powerful copyright owners than for users.¹²⁹ Given this context, it seems unlikely that, even if Congress managed to adopt a compulsory licensing regime in this and related contexts, the regime would sufficiently account for the interests of viewers and fans of anime works. Although compulsory licensing in theory might seem an attractive means of curing market failure, the practical realities of the legislative process counsel differently.

An additional reason to reject compulsory licensing as a curative measure has to do with the trademark implications such a regime would have for the creators, dub companies, and viewers. An unavoidable consequence of enacting a compulsory licensing regime would be that different adapted versions of the same series would be distributed in the same markets; indeed, the main point of the compulsory licensing system is to prevent one licensee from “locking up” the work.¹³⁰ The problem is that anime works consist of a whole host of elements that are or may be protected not just by copyright law, but also by trademark law as well: the title, the series logo, the names and likenesses of the main characters, etc.¹³¹ In allowing multiple dubbed versions

¹²⁵ See Gordon, *supra* note 66, at 1623.

¹²⁶ *Id.*

¹²⁷ *Id.* at 1623-24.

¹²⁸ See *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 743 (1989) (citing *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 159 (1985)). See generally Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 *CORNELL L. REV.* 857 (1987).

¹²⁹ See Jessica D. Litman, *Copyright Legislation and Technological Change*, 68 *OR. L. REV.* 257, 311-12 (1989); see also Litman, *supra* note 128, at 879.

¹³⁰ Cf. *Dastar v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 37 (2003).

¹³¹ The title of a cinematic work is protectable under trademark law when it has acquired “secondary meaning,” or has become sufficiently well-known such that consumers have come to associate the title with a particular author or producer. See, e.g., *Warner Bros. Pictures, Inc. v. Majestic Pictures, Inc.*, 70 F.2d 310, 311 (2d Cir. 1934). This is typically less of an issue in the music context because the analogous elements of the “covered” song, such as the title, the lyrics, or the melody, are not commonly thought to have trademark or

to come to the same market (e.g., “4KIDS PRESENTS ONE PIECE,” “KAIZOKU FANSUBS PRESENTS ONE PIECE,” etc.), the compulsory licensing regime would invariably lead to substantial viewer confusion.¹³² The creators’ marks would be identical in each version, each version would be distributed through the same marketing channels, and many viewers would be unlikely to pay attention to which particular producer was responsible for the adaptation they were viewing.¹³³

Even worse for the creators, the compulsory licensing system would leave them with no means of stopping unauthorized use of their trademarks by compulsory licensees, and with little hope of maintaining quality control over the licensees’ products. A trademark owner who fails to police her mark or who does not exercise sufficiently reasonable control over the quality of the products produced by other users will typically lose her rights in the mark, since such failure “may cause the mark to lose its significance as a symbol of equal quality.”¹³⁴ The fact that, in the context of a compulsory licensing scheme, the creators would be legally unable to prevent dub companies or fansubbers from using their marks or to control the quality of the adaptations would probably not prevent a forfeiture of trademark rights, since the “basic policy of the trademark law – the prevention of deception of the buying public” – is fundamentally consumer-focused, rather than producer-focused.¹³⁵

A compulsory licensing regime would likely render the creator’s marks generic, as the compulsory license would effectively become a license to engage in passing off. Generic terms or symbols, or those that merely identify the general type of product being sold, are not considered distinctive and cannot be protected under trademark law.¹³⁶ A term or symbol may be generic at the time it is adopted (e.g., BEER for beer), or it may begin its life as a

brand significance in the minds of consumers. *See, e.g.*, *Mattel, Inc. v. MCA Records*, 296 F.3d 894, 901-02 (9th Cir. 2002) (finding that the use of the word “Barbie” in a song title did not infringe upon plaintiff’s trademark).

¹³² Liability for trademark infringement generally depends on whether it is likely that consumers will be confused into mistaking the mark of the defendant for that of the plaintiff. *See* 15 U.S.C. §§ 1114(1), 1125(a) (2000).

