

Articles

THE USER-GENERATED CONTENT EXCEPTION: MOVING AWAY FROM A NON-COMMERCIAL REQUIREMENT*

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ABSTRACT

The non-commercial user-generated content (UGC) exception to copyright infringement in section 29.21 of the Canadian *Copyright Act* allows individuals to use copyright-protected works to create new content for non-commercial purposes. One major flaw in this exception is that it conflates non-commercial use with amateur creation. The distinction between amateur non-commercial use and professional commercial use is arbitrary and cannot sustain itself in modern technological practices. This article argues that the proper focus of the UGC exception should be on the level of originality of the UGC and its effect on the source material as opposed to its non-commercial or amateur nature.

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1.0 INTRODUCTION

In December 2006, *Time* magazine celebrated “You” as the person of the year.¹ In his article, Lev Grossman stated that our history is no longer shaped by a few famous men, but by all of us who are part of the new Web.² He applauded the fact that over the past year:

We made Facebook profiles and Second Life avatars and reviewed books at Amazon and recorded podcasts. We blogged about our candidates losing and wrote songs about getting dumped. We camcordered bomb runs and built open-source software.³

This contagious enthusiasm for user-created works has dampened somewhat over time as we have come to understand the repercussions of some of our activities online. Amateur users are increasingly ignoring copyright law in order to create content online. This is extremely problematic from a public policy perspective since a whole generation of users cannot be deemed criminals. Canada has taken a significant step in the right direction by enacting section 29.21 of the *Copyright Act*.⁴ Canada is the first country in the world to make user-generated content (UGC) an exception to copyright infringement.⁵ This UGC exception allows a person to use copyright-protected works to create new content for non-commercial purposes. One major flaw in the exception, however, is that it conflates amateur creation with non-commercial use. In the current digital sphere, amateur UGC is becoming more and more sophisticated and may have many indirect commercial benefits. The distinction between amateur non-commercial use and professional commercial use is arbitrary and cannot sustain itself in modern technological practices. This article argues that the proper focus of the UGC exception should be on the level of originality of the UGC and its effect on the source material as opposed to its non-commercial or amateur nature. In most cases, if the new content has copyright subsist in it, then it will not have an adverse impact on the source material.

Section 29.21 of the *Copyright Act* states:

Non-commercial User-generated Content

Non-commercial user-generated content

29.21(1) It is not an infringement of copyright for an *individual* to use an existing work or other subject-matter or copy of one, which has been published or otherwise made available to the public, in the creation of a new work or other subject-matter *in*

¹ Lev Grossman, “You—Yes, You—Are TIME’s Person of the Year,” *Time* (25 December 2006), online: *TIME* <<http://content.time.com/time/magazine/article/0,9171,1570810,00.html>>.

² *Ibid.*

³ *Ibid.*

⁴ *Copyright Act*, RSC 1985, c C-42.

⁵ Fraser Turnbull, “The Morality of Mash-Ups: Moral Rights and Canada’s Non-Commercial User-Generated Content Exception” (2014) 26:2 IPJ 217 at 221.

which copyright subsists and for the individual—or, with the individual’s authorization, a member of their household—to use the new work or other subject-matter or to authorize an *intermediary* to disseminate it, if

(a) the use of, or the authorization to disseminate, the new work or other subject-matter is done solely for *non-commercial purposes*;

(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*;

(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; and

(d) 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.

Definitions

(2) The following definitions apply in subsection (1).

“intermediary” means a person or entity who regularly provides space or means for works or other subject-matter to be enjoyed by the public.

“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.⁶

Section 29.21 allows the use of legitimately acquired copyright-protected work for non-commercial purposes if it does not affect the market for the original material. Arguably, the UGC exception will not be overly litigated because section 38.1(1)(b) of the *Copyright Act* limits statutory damages for non-commercial works up to \$5,000.⁷ Plaintiffs alleging copyright infringement for non-commercial purposes will not recoup their court costs in such an action. However, the UGC exception could be seen in court where there is a disagreement as to whether its use was commercial. This point will be expanded further below. It could also be seen in cases where an artist is looking for an injunction as opposed to monetary damages. Lastly, artists concerned with moral rights are not looking for monetary damages, but want to salvage their reputation. All such instances will give courts an opportunity to elaborate on this section in the future and figure out the subtleties of its functioning.

The Government of Canada website gives the following examples of the nature of content that would fit within the UGC exception: “making a home video of a

⁶ *Supra* note 4, s 29.21.

