１．Do We Need to Introduce Fair Use Regulations in Japan?
The Case of Unique Japanese Entertainment Supported by Examples of Relevant Work

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概要

再考・日本におけるフェア・ユース導入は必要か

―二次的創作物が支える日本のエンターテイメントの特殊性を踏まえて

Cool Japan の中心的存在として位置づく日本のエンターテイメント（アニメーション、漫画およびゲーム等）は、一般の顧客だけではなく、ファン活動によって支えられている。ファンは、概して「オタク」と呼ばれ、彼らのファン活動は近年では「推（お）し活」ともいわれる。彼らは、インターネット上で交流し、パロディ等の二次的創作物を創造・販売・購入し、エンターテイメントを盛り立てている。その活動には一定の自律的ルールも有り（自主規制）、それが日本の著作権法（1970 年法律第 48 号）の 3 年間の 4 度の改正にも影響を与えている。つまり、親告罪（著作権法 123 条 1 項）の維持により、著作権者が二次的創作物の作者に対して弾力的な対応が取れるようになっている。

日本は、米国法に由来する「フェア・ユース」の導入議論があったが、見送られた経験をもつ。コモン・ローの蓄積による法創造能力を有する裁判機能をもたない日本においては、筆者は「日本版フェア・ユース」を導入することには直ちには賛同できない。前述のように、エンターテイメント知財を中心に、二次的創作物のためや普及のために、自主的に著作権を弱め、「知のグローバル・コモンズ」や「クリエイティブコモンズ」等を創出する独自の動きもあると考えるからである。目指すべき実体を踏まえての法制度構築こそ求められている。

１．Introduction

Japanese entertainment (animations, comics, games, and so on) will be positioned as the central presence of the Cool Japan strategy, particularly focusing on the popularity of these relevant works of entertainment and their parodies (Cabinet Office 2019). Popular anime and comics are not merely for being seen or read. Japanese entertainment, such as anime, is becoming increasingly popular as the main characters and sub-characters start to assume independence with the stories created by people other than the copyright holders (Ishikawa 2007; Iizuka 2015; Ishikawa 2020).

The most important event in this respect is the Comic Festival (Comiket: https://www.comiket.co.jp). It is the world's largest immediate selling party that trades "the literary group magazine (*Dojin* magazine)" (a magazine in which the literary group and their favorite persons invest funds and draw, write, edit, and publish themselves) and "character goods" (a product with

characters of anime and manga). Many of the people who gather at Comiket participate in cosplay (a portmanteau of "costume play"), which is the act of dressing up as characters from cartoons, animations, games, and other entertainment products (Newsweek 2020; Diamond Weekly 2015; Comiket 2015).

It is believed that the Japanese Copyright Act (Act No. 48 of 1970: https://elaws.e-gov.go.jp/document?lawid=345AC0000000048) is lax in reflecting these cultures. If a lawsuit is filed to claim for damages, even if it is won, it entails psychological and social consequences; thus, legal action is not always taken. One of the major reasons is that authors and publishers value fans and fan activities. Moreover, violation of the Copyright Act, an Offense Subject to Complaint, is a minor criminal charge (Copyright Act §123I). However, this is different from malicious cases such as pirated edition sales (Copyright Act §123II).

In this context, the Japanese Copyright Act "gives due consideration to freedom of expression," so that copyright holders can respond quite flexibly.

The author considers this is the case because of the peculiarity of Japanese culture. The absence of the fair use debate in Japan (Kidokoro 2013) and the high flexibility of copyright management are influenced by the presence of the so-called "*Otaku* culture" (or "*Oshi* culture"; Ikeda 2022) in Japan. In other words, the Japanese anime and manga culture is such that the creation of an independent body of work through fan activities is indispensable (Nakamura 2021). Therefore , a legal system is required that allows copyright holders and publishers to value it.

However, if Japan's entertainment is considered a global presence (Kitatani 2021), the current situation cannot be said to be a global achievement. As long as it relies on the author-fan relationship of "It may be looked on with kind tolerance" and "It cannot be faulted," it is not well-suited globally.

2. Japanese Copyright Act

The production of the so-called "pirated editions" of manga and anime on websites is copyright infringement. Recently, "pirated websites" have also been reported to have generated enormous revenues (Nezu 2019).

The recent closure of the Japanese manga piracy website Mangamura, where many viewers had gathered over a short period of time, used a promotional campaign where people could enjoy numerous manga for free—which often had a paywall from the middle of the story (Violation of the Copyright Act: Defendant of violation of the Act on Punishment of Organized Crimes and Control of Crime Proceeds: Fukuoka District Court, June 2, 2021. LEX/DB Document No. 25590118: Hirashima 2022; Watanabe 2022; Okumura 2022).