¹³³ The existence of a likelihood of confusion is typically guided by a multi-factor test. Although each of the federal Courts of Appeals has its own multi-factor test, they are all essentially similar. The Ninth Circuit’s *Sleekcraft* test is a typical example, and considers:

1. [S]trength of the [plaintiff’s] mark;
2. proximity of the goods;
3. similarity of the marks;
4. evidence of actual confusion;
5. marketing channels used;
6. type of goods and the degree of care likely to be exercised by the purchaser;
7. defendant’s intent in selecting the mark; and
8. likelihood of expansion of the [plaintiff’s] product lines.

AMF, Inc. v. Sleekcraft Boats, 599 F.2d 341, 348-49 (9th Cir. 1979).

¹³⁴ 3 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 17:6 (4th ed. 2007); *see also* *Dawn Donut Co., v. Hart’s Food Stores, Inc.*, 267 F.2d 358, 367 (2d Cir. 1959).

¹³⁵ MCCARTHY, *supra* note 134, § 17:5.

¹³⁶ *See* *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9 (2d Cir. 1976).

protected mark but become generic over time as the public comes to view the term or symbol, not as identifying the source of the product, but rather as identifying what the product is.¹³⁷ This process is alternatively known as “genericism” or “genericide,” and may happen even to the strongest of trademarks, sometimes in spite of the trademark owner’s best efforts to police and control its use.¹³⁸ Genericism is a likely consequence of a compulsory licensing regime in anime, for that system would result in multiple versions of the same anime series simultaneously being offered to consumers in the same market. Over time, one would expect the creators’ marks in the series to lose their brand significance; those marks would only come to identify the original work that had been adapted, but not any particular source for the adaptation. The potential destruction of the creators’ valuable trademark rights would strongly undercut the creators’ incentives to disseminate their work in the United States, which is a key goal of copyright law. Therefore, a compulsory licensing scheme would not be a desirable means of curing market failure, because it would fail the substantial injury prong of Professor Gordon’s three-part test.¹³⁹

3. Fair Use

Fair use presents a third means of curing the partial failure of the anime licensing market, and one which shows more promise than either of the other alternatives examined thus far. As Professor Gordon has explained, “[f]air use is one label courts use when they approve a user’s departure from the [copyright] market,” finding no liability from what would otherwise be considered an infringing activity.¹⁴⁰ The current statutory definition describes fair use in reference to four main factors:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.¹⁴¹

¹³⁷ See, e.g., *Bayer Co. v. United Drug Co.*, 272 F. 505, 512 (S.D.N.Y. 1921) (holding that ASPIRIN had become a generic term for headache medicine).

¹³⁸ MCCARTHY, *supra* note 134, § 17:8.

¹³⁹ See Gordon, *supra* note 66, at 1618-22.

¹⁴⁰ *Id.* at 1614.

¹⁴¹ 17 U.S.C. § 107 (2000). Section 107 prefaces the four factors by providing paradigmatic examples of the fair use of a copyrighted work, which include reproduction “for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research.” *Id.*

A straightforward application of these factors to determine whether a fansubber should be able to make her own adaptation of an anime series when the authorized dub fails to preserve the integrity of the original almost certainly results in a finding of no fair use, at least as the doctrine has come to be understood by most courts. Applying the first factor, a fansubber's use might sometimes be a nonprofit one,¹⁴² but the purpose of her use is usually to provide entertainment, rather than education. Although there might be a plausible argument that the fansubber's purpose is to educate viewers by facilitating exposure to another culture, this argument stands a slim chance of being accepted, especially since the fansubbers' use of the original material is not "transformative."¹⁴³ The fansubber merely attempts to produce a complete and accurate translation of the creator's original expression; her use does not add anything new to the original expression, nor does it alter the expression's meaning or message. Rather, her use merely supersedes the original for an English-speaking audience.¹⁴⁴ Thus, the first factor would weigh against the fansubber, though it is difficult to be sure.

Unlike the first factor, however, the second factor, "the nature of the copyrighted work," clearly favors the creators and the dub company, since the anime work is expressive, rather than factual in nature, and thus is said to enjoy relatively "thick," or robust, copyright protection.¹⁴⁵ Likewise, the third factor, focusing on the amount of the copyrighted work that is being used, also weighs against the fansubber, since the whole point of her activities is to use all of the audio and visual content of the original work, merely adding subtitles and translators' notes to the original material. Ironically, the fair use doctrine seems to penalize fansubbers for working to preserve the public interest in the integrity of the original work, even though, as the foregoing market failure analysis demonstrates, that interest theoretically *justifies* extending the protection of the fair use doctrine to their activities. Finally, the fourth factor, dealing with fair use's effect on the market, also weighs against the fansubbers, since the continued production and distribution of fansubs has a significant and harmful effect on the U.S. market for the English-language adaptation of the

¹⁴² Fansubs are usually distributed for free; if any money changes hands at all, which is increasingly uncommon in the age of the Internet, it is almost always solely to reimburse necessary expenses. See Leonard, *supra* note 14, at 197, 218-21; *supra* notes 31-36 and accompanying text.

