

The Advantages and Disadvantages of Introducing a New User-Generated Content Exception Into Copyright Legislation

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Abstract

User-generated content (UGC) has arose many arguments while thriving. It is important but difficult to keep a balance between encourage creation and tolerance of light infringement in the field of UGC. Introducing a new exception for UGC maybe a proper method to keep the balance which may lead uncertainty and lack of protection. On contrary, a future compulsory-licensing approach may play a better role to keep the balance. Compulsory-licensing poor provide right holder a platform to sharing their content and gain profits according to the policy of sharing economy. Besides, it also enables right holder to drop out from this sharing pool when the right holder aims to control the copyright as much as possible. This new licensing method can protect the copyright as well as encouraging the prosperity of UGC industry.

Keywords: user-generated content, legal exception, compulsory-licensing

User-generated content (UGC), as a new phenomenon thrived with the development of digital technology, has become a significant and controversial part of the copyright law. More and more internet users become content producers rather than a mere content receiver. However, the possibility of infringement or a legal proceeding would hider the creativity thrive as well as the culture prosperity, which is contrary to the goal of copyright to encourage creativity. Nevertheless, an unlimited tolerance to such content and pursue freedom of using others' work blindly may impact the profit and copyright of the source-work author. It is significant to keep the balance of every parties' profit to protect the creativity and the legal right of the source work in the meantime. Generally, UGC can defense itself as fair dealing or incidental inclusion exception which leads uncertainty and lack of protection instead. As a result, there are several solutions proposed, such as introducing a new exception of UGC, adopting an open-end fair dealing list. However, as far as I am concerned, the most directive solution should be considered from another perspective rather than a new defense against a beginning allegation, which is an alternative approaches of authorization process. There are two future licensing approach proposed, the "sharing economy" approach and the compulsory-licensing model (Collins JE, 2012). This essay aims at finding a reasonable solution to the struggle between present copyright protection and UGC by discussing the advantage and disadvantage of several choices, the introduction of UGC exception mainly. Firstly, the doctrine and taxonomy of UGC will be illustrated. Secondly, the advantage and disadvantage of a new exception will be discussed based on the generally application of fair dealing.

Besides, the US transformative use system will be referred as well. Finally, a more direct perspective, the changes of licensing approach will be put forward with the elaboration and comparison between sharing economy approach and compulsory-licensing model.

It is crucial to discuss the doctrine and taxonomy of UGC in order to understanding the present situation. The doctrine of UGC is controversial and complex and the scholars came up with different viewpoints. Some defined it as the content generated and disseminated by Internet users (Gervais D, 2008) and some held that UGC is the content generated by users themselves and sharing through the online platform or internet. The most authoritative definition is published by Organization for Economic Co-operation and Development (OECD), which came up with three characteristics of UGC (Organisation for Economic Co-operation and Development, 2007) which is extensively accepted. Firstly, the content is published in some context accessible to public or a selected group of people, which excludes the content transmit through mail or private message. Secondly, the content requires a certain amount of creative effort excluding the content which is merely copying whole existing work or partly. Thirdly, the content should be created outside of professional routines, which excludes the

professional user's work. In conclusion, UGC is a type of content created by amateur users with some creative effort, which is accessible publicly or partly online.

Every poets imitate or even steal, but the good poets make it into something better or different (T.S. ELIOT, 1920). Emulation may be a standard practice of artists, with which the artists can find a voice of their own and make a creation. It is significant to figure out which type of UGC should be tolerated, or even encouraged. As the OECD classified, UGC can be sorted as photos, videos or other types, which is based on the different forms of the work (T.S. ELIOT, 1920). However, it is more helpful to divide all the content online created by amateur users into user-authored content, user-derived content, user-copied content (Gervais D, 2008). User-authored content is an original work without adopting others' work while User-derived content represents a secondary content which based on others' copyrighted work. The user-copied content, which is merely copying existing work, should not be regarded as UGC because of lacking creative effort according to the definition given by OECD. As a result, the user-copied content infringes others' copyright, which is illegal and should be removed and punished. Besides, the user-authored content will not be discussed in this essay as a legal work without the possibility of infringing existing work. On the contrary, user-derived content is more controversial with a difficult balance between the derived content and source work, which is also the main focus of the essay.