⁷ *Ibid*, s 38.1(1)(b).

friend or a family member dancing to a popular song and posting it online, or creating a ‘mash-up’ of video clips.”⁸ Parliament obviously had amateur UGC in mind when it created this exception. A harmless video such as the one described would create no problems for the original author. No one will choose to watch it over the original song. That being said, UGC is becoming increasingly sophisticated and commercially viable. More complex content can even threaten the original product on which it is based. In order to ensure that this does not happen, Parliament has limited the UGC exception to non-commercial uses. However, I argue that there are other ways to protect copyright without limiting creativity to non-commercial use.

User-generated content can be broken down into three categories: user-authored content, user-copied content, and user-derived content.⁹ User-authored content is not problematic from a copyright perspective—whether you upload vacation pictures onto Flickr or broadcast your innermost thoughts through Twitter, you are not infringing any copyright laws. User-copied content is also somewhat straightforward. If you engage in file-to-file sharing of copyrighted content for free, or if you upload a camcordered version of a movie that is out in theatres, there is no doubt that you are infringing a whole set of copyright laws. The complications arise with user-derived content. This is content that is created by using pre-existing copyrighted works and transforming, adapting, or appropriating them in some way. Examples include fan fiction (literary works that incorporate a character, setting, or plot from a pre-existing work); mashups (songs made by combining pre-existing music or sound recordings); machinima (films made within videogames using the game interface); game modifications (software modification that alters existing games); and map applications (small-scale programs that map geospatial information onto pre-existing data sets). Section 29.21 of the *Copyright Act* covers this third category of works—user-derived works.

User-derived works incorporate a pre-existing, often copyright-protected, work into a new work. One famous example in the emerging genre of mashup is the one-man band called Girl Talk.¹⁰ Girl Talk essentially remixes and manipulates music samples from other artists to create his own brand of music. His album *Night Ripper* remixes between 200 and 250 samples from 167 artists belonging to all sorts of genres from Elton John to Notorious B.I.G.¹¹ The financial cost of clearing rights from so many famous musicians would be prohibitive for an artist like Girl Talk. Similarly, many applications (“apps”) are designed by professional programmers to perform a specific task within a particular hardware, but, increasingly, more successful

⁸ Government of Canada, *What the Copyright Modernization Act Means for Consumers* (page no longer found).

⁹ Daniel Gervais, “Derivative Works, User-Generated Content, and (Messy) Copyright Rules” (2012) 16:1 Copyright & New Media L Newsletter 7 at 7.

¹⁰ Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (New York: Penguin, 2008) at 11.

¹¹ *Ibid.*

iPhone apps rely on UGC. Apps like Friend Finder take pre-existing copyright-protected information such as maps and superimpose additional information onto them that would be valuable to a potential customer.¹² It is quite possible that an amateur app creator might not clear rights before designing an app. Problems also occur with machinima, where a user manipulates the first-person point of view within a videogame to create a computer-animated film.¹³ The user incorporates the videogame's graphics, characters, and sound within their own film without clearing any rights from the game's producers.¹⁴

UGC seems somewhat parasitic on the surface because it relies on others' works, but it can have a whole range of benefits—for example, information gathering, political rallying, social support, or criticism. Parliament seems to agree with this statement because it has chosen to protect such content. At its most basic, fan fiction is homage to the pre-existing work it is based on; at its most sophisticated, it can be a criticism of the pre-existing work. In *Wind Done Gone*, Alice Randall tells the American novel *Gone with the Wind* by Margaret Mitchell from the viewpoint of the slaves.¹⁵ Likewise, Peggy Ahwesh's machinima *She Puppet*, which was created within the videogame *Tomb Raider*, provides a feminist critique of both *Tomb Raider* and the male-dominated world of gaming in general.¹⁶ At its core, all UGC is a creative endeavour, and encouraging such creativity is basic to any copyright regime.

Most UGC is created without the permission of those who hold copyright in the underlying works because of the sheer cost and logistical difficulty of obtaining licences. Prior to the UGC exception, users were expected to seek permission from the copyright holders unless a defence such as fair use applied. In cases where a large number of works were used to create UGC, there were significant transactional costs involved in determining, contacting, and negotiating with rights holders. Daniel Rosen states that electronic dance music (EDM) producers "are sometimes not aware of the exact source of their samples, as they build libraries over time with thousands of audio samples from various places including copyright protected sound recordings, sample packs, and self-constructed samples."¹⁷ What is simply

¹² Teresa Scassa, "Acknowledging Copyright's Illegitimate Offspring: User-Generated Content and Canadian Copyright Law" in Michael Geist, ed, *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Ottawa: University of Ottawa Press, 2013) 431 at 434.

