1988

Copyright Protection of Fictional Characters in Japan

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Publication Information
7 Wisconsin International Law Journal 205 (1988)

Repository Citation

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Abstract
There is a renewed interest in the United States in Japanese Copyright law. Specifically, new attention has been focused on the protection of computer software under the Japanese Copyright Act, but only a cursory attempt has been given in English language literature to the issue of whether fictional characters can be protected using copyright law in Japan independent of the original work. The objective of this Comment is to fill this void. First the Comment presents the fundamental concepts of American copyright law needed as background knowledge to understand the issue. The Comment then explores the existing satiation in Japan for legal protection of fictional characters - specifically, the pertinent judicial and legislative action. Finally, the Comment delves into the competing policies to be weighted in recognizing copyright protection for fictional characters independent of the original work.

Keywords
Japanese copyright law, fictional character copyright, Japanese Copyright Act, cartoon, Japanese copyright case law, Sazae-san Case, the Popeye Scarf Case

Disciplines
Intellectual Property Law

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COPYRIGHT PROTECTION OF FICTIONAL CHARACTERS IN JAPAN: The Popeye Case — It’s Not Just a Mickey Mouse Affair

I. INTRODUCTION

Fictional characters are the people, animals, even robots or aliens that appear in books, plays, comics, and movies. Fictional characters can be composed of voices, shapes, personalities, mannerisms, and attitudes.\(^1\) Though these characters have a tangible existence only within the mode of expression in which the author originally created them, these shapes, pictures, and personalities also leave an impression on the minds of the observers independent of the copyrighted work.\(^2\)

Because Japan and the United States enjoy a near dominance in information-based products and because both countries have decided to use copyright law to legally protect these information-based products,\(^3\) there is renewed interest in Japanese copyright law.\(^4\) New attention has been focused on the protection of computer software under the Japanese Copyright Act;\(^5\) yet, only a cursory attempt has been given in English language literature to the issue of whether fictional characters can be protected using copyright law in Japan independent of the original work.

The objective of this Comment is to fill this void in the copyright field. First, the Comment presents the fundamental concepts of American copy-
right law needed as background knowledge to understand the issue. Current American copyright law is presented not for comparison. Rather, it is introduced as a conceptual springboard to facilitate the presentation of Japanese copyright law regarding fictional characters. This Comment then explores the existing situation in Japan for legal protection of fictional characters—specifically, the pertinent judicial and legislative action. Finally, the Comment delves into the competing policies to be weighed in recognizing copyright protection for fictional characters independent of the original work. The Appendix contains the author's translation of the reasoning section of one of the leading Japanese cases on this issue.

II. UNITED STATES COPYRIGHT LAW ON FICTIONAL CHARACTERS

A. International Concerns

In a move towards world recognition of individual proprietary interests in literary, scientific and artistic works, the United Nations Scientific, Educational and Cultural Organization's Universal Copyright Convention (U.C.C.) was adopted by the Intergovernmental Copyright Conference at Geneva, Switzerland on September 6, 1952. The U.C.C. entered into force in the United States on September 16, 1955. Japan became a contracting state on April 28, 1956.

As international barriers between Japan and the United States gradually break down, assisted by such conventions as the U.C.C., it will become increasingly important for American lawyers to understand the scope and type of protection available in the field of intellectual property. The U.C.C. provides for national treatment between contracting states. That is, works by American nationals receive the same copyright protection in another contracting state as a national of that contracting state would receive. Therefore, for an American copyright holder to know how they will be treated in the expanding Japanese intellectual property market, they must know how the Japanese legal system will treat a Japanese copyright holder in Japan.

8Id.
9See U.C.C. supra note 6, art. II(2).
103 NIMMER, NIMMER ON COPYRIGHT § 17.04(B) (1979).
B. U.S. Domestic Copyright Law

Prior to analyzing copyright protection of fictional characters in Japan, a conceptual framework must be established. Copyright law is the means used to encourage creativity by protecting creative works. The fundamental notion in copyright law is that it exists to protect tangible expressions of ideas and not the ideas themselves.

Though courts speak generally of the copyrightability of fictional characters independent of their original work, the issue is not actually the copyrightability per se of fictional characters, but rather whether a specific use infringes upon the originally protected work.

One common trait in both American and Japanese copyright law is that ideas themselves cannot be copyrighted. Copyright protection begins when a work is fixed in a tangible medium of expression. A fictional character itself is not the target of a copyright, but rather is one entity of the overall plot, setting, or story that is copyrighted. A fictional character has no tangible existence outside of the original work. It exists as an abstraction in the minds of the viewer. Though some consideration has been advanced to include fictional characters as a separate copyrightable entity in and of themselves under the U.S. Copyright Act, the Register of Copyright stated that "it would be unnecessary and misleading to specify fictional characters as a separate class of copyrightable works." A body of case law exists in the United States to provide predictability in copyright protection of fictional characters. This case law is largely

12Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law 3-6 (1961), quoted in A. Latman, R. Gorman & J. Ginsburg, Copyright for the Eighties 13 (1985). See also Rokford Map Publishers v. Directory Serv. Co., 768 F.2d 145, 148 (7th Cir. 1985) ("The copyright laws are designed to give people incentives to produce new works. [Citation omitted] They allow people to collect the reward for their contributions."); Kurtz, supra note 1, at 439.


14Kurtz refers to this as the "independent legal lives of fictional characters." See Kurtz, supra note 1, at 429.

15See infra notes 109-111 and accompanying text.