This creative tsunami (Caruso HY, 2016) has caused great conflicts between the author of source work and the derived content. The exclusive right of source-work owner to prepare derivative works require users to obtain an authorization to create derived content. However, the inherent characteristics of UGC make it difficult to realize this requirement. Firstly, the popularization of creative subject requires a large amount of users to obtain an authorization which is self-evidently difficult. Secondly, the mixed use of fragments and sources lead several vague authorship or copyright which deteriorate the situation. Thirdly, the non-commercial purpose of creation pursue no profits which result in less incentive to obtain an legal authorization. Fourthly, the demand volume of UGC creation and the low-cost intrinsic feature of UGC make it unrealistic to require a license. When adopting an existing work, it is quite possible to infringe its copyright, such as reproducing, copying and disseminating. There is no doubt the prosperity of UGC is important for the development of technology and economic (Organisation for Economic Co-operation and Development, 2007), but without regulation of copyright, it may impact the creativity and economic instead. Not only a great amount of low quality UGC will emerge, but also the creation active will diminish with the increase of "infringement". As a result, the UGC has become a negative space of copyright law which mainly rely on self-protection and self-relief. For the author of source work, the stock-in-trade of protection is to inform platforms to delete the "infringing" content. The platform will delete it without any substantial examination according to the safe harbour principle. As for the author of UGC, they will relief themselves from litigation by marking that it will be deleted if infringing. This imbalance protection between the authors of source work and UGC is the first pressing reason to find a solution. On the contrary, this situation severely bothered the author of source work as well, since the premise of protection is to discovery of derived content which is troublesome under such a large volume of UGC. Therefore, the current situation is not beneficial to every parties in the legal relationship.

With the development of internet, the dispute of UGC has been increasingly severe. Fair dealing is the common defense of a suspected infringing UGC (*England and Wales Cricket Board Ltd v Tixdaq Ltd*, 2016), sometimes the incidental inclusion exception (*Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, 1991) may considered. However, fair dealing is not defined within CDPA nor a precise guideline to identify "fair". Even there is a "three-step" test derived from Berne Convention, the case-to-case basis of decision leads the uncertainty of law. Users can not forecast the legal status of their work which will hinder them from creation. In order to solve this troublesome situation, there are several solution proposed and practiced, including the introduction of new exception in Canada and the transformative system in US, where we can find enlightenment.

As Canada Copyright Modernization Act (S.C.2012, c.20) amended, UGC became a legal exception (Copyright Act, 1985), with which a non-commercial creator of UGC can use and transmit an existing work or other subject-matter without a license (*Copyright: A New Frontier—Bill C-11 Moves Out of Committee*, 2012). According to Canada Copyright Act s29, there are six elements of UGC exception: the party who created UGC is an individual; the purpose is non-commercial; a new work is created; reasonably mark the source; the individual had reasonable grounds to believe that the existing work was not infringing copyright; the work does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work (Copyright Act, 1985). UGC, which meet the above requirements, are legal exception and not infringing without an authorization as an exception of copyright law. The introduction clearly presented the legal status of UGC, which decreased the anxiety and uncertainty to users. With the exception, every user can create content based on existing and express themselves without unreasonable limitation. As a result, the UGC would develop

which result in increasing economic and culture actively. This amendment adjusted the scales of law and keep a reasonable balance between UGC and copyrighted work.

Furthermore, UGC exception can solve the problem of traditional license patterns. As professor Daniel Gervais noted, copyright was not designed for dealing with consumers, but for the transaction between authors, publishers, producers and distributors (Daniel J. Gervais, 2007). However, this traditional licensing pattern build obstacles for the UGC creator. The massive license demand of UGC is impossible to realize and the source-work owner is not always accessible to UGC creator, especially when the owner is a company or powerful party (Daniel J. Gervais, 2007). Not to mention the legal production of a derived content would be unreasonably high when using multiple copyrighted samples (Chauvin, Lara, 2012). Therefore, most amateur UGC creators ought to make a choice between paying expensive sample license or risking a suit of copyright infringement. UGC exception gives these artists another bright way to chase their art (Chauvin, Lara, 2012). On the contrary, with the application of UGC exception, users can avoid the expensive transaction cost of a license.