The company was punished for illegal uploads conducted on their website. This also raised the need to pay attention to illegal sites, which impact the people. In response to these developments, the 2020

fiscal revision—hereafter called the Amended Act—was implemented promptly (the Copyright Act has been revised four times over three years).

Until then, the measure against pirated content was the illegalization of downloads operated only for screen image and music. However, the revision of the Copyright Act has extended the scope to all works—not only manga, but also books, such as novels, articles, illustrations, and computer programs (Amended Act Article 30, paragraph 1, sub-paragraph 3, sub-paragraph 4; Article 119, paragraph 3, sub-paragraph 1, sub-paragraph 2).

However, for the act to be a legal offense, downloading while knowing that it is pirated edition content is a prerequisite, and "downloading without knowing that it is pirated edition content" is not. It also stipulates that in such cases, even in the presence of gross negligence, the offender shall not be held liable (Amended Act Article 30, Article 2).

Furthermore, at the beginning of the discussions on the revision, some expressed that relevant works, such as parodies, should be regulated (Yamada 2016). However, downloading in cases where there are special circumstances, such as the offender commits a petty crime or the interests of the copyright holder are not deemed to be unreasonably infringed, is not subject to illegality. In other words, offense subject to complaint by the copyright holder is fundamental. Otherwise, it could be anticipated that the number of third party accusations and notifications would increase, without the copyright holder's intention.

In addition, downloading of the relevant work, including parody, does not constitute a copyright infringement in relation to the original work on which Amended Act 3 Article 30 was based (Amended Act Article 30, paragraph 1, sub-paragraph 4). Furthermore, downloading activities subject to criminal penalties are more limited (Amended Act Article 119, paragraph 3, items 1 and 2) than Offense Subject to Complaint.

However, what needs attention is the "reach site regulation," where websites that post links to illegal content are also regarded as infringing copyrights (Article 120-2, item 3 of the Amendment Law).

Although copyrights are becoming stricter in this manner, there remain some cases where the boundaries between the three points outlined above and those considered legal cannot be distinguished. It is also difficult to objectively judge cases where there are special circumstances and where the interests of the copyright holder have not been unreasonably infringed.

3. Debate on the Introduction of Fair Use in Japan

The discussion that regulations should be imposed on relevant work, such as parody, takes into consideration conversations around the introduction of "fair use." Briefly, the idea is to permit the restriction of copyright with respect to the use of a work that is considered "fair" (Takada 2009). The background to this approach is that in the digitized, networked world, there is a growing number of

literary works that are not known to be copyrighted, and we face the contradiction that the more we try to comply with the Copyright Act, the more inconvenience we will be forced to endure (Nakayama 2019; Ueno 2019).

The legal principle of fair use under U.S. law is well-established. Therefore, the Berne Treaty and the relevant U.S. law are compared here.

First, Article 9, paragraph 2 of the Berne Convention for the Protection of Literary and Artistic Works (WIPO 1978) provides that:

> In special cases, the power to permit reproduction of a work in subsection (1) shall be reserved to the legislation of the Special Union, provided that such reproduction does not interfere with the normal use of the work and does not unreasonably prejudice the legitimate interests of the author.

It also provides for the so-called three-step testing, which does not 1) impose overly broad restrictions and exceptions; 2) rob rightful holders of a real or potential source of income that is substantive to deprive rights owners of substantial or potential sources of income (a conflicting with normal exploitation of the work inconsistent with normal use of the work); or 3) do disproportional harm to the rights holders or unreasonably harming rights owners (prejudice legitimate interests).

The U.S. fair use legal doctrine exists as a common right-limiting provision in the 1976 Copyright Act, Article 107 (Takada 2010a: Shiomi 2019; Yamamoto 2008). The content provides that:

> fair use of copyrighted works for criticism, commentary, news coverage, professors (including the act of making multiple copies for use in classrooms), research or investigation (including use by the means specified in Article 106) and for the purpose of presenting four judgment elements that shall not constitute infringement of copyright.

The four judgment elements considered are: (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.

Professor Hiroshi Takada analyzed the U.S. fair use regulations as follows. There are statutory provisions, based on judicial precedents that influence whether infringement of the law has become part of common law over time; thus the law based on the judicial precedent and the standards thereof, become increasingly clear (Takada 2010a; Takada 2011b). In the final analysis, the fair use provision exists as a matter to be considered by the court. Therefore, fair use can be said to be a functioning system, because there is a long history cultivated by the common law in each state.

