



Copyright as Barrier to Creativity: The Case of User-Generated Content

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ABSTRACT (EN): The chapter begins with a definitional overview of user-generated content (UGC) as a growing form of cultural and communicative activity in the digital environment. Its potential economic and cultural value are considered, as well as factors which act as barriers to its further development and distribution. It is argued that overly restrictive copyright policies and the threat of infringement liability unduly constrain the full potential of this emerging practice.

A comparative analysis of UGC's treatment as an exception or limitation to infringement in Canada, the United States, and other jurisdictions is undertaken, and the recently enacted UGC amendment to the Canadian *Copyright Act* is evaluated and critiqued. It is argued that UGC can best flourish as part of a broad fair-dealing right where its transformative nature is a central criterion.

User-generated content as a category of creative activity remains under-theorized, especially with respect to the relationship between the labour of individual creators in the networked environment and copyright policy. This chapter explores how changes in the digital environment necessitate the rethinking of certain aspects of copyright law in order to avoid undue barriers to the further development of digital content.

RÉSUMÉ (FR): Ce chapitre débute avec la présentation d'une vue d'ensemble du contenu généré par l'utilisateur (CGU) en tant que forme grandissante

d'activité culturelle et communicative dans le contexte numérique. Ses valeurs économiques et culturelles potentielles, ainsi que les facteurs agissant comme barrières à son développement et à sa distribution future, sont considérées. L'auteur soutient que les politiques trop restrictives du droit d'auteur ainsi que les menaces d'actions en violation de droit d'auteur restreignent indûment le plein potentiel de cette pratique émergente.

Le traitement du CGU, comme exception ou limite à la violation de droit d'auteur, fait l'objet d'une analyse comparative au Canada, aux États-Unis et dans d'autres États, et les modifications récemment apportées à la loi canadienne relativement au CGU sont évaluées et critiquées. L'auteur soutient que les pratiques de CGU peuvent mieux s'épanouir comme partie d'un droit à l'utilisation équitable des œuvres étendu, dans lequel la nature transformée de l'œuvre devient un critère central.

Le contenu généré par l'utilisateur, comme catégorie d'activité créative, reste peu analysé sur le plan théorique, surtout sous l'aspect du travail des créateurs individuels dans un environnement de réseaux interconnectés et des politiques de droit d'auteur. Ce chapitre explore comment les changements dans le contexte numérique nécessitent la reconsidération de certains aspects du droit d'auteur afin d'éviter de créer des entraves démesurées au développement futur du contenu numérique.

A. INTRODUCTION

This chapter looks at the creative processes from the point of view of authors who use existing copyrighted content as part of their creation of new works. Borrowing as a component of creative practice is not a new issue as authors have long been faced with questions concerning the scope of permissible borrowing, or use, in the course of generating new cultural objects. A long trajectory of borrowing practices is well documented in music, literature, and the visual arts. But what is new about the practice of borrowing is an increased tension between two processes. On the one hand, more and more individuals are now creatively engaging with cultural objects in an increasingly connected and networked environment. At the same time, though, content owners have become increasingly protective of their property rights, as they resort to the use of technological protection measures, as they issue take-down notices, and as they threaten litigation. This heightened tension results in an increasingly contentious policy environment, as was recently witnessed as Parliament went through the stages of amending

the *Copyright Act*,¹ and which continues to play itself out in the press and the blogosphere.

The conceptual frame of reference for this chapter will be “User-Generated Content” (UGC). This usage is emerging as both an indicator of a range of commonly understood creative practices, and a widely used legal term of art, particularly in the area of copyright law. UGC also exemplifies how contemporary forms of cultural and communicational practices shape intellectual property law, rather than simply being shaped by it. This chapter seeks to define and delineate the concept of UGC as it relates to creative practices; to consider the impacts and effects of copyright laws on its production and dissemination; and also to describe and then critically assess recent changes to Canadian copyright law pertinent to UGC.

This chapter will proceed as follows. Building on recent work on UGC,² Section B will review the general nature and characteristics of UGC, including definitional and classification issues. Section C will then consider the interrelationships between the creation and dissemination of UGC and copyright law. This section points to a paradox, one that is an increasing source of tension. On the one hand, copyright restrictions threaten to limit and impede the ability of creators to effectively engage with UGC, a constraint especially salient in institutional environments. On the other hand, creative practices have informally evolved in spite of copyright restrictions, and when practices become widespread and accepted, they become an impetus for reform in a user-oriented direction. The recent amendments to the *Copyright Act*, considered in more depth in Section D, evidence this paradox. While the new digital locks provisions have the potential to limit and impede the ability of end-users to make use of copyrighted works that are otherwise lawful, the expansion of the fair dealing categories to include education, parody, and satire, as well as the time shifting exception,

1 *Copyright Act*, RSC 1985, c C-42 [*Copyright Act*]. All references to “Act” in this chapter are to the *Copyright Act*.