17See Kurtz, supra note 1, at 440.


grounded in the U.S. Copyright Act21 and in the United States Constitution.22 These cases struggle to balance the competing policy issues of protecting free speech and press versus “encouraging creativity by protecting expression” of ideas.23

In the United States, fictional characters are generally provided copyright protection both in the original work24 and independent of that original work.25 In Nichols v. Universal Pictures Corp.,26 Learned Hand set forth a two-fold test in determining infringement of a copyrighted fictional character. First, the character as originally conceived and presented must be sufficiently developed to command protection.27 Second, the alleged infringer must have copied a specific development of a character and not merely a broader and abstract outline of that character.28 “[T]he less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for making them too indistinctly.”29

Recently courts have been much more willing to protect these “silly pictures”30 than Learned Hand was.31 As stated earlier, the issue is not the copyrightability of a fictional character independent of its original work, but rather whether a particular image created by another infringes that original work. However, courts seem to be moving in a direction of

22 U.S. Const. art. I, § 8, cl. 8, commonly known as the Copyright Clause.
25 See Air Pirates, 581 F.2d at 754.
26 45 F.2d 119 (2d. Cir. 1930), cert. denied, 282 U.S. 902 (1931).
27 Id. at 121.
28 Id.
29 Id.
30 National Comics Publications v. Fawcett Publications, 191 F.2d 594, 603 (2d Cir. 1951). It is important at this point to clearly draw the distinction between how courts treat cartoon characters and literary characters. Typically, cartoon characters receive more protection than literary characters because they are more concrete—that is, there is a tangible entity (a picture) that courts can visually compare. When a literary character is at issue, usually more abstract, mental images are used. Courts have an easier time comparing pictures, be they silly, than they do mental abstractions.
31 See, e.g., Detective Comics Inc. v. Bruns, 111 F.2d 432 (1940). (Held that “Wonderman” infringed Action Comic’s copyright of “Superman.” An embodiment and arrangement of incidents and literary expressions of the original author are proper subjects for copyright protection.). But cf. Warner Bros. Inc. v. American Broadcasting Company 720 F.2d 231 (1983). (Directed verdict that ABC’s sitcom character called “The Greatest American Hero” was not sufficiently similar to the character Superman to even let the case go to the jury upheld. Copyright law is designed to promote creativity, not impair it.)
accepting the copyrightability of fictional characters even outside of the original work.

In *Walt Disney Production v. Air Pirates,* the court stated that "[t]he fact that . . . characters are not the separate subject of a copyright does not preclude their protection" because all of the component parts of a work are copyrighted. Here the defendants had used 20 Disney characters to create parodies in an adult counter culture comic book. The court held that this use infringed Walt Disney's copyrights of the characters because "a comic book character, which has physical as well as conceptual qualities, is more likely to contain some unique elements of expression." Since the Disney characters were component parts of the copyrighted expression, they were also protected independent of the original work. The court did not address either prong of Hand's sufficient development test.

Currently under U.S. copyright law, copying a character alone without copying plot elements will result in copyright infringement if the character is substantially similar to the original copyrighted work. If there is a physical character to objectively compare to the copied image, courts can analyze and compare the two figures. Though still an abstraction, the character is "the least abstract of abstractions" and therefore copying it may be an infringement if they are substantially similar.

### III. Japanese Copyright Law

Unfortunately, case law in Japan is not as well developed and does not provide the same degree of predictability available in the U.S. This issue of copyrighting fictional characters is of much importance to non-Japanese copyright holders seeking copyright protection in Japan. Much attention is given to the favorable trade balance enjoyed by Japan, but...
in intellectual property, there is a large trade surplus in favor of the United States. Because of the massive flow of intellectual property to Japan, it is imperative that American licensors understand the legal protection available to their copyrightable material in Japan.

A. Copyright in Japan

The concept of an individual possessing "rights" in a "character" of one's creation independent of the original work is quite new in Japan. The concept originally was developed to protect Japanese companies from American businesses dominating the Japanese domestic business environment under the auspices of the American occupation forces.

Copyright law in Japan consists of a "bundle of rights." This bundle primarily includes reproduction rights, the right of exhibition, moral rights and neighboring rights.

In 1985, Japan imported 2,086,000,000 yen (or approximately 15.57 million dollars) worth of technology. Japan's technology exports for the same period to the United States were approximately $14 of that or 518,000,000 yen (approximately 3.8 million dollars). There has been a constantly increasing trend to the reliance by Japan on imported technology from the United States. In 1981, Japan imported 1,718,000,000 yen worth of technology; in 1983, the figure arose to 1,930,000,000 yen. Most importantly, in 1985 technology trade from the United States comprised 71.1% of all imported intellectual property. See Japanese Agency of Industrial Science and Technology Trends of Principal Indicators on Research and Development in Japan (1987) (table 6-1 at 36). The exchange rate of 134 yen per dollar is used in this Comment. See N.Y. Times, Sept. 17, 1988, § 1, at 17, col. 1.

Note, The Copyright Law and the Protection of Fictional Characters (Chosakukenbo to character no hogo), IV Design and Copyright (Isho chosakuken) 258, 262 (1983). Much attention is given in Japan to the Japanese lack of rights consciousness (kenri ishi). See, e.g., T. Kawashima, Nihonjin no Hoishiki (Law Consciousness Among the Japanese People) (1967). But see H. Tanaka, The Japanese Legal System 339-341 (1982) for the contrary view that Japanese people appear less rights-conscious than their Western counterpart only because of internal disincentives in the Japanese legal system. See also F. Upham, Law and Social Change in Postwar Japan 2 (1987) for the view that the popular perception of harmony and consensus in Japan and the limited role of law in Japan is fundamentally incorrect. Upham's conclusion is that legal rules and institutions do, in fact, greatly influence the course of conflict and the direction of social change in Japan.


Lecture by T. Doi at University of Tokyo on August 4, 1987.

Copyright Act, supra note 5, art. 21.

Id., art. 25.

Id., arts. 18-20.

Id., arts. 89-104.
The scope of material protected by the Copyright Act is limited to "works" (chosakubutsu) defined as "productions in which thoughts or sentiments are expressed in a creative way and which fall within the literary, scientific, artistic or musical domain." These works include the original work (genchosakubutsu) and derivative works (nijiteki chosakubutsu). Derivative works are defined as works created by translating, arranging musically, transforming, dramatizing, cinematizing or otherwise adapting a pre-existing work. Therefore, to be copyrightable, a work must express thought or sentiment in a creative way and come within the literary, scientific, artistic, or musical domains.

To clarify the types of works protected, Article 10 of the Copyright Act lists nine categories which are included as "works." Two categories are pertinent to the discussion here: literary works and artistic works. "Literary works" includes novels, articles, and other material arguably of a literary nature. Courts have potentially extended the definition of literary works to protect a classified telephone directory and a court journal.

