

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

Yoshimi M. Pelc*

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I. INTRODUCTION

The film industry as a whole is without question an important

initiation.⁷ Although one might think that copyright holders would welcome such a law, it created a unique problem within Japan's anime and manga industry. It has been argued that the manner by which the law defines the scope of piracy could affect the creation of parody

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

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

II. JAPANESE PARODY DEEMED AS COPYRIGHT INFRINGEMENT IN JAPAN

A. The Importance of Parody for the Japanese Culture

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

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

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

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

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

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

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

25. Hsiao-Ping Chen, *The Significance of Manga in the Identity-Construction of Young American Adults: A Lacanian Approach*, MARILYN ZURMUEHLIN WORKING PAPERS IN ART EDUC., issue 1 art. 2, 2006, see also Minoru Matsutani, "Manga: Heart of Pop Culture," JAPAN TIMES (May 26, 2009), http://www.japantimes.co.jp/news/2009/05/26/reference/manga-heart-of-pop-culture/#.VIUc_n4vfIU.

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

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

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

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

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

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

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

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

Despite these similarities, there are also dissimilarities between the JCA and ACA. Most notable and relevant to the creation of parodies is that the JCA does not include a general exception to copyright owners' exclusive rights, while the ACA's fair use provision offers flexible defenses to certain copying.⁴⁵ Instead, the JCA enlists a limited "laundry list" of permitted copying,⁴⁶ including copying for private use⁴⁷ and quotations for news reporting, criticism, or research.⁴⁸ These provisions are narrowly interpreted by Japanese courts, and thus, far from comparable to the American fair use doctrine.⁴⁹ Moreover, the JCA contains protection for the moral rights of the original author, including the right to preserve the work's integrity,⁵⁰ whereas American law limits moral rights protection to narrow categories of visual arts.⁵¹ As discussed *infra* Part IV, these dissimilarities should be considered for "parody" protection.

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

42. See Japanese Copyright Law, arts. 2-(1)(i), 10-(1)(vii) (providing that JCA protects pro-J -5W 2or ur

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

C. Dojinshi and Tolerated Uses

Despite the obvious copyright infringement issues associated with

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

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

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

68. TPP Agreement, art. 18.77.

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

III. OVERVIEW OF THE U.S. FAIR USE ANALYSIS

Even without regard to the TPP agreement, Japan is still in need of broader exceptions to copyright protection because current Japanese copyright law does not protect political speech in the form of parody, as was the case with *Mad Amanō*.⁷⁰ Some commentators argue that adopting the United Kingdom's fair dealing doctrine⁷¹ is the better option due to both its similarity to U.S. fair use doctrine and the scope of the doctrine being limited to certain categories of works.⁷² However, implementing the U.S. fair use doctrine would be more appropriate than using the U.K.'s fair dealing doctrine because the former better serves the policy goal of copyright.⁷³ Part III of this article describes the current state of the U.S. fair use doctrine, and Part IV explains how Japan can achieve its copyright policy goal through adoption of a U.S.-modeled fair use exception.

Under Section 107 of the U.S. Copyright Act, certain uses of copyrighted materials are permitted as fair use.⁷⁴ To determine whether an unauthorized appropriation of a copyrighted work constitutes fair use, courts analyze each case on a case-by-case basis⁷⁵ under four statutory factors:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Additionally, the Second Circuit court's analysis is particularly instructive to transformativeness analysis involving parodic works or

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

B. The Nature of the Original Work

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

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

However, it is important to note that because the significance of this factor tends to be affected by the other factors, especially the first factor¹¹⁵, courts generally give little weight to this second factor in their overall fair use analysis.¹¹⁶ This is especially true in cases in-

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

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

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

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

110. 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT

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

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

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

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

130. *Id.* at 546-49.

131. *Id.* at 548-49.

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

133. *Id.*

134. *Id.*

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

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

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

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

IV. HOW JAPAN SHOULD ADOPT FAIR USE TO MAXIMIZE THE PROTECTION FOR PUBLIC INTERESTS

the U.S. fair use doctrine would not be enough to secure the protection of the rights of the authors.¹⁵⁵ However, the fact that U.S. copyright law does not protect the author's rights or moral rights¹⁵⁶ does not mean that adopting a U.S.-modeled fair use exception into the JCA would jeopardize Japan's moral rights protection. First, Japan has adopted the dualistic approach,¹⁵⁷ which clearly distinguishes between economic rights on the one hand, and moral rights on the other.¹⁵⁸ Thus, changing the level of economic rights protection would not significantly affect moral rights protection. In fact, as previously discussed, Japan's moral rights protection is already strong.¹⁵⁹ Moreover, the language of JCA Article 1 clearly suggests that the development of culture is the ultimate end and the protection of the rights of authors, etc. is a means to achieve that end.¹⁶⁰ Therefore, the JCA has an objective similar to that of the ACA, which is benefitting society as a whole,¹⁶¹ and an adoption of a U.S.-modeled fair use exception will help ensure that the JCA can achieve that goal.

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

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

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

155. Japanese Copyright Law, art. 1.

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

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

158. Id.

159. See supra Part II.B.

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

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

162. See id. at 1111.

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

not merely a derivative work that •supersede[s]Ž the original work.¹⁶⁴ This does not mean that transformativeness is the only element that needs to be considered under the first factor; other elements such as commercialism¹⁶⁵ are also relevant to the first factor. However, considering that the degree of the transformative use affects the weights given to other factors,¹⁶⁶ the proposed fair use exception should reflect the importance of the transformative use. Therefore, Japan should stipulate transformative use as a sub-factor under the first factor.

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

Most importantly, the new fair use exception should codify the definition of •transformativeŽ use in its provision. This codification is important because it distinguishes transformative works from derivative works. As already discussed in Part III.D., the line-drawing between transformative works and mere derivative works affects the fourth factor because the risk of market substitution includes potential harm to the derivative work market that the original authors •would in general develop or license others to develop.Ž¹⁶⁷ Furthermore, the degree of transformativeness of the secondary work would also affect the reasonable amount and quality of permitted copying.¹⁶⁸ Therefore, defining •transformativeŽ use within the proposed fair use provision would substantially affect the analysis of other fair use factors.

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

164. *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4901).

165. 17 U.S.C. § 107(1).

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

167. *Id.* at 592.

168. See *supra* Part III.C.

169. See Japanese Copyright Law, arts. 20, 28.

170. *Id.* art. 20.

ing is reasonable.¹⁷⁶ Under this assumption, legal parodies most likely qualify as fair use because they use the original work for a new purpose and message, namely to criticize or comment on the original.¹⁷⁷

the secondary use at issue is a legitimate fair use that contributes to the development of culture.⁸¹

V. CONCLUSION

Japan needs to adopt a U.S.-modeled fair use exception to mitigate the possible chilling effect on parodies that would likely be created through Japan's compliance with the TPP Agreement. Japan's entrance into the agreement will tilt the balance of its copyright protection towards the overprotection of authors and copyright owners,¹⁸¹ which could create a chilling effect on all creations of secondary works. This stunted growth of new creations would not only undermine Japan's development of culture,⁸²