¹³ Christina J Hayes, "Changing the Rules of the Game: How Video Game Publishers Are Embracing User-Generated Derivative Works" (2008) 21:2 Harv JL & Tech 567 at 568.

¹⁴ *Ibid.*

¹⁵ Gervais, *supra* note 9 at 8.

¹⁶ Graham Reynolds, "Towards a Right to Engage in the Fair Transformative Use of Copyright-Protected Expression" in Michael Geist, ed, *From "Radical Extremism" to "Balanced Copyright": Canadian Copyright Digital Agenda* (Toronto: Irwin Law, 2010) 395 at 400.

¹⁷ Daniel Rosen, "Electronic Dance Music, Creativity, and User-Generated Content—A Canadian Perspective" (2014) 26:2 IPJ 153 at 161.

industry practice within the EDM community can create a serious risk of infringement from a copyright perspective. Moreover, in cases where a large corporation holds the copyright over the source material, the cost of litigation or even the potential for litigation either has a major chilling effect or leads people to ignore intellectual property rights. Attempts to clear samples are typically more difficult for artists who lack fame or fortune. The drum and bass artist Mocean illustrates this: “I tried for nine months to clear the Mahalia Jackson sample. When I finally got a call back, they’re like, ‘We want six cents on a record and \$10,000 in advance.’ I said, ‘You know, I am going to sell, like 2,500 records. You’re crazy!’ My album budget was \$40!”¹⁸ Before the advent of section 29.21 of the *Copyright Act*, industry practices and amateur use were clearly out of step with copyright law.

2.0 OVERLAP WITH FAIR DEALING

Some user-generated work can fall under the fair-dealing defence. The test for fair dealing involves two steps. The first entails determining whether the dealing is for one of the purposes enumerated in section 29, 29.21, or 29.2.¹⁹ Bill C-11²⁰ has expanded this list by adding the categories education, parody, and satire to the previous fair-dealing categories of research, private study, criticism or review, and news reporting.²¹ The second step involves assessing whether the dealing is fair using a list of predetermined factors; the onus to satisfy both steps is on the person invoking the fair-dealing defence.²² In *CCH Canadian Ltd v Law Society of Upper Canada*, the Supreme Court of Canada stated that the fair-dealing defence “is a user’s right. In order to maintain a proper balance between the rights of a copyright owner and the user’s right, it must not be interpreted restrictively.”²³ The purpose of such an expansive reading of fair dealing is to emphasize that fair dealing is not simply a way to avoid infringement but a right that all users have the liberty to exercise. This broad reading means that there will be more intersection between section 29.21 and fair dealing. For example, UGC that is satirical or involves parody may also qualify as fair dealing. The court in *CCH* ruled that fair dealing is always available to users notwithstanding any other exceptions found in the *Copyright Act*.²⁴ Hence, a fair-dealing defence will be an option for the creator of UGC despite the availability of the section 29.21 exception.

¹⁸ *Ibid* at 162.

¹⁹ *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, 2012 SCC 36 at para 13, 2 SCR 326 [SOCAN].

²⁰ *An Act to amend the Copyright Act*, 1st Sess, 41st Parl, 2012 (assented to 29 June 2012).

²¹ *Copyright Act*, *supra* note 4, ss 29, 29.1, 29.21.

²² SOCAN, *supra* note 19.

²³ *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13 at para 48, [2004] 1 SCR 339.

²⁴ *Ibid* at para 49.

Users would prefer the UGC exception because it can lead to more predictability. Fair dealing is described as a “critically important safety valve within copyright,”²⁵ but it is still an extraordinarily complicated balancing exercise and remains inappropriate for most UGC creators. Fair dealing is determined after the fact and may not provide the peace of mind necessary to create user-generated works. Furthermore, it is an extremely fact-based analysis that leads to uncertain applications in many scenarios. Lastly, the costs of defending an infringement action through the doctrine of fair use may be too costly for most defendants who engage in UGC creation. Hence, Parliament realized that a more straightforward exception was necessary in certain cases where the use was transformative enough not to impact the market for the prior existing work.