¹⁴³ Although it is often noted that the defendant's lack of "transformative" purpose does not foreclose the fair use defense, "the more transformative the new work, the less will be the significance of other factors . . . that may weigh against a finding of fair use." Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

¹⁴⁴ See *id.* ("The central purpose of this investigation is to see . . . whether the new work merely 'supersede[s] the objects' of the original creation." (quoting Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841))); Castle Rock Entm't v. Carol Publ'g Group, Inc., 150 F.3d 132, 142-43 (2d Cir. 1998).

¹⁴⁵ See Harper & Row, Publishers v. Nation Enters., 471 U.S. 539, 563 (1985).

anime work. The fansubbers are directly competing with the authorized licensed version produced by the dub company.¹⁴⁶

It appears, then, that under the conventional understanding of the fair use doctrine, fansubbers acting to preserve the public's integrity interest in the face of anime licensing market failure would receive no protection. The result is especially perverse considering that some of the very market failure conditions that theoretically justify fair use on economic grounds weigh against a finding of fair use under current law. However, this Note argues that the best available cure for the failure of the anime licensing market is a form of fair use, though it is clear the traditional understanding or application of that doctrine will require some modification to achieve the optimal result. The next Section advances and defends a proposal for a new categorical rule that could be incorporated into the existing fair use doctrine.

B. *A Proposal for a New "Fair Use" Rule to Preserve Integrity in Adaptation*

As Professor Gordon has cautioned, the decision to recognize a use as fair, or to refuse to protect what would otherwise be a perfectly good copyright entitlement is not a decision to be made lightly.¹⁴⁷ Traditionally, a finding of fair use translates into a refusal to protect the copyright owner's entitlement in certain circumstances where a court is convinced such refusal is justified.¹⁴⁸ Granting competing dub companies or fansubbers blanket immunity from infringement liability whenever there is a market failure resulting in a licensing agreement that fails to protect the integrity of the licensed work would likely present the same dangers posed by a compulsory licensing regime,¹⁴⁹ only the creators would receive no compensation at all.

Thus, this Note argues that the traditional application of the fair use doctrine must be refined and adapted to the particular needs of the anime licensing market. The goal, again, is to channel the incentives of the creators and the dub companies, such that they are forced to take into account the interests of third parties in preserving the integrity of the licensed works, thereby accounting for all of the externalities. The following proposed rule should be adequate to achieve that goal:

¹⁴⁶ See *Campbell*, 510 U.S. at 590 (stating that the fourth factor requires the court to look at the market effect that would arise from widespread use of the work and not just the actions of the particular defendant); *Harper & Row*, 471 U.S. at 568.

¹⁴⁷ See Gordon, *supra* note 66, at 1618-19.

¹⁴⁸ See *id.* at 1602.

¹⁴⁹ See discussion *supra* notes 130-39 and accompanying text.

**Limitations on Exclusive Rights: Fair Use to Preserve the Integrity of
Foreign Audiovisual Works Licensed for U.S. Adaptation**

(a) Where a foreign audiovisual work has been exclusively licensed for adaptation and distribution in the United States, it shall not be an infringement of copyright for a person to create and distribute a competing adaptation if the adaptation of the exclusive licensee fails to conform to any of the following criteria:

(1) The content of the adaptation created by the exclusive licensee does not differ in any way from the original foreign version of the work with respect to either its visual or audio components.

(2) In cases where the adaptation involves the translation of the foreign work into English, the connotative or denotative meaning of any speech or dialog contained within the original work has not been materially altered in the adapted version prepared and distributed by the exclusive licensee.