UGC exception is designed for improve the certainty of legal status of UGC to improve the situation result from complicated understanding fair dealing. However, the imitation and guideline is still vague after analyzing the article which does not change the situation at all, even lead more uncertainty of law instead. For example, the authority did not give a precise explain about individual creation. When a UGC is a co-creation, can the exception applied? Furthermore, the non-commercial purpose is controversial in practice without an official explanation. Even users-free can not represent non-commercial, while the dissemination of UGC can improve the reputation of creator, which is a type of commercial value in a perspective. In addition, the use of existing work ought to have no substantial harm in economic or other area to the existing work, which limits the application of UGC exception most. It is too uncertain to identify the substantial harm which may impact the mental impairment or reputational damage or otherwise, which re-expresses the protection of existing work. There is no doubt that the UGC exception is advanced to protect the creation of UGC as well as the dissemination. However, the inherent meaning of this provision is ambiguous, which leads to great limitation in application. Besides, the powerful protection of the author of source work gave rise to more uncertainty. In conclusion, the application of the UGC exception parallel to the fair dealing is progressive, but defective in the meantime, which is limited to apply.

Except for the uncertainty, UGC exception has another disadvantage which is overlapping protection. The introduction of UGC exception may contribute a situation that some UGC can apply fair use as well as UGC exception, which may cause confusions. In certain cases, the scope of protection of fair use is broader. As the Supreme Court of Canada pointed out, a commercial use content may also constitute fair use (SCASSA T, 2013), while the UGC exception only applies to non-commercial purpose. From this point of view, fair use provides better protection. On the contrary, UGC exception may apply when outside of fair use scope. When considering the dissemination of works, UGC exception gives UGC creators the right to disseminate their works on the Internet when fair use can not apply. Therefore, UGC exception seems to be more suitable for protecting UGC when referring to determinate work. In conclusion, every advantage has its disadvantage, the intersection of fair use and UGC exception brings more comprehensive protection to UGC on the one hand, but brings doubts to the application of law on the other hand.

Meanwhile, Canada expanded the list of fair use and form a semi-open system (Lambrecht, Maxime, and Julien Cabay, 2016) of fair use in practice. In order to keep a balance between the rights of copyright owners and the interests of users, restrictive interpretations are undesired. Both rights should be interpreted fairly in a balanced way to remedy the legislation (Supreme Court of Canada, 2004). This type of semi-open fair use greatly improves the flexibility of Canadian copyright act, such as in *SOCAN v. Bell (Society of Composers, Authors and Music Publishers of Canada (SOCAN) v. Bell Canada*, 2012), the court held that fair use can apply when a commercial website use preview of musical work. Identically, US expanded the scope of fair use list by adding transformative use. The supreme court held that if the derived-content added a new expression, meaning or function based on the source work, the transformative use can be applied as one kind of fair use. While the derived-content is more transformative, other factors is less important to construe a fair use (*Campbell v. Acuff-Rose Music*, 1994). Similar to the criteria of fair use, transformative use has four criteria including the purpose, the nature of content, substantial part, the impact on source work. Comparing to introduce a UGC exception, expanding fair use is more convenient and certain.

However, would it be more effective to solve the problem in the licensing process rather than the exception of infringement for UK? As mentioned above, the traditional licensing model has hindered the development of UGC. If every creator of UGC can be pre-licensed automatically, the imbalance and conflict between the authors of UGC and source work would not exist. In this perspective, there are two possible solution suggested, which

can simplify the licensing process.