3.0 INDIVIDUAL USE

The section 29.21 exception is available only to individuals engaged in user-generating enterprises, not to co-creators or corporations. This is perhaps because collaborative work is seen as more professional or commercial than individuals tinkering with their home computers. This seems to ignore the growing trend of collaborative co-creation in the digital environment—from online wikis to videogame modifications. It has an outdated view of UGC creators in mind. In contrast to section 29.21, the fair-dealing exception is clearly available to corporate entities. In *Allen v Toronto Star Newspapers Ltd*, the court held that a corporate newspaper is entitled to the fair-dealing defence.²⁶ This distinction once again highlights that the UGC exception is aimed at amateurs who should not have to go through a complex fair-dealing analysis, while fair dealing can also protect co-creators and professionals. Nonetheless, the proliferation and success of individual UGC creators demonstrates that large centralized players and corporations are not the only cultural creators.

4.0 IN WHICH COPYRIGHT SUBSISTS

Section 29.21(1) requires that UGC be work “in which copyright subsists.” This underscores the fact that these works must themselves have a sufficient degree of originality and authorial effort to qualify for copyright protection. Content that is not sufficiently original or does not have enough authorial effort to be protected by copyright is not covered by this exception. On the other hand, the doctrine of fair use does not require the use to be original in itself. In *SOCAN*, the Supreme Court of Canada stated that “[a]lthough one of those fairness factors includes whether the use is transformative, it is not at all clear that a transformative use is ‘absolutely necessary’ for a finding of fair use.”²⁷ This is a significant distinction. In providing users

²⁵ Lessig, *supra* note 10 at 242.

²⁶ *Allen v Toronto Star Newspapers Ltd* (1997), 36 OR 201 at para 43 (Gen Div).

²⁷ *Supra* note 19 at para 24.

with the fair-use exception, the aim is not necessarily to encourage creativity. With regard to the research category in fair dealing, the court stated: “Limiting research to creative purposes would ... run counter to the ordinary meaning of ‘research,’ which can include many activities that do not demand the establishment of new facts or conclusions. It can be piecemeal, informal, exploratory, or confirmatory.”²⁸ A finding of creative or original endeavour is not necessary for the fair-dealing defence but it is necessary for the UGC exception—otherwise, copyright wouldn’t be able to subsist in it. When it comes to fair dealing, the test for fairness is “essentially purposive.”²⁹ The court in *CCH* outlined a series of factors to consider when assessing whether a dealing is fair: (1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternative to dealing; (5) the nature of the work; and (6) the effect of the dealing on the work.³⁰ On the whole, these factors emphasize the motive for the dealing and the amount of dealing taking place. *SOCAN* grappled with the issue of whether Internet sellers who distribute music engage in copyright infringement when they allow consumers to preview a musical work before making a purchase.³¹ The court concluded that the short duration of the clips and their degraded quality ensured that they were not in competition with the actual works themselves and hence could constitute fair dealing under the research category.³² The court showed a preoccupation with whether the use or copying was substantial or not.

Such an analysis of substantiality would be rendered irrelevant under the UGC exception because the content covered under section 29.21 would be sufficiently original not to compete with the original work. For example, Girl Talk’s album *Feed the Animals* combines 322 songs in around 54 minutes and some songs are sampled only for a second or two.³³ Here, the final product becomes so different from the base products that an analysis based on the artist’s purpose or the amount of work appropriated becomes irrelevant. This shows that the key to the UGC exception is sufficient transformation of the new work, not its commercial or non-commercial nature. If it has been sufficiently transformed into a work that holds its own copyright, then it would not compete with the original artist’s market. Despite some overlap between section 29.21 and fair dealing, the UGC exception at its essence seeks to protect individuals who use protected works to create original work, while fair dealing seeks to protect individuals for a host of other socially beneficial reasons.

²⁸ *Ibid* at para 22.

²⁹ *Allen*, *supra* note 26 at para 39.

³⁰ *Supra* note 23 at para 53.

³¹ *SOCAN*, *supra* note 19.

³² *Ibid* at para 48.

³³ Graham Reynolds, “A Stroke of Genius or Copyright? Infringement Mashups and Copyright in Canada” (2009) 6:3 *SCRIPTed* 639 at 648.