(b) The defense provided in subsection (a) shall not be available if the exclusive licensee makes available and distributes, in any form, an adaptation of the foreign work that meets the standards prescribed in subsections (a)(1) and (a)(2) of this section.

(c) The defense provided in subsection (a) shall not be available to any person if that person's competing adaptation fails to meet the standards prescribed in subsections (a)(1) and (a)(2) of this section.

(d) A person wishing to rely upon the defense provided in subsection (a) may bring an action in the appropriate United States District Court seeking a declaratory judgment that she is entitled to the defense provided in subsection (a), and that she would not infringe copyright in the exclusively licensed work by producing a competing adaptation that meets the standards prescribed in subsections (a)(1) and (a)(2) of this section.

1. Incorporating the Rule into U.S. Law

One should inquire into the means by which the proposed rule could or should be incorporated into U.S. copyright law. One option would be for federal judges to adopt the rule as a matter of federal common law. This avenue might strike some as strange. Admittedly, the preceding proposal does not much resemble the fair use doctrine as it is currently codified in federal statutory or decisional law.¹⁵⁰ After all, while the proposal seems to take the form of a relatively rigid rule, the fair use doctrine has traditionally been described as “an equitable rule of reason, [where] no generally applicable definition is possible, and each case raising the question must be decided on its

¹⁵⁰ See 17 U.S.C. §107 (2000).

own facts.”¹⁵¹ Do federal judges even have the power to so radically depart from a prior doctrine based on a federal statute? The answer is a resounding “yes,” for the text¹⁵² and legislative history¹⁵³ of the fair use statute make plain the authority of federal judges to mold and shape the contours of the fair use doctrine as a matter of common law. In enacting the current statutory definition of fair use, Congress did not lay out any rigid test, but rather chose to give statutory recognition to antecedent federal common law, leaving it to the federal courts to continue illuminating the contours of the fair use doctrine.¹⁵⁴

The statutory text also demonstrates that Congress intended to delegate lawmaking authority to courts in fair use cases. Section 107 introduces its lists of fair use purposes and factors with the phrases “such as” and “shall include,” respectively.¹⁵⁵ These terms are explicitly defined in the Copyright Act, which expressly provides that “[t]he terms ‘including’ and ‘such as’ are illustrative and not limitative.”¹⁵⁶ That definition, combined with the Copyright Act’s legislative history,¹⁵⁷ clearly shows that Congress did not intend for the lists of purposes and factors provided in section 107 to be exhaustive. Congress has made plain that the statute lists only some of the factors that are important to the fair use analysis and only some of the purposes that suggest a use is fair, but not all of them. It falls to judges to determine whether to consider other factors that seem relevant to the fair use inquiry in any particular case, and previous courts have not been afraid to consider extra-textual factors in their analysis.¹⁵⁸ Thus, there is no reason why the courts could not adopt the proposed rule, considering as additional factors the presence of market failure and the public interest in preserving the integrity of the original version where the anime is adapted for U.S. consumption.¹⁵⁹ The proposed rule could act as persuasive authority to guide their analysis in those cases.

¹⁵¹ H.R. REP. NO. 94-1476, at 65 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5679. Given the highly fact-specific and often indeterminate nature of the fair use inquiry, it comes as little surprise that judges in copyright cases have routinely described the doctrine as “the most troublesome in the whole law of copyright.” *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939); COHEN ET AL., *supra* note 58, at 530.

¹⁵² *See* discussion *infra* notes 155-56 and accompanying text.

¹⁵³ H.R. Rep. No. 94-1476, at 66, *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5680.

¹⁵⁴ *Id.* (“Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.”).

¹⁵⁵ 17 U.S.C. § 107 (2000).

¹⁵⁶ *Id.* § 101.

¹⁵⁷ H.R. Rep. No. 94-1476, at 65-66, *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5679-80.

¹⁵⁸ *See, e.g., Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 562-63 (1985) (finding that defendant’s bad faith or inequitable conduct in obtaining the copyrighted work weighed against a finding of fair use).