2 Samuel E Trosow et al, “Mobilizing User-Generated Content for Canada’s Digital Advantage” (Report Prepared for the Social Sciences and Humanities Research Council of Canada, 1 December 2010), online: Western Libraries <http://ir.lib.uwo.ca/fimspub/21> [Trosow et al, “Mobilizing UGC”]; Pamela J McKenzie et al, “User-Generated Online Content 1: Overview, Current State and Context” (2012) 17:6 *First Monday*, online: <http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/3912/3266> [McKenzie et al, “UGOC Overview”]; Michael McNally et al, “User-generated online content 2: Policy implications” (2012) 17:6 *First Monday*, online: <http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/3913/3267> [McNally et al, “UGOC Policy”].

back-up, and user-generated content exceptions bring the Act into a closer fit with what had become established practices, or what Edward Lee calls “gap-fillers.”³

This chapter concludes that Canada has the potential to become a UGC haven, and that these “digital advantages” will have positive economic, social, and cultural effects. But more explicit policy attention needs to be given to UGC, as it is an essential component of a broader innovation policy. However, there are still several barriers which need to be overcome for these benefits to be realized. Despite the changes to the *Copyright Act* along with very positive signals from the Supreme Court in the pentalogy, there remains the danger that users will still be reluctant to fully embrace the full set of their rights. The fear of infringement liability is still very real. These barriers are likely to be especially persistent in institutional settings where overly restrictive copyright policies will only magnify the problem.

B. REVIEW OF THE GENERAL NATURE AND CHARACTERISTICS OF UGC

There have been various attempts to define and characterize UGC. A good starting point is the 2007 OECD definition as content that “reflects a certain amount of creative effort, and . . . which is created outside of professional routines and practices.”⁴ UGC has more recently been defined “as content that is voluntarily developed by an individual or a consortium and distributed through an online platform,”⁵ and a three-part classification scheme for UGC has been proposed as:

- 1) Individual textual, audio, image, video, and multimedia productions that are distributed online through software platforms such as blogs, podcasting repositories, Flickr, Twitter, YouTube, and citizen journalism sites;

3 Edward Lee, “Warming Up to User-Generated Content” (2008) 2008:5 U Ill L Rev 1459 at 1461.

4 Organisation for Economic Cooperation and Development (OECD), *Participative Web and User-Created Content: Web 2.0, Wikis and Social Networking* (28 September 2007) at 9, online: www.sourceoecd.org/scienceIT/9789264037465.

5 Trosow et al, “Mobilizing UGC,” above note 2 at 10; see also McKenzie et al, “UGOC Overview,” above note 2 in the “Overview and current state of user-generated content” section. In both of these sources, the term “developed” was used as a surrogate for the more precise copyright categories of originality and transformativity. For purposes of this chapter, these terms will be made more explicit.

- 2) Software modifications or applications that are written by individuals to operate within or augment specific previously existing datasets or hardware or software platforms (e.g., iPhone applications or “apps,” utilities that manipulate publicly-available data sets, game or virtual world modifications); and,
- 3) Formal or informal consortia that collaboratively produce and distribute UGC, including open source software (OSS), such as the Linux or Apache, and wikis, such as Wikipedia.⁶

While software development of modifications and apps as well as the larger scale projects included in the second and third categories are important types of UGC, this chapter will focus on the first category. As Daniel Gervais noted back in 2009, “[h]undreds of millions of Internet users are downloading, altering, mixing, uploading, and/or making available audio, video, and text content on personal web pages, social sites, or using peer-to-peer technology to allow others to access content on their computer.”⁷

At the outset, an important distinction should be made between original UGC and transformative UGC. In order for content to qualify as “UGC” in the first instance, it must possess a degree of creativity. Simply reposted existing content is not UGC.⁸ In other words, for content to qualify as UGC it must contain some degree of originality or transformativity (or more likely some combination of both).

Originally authored creative content ranging from blog posts, a Wikipedia article or new open source software program are *prima facie* examples of how users can produce and distribute new, economically and socially valuable works. However, not all UGC is entirely original. One of the most important kinds of UGC is content where the author/creator has drawn on existing works and transformatively repurposed them into a new work. Transformative uses run the gamut from photo mashups that juxtapose two different images to video remixes drawing on hundreds of pieces of content.⁹

6 Trosow et al, “Mobilizing UGC,” above note 2 at 4–5; McKenzie et al, “UGOC Overview,” above note 2 in the “Introduction” section.

7 Daniel Gervais, “The Tangled Web of UGC: Making Copyright Sense of User-Generated Content” (2009) 11:4 Vand J Ent & Tech L 841 at 845–46.

8 While this point may seem self-evident, see the text accompanying notes 44–46 below.

9 McNally et al, “UGOC Policy,” above note 2 in the “Originality, transformativity and UGC” section [emphasis in original].