Firstly, sharing economy approach is regarded as a solution result from its simple licensing process and flexible authorization. The knowledge sharing mode depends on an agreement of sharing license, which is a statement that the author gives up copyright. The precondition of this sharing model depends on the copyright owner's willingness to participate in "sharing pool" voluntarily (Swallow E, 2012), which is unquestionable for a non-commercial user. However, to a traditional copyright owner who takes creation as a career, sharing their work is not only a disposition of copyrighted work, but also an abandonment of derived market. Therefore, it is unrealistic to request all copyright owners to share. Comparing to the opt-in mechanism, an opt-out mechanism is more effective. Opt-out mechanism sets a default that everyone participated are willing to share the copyrighted work and allow others to create derived content, where can be regarded as a "free" and automatic license. Meanwhile, this system enables the copyright owner choose to drop out from the "sharing pool" if the owner can not tolerate a derived-use of his work and users can not adopt the content before a licensing. It is a better choice to adjust the licensing mode to reduce the cost of reproduction and authorization, instead of exercising copyright positively.

Besides, some scholars suggested the compulsory license system which is accepted by the US musical industry can be applied in UGC to solve the predicament. US congress adopted the compulsory licensing system to prevent the monopoly of music copyright and reduce the transaction cost of music copyright licensing (Abrams, Howard B., 2010). This system requires the copyright owner acquiesce others to use their work without a peer-to-peer permission. Therefore, the users can use the work by paying relevant expense as the authority regulated. In order to powerful protection of original copyright, US Copyright Law allows a re-arrange of musical work but exhibit the change of basic characters and the entrance to derived-market (17 U.S. Code § 115-Scope of exclusive rights in nondramatic musical works: Compulsory license for making and distributing phonorecords, 2016). The UGC would be regarded as an infringement if the users violate the provision. Supporters believe that compulsory license is applicable to film and television works of UGC if following three criteria modified. Firstly, release the derived market of source work and set no limitation on the way of using source work. Secondly, distinguish the license rates from the amateur creators and professional creators of UGC. Thirdly, change the way to calculate the length of works by minutes which may leads an extremely expensive license fee. Therefore, it is necessary to stipulate a low-standard license fee standard for UGC based on the traditional compulsory licensing system (Collins JE, 2012).

Although these two model are similar and have same function to substitute traditional licensing process and both of them enable the confused user to deal with the licensing detailed, a mandatory collective management could replace the traditional licensing model better. Unlike the sharing economy model, compulsory licensing not only enables the copyright owner receive reasonable profit, but also enables the users enjoy the convenience and cheap license fee (Nate Anderson, 2007). Furthermore, a negotiation choice can be provided under the compulsory model to solve every special circumstance flexibly (Nate Anderson, 2007).

In the last decades, UGC have become a major mode of creative expression penetrated in daily life and commerce (University of Michigan Press, 2008). The conflict between UGC which is derived from existing works, the user-derived content, and copyright protection has been imminent. However, present fair dealing provision or other exceptions can not provide enough protection to the users which evolved into an imbalance protection. From the defense perspective, there are several amendment suggested including introducing a new UGC exception or expanding the fair dealing list. As the Canada practiced, UGC exception would enable the satisfactory users defense an infringement suspicion, which provides more protection clearly to users and improve the imbalance situation of protection between source work owner and derived-content. Besides, a new exception can perfectly cover the encouraged UGC which is not included within the scope of fair dealing. However, it has some disadvantages in the meantime. It is difficult for the new exception to define the relevant concept precisely and make the relevant legislation more certain. As Canada practiced, the uncertainty of law remained after the introduction of UGC exception which requires a long-term practice to stipulate a relatively clear criteria of the application of UGC exception. Besides, the exception may result in an overlap protection with fair use which causes more confusion. On the contrary, the open-end fair dealing is more acceptable which can provide more certain criteria relying on the existing three-step test. From the licensing perspective, which is more directive in my opinion, there are sharing economy model and compulsory licensing. Both of them can replace the traditional licensing process to reduce the cost of licensing and provide more convenience to the users. As analyzed above, compulsory licensing model which can modified from the existing system of US musical copyright licensing, can encourage the creation and protect the profit of source work owner. It is time to build a new licensing framework to replace the "one size fits all" licensing (Collins JE, 2012) and evolve

copyright law to achieve a more sustainable and creative market.

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