¹⁵⁹ Arguably, the courts could not ignore the fair use factors listed in the text, since the statute commands that its analysis “shall include” those factors as considerations. 17 U.S.C. § 107 (emphasis added). However, there is generally no consensus regarding “how much

A second option would be for Congress to formally enact the proposed rule into federal copyright law as a new statutory provision, perhaps section 107A of the Copyright Act. Though unlikely to happen (due partly to the disproportionate influence of copyright owners discussed earlier)¹⁶⁰ and probably unnecessary, legislative adoption would have significant advantages over judicial adoption. Enshrining the proposed rule in the text of the Copyright Act would clearly sanction the policy of recognizing fair use in these particular market failure situations, thereby assuaging any remaining concerns that some judges might have regarding their authority to recognize fair use where the text of section 107 seems to suggest it should not be allowed. It would also mandate that such fair use be allowed notwithstanding disagreements between different judges over the policies that underlie the proposed rule.

2. The Benefits of the Rule: Making the Anime Licensing Market Work

However the proposed rule is incorporated into existing law, it should be adequate to at least mitigate the failure of the anime licensing market to produce dubs that sufficiently respect the public's interest in the integrity of the original anime series. The rule channels the incentives of the anime creators and dub companies, forcing them to take account, albeit indirectly, of the psychic external costs that the excessive editing of an anime series may impose on viewers and fans who are not parties to the transaction. The rule functions by creating a risk of nonenforcement for the party who acquires the legal entitlement to the anime work being bargained over in the licensing transaction. Under the proposed rule, there is now a nonzero chance that some person, such as a fansubber dissatisfied with the way in which the dub company has edited the original source material, will seek a judicial declaration that she is entitled to create her own directly competing, more faithful adaptation, to which neither the dub company nor the creators could object. The likelihood of such a lawsuit will no doubt increase along with the dissatisfaction of viewers and fans, and the latter will probably correlate with the extent of the editorial liberties the dub company assumes for itself under the licensing agreement.

This risk will cause the parties to factor a risk premium into the transaction, making the transaction less likely to occur overall.¹⁶¹ On the one hand, the dub companies will see the entitlement that they wish to buy as less valuable, on account of the risk that the entitlement might not be enforceable against potential competitors. Thus, the dub companies will demand that the royalties

weight should be given to any one of the four factors, what additional factors should be considered, or whether any one of the factors is a sine qua non for a finding of fair use." Gordon, *supra* note 66, at 1604.

¹⁶⁰ See discussion *supra* notes 127-29 and accompanying text.

¹⁶¹ See PINDYCK & RUBINFELD, *supra* note 90, at 559-61.

they pay for the entitlement be discounted accordingly.¹⁶² On the other hand, the risk that the dub company may be left with an unenforceable entitlement makes the royalty revenue stream to the creators that much more uncertain and the likely response of the creators would be to try to get the dub company to pay a higher royalty as a risk premium.¹⁶³ Thus, the bargaining incentives of both the creators and the dub companies are shifted in opposite directions. In this respect, the proposed rule would seem to make anime licensing transactions less likely to happen overall by threatening the incentives that creators and dub companies would otherwise have to disseminate their works in the United States.¹⁶⁴

However, it is at this point that the proposed rule's safe harbor provisions come into play. The rule provides the dub companies with an easy way out, a means of restoring the certainty of the entitlement that was originally threatened. The safe harbor provides the dub companies with a strong incentive to release a dub that preserves the integrity of the source material to foreclose any potential fair use claims that could make their entitlement worthless. The dub companies may release multiple versions of the same anime, with different levels of editing aimed at different markets; only one version need comply with the standards provided in the rule for the dub company to enjoy the safe harbor. The proposed rule not only forces the dub companies and the creators to take account of the psychic harm their actions might inflict on fans, but also mandates that the dub companies' entitlements be scrupulously protected where they have accounted for those costs and acted accordingly.

The proposed rule also makes it quite easy for the dub companies to take advantage of the safe harbors.¹⁶⁵ To claim the safe harbor, all the dub company must do is release an uncut version of the original anime series in some form. It need not be shown on broadcast or cable television, where regulatory and market forces might make such a release infeasible.¹⁶⁶ It also need not be the only version released on home video. The dub company might, for example, decide to release both an edited version and an uncut version, and can price discriminate such that the latter version (which might appeal to fewer people) would be more expensive for consumers to

¹⁶² *See id.*

¹⁶³ *See id.*

¹⁶⁴ This is essentially the result that would occur if a more traditional version of the fair use doctrine were applied to this situation. A blanket grant of immunity from infringement liability would destroy the incentives the copyright system seeks to protect. *See Gordon, supra* note 66, at 1618-19. That is why it is so crucial to modify the fair use doctrine so as to avoid destroying all incentives to enter into anime licensing transactions. Such modifications are explored below.