In terms of how an existing copyrighted work is being used, Rebecca Tushnet argues that “[u]sing a work as a building block for an argument, or an expression of the creator’s imagination, should be understood as a transformative purpose, in contrast to consuming a work for its entertainment value.”¹⁰

Tushnet’s distinction between consumptive and transformative uses is crucial, and it is reflected in the language of section 29.21 itself. While most original works involve some degree of borrowing, and while transformative works necessarily involve some degree of originality, it is useful to separate the concepts of originality and transformativity for analytical purposes because it is the particular case of transformative UGC that poses the more challenging copyright issues.¹¹

This chapter will pay particular attention to transformative UGC where the creator is making substantial uses of existing works or sound recordings in which copyright exists. To the extent that such uses are not licensed or otherwise utilized with the permission of the copyright holder, we are essentially assuming what would technically amount to a *prima facie* case of copyright infringement. Since “UGC creates cultural, symbolic, and affective benefit including personal satisfaction, enhanced skill or reputation, improved functionality for existing games or devices, community building or civic engagement,”¹² the working assumption in this chapter is that copyright policy needs to be able to accommodate a robust set of user-oriented rights which will not simply permit or tolerate, but affirmatively encourage and nurture the development and dissemination of transformative UGC.

10 Rebecca Tushnet, “User-Generated Discontent: Transformation in Practice,” (2008) 31:4 Colum J L & Arts 497 at 506.

11 Where a use is merely consumptive, or where it involves mere copying without any additional element of added originality, then the new UGC exception does not come into play. Such a use might or might not come within the scope of fair dealing or another special limitation or exception in the Act depending on the circumstances.

As Daniel Gervais points out: “The proposed exception is not a license to freely copy anything or to upload it to any social site. It requires transformation. It is a *limited* right to reuse existing works to create new works, in cases where a licensing transaction is not reasonable and there is no demonstrable impact on the market for existing works”: Daniel Gervais, “User-Generated Content and Music File-Sharing: A Look at Some of the More Interesting Aspects of Bill C-32” in Michael Geist, ed, *From “Radical Extremism” to “Balanced Copyright”: Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010) 447 at 465 [footnote omitted].

12 McKenzie et al, “UGOC Overview,” above note 2 in the “Value Creation” section.

Finally, before turning to a consideration of how copyright can act as a constraint to the creation and dissemination of UGC, it is useful to first contextualize UGC as a historically disruptive force. While UGC offers an important source of innovation, it also tends to destabilize several entrenched dichotomies, thereby posing a challenge to established business models, especially in the cultural, publishing, and entertainment sectors.

The UGC phenomenon disrupts the traditional dichotomies between the creator and the end user, between the producer and the consumer, between the performer and the audience, and between (waged) work time and (unwaged) leisure time. It also challenges the significance of core copyright concepts such as authorship, ownership, and infringement. For Debora Halbert, UGC is not only creative work in its own right, but work that “generally disrupts the commercial paradigm.”¹³ She observes that “[t]he user-generated world can and does play with the commodified products of the culture industry, appropriating common cultural symbols and remaking them as personally meaningful connections.”¹⁴

Halbert’s Manifesto is important because by explaining UGC as a disruptive force, it helps set the stage for why it has generally become such a contested policy issue and why copyright has become the specific locus of the dispute.

Where once there existed the relatively stable world of the culture industry in which concentrated control over film, music, literature, and art was easy, the technology of modernity has shifted control into the hands of consumers of culture. Stable control over the culture industry was possible because commodity culture de-skills people as creators, in the same way that industrialization de-skilled the artisan and craftsperson while turning them into fodder for the industrial machine.¹⁵

C. COPYRIGHT: A CONSTRAINING BARRIER TO UGC

Barriers to UGC production and distribution can take several forms:

First, to produce and share UGC individuals must have the requisite technology and skills as well as access to appropriate tools. Second, private

13 Debora Halbert, “Mass Culture and the Culture of the Masses: A Manifesto for User-Generated Rights” (2009) 11:4 *Vand J Ent & Tech L* 921 at 924. [Halbert, “Manifesto”].

14 *Ibid* at 930.

15 *Ibid* [footnote omitted].

ordering mechanisms such as licenses and technological protection measures (TPMs) provide content owners increased control over their products even beyond the scope of publicly ordered intellectual property law. Finally, copyright and patent laws directly provide powerful legal mechanisms which impede the creation and dissemination of UGC.¹⁶

Without downplaying the importance of the other factors, this section will focus on the last factor, the effects of copyright policies as a constraining barrier to UGC.

Using evidence gathered from the Chilling Effects Project,¹⁷ Wendy Seltzer argues that US law, “through copyright and the DMCA, is responsible for this restriction on Internet speech . . . even though the DMCA relies upon private enforcement, because of the incentive structure the DMCA creates for online intermediaries.”¹⁸

Seltzer uses several high-profile examples and she acknowledges they may seem extreme. But she asserts that the

frequency of error and its bias against speech represents a structural problem with secondary liability and the DMCA: the DMCA makes it too easy for inappropriate claims of copyright to produce takedown of speech. It encourages service providers to take down speech on notice even if the notice is factually questionable or flawed.¹⁹

While Canadian intermediaries are at an advantage in this regard since at least so far the government has resisted calls for the type of “notice and takedown” regime in effect in the US,²⁰ it is too early to assess whether the

16 McNally et al, “UGOC Policy,” above note 2 in the “Barriers to user-generated content production and distribution” section; see also Trosow et al, “Mobilizing UGC”, above note 2 at 37–41.