5.0 THE ORIGINAL SOURCE

The attribution requirement of section 29.21 is not particularly strong since the source of a work should be mentioned only if “it is reasonable in the circumstances to do so.”³⁴ The original source can be attributed in the inside of an album cover of a mashup, the end credits of a machinima, or the last page of a fan-fiction work. However, it becomes more complicated in situations where the source isn’t always easy to identify:

In the [YouTube] “Harlem Shake” [meme], the original UGC creator properly attributed Baauer as the author of the existing work. Subsequent videos copied the format of the original “Harlem Shake” video and properly attributed Baauer as the author of the musical work, but did not cite the UGC creator as the author of the “Harlem Shake” concept. ... New creators were inspired by derivative interpretations of the “Harlem Shake” concept, without any indication of the source of the original work. It could be notoriously difficult to determine who the original source of a viral video is, especially since there are thousand of similar derivative works.³⁵

Such an example explains why the attribution requirement is somewhat relaxed with regard to UGC. Imposing a strict duty to credit the source may prove to be too onerous in a digital age with such wide proliferation of UGC.

6.0 NON-COMMERCIAL USE

Section 29.21(1)(a) requires that the use of the generated content or the authorization to disseminate the content should be for solely non-commercial purposes. However, legislative amendment or additional jurisprudence would be required to clarify what constitutes commercial activity. A user may post a work onto his or her website to increase the traffic on it. If that website is supported by advertising revenue and has multiple works on it, it may be difficult to trace the commercial benefit to a single work. Additionally, an author may write a book for non-commercial purposes and direct the royalties to a charity or non-profit organization—likely in cases where the author believes strongly in a particular cause. Furthermore, Daniel Rosen states that EDM producers and DJs often release mashups that use other artists work for free on sites like SoundCloud and HypeMachine.³⁶ Monetary rewards may not be the best way to track a commercial benefit since user-generated works can have intangible benefits. The dissemination of UGC may lead to self-promotion or brand building.³⁷ Samuel Trosow states that videogame modifiers may “gain game development knowledge, skills for how and when to apply that knowledge,

³⁴ *Copyright Act*, *supra* note 4, s 29.21(1)(b).

³⁵ Turnbull, *supra* note 5 at 230-31.

³⁶ Rosen, *supra* note 17 at 164, 167-68.

³⁷ Scassa, *supra* note 12 at 441-42.

status among peers, recognition, and social capital within the community.”³⁸ On the surface, social capital seems entirely distinct from financial capital, but what happens when that social capital is used to gain followers for a blog that relies on advertising revenue? This highlights the problem with section 29.21’s focus on non-commercial uses. It is extremely difficult to tease out commercial use from a non-commercial use on the Internet. The purpose of requiring non-commercial use is to make sure that the UGC doesn’t have an impact on the market for the source work. This can be done by focusing on the criteria set out in section 29.21(1)(d), which require that the generated work not have a substantial adverse effect on the existing work³⁹—it does not require a strict non-commercial requirement.

While the UGC exception requires both a non-commercial purpose and sufficient originality in the created work for it to be protected by copyright, fair dealing requires neither sufficient originality nor a non-commercial use. The Supreme Court of Canada in *CCH* stated that fair dealing in the case of research is not limited to a non-commercial purpose.⁴⁰ Lawyers are free to do research on behalf of clients who pay them and claim the fair-dealing exception. The court in *SOCAN* also allowed fair dealing within a commercial context since consumer research for the purpose of buying music is a commercial endeavour.⁴¹ Thus UGC that is created or disseminated in a commercial context may not qualify for the section 29.21 exception but may nevertheless constitute fair dealing. However, the content would have to fit into one of the enumerated purposes of fair dealing. Although these are quite broad, there still may be works that do not fit into them. Girl Talk’s mashups are a good example. An artist like Girl Talk can use the UGC exception as long as his work doesn’t have a commercial purpose. The moment he decides to make a profit from his work, he would no longer have the UGC exception available. This would be the case even if his mashups were sufficiently original to have copyright subsist in them. The result seems somewhat absurd given that negotiating rights with hundreds of artists for a single album may not be financially feasible for Girl Talk.

7.0 INTERMEDIARIES OR DISSEMINATORS

The creator of a UGC may authorize an intermediary to disseminate it. The use or dissemination must be for non-commercial purposes but these would be the user’s non-commercial purposes. Intermediaries such as YouTube, Facebook, and SoundCloud are free to make a profit from advertising revenues. This extends indirect protection to disseminators of UGC. As long as the creator of the UGC does not make a commercial use of it, it does not seem to matter that the disseminator is a

³⁸ Samuel E Trosow et al, “Mobilizing User-Generated Content for Canada’s Digital Advantage” (1 December 2010) at 33, online: Western Libraries <<http://ir.lib.uwo.ca/fimspub/21>>.