In 2009, the Agency for Cultural Affairs in Japan also conducted a study on the distribution of regulations for the introduction of general provisions on restrictions on rights (the Japanese version of the U.S. fair use regulations: Yamamoto and Okumura 2010; National Diet Library 2009; Agency for Cultural Affairs 2010). This amendment discussion was conducted while ensuring that copyright holders would not suffer significant damage. Ultimately, however, many Diet members were against rights restrictions (Adachi and Miyake 2019). Therefore, the law has not been amended.

The defendant in the Tokyo District Court, December 18, 1995, Case Times No. 916, at 206, argued that fair use should be applied, but this was not accepted in the judgment (Takada 2011b).

Additionally, there was a discussion on copyright enhancement when the United States was a member of the Trans-Pacific Partnership (TPP). However, copyright infringement is still a rule of Offense Subject to Complaint (Article 123 clause 1). However, at the time the TPP came into being, a Non-Offense Subject to Complaint amendment was made to the law provided three requirements were met. Among the crimes of infringement of copyright that were regarded as Offense Subject to Complaint, Non-Offense Subject to Complaint was granted if all three of the following conditions were met, and prosecution could be instituted without a complaint filed by the copyright holder, etc. (Article 123, paragraph 2 of the Amendment Law based on TPP; Agency for Cultural Affairs 2018):

a) The subject matter for which consideration is to be received or the interest of the right holder is to be prejudiced.

b) The copyrighted works, etc. shall be transferred, publicly transmitted, or reproduced without modification.

c) In light of this standard, where the interests of rights holders who are expected to be obtained by providing or presenting paid works, etc. are unreasonably harmed, for example, sales of pirated edition such as manga on sale or distribution of pirated editions of movies, are subject to all three requirements and are Non-Offense Subject to Complaint.

In other words, the effectiveness of the pirated edition measures has increased, and copyright protection has been strengthened. However, the secondary creative activities (include drawing relevant works) of the *Dojin* magazine and others in Comiket are not considered to fall under some of the requirements and will not become a Non-Offense Subject to Complaint. Consequently, it is expected that pirated edition measures will be reliably effective while suppressing the atrophy of secondary creative activities.

In sum, as an exception to the common violation of the Copyright Act, the relevant work was taken favorably and a criterion different from the pirated edition measures was established. Additionally, another exception to common violation of the Copyright Act was the positioning of the pirated edition regulations, which enabled the state (police power) to respond to it as a Non-Offense Subject to

Complaint.

4. The Relevant Japanese Work Cultures

(1) Major events, Comiket

The introduction stated that Japan is enlivened by entertainment culture by parody work, which is a fan activity.

Comiket is held at the Tokyo International Exhibition Hall (Tokyo Big Sight) twice a year for three days in August and December. It is attended by approximately 500,000 people. According to one theory, its economic effect is said to be 18 billion yen (Comiket 2022). Moreover, it is not an art appreciation meeting, but a "creative incubation platform that supports the creation of copied creations to be distributed directly by their creators and to meet people who come in search of their works."

The precondition is that activities to sell "copied creations" will be undertaken; thus, it will be a matter of violation of the Copyright Act since it is a fairly large-scale event, and a considerable amount of revenue is expected to be earned (Nikkei BP 2020; Karasawa and Okada 2007; Karasawa 2005).

In this regard, the question of whether criminal punishment or civil damages are charged, except for pirated editions as mentioned already, depends entirely on the copyright holder. However, they generally do not condemn fan activities (Narisawa 1989), unless those activities involve extreme cases. In fact, publishers and movie entertainers want to boost the popularity of the works through fan activities.

(2) Movie: Demon Slayer: *Kimetsu no Yaiba* – The Movie: Mugen Train

In October 2020, the theater edition of "Demon Slayer: "*Kimetsu no Yaiba*"—The Movie: Mugen Train," (Shueisha et. al. 2020a), which was published in Japan, raised entertainment revenues of more than 40 billion yen. This number is astonishing; however, a lot of it is the result of a number of repeat visits to movie theaters by fans.

This also has an effect on the "benefit for repeater/visitor (attendant's benefits)" on the film box office side. Regarding the theater audience, the studios went every week to prepare different gifts each time, to encourage enthusiastic fans to go. Furthermore, for the so-called *netabare* (social networking service posts in which the story becomes clear; in other words, spoilers), there were no regulations because this movie is a film adaptation of the original comic (Shueisha et. al. 2020b). That is why many fans discussed the details on social media, which could be seen by all. As a result, fans who overlooked certain scenes repeatedly visited the movie theater because they wanted to review the movie more carefully and (re)watch critical scenes they might have missed (Watanabe 2020).

An example of a fine point is a scene in which the connecting part of the train is lifted, and it was questioned whether this was due to the impact of *Rengoku-san*'s movement. After reviewing the scene, some fans were surprised by the high physical abilities of *Rengoku-san* (Yanagida 2021).