17 Chilling Effects is a joint project of the Electronic Frontier Foundation and several legal clinics in the US. The project is intended to draw attention to overreaching attempts by content owners to use their intellectual property rights to impede protected activity on the Internet, noting that “[a]necdotal evidence suggests that some individuals and corporations are using intellectual property and other laws to silence other online users” and they provide a searchable database of cease and desist letters: see <http://chillingeffects.org>.

18 Wendy Seltzer, “Free Speech Unmoored in Copyright’s Safe Harbor: Chilling Effects of the DMCA on the First Amendment” (2010) 24:1 Harv JL & Tech 171at 175.

19 *Ibid* at 177–78.

20 Sections 41.25 et seq. of the Canadian *Copyright Act*, above note 1, added by Bill C-11 provide for a “notice and notice” regime wherein intermediaries are under an obligation to provide notice to the account holder when they receive a notice from a content owner that there is alleged infringement.

“notice and notice” provisions will create similar problems of chilling effects.²¹ But the problem of chilling the full utilization of users’ rights is still present in Canada. Canadian rights-holders, especially as represented by collectives such as Access Copyright and SOCAN, very aggressively assert their rights, and they have been successful in discouraging the full utilization of users’ rights.²² Access Copyright has the additional advantage that they do not deal directly with end-users. They contract directly with institutions which are often risk-averse and willing to comply with licensing terms that seek compensation for uses that are otherwise non-compensable,²³ especially when the licensing costs can be downloaded on another party.

In contrast to much of the emphasis on chilling, Edward Lee emphasizes warming. He argues that the most significant copyright development did not come from the legislature, courts, or industry, but rather “from the unorganized, informal practices of various, unrelated users of copyrighted works, many of whom probably know next to nothing about copyright law.”²⁴ Lee’s thesis is that these informal practices provide “gap-fillers” and that “these unauthorized mass practices of users may have . . . turned out to be the catalyst for subsequent ratification of those practices . . .”²⁵ He introduces the concept of warming to explain how uncertainty in copyright law may actually embolden user behaviour, and that user-generated content on the Internet is particularly conducive to such warming.²⁶ Lee’s analysis seems to be especially on point with a range of the new exceptions and limitations added

21 For a further discussion of chilling effects in the Canadian context, see Jonathon Penney, “Copyright’s Media Theory and the Internet: The Case of the Chilling Effects Doctrine,” Chapter 23 in this volume.

22 For a further discussion on the success of copyright collectives, particularly SOCAN in the area of public performances, see Louis D’Alton, “A Gramscian Analysis of the Public Performance Right,” Chapter 10 in this volume.

23 An assessment of institutional risk-aversion and its relationship to the notion of copyright chill is beyond the scope of this essay. For further discussion on how Access Copyright has been able to impede the full utilization of users’ rights in the educational context, see Samuel E Trosow, “Bill C-32 and the Educational Sector: Overcoming Impediments to Fair Dealing” in Michael Geist, ed, *From “Radical Extremism” to “Balanced Copyright”: Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010) at 519; Samuel Trosow, Scott Armstrong, & Brent Harasym, “Objections to the Proposed Access Copyright Post-Secondary Tariff and its Progeny Licenses: A Working Paper” (14 August 2012), online: Western Libraries ir.lib.uwo.ca/fimspub/24.

24 Lee, above note 3 at 1460.

25 *Ibid* at 1461.

26 *Ibid* at 1463–64.

to the *Copyright Act* through Bill C-11, especially those contained in sections 29.21 through 29.24.

Perhaps the most significant instances of copyright chill have taken place with respect to the remixing and sampling of musical works and sound recordings. Like Seltzer's examples from the US *Digital Millennium Copyright Act*, these problems emanate from the United States, but they do have spill-over effects in Canada.

Even though the fair use doctrine in the United States allows for the creation of transformative works, cases related to sampling from sound recordings have limited practical application and have created a chilling effect against what were the previous sampling practices in the 1980s.²⁷ While these cases are of questionable precedent value, they have had a significant chilling effect on the willingness of artists to fully utilize their users' rights and engage in sampling practices.

While most of these constraints seem to emanate from the United States, Canada has not been without its problems. While the application of the fair use doctrine is open-ended in the US, in that there is no need to first come within a threshold category, Canadian fair dealing is still limited to certain enumerated categories.²⁸ In other words, merely engaging in a transformative use will not necessarily trigger fair dealing in Canada. It is still conceivable, even with the addition of education, parody, and satire to section 29, that a particular instance of UGC might not fit into an allowable fair dealing category. Hence the importance of new section 29.21 of the Canadian *Copyright Act*, which was recently added by the enactment of Bill C-11 in June 2012. The next section will look at the new UGC provision in

27 In *Grand Upright Music Ltd v Warner Bros Records*, 780 F Supp 182 (SDNY 1991), rapper Biz Markie was found liable for infringement for sampling Gilbert O'Sullivan's song "Alone Again Naturally," with Judge Duffy going so far as to note that sampling not only violated US copyright law but also the Seventh Commandment. In *Bridgeport Music, Inc v Dimension Films*, 410 F 3d 792 (6th Cir 2005), the 6th Circuit found that the borrowing of three notes constituted infringement. The court also stated "[g]et a license or do not sample" as a general proposition. While these cases are not binding precedent outside of the 6th circuit and the Southern District of NY (much less in Canada), they have had a persistently persuasive and chilling effect on sampling practices.