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48 Id., art. 2(i).
49 For a broader and more detailed analysis of the mechanics of Japanese copyright law, see Z. Kitagawa, Doing Business in Japan, § 8.01-8.07 (1980) [hereinafter Kitagawa]. Though the cases used as examples are somewhat dated, Kitagawa has assembled in this treatise much useful information on Japanese law.
50 Copyright Act, art. 2(xi).
51 Id., art. 2(1)(i). For a detailed investigation of the varying degrees of protection under different protective schemes, see Karjala, supra note 3.
52 Copyright Act, art. 10(i)-(ix). They are: 1) novels, dramas, articles, lectures and other literary works; 2) musical works; 3) choreographic works and pantomimes; 4) paintings, engravings, sculptures and other artistic works; 5) architectural works; 6) maps as well as figurative works of a scientific nature such as plans, charts, and models; 7) cinematographic works; 8) photographic works; and 9) program works. The addition of program works is new with the 1987 amendment. See Karjala, Lessons From the Computer Software Protection Debate in Japan, 1984 ARIZ. ST. L. J. 53.
53 Sakimura v. Yashiro, II-1 Chosakuken Hanreishu 84 (June 20, 1919, Tokyo District Court) The Telephone Directory Case. In this case, the copyright requirement of novelty was evidently not fulfilled and thus copyright protection was actually denied. However, the court did say that "a directory should be copyrightable if it is the product of considerable thought faculties, systematically employing a method of arrangement, and contains new thought content." See Karjala, supra note 3, at 25.

In Japan cases receive a descriptive word title. There is no Japanese equivalent to Harvard's 'Blue Book' (The Harvard Law Review Association A Uniform System of Citation (1986)). Therefore, cases are referred to using this descriptive word title rather than mentioning the parties. Though I will give a citation for each of the cases discussed, the body of this Comment shall refer to cases only by their descriptive word title. In my citation form of Japanese cases and statutes, I
However, courts have denied copyright protection to a bookkeeping journal and a bill of lading form. Interestingly enough, Article 10 of the Copyright Act expressly prohibits news of the day and miscellaneous facts which are mere items of information from receiving copyright protection.

The category "artistic works" only applies to works of artistic craftsmanship and not applied art. However, though industrially produced art objects have been protected, the Olympic rings did not fit the definition of an artistic work because they were applied art. Fictional characters fit most appropriately into the category of artistic works.

One legal scholar has described the Japanese legal system as "developing" and "in the process of dynamic change." The degree of copyright protection afforded fictional characters independent of their original work is certainly one area that supports this opinion. Naturally, when a fictional character is in the original work (such as a cartoon strip), there is no question that it would receive full copyright protection as an artistic work. The question remains whether copyright protection extends to protect

follow the suggestions in Henderson, *Form of Citation of Japanese Legal Materials*, 42 Wash. L. Rev. 589 (1967) and H. Tanaka, *The Japanese Legal System* 30-35 (1982). Whenever possible citations are to the Chosakuken Hanreishu. The full title is *Saishin Chosakuken-kankei Hanreishu* (Most Recent Copyright-related Reports). This is a four volume set reports all copyright cases in Japan. Its most recent volume includes cases up through 1984. See Karjala, *supra* note 3, at 5 n. 6.

54Takeuchi v. Ogawa, II-1 Chosakuken Hanreishu 119 (May 18, 1940, Great Court of Judicature). The Great Court of Judicature is the pre-WWII supreme court. For a history of Japanese judicial systematic development, see Y. Taniguchi, *The Post-War Court System as an Instrument for Social Change*, in *INSTITUTIONS FOR CHANGE IN JAPANESE SOCIETY* (1984) (G. DeVos, ed.). Also, for the background and significance of the Court Diary Case, see Karjala, *supra* note 3 at 37-38 and accompanying footnotes, especially n. 119.


57Copyright Act, art. 10(2).

58Copyright Act, art. 2(2).

59KITAGAWA § 8.02(5)(c).


fictional characters independent of the original work. What happens when a competent artist creates a new and original drawing that is recognizable as the character in question, for example, on the side of a bus? Or what happens when a person redraws the image of Popeye, prints it on a scarf and markets the scarf?

Over time, fictional characters attain goodwill and a merchandising value of their own. This independent value is often separate if not totally distinct from the original work. Everyone knows Popeye, but how many people know that Popeye originally appeared in the cartoon "The Thimble Theater"?

B. Japanese Case Law

Prior to analyzing the pertinent cases, it is important to first understand the structure of and relationship between Japanese courts. Japanese district and high (appellate) courts do not recognize stare decisis, a common law concept. Therefore, one court’s decision is not formally binding on another. However, each judge does not decide every issue in a vacuum, ignoring all other approaches to the issue. Rather, in the spirit of equal protection, most judges follow similar analyses to reach similar conclusions. Unfortunately, judges deciding the issue of copyrightability of fictional characters do not follow this trend.

The Tokyo District Court and the Osaka District Court have each established divisions to decide intellectual property cases. The judges in these divisions are specialists in intellectual property law. Therefore, even

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64 See infra note 77 and accompanying text.
65 See infra note 104 and accompanying text.
66 Copyright holders license the use of their characters to take advantage of the monetary awards from independent use of fictional characters. Licensees intend primarily to use the goodwill or name of a character—the ornamental value of such characters is merely incidental. Fictional characters of foreign origin are licensed in Japan either directly or through local representatives of the copyright holder. See supra note 63.
68 Kenpo (Constitution) art. XIV (Japan).
69 See Karjala supra note 3, at 4.
70 In Tokyo it is the 29th division and in Osaka it is the 21st division. See Karjala supra note 3, at 4 n. 5. The two geographical areas that these districts represent are the most respected in Japan. This is partially because of the historic focus on the two cities but also because of the population concentration in the two regions. One third of all Japanese people live within 100 miles of the center of Tokyo. See N.Y. Times, Oct. 15, 1987, § A at 4, col. 3.
though there is no official binding force on the other courts, decisions on intellectual property issues from these two divisions generally receive de facto precedential value. Confusion emerges when these two courts disagree on a specific issue, such as whether or not copyright law ought to protect fictional characters independent of the original work.

Further confusion is created by the Japanese courts in their analytical approach to these cases. For the American reader, it appears that the courts have merged copyright and trademark concepts to make the discussion unintelligible. However, the relationship between trademark law and copyright law in Japan differs greatly from that of the United States.