¹⁶⁵ *Id.* at 1615-18.

¹⁶⁶ *See supra* notes 1-17 and accompanying text.

purchase.¹⁶⁷ The dub company pursuing this strategy would be able to maximize expected revenues from home video sales while still making an uncut version of the anime series available in the U.S. market.¹⁶⁸

One drawback to this strategy is that dub companies might find it prohibitively expensive at the margin to create two versions of a dub with different levels of editing. There might be a potential danger that the rule's costs will push dub companies out of the business entirely, destroying the anime licensing market instead of perfecting it. However, even without pursuing a price discrimination strategy, at least some dub companies, such as FUNimation, appear to do quite well by specializing primarily in unedited home video releases,¹⁶⁹ while distributing unedited or barely-edited versions of their most popular dubs on cable late at night.¹⁷⁰ It is therefore unlikely that the proposed rule will have the cataclysmic consequences for the anime licensing business in the United States that some might fear. The rule would make certain avenues of potential distribution (i.e., those which would require greater censorship)¹⁷¹ less attractive to dub companies, but other viable marketing channels for anime would continue to exist, and the anime released through these channels would be more likely to stay true to the original. Indeed, this approach would seem to be in the dub companies' and the creators' best economic interests. Releasing a dubbed version that is true to the original allows the dub companies and the creators to benefit from the

¹⁶⁷ See PINDYCK & RUBINFELD, *supra* note 90, at 376-78, 381-86; *cf.* POSNER, *supra* note 89, § 9.5, at 283-84.

¹⁶⁸ The availability of price discrimination between the two versions would generally facilitate an efficient anime licensing market. The dub companies would not be forced to produce an uncut dub where the public does not demand it, but would be forced to give those consumers who demand nothing less a chance to prove it by paying a premium. See PINDYCK & RUBINFELD, *supra* note 90, at 381-86; *cf.* POSNER, *supra* note 89, § 9.5, at 283-84.

¹⁶⁹ FUNimation was acquired in 2005 by the Navarre Corporation, a media and entertainment conglomerate, so it is somewhat hard to tell exactly how good business has been since their finances were merged with Navarre's. Some indications, however, can be seen in Navarre's most recent annual 10-K report to the Securities Exchange Commission. See Navarre Corp., Annual Report (Form 10-K), at 35 (June 12, 2007) ("FUNimation contributed \$55.0 million and \$37.2 million during fiscal 2007 and 2006, respectively The decrease in net sales was primarily due to a softness in net sales due to a decline in certain PC software and DVD categories, offset by strong anime home video net sales"). Prior to its acquisition, FUNimation appeared to be a rather profitable venture: in 2004, FUNimation reported net income of almost \$30 million, and Navarre paid well over \$100 million to acquire it in 2005. *Acquisition of FUNimation Productions Ltd.*, Mar. 26, 2008, available at MERGERSTAT M & A DATABASE, Deal No. 324941, <https://www.mergerstat.com/newsite/>.

¹⁷⁰ See *supra* note 86 and accompanying text; see also FUNimation Entertainment, What's on TV, http://www.funimation.com/f_index.cfm?page=tv (last visited Apr. 22, 2008).

¹⁷¹ See *supra* notes 73-86 and accompanying text.

“proselytization commons” created by U.S. fans of the original version, who have been largely responsible for the creation of a market for anime in the United States in the first place.¹⁷² Conversely, the release of a heavily-edited dub, such as 4Kids’s *One Piece*, risks alienating this same devoted core of fans, which may ultimately contribute to the failure of the dub in the U.S. market.¹⁷³

The proposed rule also limits the availability of the fair use defense so as to ensure that the person claiming the defense, such as a fansubber, will actually be likely to produce an adaptation that preserves the integrity of the original. If all the fansubber intends to do is make exactly the same cuts that the dub company would make under its license agreement, then the fansubber cannot claim the defense, since allowing such use would do nothing to increase social value.