28 In order to qualify for fair dealing in Canada, the use must come within the enumerated categories of research and private study (s 29), criticism or review (s 29.1), or news reporting (s 29.2): *Copyright Act*, above note 1, ss 29–29.2. Bill C-11 has added the categories of education, parody, and satire to section 29. As well, Canadian courts have been very clear that these categories should be broadly construed because fair dealing is an important user's right. Still, not all instances of UGC come within one of these categories, even if they are broadly construed.

detail, and also consider its relationship to both fair dealing and the digital locks provisions.

D. EVALUATING THE AMENDMENTS TO THE CANADIAN COPYRIGHT ACT

1) The New User-Generated Content Exception: Section 29.21

The new provision in the Canadian *Copyright Act*,²⁹ section 29.21, (formally labelled “Non-commercial User-generated Content” but also frequently referred to as the YouTube exception) provides a broad exception to copyright infringement for making use of copyrighted content in the creation of new content. Subject to five conditions, an individual can use an existing copyrighted work (or other subject matter like a performance or a sound recording) to create a new original work (or other subject matter). Furthermore, the individual (or a member of the individual’s household) can then use it or authorize an intermediary to distribute it. The exception is not limited to works, but can also be applied to other subject matter such as performers’ performances and sound recordings.³⁰

The term “use” is defined very broadly to include not only making reproductions of the copyrighted content, but also publicly performing it, communicating it to the public, translating it, and making adaptations.³¹

According to the official *Legislative Summary* for Bill C-11:

New section 29.21 of the Act creates a new exception for content generated by non-commercial users (this has been referred to as the “UGC” (user-generated content) or “mash-up exception”). Under this exception, a consum-

29 Most of the provisions of Bill C-11 (including the subject UGC provisions) were proclaimed in force on 7 November 2012; Order Fixing Various Dates as the Dates on which Certain Provisions of the Act Come into Force, (2012) 146:23 C Gaz II, 2447 referring to PC 2012-1392, 25 October 2012), online: www.gazette.gc.ca/rp-pr/p2/2012/2012-11-07/pdf/g2-14623.pdf.

30 The first paragraph of s 29.21 of the *Copyright Act*, above note 1, refers to an “existing work or other subject-matter” which would include performers’ performances (ss 15, 26), sound recordings (s 18), and communication signals (s 21). The fact that the UGC exception is not limited to just works is significant as it explicitly applies to material from sound recordings.

31 “Use” is broadly defined to include all of the exclusive owners’ rights in s 3 of the *Copyright Act* other than the authorization right. Section 29.21(2) provides: “‘use’ means to do anything that by this Act the owner of the copyright has the sole right to do, other than the right to authorize anything.”

er has the *right* to use, in a non-commercial context, a publicly available work in order to create a new work. This exception is subject to conditions, namely the identification of the source, the legality of the work or the copy used, and the absence of a substantial adverse effect on the exploitation of the original work.³²

The five conditions are important because they constrain the potential scope of the UGC right. First, the content being used must have been “published or otherwise made available to the public.”³³ Second, the use of the newly resulting UGC (and the authorization to distribute it) must be solely for non-commercial purposes.³⁴ Third, where it is reasonable under the circumstances to do so, the source (name of the author, etc.) of the content used must be given.³⁵ Fourth, the user must have had a reasonable belief that the source was not infringing.³⁶

The fifth condition is a bit more complex; that “the use of, or the authorization to disseminate, the new work or other subject-matter does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work or other subject-matter — or copy of it — or on an existing or potential market for it, including that the new work or other subject-matter is not a substitute for the existing one.”³⁷

The first, third, and fourth conditions are relatively straightforward and non-problematic. But the second condition that the UGC be “solely for non-commercial purposes,” and the last condition regarding lack of substantial effect, even on a *potential* exploitation, as they are so broadly drafted require further discussion. The limitation in paragraph 29.21(1)(a) “the use of, or the authorization to disseminate, the new work or other subject-matter is done solely for non-commercial purposes” purports to create a bright-line distinction between commercial and non-commercial purpos-

32 Legal and Legislative Affairs Division, Legislative Summary, “Bill C-11: An Act to Amend the *Copyright Act*” (Publication No 41-1-C11-E) by Dara Lithwick and Maxime-Olivier Thibodeau (Ottawa: Library of Parliament, 20 April 2012) at 12, online: www.parl.gc.ca/Content/LOP/LegislativeSummaries/41/1/c11-e.pdf [emphasis added].