A major precept of American trademark law not recognized in Japan is that one must use a mark in order to acquire trademark rights associated with it. In Japan, a trademark does not have to be used before it can be registered, for it is the trademark registration that establishes the right, not its use. Thus, trademark is typically granted to the first registrant in time.

Though this Comment does not explore the trademark issues involved in the Japanese cases presented below but rather focuses on the copyright law issues, it is important for the American reader to understand that Japan's differences in legal heritage cause the Japanese courts to appear to be mingling the two distinct areas of law. This mingling permeates the judges' analysis of the cases. However, this Comment does not impose American analytical patterns on the Japanese cases, but rather presents them in a way more faithful to the original.

1. The Sazae-san Case

The Sazae-san Case was the first case in Japan to extend copyright protection to fictional characters independent of their original

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71 See Karjala supra note 3, at 5.
74 This is because the sources of U.S. trademark law and Japanese trademark law differ. U.S. trademark law came from English common law while Japan adopted the German Civil Law model which bases trademark protection on registration, not on use. For a further discussion, see Doi, Digest of Japanese Court Decisions in Trademarks and Unfair Competition Cases (1971).
75 See Kitagawa, § 3.04(1).
76 The modern Japanese legal system was based primarily on the Civil Law systems
work.\textsuperscript{77} One commentator has stated that the \textit{Sazae-san Case} is on the cutting edge in using copyright law to protect fictional characters.\textsuperscript{78} (A translation by the author of the reasoning section of this case appears in the Appendix.)

In the \textit{Sazae-san Case}, the plaintiff, Machiko Hasegawa, a famous Japanese cartoon artist,\textsuperscript{79} brought a copyright infringement action in Tokyo District Court against the Tachikawa Bus Company. The plaintiff contended that the defendant violated her copyright because he placed the faces of three of the leading characters of the "Sazae-san" cartoon strip on each side of twenty-seven tour buses and named his business the "Sazae-san Tours."\textsuperscript{80}

The defendant stipulated to these facts but argued that this did not amount to a copyright infringement. The defendant argued that his use of the three faces from the comic strip had nothing to do with the story or plot of the comic strip copyrighted in the newspapers and that his use of these three faces was in no way an expression of that story.\textsuperscript{81} Further, the defendant argued that his objective in using these faces was not to express the story in which the faces were copyrighted, but rather to indicate his legitimate business activity.\textsuperscript{82}

The Tokyo District Court rejected the defendant's arguments and established its test for copyright infringement of fictional characters. The Tokyo District Court adopted a standard similar to the U.S. standard followed in \textit{Warner Bros. v. American Broadcasting Co.}\textsuperscript{83} In an often quoted phrase, the Tokyo court announced its test as follows: if a person were to look at the defendant's buses and in his/her mind immediately connect those figures on the bus with the plaintiff's copyrighted figures, that would sufficiently establish a copyright infringement.\textsuperscript{84}

\textsuperscript{77}Hasegawa v. Tachikawa Bus K.K., I Chosakuken Hanreishu 721 (Tokyo District Court, May 26, 1976). An official English translation of this case does not exist. \textit{See Appendix} for the author's translation of the \textit{REASONING} section.

\textsuperscript{78}Editorial comment, I Chosakuken Hanreishu at 722-723.

\textsuperscript{79}Hasegawa's comic strip in question has run continuously in two different newspapers since 1946. \textit{See I} Chosakuken Hanreishu at 726. The popularity of this comic strip is comparable to "Blondie" and is thematically similar. \textit{See Appendix} for a more thorough description of this comic strip.

\textsuperscript{80}I Chosakuken Hanreishu at 727.

\textsuperscript{81}\textit{Id.} at 728.

\textsuperscript{82}\textit{Id.}

\textsuperscript{83}\textit{See supra} notes 36-38 and accompanying text.

\textsuperscript{84}I Chosakuken at 727.
The court further stated that there is no need to compare the faces of the characters on the defendant's buses with actual characters or scenes that appeared in any one of the copyrighted frames, because copyright infringement had already been established. Since an ordinary person viewing the characters would immediately connect them with the original, the plaintiff fulfilled the burden of proving that the characters were hers.

After establishing this broad test, the court proceeded to create some limits. The plaintiff had contended that the infringed copyright was "one individual, independent copyright of the entire comic strip from its inception in the newspaper until today." The court emphatically rejected copyright protection for the comic strip as a whole, because it was not completed. The court reasoned that a novel published serially in a newspaper has a definite beginning, an end, and definable, finite contents. However, an open-ended, unfinished serial comic strip should not be viewed as a complete copyrightable package, or it would amount to copyrighting material with indefinite contents.

Therefore, the court determined that the defendant did not infringe an individual, independent copyright as the plaintiff alleged, but rather the defendant infringed each one of the plaintiff's copyrights for each day's comic strip. Ignoring economic factors, the court stated that it was willing to extend copyright protection in this manner because the characters, over time, had established their own identity. Rather than using the characters as an expositor of a plot or story, the court explained, the author adopts and writes plots and stories to fit the character's established personality. "[T]he expression of permanent characters in a certain role with certain looks and shape exceeds the mere facial expressions, movements, or emotions of the specific characters in specific scenes within the comic strip." Though the court does not explain how much of a factor popularity should be in determining copyright protection, the court used this popularity notion as a further justification for its holding, above and beyond the test it established.

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85 Chosakuken at 728.
86 Chosakuken at 729.
87 Different fictional characters have different economic worth or goodwill depending upon the degree to which they are well known. "Sazae-san" has been one of the most well-known comic strips in Japan for 40 years. The court could have analyzed this and used it as weight in favor of its decision but did not. It appears that the court took the easy way out: once it recognized the extension of copyright protection to fictional characters independent of the original work, there was no need to go into, for example, Hand's sufficient development test from Nichols. See supra notes 26-29 and accompanying text. Popularity and economic value seem to be two distinct entities.
88 Chosakuken at 729.
89 It is difficult to tell how much weight this factor should be given. On one hand,
However, the court's reasoning on this point has been criticized because it appears to confuse the issue rather than clarify it. In fact, the test the court established is so vague, it is difficult to tell exactly where the boundaries lie. However, the vagueness of the court's test should not detract from the fact that the court expressly recognized an artist's ability to protect a work independent of the original copyrighted expression. While the court found no need to compare the specific characters copyrighted in each cartoon frame with the alleged infringing characters, the court refused to extend copyright protection to the entire comic strip (apparently until it was completed). This decision has become the source of debate in answering the basic question of whether a fictional character is copyrightable independent of its original work.