In addition, when the total box office income reached nearly 30 billion yen, the fans also came to the movie theaters with the slogan, “Give *Rengoku-san* the title of a man of 30 billion yen” (Oricon News 2020). As a result, he achieved a performance score of 40 billion yen or more (Oricon News 2021). Indeed, with a historical record of becoming the best liked among fans, both the copyright owners and filmmakers were pleased with the achievements.

(3) Fan activity supported by copyright holders

In this way, the activities of Japanese anime fans and others constitute the production and sales of the relevant work; however, people recognize, “Since the fan activities including the relevant works sales are a win-win for the copyright holder, violation of the Copyright Act is irrelevant.”

For example, in one case, the copyright holders visited the website and site of fan activities and gave them an endorsement (Nico Nico Pedia 2021). It is a high honor for fans. However, it is impossible for copyright holders to inspect and monitor everything and give credit to what they recognize.

Therefore, the question rises whether fans can decide whether they will be in a win-win situation with the copyright holder. Thus, many publishers have provisions on their websites for violation of the Copyright Act cases (major publishers specify this for each work or for each copyright holder). Most of them deal strictly with pirated edition sales; however, overall, they want to support fan-related activities (Shueisha Official Website 2022; Kohdansha Official Website 2020).

5. Judgment based on whether we support each other with cheer and not by law

Another hallmark of the relationship between Japanese rights holders and fans is the *Yukkuri-Chabangeki* Trademark Registration Problem that occurred in 2022. This is a matter in which one of the keywords of the relevant work was registered as a trademark by an unrelated third party, a certain YouTuber, when the relevant work itself was well-known (Nico Nico Pedia 2022).

A trademark shall not be registered under the Trademark Act (Act No. 127 of 1959) where the trademark applied for is not used in connection with the goods or services in connection with the business of the applicant (Article 3 paragraph 1) or in cases where the trademark is applied for in advance of another person’s famous trademark or where the trademark is applied for by a third party in the public interest (in the respective items of Article 4, para.1). However, there is a need for the claimant to waive the trademark right.

In this case, fans voiced their opinions on the internet (for example, signature campaigns on social media sites (Trend View 2022)), rather than litigation, and formed a public opinion. The video distribution company also stated that as a response, it would raise negotiations for waiver of trademark registration and demand an invalidation trial. In response to this, the YouTuber announced on Twitter that “an application was filed on May 23 to cancel the trademark right.”

In response, Chief Cabinet Secretary Hirokazu Matsuno expressed his views on this issue in a press conference on May 24, 2022, the following day:

> I will refrain from commenting on individual cases. However, in general terms, regarding the relevant works and secondary creations, it is important to recognize that unique cultures are developing on the internet and to appropriately and justly protect creations (Tanii 2022).

Thus, it can be said that the relevant work has already been accepted by society but there is ambiguity regarding its treatment. In other words, cheerful, loving, and respectful fan activities are acceptable to society. However, even if it legal, it is judged whether certain fan activities are accepted by society or the inner circles of fans. Therefore, this unacceptance, while legal, can be overwhelming due to critical social media discussions.

6. Conclusion

"Cheerful, loving and respectful fan activities" is an obscure expression. It seems very unlikely that a law-governing nation would be able to judge whether fans are accepted by the "inner circle." However, the capacity of the current Copyright Act to accept these ambiguities can be assessed.

Conversely, many of these activities are illegal by law; however, because the copyright holder does not file a complaint, the legality is not questioned. People who want to comply with the law are more likely to control their behavior. Moreover, because the copyright holder is not obvious, it is often impossible to obtain permission. In some cases, the disadvantage suffered by regulation (i.e., freedom of expression) is greater than the benefit of the copyright holder who is protected.

For this reason, I agree with Professor Takada, vis-à-vis, not easily introducing general rules on fair use (Takada 2011a). The fair use regulation is ultimately a consideration for the court because there is concern about whether it will work properly even if it is introduced in Japan, where the court does not have a law-creating function.

The fans who produce the relevant work are also protected by the amended law. Therefore, in the next case, it is necessary to establish "Global Commons of Knowledge" or "creative commons" from a global perspective (Fukui 2020). Consideration must be given as to whether there is a need for a legal system and a mechanism for indicating the authorization and scope of the copyright holder's use of the work. In this regard, it is necessary for copyright owners to visit fan activities and fan-operated websites, as described, to present the right in an easy-to-understand format, rather than provide them with an endorsement. For example, is it possible to indicate that the copyrighting material at the stage of publication relevant to secondary/subsequent publishing, and if so, what is the method to be followed? It is necessary to consider the creation of the scheme that allows copyright holders to waive their rights from the publication stage and that allows people to recognize and watch this.

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