33 *Copyright Act*, above note 1, s 29.21(1).

34 *Ibid*, s 29.21(1)(a) (“the use of, or the authorization to disseminate, the new work or other subject-matter is done solely for non-commercial purposes.”).

35 *Ibid*, s 29.21(1)(b) (“the source — and, if given in the source, the name of the author, performer, maker or broadcaster — of the existing work or other subject-matter or copy of it are mentioned, if it is reasonable in the circumstances to do so.”)

36 *Ibid*, s 29.21(1)(c) (“the individual had reasonable grounds to believe that the existing work or other subject-matter or copy of it, as the case may be, was not infringing copyright.”)

37 *Ibid*, s 29.21(1)(d).

es. This is not only a difficult distinction to make in such absolute terms at the outset, but the commercial/non-commercial nature usage of the UGC might also shift over time. The language would be easier to comprehend and implement if it said “primarily” instead of “solely.” Taken literally, any incidental or even insignificant commercial aspect of the use threatens to nullify the exemption. While the degree of commerciality is certainly an important factor, it should not have been drafted as a bright-line requirement. Does posting UGC on a platform that provides potential economic benefits for popular content nullify the exception? Given YouTube’s potential monetization incentive, are postings on YouTube likely to be disqualified? On the one hand, a strict reading of the provision would suggest likely disqualification. Daniel Gervais suggests that such a narrow reading of the exception to restrict it to purely non-commercial uses would offer only limited protection as sites like YouTube and many blogs ultimately have commercial aspects.³⁸

On the other hand, the term “YouTube exception” was widely utilized during the discussions on Bills C-32 and C-11 so a strong counter-argument can be made that Parliament did not intend YouTube postings to be necessarily commercial and hence disqualifying. In its *Backgrounder* on Bill C-31, the government summarized the provisions as follows:

Canadians will also be able to incorporate existing copyrighted material in the creation of new works, such as Internet mash-ups, as long as:

- it is done for non-commercial purposes;
- the existing material was legitimately acquired; and
- the work they create is not a substitute for the original material or does not have a substantial negative impact on the markets for the original material, or on the creator’s reputation.³⁹

And in a posted Q&A on the provision, the government stated “[f]or users, the Bill will allow the creation of user-generated content using copyright materials, such as mash-up videos, for posting on a blog or video-sharing site.”⁴⁰

38 Gervais, above note 11 at 473, arguing that an expansive definition of commerciality might cover postings to YouTube.

39 Industry Canada, *Copyright Modernization Act — Backgrounder* (2011), online: www.ic.gc.ca/eic/site/crp-prda.nsf/eng/h_rp01237.html.

40 Industry Canada, *Questions and Answers: The Copyright Modernization Act* (2011), online: www.ic.gc.ca/eic/site/crp-prda.nsf/eng/h_rp01153.html.

Most telling, direct references to YouTube were made by the government prior to the passage of Bill C-11 with respect to the proposed exception. A memorandum for use by ministers in responding to questions for legislative committees entitled “Questions and Answers—Bill C-32: For Ministers’ Appearance Before the Legislative Committee” contains a heading entitled “Copyright Owner Concerns Around the UGC Exception.”⁴¹ It asks the question: “The YouTube/mash-up exception opens another door to piracy. Why did the government create such a broad and undefined exception?” In a separate document providing a clause-by-clause analysis, the government explicitly indicates posting a video to YouTube as an example of activity that could fall under the exception. In explaining the rationale for the new section, the analysis stated: “The individual who creates this ‘user-generated content’ can also authorize its dissemination by an intermediary (e.g., YouTube).”⁴² These documents provide compelling evidence that a posting to YouTube or similar commercial website should not necessarily be a disqualifying act under paragraph 29.21(a).

More problematic is the question of what happens if the UGC begins as a wholly non-commercial project, such as a school project or a hobby-related activity, and subsequently enjoys a measure of commercial success. Would the previously attached UGC exception remain intact, or would it be nullified? Most likely the exception would remain intact because it would be unusual to suggest that what was a non-infringing act at the time of creation has somehow now morphed into an infringing act.

The final condition also creates unwarranted ambiguity about the scope of the exception and the certainty with which it can be utilized. Of particular concern is the vagueness of the wording “potential exploitation of the existing work” and “potential market for it [the existing work].” If interpreted broadly, these potentialities could be quite large and significantly limit UGC production and distribution. In the extreme, it could be argued orig-

41 “Questions and Answers—Bill C-32: For Ministers’ Appearance Before the Legislative Committee” (2011); the document has been posted to www.scribd.com/doc/65726239/c32ministerqanda; according to a stamp, it was released pursuant to the *Access to Information Act*: see Michael Geist, “Behind the Scenes of Bill C-32: The Complete Ministerial Q & A” (21 September 2011), online: MichaelGeist.ca www.michaelgeist.ca/content/view/6017/125/.