One Japanese commentator has suggested that the court has misinterpreted the usage of the word "character." After presenting the court's definition of a character as "the expression of the personality, shape, and looks of an entity in the comic strip," the commentator stated that he was still confused about copyright protection of fictional characters, because the court emphasized the character itself rather than the protection of that character. The use of the term character is inconsistent in the Sazae-san Case, because the court recognized copyright protection of well-known characters independent of the original work and yet at the same time it denied copyrightability of the entire comic strip as a whole on the formalistic ground that it was incomplete.

Though that commentator's argument may appear to be one of Japanese semantics, it has some influence. That is, the court ought not extend copyright protection to abstract fictional characters completely void of a tangible expression.

The Tokyo District Court would respond that if its test was satisfied, the character, in fact, is a tangible expression of the copyrighted work. That is, the Tokyo District Court would not ignore the frames protected by the plaintiff's copyright. What the plaintiff did was abstracting, but it seems conceptually similar to Hand's sufficient development test from Nichols, see supra notes 26-29 and accompanying text. However, it appears that the court only considered it because of its overwhelming weight in this case. It did not present popularity as a requisite to copyright protection.


Id. at 264.

Id. at 264, quoting IV Chosakukendo at 727.

Id.

See supra note 84 and accompanying text.
abstracting from a tangible expression.\textsuperscript{96} The issue then becomes whether there is substantial similarity with the figures in the strip.

2. Post Sazae-san Developments

A secondary case necessary to understand the copyright protection of fictional characters in Japan is the \textit{Tokyo Popeye Undershirt Case}.\textsuperscript{97} Here, the registered trademark holder of the Popeye character's name and image brought suit in Tokyo to enjoin a distributor from selling or distributing undershirts manufactured in Osaka. The undershirts had a large print of Popeye on the front along with the copyright notice "© King Features Syndicate."\textsuperscript{98} Though it is important to note that the defendant did not participate in oral arguments,\textsuperscript{99} the Tokyo District Court held that the defendant had infringed on the plaintiff's trademark and ordered a permanent injunction against the defendant.\textsuperscript{100}

Though this case did not develop far enough for the copyright defense to arise, it is examined here as background for two other cases decided by the Osaka District Court. It is significant that two of the three judges that heard this case also heard the \textit{Sazae-san Case} and wrote that opinion.\textsuperscript{101} These two cases demonstrate the Tokyo District Court's tendency to differ from the Osaka District Court on this issue.

Simultaneously with the \textit{Tokyo Popeye Undershirt Case}, the same plaintiff, Osaka Sankei K.K. brought suit against the manufacturer of those undershirts...
same undershirts in Osaka in the *Osaka Popeye Undershirt Case*. This time the defendant aggressively defended his use of the Popeye figure on two grounds. First, the defendant argued that the use of the figure was only for ornamental reasons and that he had no intention of indicating Popeye as a trademark because his own trademark was on the tag of the shirt. Secondly, the defendant argued that his use of the Popeye figure was legitimate, for he manufactured the undershirts under a license with the copyright holder of the Popeye figure, King Features Syndicate.

However, the Osaka District Court accepted the defendant’s first contention and did not rule on the copyright issue. This was apparently quite a disappointment for copyright proponents, for it left the issue of copyright protection for fictional characters unresolved.

Therefore, after the *Osaka Popeye Undershirt Case* was announced, a dichotomy existed. An undershirt manufactured in Osaka with a figure of Popeye on it would not infringe Osaka Sankei’s trademark; however, the same undershirt would infringe the same plaintiff’s trademark in Tokyo and thus the defendant was barred from marketing it in Tokyo. In other words, the manufacturer could manufacture and sell the undershirt in Osaka but could not sell it in Tokyo. It follows, also, that he could sell it in Osaka but could not manufacture it in Tokyo.

3. The Popeye Scarf Case

The most important case decided by the Osaka District Court in this line of copyright cases that this Comment analyzes is the *Popeye Scarf Case*. Here, the same plaintiff, Osaka Sankei K.K., again brought suit for trademark infringement against the producer of a scarf with Popeye’s figure on it.

The defendant contended that the use of Popeye was ornamental and was not an expression of the quality assurance that is included in the trademark’s use. Further, the defendant contended that the scarf was marketed under a license from the licensee of the original copyright holder, King Features Syndicate. Consequently, the Osaka District Court was directly confronted with the issue of where it would draw the line in protecting fictional characters independent of their original work.

Though the facts and arguments presented were nearly identical to the *Osaka Popeye Undershirt Case*, here the Osaka District Court held that

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102Osaka Sankei K.K. v. OX K.K., 8 Mumin-kohanshu 102 (Osaka District Court, February 24, 1976).


105See supra note 102 and accompanying text.
the use of the Popeye figure on a scarf did infringe the plaintiff’s trademark. Unlike the Tokyo District Court eight years earlier, however, the Osaka District Court was unwilling to extend copyright protection to the Popeye figure itself.106

In this case, the Osaka District Court held that a fictional character outside of its original work was not copyrightable material. The court determined that a fictional character was a personality comprised of a name, a figure and a role within an original work.107 Once independent of the original work, the character became an abstract idea incapable of copyright protection because copyright protects expressions not ideas. Therefore, the court held that a fictional character should not be afforded protection under copyright law as it is an abstract expression of the original work.109 The Japanese Copyright Act does not explicitly deny the copyrightability of ideas, as does its U.S. counterpart;110 however, Japanese case law has firmly established that expressions are copyrightable and ideas are not.111

The court next stated that in order to protect the right to use one’s character, the Copyright Act gives the reproduction rights to the original copyright holder.112 The court stated that a character is not equivalent to the original work, but rather is an abstract concept independent of that work. Therefore, the court reasoned that people cannot equate the fond image of the character understood as Popeye with the thought or sentiment the “original” author expressed in the original work.113 The court con-

106 As one would expect, the Sazae-san Case was not mentioned nor referred to in the opinion, because the Osaka District Court is under no obligation to follow previous Tokyo District Court decisions. However, the Osaka District Court generally ought to follow its own prior decisions or overrule them. Though trademark issues are beyond the scope of this paper, it is interesting to note that three different judges refused to follow the holding in the Osaka Popeye Undershirt Case; here they found the Popeye figure on a scarf to infringe the trademark, whereas a figure of Popeye on an undershirt would not. It is very difficult to reconcile these two cases because of this point. Neither case specifies if the figure on the scarf was a different source—a potential distinguishing point.