Moreover, the proposed rule should be relatively easy and inexpensive for a court to administer. In most cases, there should be no need for judicial administration at all. Much of the benefit of the rule derives from the way it shapes the incentives of the dub companies, encouraging them to preserve the integrity of the series and respect the public interest therein. To the extent that the dub companies’ behavior is affected, the rule rewards them with a safe harbor that precludes a finding of fair use. The availability of this safe harbor makes it highly unlikely that an action seeking a declaration of fair use will ever be brought, since the fansubber is almost certain to lose. Furthermore, even in the rare case that does come to court, the test which the proposed rule requires judges to apply is an objective one that can be decided on the basis of empirical evidence with relative ease.¹⁷⁴ The court need only compare the two filmstrips and soundtracks and see whether there is any variation (excluding certain changes like the translation of Japanese signs or the addition of subtitled translations); if so, then the analysis ends and fair use should be recognized. If there is no variation, then the quality of the translation must be examined. Admittedly, this is a more difficult inquiry, but certainly not impossible: the court will probably be confronted with competing expert testimony from Japanese linguists, and will have to decide which expert, if

¹⁷² See Leonard, *supra* note 14, at 211-17.

¹⁷³ See Justin Sevakis, *Why Dub-Haters Are Killing Anime*, ANIME NEWS NETWORK, Nov. 9, 1998, <http://www.animenewsnetwork.com/editorial/1998-11-09> (“There is probably no plague more infectious in the world of American anime fandom than that of hating dubs with a passion. It’s not hard to see why: most dubs sound horrible, with bad acting, direction, and sloppy rewrites.”). Another, related reason why the heavily edited dub may fail in the U.S. market might be that a large part of what makes most anime attractive to viewers is the fact that it is markedly different from most other forms of Western programming; to the extent that dub companies, like 4Kids, strive to remove this distinctiveness, they risk eliminating the special cachet that made the series appealing in the first place. See NAPIER, *supra* note 29, at 9-10.

¹⁷⁴ A related advantage to the rule’s objectivity is that it allows courts to avoid running afoul of copyright law’s longstanding non-discrimination principle. See *supra* note 99.

any, to credit.¹⁷⁵ This task is not really any different or more challenging than those that confront District Judges on a regular basis.

CONCLUSION

This Note has suggested that the failure of anime creators to insist on the preservation of their works' integrity when licensing adaptation and distribution rights to U.S. dub companies is symptomatic of market failure. To the extent that third parties, mainly consisting of fans and viewers, have an interest in the integrity of the anime series, that interest is not considered in the ordinary licensing transaction. Thus, where the dub companies fail to preserve that integrity, their licensing arrangements with the Japanese creators may ultimately impose a psychic cost on third parties, resulting in licensing agreements that destroy value rather than create it. To prevent this market failure, this Note has advanced a modified form of fair use protection for fansubbers, which should block socially harmful licensing transactions without discouraging socially valuable transactions.

A few brief observations should be made in closing. First, the calls of many commentators for stronger legal protections for moral rights may be, at least in part, misdirected.¹⁷⁶ Though it may indeed be true that U.S. law currently lacks robust protection for moral rights, it is also true that authors may lack sufficient incentive to protect the integrity of their works even though they have adequate legal means of doing so, and that this may sometimes be a significant social problem. Further inquiry should be conducted, following in the footsteps of Professors Hansmann and Santilli,¹⁷⁷ into exploring the normative reasons why the law should protect moral rights at all, and whose interests – the author's or the public's – the recognition of those rights is supposed to vindicate. If there is a public interest in protecting the integrity of the work, and if the author's interest diverges from the public's interest, granting the author greater moral rights will not solve the resulting social problem, and may even exacerbate it.¹⁷⁸ It may be necessary in these cases to provide non-authors with their own legal rights, like fair use, in order to give proper weight to their interests that might conflict with those of the author. In such cases, the proper balance between the author's interests and the public interest must be struck, and conflicts between these interests must be resolved.

The second observation relates to the utility of market failure theory as an analytical framework and the corrective potential of fair use. As Professor Gordon has demonstrated, failures in the market for copyright entitlements often block transactions that, by putting the entitlement to its highest and best

¹⁷⁵ The court could also consult its own experts if it doubts the credibility of those which the litigants have offered. *See* FED. R. EVID. 706(a).