42 See Michael Geist, “Behind the Scenes of Bill C-32: Govt’s Clause-By-Clause Analysis Raises Constitutional Questions” (27 September 2011), online: MichaelGeist.ca www.michaelgeist.ca/content/view/6026/125/, embedding a document containing detailed reviews of, rationales underlying, and changes in Bill C-32, at 45.

inal works could be potentially exploited in an unlimited number of ways and that potential markets for such works include a variety of yet unimaginable (but potential) opportunities. It is important to emphasize that while this final condition appears similar to the sixth fair dealing factor, the effect of the dealing on the work,⁴³ the limitations in paragraph 29.21(1)(d) seem more explicit and potentially broader. In other words, the analysis that is required under paragraph 29.21(1)(d) could be more complex and fraught with uncertainty for the claimant of the UGC exemption than the same person making a fair dealing claim under the very same circumstances. This additional language regarding the *potential* exploitation of the work has not been inserted into section 29 despite the fact that section 29 was itself amended in Bill C-11. This disparity creates the possibility that under the same set of circumstances, a claim under the UGC exception could be weakened even where fair dealing could still be successfully established.

Despite these clear limitations on the scope of the UGC exception, opponents of the proposed section persistently argued that it would apply to simple re-postings of existing works. For example, in their submission on Bill C-32, the Entertainment Software Association of Canada (ESAC) made the claim that the UGC provision “would allow anyone to copy all of the designs, art assets and even programming code from a game and release a ‘copycat’ game for free on the Internet.”⁴⁴ Of course simply re-posting an existing work does not constitute user-generated content even under the most liberal of its definitions. Section 29.21 has an explicit threshold requirement that the content be new, and there is no doubt that under the circumstances of ESAC’s example the copying would be disqualified for not

43 In *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 SCR 339, the court set forth the six factors to consider when determining whether a dealing is fair. The sixth factor, the effect of the dealing on the work, was explained in paragraph 59: “[T]he effect of the dealing on the work is another factor warranting consideration when courts are determining whether a dealing is fair. If the reproduced work is likely to compete with the market of the original work, this may suggest that the dealing is not fair. Although the effect of the dealing on the market of the copyright owner is an important factor, it is neither the only factor nor the most important factor that a court must consider in deciding if the dealing is fair.” Accordingly, it appears that in a fair dealing analysis the effect of the dealing on the work is only one of six factors, and not a determinative one at that. Yet, the language of section 29.21(1)(d) elevates the effect on the work to a determinative factor, which alone could disqualify the exception.

44 Entertainment Software Association of Canada (ESAC), *Submission to the Legislative Committee on Bill C-32* (December 2010) at 11, online: Parliament of Canada www.parl.gc.ca/Content/HOC/Committee/411/CC11/WebDoc/WD5401532/403_C32_Copyright_Briefs/EntertainmentSoftwareAssociationofCanadaE.pdf.

meeting these conditions. ESAC further claimed that the provision would “allow anyone to reverse engineer and extract the underlying technologies and code from a game (such as a game engine) and offer it for free on the Internet.”⁴⁵ Similarly, counsel for the Canadian Media Production Association (CMPA) told the Legislative Committee on Bill C-32:

[W]hile we fully appreciate the rationale for the user-generated content exception, our members are deeply concerned that it sets the creative bar way too low for what would constitute such content. What none of us want is a provision that might, for example, inadvertently permit a user to upload full seasons of *Degrassi* or *Corner Gas* to the Internet. In that scenario, the only thing that’s being generated is lost revenue to the people who make *Degrassi*.⁴⁶

Given the explicit language in section 29.21, it appears that the UGC exception, while closely related to fair dealing, is not exactly the same. The two defences exist in parallel and a UGC claimant defending against an infringement action could raise either or both the general fair dealing right or the special UGC exception. In a situation where one of the categories of fair dealing is not present,⁴⁷ then the defence under section 29.21 is still available assuming all of its conditions can be met. However, in a situation that is otherwise eligible for fair dealing, the fact that a use is commercial (or somewhat commercial) or where a *potential* exploitation has an adverse effect on the work, fair dealing is not necessarily nullified; it would depend on all of the factors. It is anticipated, however, that in most situations, the same result should be reached under both fair dealing and the UGC exception.

2) Interaction between Section 29.21 and the Digital Locks Provisions

Over the past few years, much concern has been expressed about the interaction between the digital locks provisions contained in Bills C-61, C-32, and ultimately C-11 and their relationship to various users’ rights in other sec-

45 *Ibid.*

46 Legislative Assembly, *Legislative Committee on Bill C-32: Evidence*, 40th Parl, 3rd Sess (1 February 2011) at 1220, Testimony of Reynolds Mastin, online: Parliament of Canada www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4915240&Language=E.

47 That is, the use qualifies neither as research, private study, parody, or satire under s 29; criticism or review under s 29.1; or news reporting under s 29.2: *Copyright Act*, above note 1, ss 29–29.2.

tions of the Act. Insofar as the text of the anti-circumvention rules added in section 41 of the Act do not contain general limitations for activity that is otherwise non-infringing, the concern has been that users' rights (such as fair dealing or other specific statutory exceptions) would be impaired.