108 Id.
109 Id.
110 17 U.S.C. § 102(b) reads in part: “In no case does copyright protection for an original work of authorship extend to any idea. . .”
111 See Karjala supra note 3, at 52.
112 Copyright Act, art. 21. This states that the author shall have the exclusive right to reproduce his work.
113 In Kurtz’ words, “[s]tirring the memory of a character is not the same as substantial similarity, and only the later is infringing.” Kurtz supra note 1, at 451.
cluded that the tangible expression of the original characters as they were originally produced does not include the abstract concept of those characters. "[T]here is no reason to interpret all expressions of the character as that of the original work."114

That is, the court held that a fictional character is an idea. Therefore, any expression beyond the original work is not infringing but is even independently copyrightable by the "new" author. Therefore, the Osaka District Court denied the copyright defense and awarded Osaka Sankei $23,000 in damages in a partial trademark infringement award.

The defendant, Kawamura Shoji K.K., appealed to the Osaka High Court.115 However, in the midst of the appeal, Osaka Sankei (the winning plaintiff at the district level) conveyed their trademark to a third party, K.K. Matsudera, and withdrew from the case.116 Apparently, Osaka Sankei had grown weary of pursuing their trademark claim. This is understandable since they spent over seventeen years in three law suits in two different districts courts pursuing this issue. As a result of their efforts, they had only succeeded in attaining an injunction in Tokyo and a $23,000 trademark infringement award in Osaka.

The Osaka High Court117 affirmed the district court’s holding on the copyright defense in a “redundant expression of the [district court’s] opinion.”118 The case is now before the Supreme Court.119 The Supreme Court, therefore, is close to finally settling this twenty-year-old issue and determining what judicial standards will govern copyright protection of fictional characters.120

115Osaka Sankei K. K. v. Ox K.K., 17 Mutaishu (No. 3) 411 (Osaka High Ct., September 26, 1985).
116See Kikuchi, Characters from Comics, 91 JURIST (On Copyrights) 56 (1987) (Japanese) [hereinafter Kikuchi].
117An appeal in Japan is a matter of right. The procedure of the High Court (the appellate court) is basically a continuation of the trial court. New evidence may be submitted, theories of the case may change, and the lower court’s findings of fact are not binding on the appellate court. See TANAKA supra note 101, at 467; Taniguchi, The Post-War Court System as an Instrument for Social Change, INSTITUTIONS FOR CHANGE IN JAPANESE SOCIETY (G. DeVos ed.) 1984.
118Kikuchi supra note 116, at 56.
119At the date of printing, an opinion had not been issued.
120To decide this, the Supreme court will have to determine if a fictional character independent of its original expression is a "work" under Article 2 of the Act. As discussed earlier, though there is no precedent for this position, the Supreme Court could define a fictional character independent of its original expression as a "derivative work." A derivative work is defined as a work created by, among other things, adapting an otherwise pre-existing work. See Copyright Act, art. 2(i).
C. Policy Analysis of the Japanese Dichotomy

The Supreme Court is best equipped to decide this issue because it is an issue that is difficult to legislate. It would be overly expansive to amend the Copyright Act by adding another category to Article 10 — though this was done in the 1987 amendment to provide computer programs with copyright protection.\textsuperscript{121} Even if an amendment was added to provide copyright protection to "(x) fictional characters independent of their original work in some tangible form," it would not clarify the issue. Judicial standards are still needed to determine under what factual setting fictional characters will receive copyright protection when someone other than the original author tries to use the character and when a character is an "idea" rather than a "tangible expression."

The major policy concern to be balanced is the competition between the need to protect authors' rights to encourage creativity versus freedom of speech, free press, and fair use. Legislatively expanding the protection of fictional characters would have a negative impact on the expressed objective of the Copyright Act.\textsuperscript{122} Article 1 expressly states that the Copyright Act's purpose is to "protect the rights of authors... having regard to a just and fair exploitation of these cultural products, and thereby to contribute to the development of culture."\textsuperscript{123} Overly expansive protection would give authors a virtual monopoly on all versions of their original idea, resulting in a barrier to cultural development and prohibiting needed and fair exploitation of the characters.

Furthermore, the notion that Popeye is an abstract idea in any other medium of expression than the cartoon strip, as the Osaka court held, is

\textsuperscript{121}Copyright Act, Law No. 64 of 1987. "Computer programs" are much more amenable to clear definition than "fictional characters." Also, this 1987 amendment was the result of much heated debate on how to protect computer programs under Japanese law. Computer programs are a relatively new item. This debate centered on what sort of property rights should be recognized in the writer of the programs. Professor Karjala argued that a \textit{sui generis} approach should be used. \textit{See} Karjala, \textit{Lessons from the Computer Software Protection Debate in Japan}, 1984 \textit{Ariz. St. L. J.} 53. \textit{But Cf.} Y. Takaishi, General Counsel, IBM Japan Ltd., who argued that copyright was the logical source of protection. \textit{See} Y. Takaishi, \textit{The Perspective From Japan On Software Protection}, 1 \textit{Software L. J.} 187 (1986).

\textsuperscript{122}Copyright Act art. 1.

\textsuperscript{123}Id.
difficult to accept conceptually. Just like Sazae-san\textsuperscript{124} and the Disney characters,\textsuperscript{125} Popeye was taken from a tangible expression. In the case before the Osaka District Court, the plaintiff was not claiming a copyright over all conceptions of Popeye with no tangible expression. Rather, in that case there was a tangible expression—the character on the scarf—to compare with the original. Rather than look for any substantial similarity with the original work, the Osaka court arbitrarily concluded that Popeye was an abstract idea of the original and therefore should not be afforded protection.