¹⁷⁶ *See, e.g.,* Jane C. Ginsburg, *The Right to Claim Authorship in U.S. Copyright and Trademarks Law*, 41 HOUS. L. REV. 263, 281-82 (2004); Landau, *supra* note 61, at 314.

¹⁷⁷ *See generally* Hansmann & Santilli, *supra* note 65.

¹⁷⁸ *See id.* at 106.

use, would otherwise increase social value; allowing fair use is a means of correcting for this market failure.¹⁷⁹ However, the converse may also be true. There may be failures in copyright markets – caused, in the case of anime, by the presence of negative externalities – that result not in the mere failure to generate value, but in the creation of actual harm. Here, the application of fair use as a corrective measure is in some ways a more nettlesome problem, because the purpose of applying fair use would be to *prevent* certain transactions from occurring. In so doing, the law runs a substantial risk of destroying the market entirely if it paints with too broad a brush.¹⁸⁰ If it is carefully calibrated, fair use might be able to solve this kind of market failure as well, without undercutting incentives too much.

Hopefully this Note's proposed rule will contribute to a more efficient anime licensing market, one in which the dub companies and the creators of anime will fully account for the costs their licensing transactions will impose on others. The rule should also prove largely beneficial for the creators and dub companies, as well, by steering them away from licensing arrangements that are likely to fail in the market anyway. The rule should save these companies the need to undergo wasteful re-licensing transactions, as Toei has done on at least two occasions now. In addition, the rule would do much to clarify (and legitimate) the precarious position of U.S. fansubbers vis-à-vis the anime industry.¹⁸¹ Even though many have credited fansubbers with the creation of a U.S. market for anime, fansubbers and those who patronize them maintain an uncomfortable relationship with both dub companies and the Japanese creators.¹⁸² On the one hand, the fansubbers and fansub viewers are devoted fans crucial to anime's success in the U.S. market; on the other hand, these people are also serial copyright infringers whose activities threaten to seriously injure that market. The proposed rule would carve out a sphere of legitimate activity for fansubbers in the U.S.-Japanese anime industry. The fansubbers would be able to play a salutary role in ensuring that creators and dub companies remain ever-cognizant of the U.S. fans' interests in enjoying the same experience that anime series have brought to Japanese viewers. Thus, the new regime would allow fansubbers to provide access to that experience in the unlikely event that the creators or the dub companies were to stray.

Finally, this Note contributes to an important discourse in copyright law regarding the interplay between copyright owners and the public. In general, the law of copyright has always attempted to negotiate a precarious balance between the interests of authors in the ownership of their works, and the public interest in the use and enjoyment of those works. Usually, these interests are compatible insofar as the protection of the author's ownership interest benefits the public by increasing the quantity and quality of creative works available for

¹⁷⁹ See Gordon, *supra* note 66, at 1607, 1613-14.

¹⁸⁰ See *id.* at 1618-19.

¹⁸¹ See discussion *supra* Part I.

¹⁸² See Leonard, *supra* note 14, at 216-17.

public consumption. However, these interests often diverge, and when they do, copyright law must step in and strike the balance more or less in favor of one of these competing interests. This Note has discussed an example of this divergence which occurs in a global context, where copyright may create an additional barrier – as if there were not enough – that prevents persons in one country from accessing the same work that others enjoy in another country. The proposal advanced here may be able to resolve this dilemma by ensuring not only that the author's ownership interest and incentives to produce are protected, but also that the work is disseminated on equal terms as far as content is concerned, regardless of the audience's location. The proposal advances a core purpose of copyright law and of the fair use doctrine by recognizing a right of public access to foreign works in their original form where there is no other practicable legal means of obtaining that access. It strikes the balance of competing interests in favor of public access, rather than the author's right to exclude, on the ground that the author's exclusive rights are not ends in themselves or unqualified moral goods, but merely a means of ensuring that there are more creative works available for public enjoyment. The decision to grant the public an explicit right of access to the author's work, even in the limited circumstances proposed here, will no doubt be quite controversial. That controversy is most welcome. As previously discussed with respect to moral rights, it is a crucially important question whether the public's interest in access should entitle its members to explicit legal rights that override those of the author. These questions should be further debated to the end that the proper balance between the author's interest and the public interest might be achieved.