Indeed, several of the new special exceptions in Bill C-11 are explicitly so limited. For example, section 29.22, which adds a safe-harbour for certain instances of private copying provides "the individual, in order to make the reproduction, did not circumvent, as defined in section 41, a technological protection measure, as defined in that section, or cause one to be circumvented."⁴⁸ Section 29.23, which provides a limited exception for reproduction of parts of broadcasts for later viewing or listening, contains a similar counter-limitation. The safe-harbour from infringement liability in that section applies only if "the individual, in order to record the program, did not circumvent, as defined in section 41, a technological protection measure, as defined in that section, or cause one to be circumvented."⁴⁹ Section 29.24, pertaining to back-up copies, contains the same caveat.⁵⁰ Finally, section 30.04, which provides educational institutions with a limited exception to make certain uses of materials that are publicly available on the Internet, contains a specific counter-limitation that "[s]ubsection (1) does not apply if the work or other subject-matter — or the Internet site where it is posted — is protected by a technological protection measure that restricts access to the work or other subject-matter or to the Internet site."⁵¹

As the above paragraph demonstrates, Parliament has expressed a very clear intent to limit certain exceptions. In contrast to the other new exceptions, the UGC exception in section 29.21 does not contain any reference to it being inapplicable where a technological protection measure is circumvented within the meaning of section 41. In other words, Parliament chose NOT to so limit the availability of the UGC exception where there is an act of circumvention. This is not to say that engaging in a proscribed act of circumvention would not otherwise constitute a violation of section 41; however, unlike sections 29.22, 29.23, 29.24, and 30.04, the exception itself

48 *Copyright Act*, above note 1, s 29.22(1)(c).

49 *Ibid*, s 29.23(1)(b).

50 *Ibid*, s 29.24(1)(c).

51 *Ibid*, s 30.04(3). Paragraph 30.04(4)(a) contains the further counter-limitation that the exception does not apply where "that work or other subject-matter — or the Internet site where it is posted — is protected by a technological protection measure that restricts the doing of that act."

is not nullified and to suggest otherwise would be to render the referenced language in these other sections as *surplusage*.

This argument might be countered with the assertion that acts of circumvention would also disqualify the UGC exception because paragraph 29.21(c) nullifies the exception where “the individual had reasonable grounds to believe that the existing work or other subject-matter or copy of it, as the case may be, was not infringing copyright.” However, there is an important distinction to be made here. An act of circumvention proscribed by section 41 is not an act of copyright infringement. Nowhere does the Act purport to characterize an act of circumvention as a copyright infringement as such. The remedies provision in section 41 makes explicit reference to the remedies for copyright infringement,⁵² and this is very different than characterizing the underlying acts of circumvention as infringement themselves.

E. CONCLUSIONS

Despite its shortcomings and limitations, the new UGC exception added to the *Copyright Act* provides an extra level of protection for creators of user-generated content and it could prove to be exceptionally flexible. It is additive to fair dealing in the nature of a statutory safe-harbour so long as its conditions are met. In situations where failure to meet one of the conditions disqualifies the UGC safe-harbour, resort can still be made to fair dealing. The provision is not limited to using works; it applies to all copyrighted subject matter including sound recordings. It is not limited to making copies, as the term “use” applies to all of the owner’s exclusive rights other than the authorization rights, so it applies to public performances, translations, adaptations, and communications to the public of works and sound recordings. As well, while under current usage, UGC generally refers to materials that are distributed online, there is no such limitation in the text of the exception. Thus, it could be applicable to CDs and reprographic reproductions.

52 Subsection 41.1(2) provides: “The owner of the copyright in a work, a performer’s performance fixed in a sound recording or a sound recording in respect of which paragraph (1) (a) has been contravened is, subject to this Act and any regulations made under section 41.21, entitled to all remedies — by way of injunction, damages, accounts, delivery up and otherwise — that are or maybe conferred by law for the infringement of copyright against the person who contravened that paragraph.” There is similar language with respect to violations of the device and service prohibitions in subsection 41.1(4). But referencing the remedies for infringement is very different than characterizing the act itself as infringement.

Yet, it remains to be seen how well the new provision will be received and implemented. While the problem of copyright chill is still present as an inhibiting factor, the new provision may well act as a counter to copyright chilling and result in the soft warming as envisioned by Edward Lee. It could also have the effect of furthering the process of de commodification and the democratization of content provision, as envisioned by Debora Halbert, insofar as the production of creative content is being widely distributed among a large number of dispersed creators.

Creating an environment where UGC creators are enabled and encouraged to produce, distribute, and reuse new materials continues to present a challenge to policy-makers. Given the benefits of UGC, it is not enough that they be merely tolerated; they need to be actively encouraged. While the addition of section 29.21 to the *Copyright Act* is a positive step forward, strategies for encouraging the development of UGC need to be more broadly considered as an essential element of Canada's innovation policy, a policy which remains as yet unarticulated.