If this analysis were applied to other cases, such as The Sazae-san Case,\textsuperscript{126} the infringing defendant would be able to use the character with impunity regardless of how similar the figures were. Without providing any protection for authors' characters, it would become a significant impediment to creativity. Impeding creativity would be diametrically opposed to the objective of the Copyright Act—to protect authors' creations to encourage them to contribute to the development of culture.

The opposite extreme is to grant the author a monopoly over any and all expressions of the character. This, likewise, would be an impediment to the development of culture because often characters are the result of a cumulative developmental process.\textsuperscript{127} Authors do not start with an empty mind and create a character from a unique creative burst. Rather, the character is the cumulative result of the author's experiences through life. Preventing new authors from using anything in the past that they were exposed to would also impede cultural development because the authors would be prohibited from creating anything that was not completely unique.\textsuperscript{128}

\textsuperscript{124}See supra note 77 and accompanying text.
\textsuperscript{125}See Air Pirates, 581 F.2d 751.
\textsuperscript{126}See supra note 77.
\textsuperscript{127}See Detective Comics v. Bruns, 111 F.2d 432, 433 (1940). In this case, the losing defendant had argued that the character of "Wonderman" was not an infringement of the copyright of "Superman" because Superman himself was not an original but rather is based on heroes of mythology such as Hercules. The court rejected this argument in this case because the defendant's appropriation of the character of Superman had been so blatant. However, in dicta, the court intimated the plausibility of this defense if the appropriation was of general types and ideas.
\textsuperscript{128}For example, in Warner Bros. v. American Broadcasting Cos., 720 F.2d 231 (2d Cir. 1983), the court held that the "The Greatest American Hero" (the star of an ABC television sitcom) was not substantially similar to "Superman" and therefore did not infringe on the plaintiff's copyright of Superman. With lines in the program such as, "It's a Bird, it's a Plane, it's Ralph Hinkley" (720 F.2d at 237), and the physical prowess of the two super characters (Id. at 237), it is difficult not to see some similarity. However, by requiring "substantial similarity," U.S. courts allow creative use of one character in the building of another.
Therefore, a balance must be struck between society's interest in using and developing an author's idea and the author's individual interest in protecting his idea from unfair exploitation by others. Since the copyright holder has exclusive right to derivative works, it seems that one potential solution would be to grant protection of fictional characters outside of the original work as a work derived from a tangible source.

When the Supreme Court decides this issue, it will also need to clarify the balance between copyright and trademark rights. Because the Osaka court held that Popeye was an abstract idea when expressed outside of the original work—and thus would not allow copyright laws to protect it—it has created a difficult situation. Currently in the Osaka district, the trademark holder of a copyrighted character can successfully sue a licensee of the copyright holder when that licensee markets the character. Though this situation is not possible in Tokyo following the Sazae-san Case, it is possible and recurs in Osaka.

IV. Conclusion

This Comment has described the contradiction that exists between the Tokyo courts and the Osaka courts in the interpretation of the Copyright Act and whether fictional characters can still be protected when they are expressed independently of the original work. The Tokyo court has granted such protection establishing a substantial similarity test similar to

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129 See Copyright Act, art. 21.
130 Id.
131 This is something the Diet [the Japanese legislature] has been unable to do.
132 This is true because Japanese Trademark Law does not require actual use of a trademark before registration. See supra note 98. Any copyright holder is thus burdened with having to police any potential infringing registration of their characters in Japan as trademarks of unrelated, unlicensed people or companies. However, even if a person or company does have the resources to monitor the Patent Office for infringing trademark applications, they are not guaranteed of success. In In re Walt Disney Productions, Shinketsu koho (No. 226) 23 (Pat. Off., April 25, 1960), the Patent Office dismissed Walt Disney's petition to deny a trademark of a black mouse called "Micky Mouse" (notice the "e" is missing from "Mickey"). Walt Disney relied on Article 4(1)(vii) of the Trademark Act which precludes trademarks which are "contrary to public order or good morals." The Patent Office rejected this stating that "even though the use of the registered trademark conflicts with the copyright owned by the petitioner, there is no likelihood that it will disturb public order or good morals to the extent that necessitates invalidation of its registration..." See, Doi, The Scope of Copyright Protection Against Unauthorized Copying, 29 COPYRIGHT SOC'Y U.S.A. (No. 4) 367, 375-376 (1982).
133 See, e.g., In re Walt Disney Productions, koho (No. 226) 23 (Pat. Off., April 25, 1960); The Osaka Popeye Undershirt Case, supra note 91; but cf. The Tokyo Popeye Undershirt Case, supra note 97 where this action was enjoined.
that of *Warner Bros. v. American Broadcasting Co.*134 The Osaka court held that Popeye was an abstract idea when not contained within one of the originally copyrighted comic strips. Therefore, copyright law was not available to protect Popeye independent of those comic strips.

Under such a conflicting situation, there is no predictability for either Japanese or American authors seeking protection of their characters in Japan. However, the Japanese Supreme Court has taken *The Popeye Case* on appeal. The Supreme Court should settle the issue and provide an articulable standard. This will provide some predictability and certainty to an area of current confusion in Japanese law.

\[134\text{See supra note 38 and accompanying text.}\]

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APPENDIX

[The following is the author's translation of the REASONING section of the Sazae-san Case. All footnotes are the author's additional comments intended to facilitate an otherwise quite literal translation that is as faithful to the original as possible. The purpose of this translation is to give the reader a flavor of the nature of Japanese legal reasoning.]


Sazae-san Case
Reasoning (I Chosakuken 726-730)

1. The plaintiff is a cartoon artist. Sazae-san is representative of her work. The cartoon Sazae-san is a daily newspaper comic strip consisting of four frames each day. The plaintiff has been writing this comic strip since 1946. In the beginning, this comic was published in the evening Fukunichi newspaper. Since 1949 it has been published in Asahi Shinbun.135

The defendant began operating a tour bus business and gave it the name of “Sazae-san Tours.” During the period from May 1, 1951 to December 31, 1970, the defendant’s buses operated with pictures of Sazae-san, Katsuo and Wakame, three characters from her cartoon strip. The significance of this action is in dispute here even though both parties stipulate to the above facts.

As stated above, the cartoon strip Sazae-san was a serial comic strip published in newspapers from 1946 until [and since] the defendant’s [alleged infringement] action. According to the testimony of Mr. Iida, the defendant began soliciting the name of “Sazae-san Tours” in the beginning of 1961 and began operations with the pictures of Sazae-san, Katsuo, and Wakame on both sides of its buses on May 1, 1951. By 1964 the defendant was operating 27 such buses. The use of these characters on these buses continued until December of 1970 when the plaintiff demanded that the defendant cease such usage.136 During the time of the defendant’s [alleged infringement] action, though obvious to this court, the contents of the cartoon Sazae-san were as follows.

The Sazae-san comic strip consisted of the main character Sazae, a typical housewife to an ordinary salaryman,137 her son Katsuo, daughter

135Asahi Shinbun is one of Japan’s major national newspapers.
136The defendant was apparently legally enjoined from further use. The opinion is not clear.
137A “salaryman” in Japan is the colloquial expressing used to describe a white-collar worker who is very dedicated to his company and spends most of his time and energy on that company. For a more detailed discussion, see Nakane, JAPANESE SOCIETY 120 (1984).
Wakame, husband Masuo, mother and father.\textsuperscript{138} It is written so as to develop the bright personality of Sazae-san as she tries to care for her household, raise children, take care of the family, etc. Even the personalities of the other characters that are expressed through their role, their looks, and their shape have a consistent, perpetual nature. Moreover, each particular four frame strip that appears each day is itself copyrighted.

We accept the above [as a true factual characterization of the case]. In each four-frame copyrighted comic strip, there is a specific topic and plot. This entire comic strip, characters and story, was created by the plaintiff. Even if there are similarities between the defendant’s characters and the Sazae-san created by the plaintiff, unless people recognize the three characters on the bus as Sazae, Kutsuo, and Wakame, it is not the Sazae-san comic strip, but something else. That is, regardless of the shape or looks of the figures, if a person were to look at the defendant’s buses and in his/her mind immediately connect those figures on the bus with the plaintiff’s copyrighted figures, that would sufficiently establish a copyright infringement. In other words, if someone else’s comic resembles Sazae-san characters, it could be mistaken for the real thing. For comic strips such as Sazae-san that have continued over a long period of time, the plot and topic is more often chosen to fit those characters specifically rather than having the characters merely be expositors of the topic or plot. In other words, the expression of permanent characters as a certain role, looks, and shape exceeds the mere facial expressions, movement, or emotions of the specific characters in specific scenes in the comic strip.

Therefore, using this as an example, a “character” can be defined as the overall expression of looks, shape, and personality of the entity in the comic strip.

2. The defendant has stipulated to the facts that they placed Sazae-san characters on both sides of their buses. They argue that this had nothing to do with the topic or plot of the story and was in no way an expression of it. The objective of using these figures, they explain, was to indicate their business activity of offering tour buses and guides for the public. However, as is indicated in plaintiff’s exhibit 5—to which the defendant shows no material objection—if someone looked at the defendant’s buses, they would instantly believe that the characters from Sazae-san, Sazae, Katsuo, and Wakame were being represented. That is, the fictional characters from the serial comic strip Sazae-san were being expressed. These figures on the buses may even resemble or be similar to specific characters as they appear in one of the specific copyrighted four-frame serial comic

\textsuperscript{138}Part of the humor behind this comic strip is in the names of the characters themselves. For instance, Wakame is actually the name of a type of seaweed most popularly used in ramen. All the names in the strip conjure up food images in the readers’ minds.
strips. However, we need not compare them with such a degree of scrutiny. In this case it has been sufficiently established that the defendant used the characters of the Sazae-san comic strip that were created and published in newspapers over a long period of time. These actions must be said to amount to an infringement of the plaintiff’s copyrights.

The plaintiff claims to possess one individual, independent copyright of the entire comic strip from its inception in the newspaper until today. The plaintiff claims that the defendant infringed upon the reproduction right of this copyright.

However, [this court cannot subscribe to this point of view.] For example, the completion date of a serial novel being published in a newspaper can be easily defined. When the novel is completed, it then as a unit is copyrightable. Even if a copyright for it as a single unit does appear (needless to say, each portion of novels that appear in newspapers are copyrightable on a daily basis as the creative expression of an idea or feeling), the type of comic strip, as is in question here, cannot be predicted or scheduled for completion.

Therefore, the plaintiff’s claim here cannot be accepted as it would amount to copyrighting material with indefinite contents. However, the plaintiff [correctly] claims to possess the copyright for each individual publication of each daily comic strip. The plaintiff’s contention that she possesses one individual, independent copyright ought to be viewed merely as the plaintiff counsel’s legal opinion. This court will not be restricted in this manner.

3. Next we must analyze the issue of monetary damages. According to the attitude taken by the defendant, as is expressed in the above opinion, the least we can do is to conclude that the defendant was negligent in infringing upon the copyrights of the plaintiff.

Therefore, the defendant has the duty/obligation\textsuperscript{139} to compensate the plaintiff for damages sustained.

The parties have stipulated to the fact that during the period of March 1, 1967 to December 31, 1970, the defendant used the Sazae-san characters on both sides of each of its 27 buses. However, the plaintiff claims that she is entitled to the normal monetary award in exercising her copyright vis-a-vis the defendant’s infringement. The plaintiff claims that this amount would come to at least 30,000 yen [$223.88] per bus per month. [Two] witnesses . . . testified that this was an appropriate amount.

However, with no convincing proof offered, it is difficult for us to trust this figure. On the other hand, [another witness] testified that in

\textsuperscript{139}The Japanese word is \textit{gimu}. Currently, this is translated as obligation/duty in order to incorporate both meanings of those words. Since the court has no contempt of court power, this refers to a social or moral obligation/duty to perform and not a legal one. \textit{See Kitagawa} § 8.01-8.07 (1980).
licensing agreements where the use of fictional characters is contracted to a third party and marketed, the usual approach in the business world is that at least 3% of the wholesale amount is paid to the licensee. (There was no other convincing proof offered.) In this case, based on the acceptable testimony named above, we will recognize damages as 3% of the income received from the use of the Sazae-san characters.

***[Detailed calculation of this 3% figure].***

The amount that the plaintiff is entitled to [due to the infringement of its copyright by the defendant] according to the above calculation[, therefore,] amounts to 18,244,099 yen [$136,149.99].