³⁹ *Copyright Act*, *supra* note 4, s 29.21(1)(d).

⁴⁰ *Supra* note 23 at para 51.

⁴¹ *Supra* note 19 at para 48.

major corporation with a business model that profits directly from the supply of the UGC to a broad audience. This is curious since the creator of the content is unable to exploit the work for commercial benefit, but there is no prohibition against the publishers or disseminator making money from UGC.

Recent Supreme Court of Canada cases on fair dealing have accepted that the purpose of copying does not have to be considered from the perspective of the intermediary. In *CCH*, it was the Great Library that was disseminating copies, but the court focused its inquiry on the ultimate users—the lawyers who were making copies for legal research purposes.⁴² Similarly in *SOCAN*, SOCAN argued that the purpose of “research” for fair dealing should be analyzed from the perspective of the online service providers and not the consumer.⁴³ From that perspective, service providers were allowing 30- to 90-second previews of music tracks before consumers purchased them for a commercial purpose, not research. However, the court decided that in considering the purpose of the previews under a fair-dealing analysis, it should be the user’s purpose that is assessed, not the disseminator’s—even though it was the disseminator relying on the fair-dealing defence.⁴⁴ It was decided that consumers used previews for the purpose of conducting research in order to identify which music to purchase, and this can be covered under fair dealing. In *Alberta (Minister of Education) v Canadian Copyright Licensing Agency*, the court declared that teachers, in making copies for students, have no purpose that is separate from that of the students—they “have no ulterior motive when providing copies to students.”⁴⁵ The fair-dealing exception aims to provide users with the right to engage with cultural works without being penalized and hence it is their perspective that is important for the purposes of inquiry. Similarly, the UGC exception aims to provide creators with the right to engage with cultural works without being penalized; hence the non-commercial use of the UGC is analyzed through their perspective. However, the court clarified that disseminators and intermediaries cannot camouflage their own distinct purposes by conflating them with the legitimate purposes of the user:

Fair dealing is a “user’s right,” and the relevant perspective when considering whether the dealing is for an allowable purpose under the first stage of *CCH* is that of the user. ... That does not mean that the copier’s purpose is irrelevant at the fairness stage. If, as in the “course pack” cases, the copier hides behind the shield of the user’s allowable purpose in order to engage in a separate purpose that tends to make the dealing unfair, that purpose will also be relevant to the fairness analysis.⁴⁶

⁴² *Ibid* at para 29.

⁴³ *Ibid* at para 19.

⁴⁴ *Ibid* at para 30.

⁴⁵ *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37 at para 23, 2 SCR 345.

⁴⁶ *Ibid* at para 21.

An intermediary cannot hide behind a user's purpose if it has an ulterior motive that does not completely map onto the user's purpose. YouTube may wish to disseminate a user's video in order to facilitate interaction between the user and the wide YouTube community, but if its primary purpose for disseminating videos is still to gain traffic on the website and increase advertising revenue, then that purpose cannot be ignored.

This becomes even more problematic when one looks at the commercial practices of some of these disseminators. Facebook's terms of use state:

By posting User Content to any part of the Site, you automatically grant ... to the Company an irrevocable, perpetual, non-exclusive, transferable, fully paid, worldwide license (with the right to sublicense) to use, copy, publicly perform, publicly display, reformat, translate, excerpt (in whole or in part) and distribute such User Content for any purpose, commercial, advertising, or otherwise, or in connection with the Site or the promotion thereof, to prepare derivative works of, or incorporate into other works, User Content, and to grant and authorize sublicenses of the foregoing.⁴⁷

Such an agreement grants all the power to Facebook and none to its users. According to this agreement, Facebook could easily sublicense its UGC to a third party that could use it in whatever way it pleases. The only thing preventing Facebook from doing so is its own interest in brand management and public relations. Facebook would obviously receive bad publicity and public reprobation if it used its user agreements in a blatantly unfair manner. Nonetheless, a change in management can often create surprising changes for a company's policies. Additionally, Steven Hetcher points out that "[t]he fact that a significant number of Facebook users are between the ages of thirteen and eighteen raises the question under what conditions, if any, can minors sell, license, give away, or in other ways dispose of their intellectual property."⁴⁸ He argues that agreements between UGC mega sites and minors that involve minors giving away their intellectual property rights are unconscionable and hence invalid.

However, from the perspective of disseminators, websites such as Facebook, Twitter, YouTube, and Flickr provide users with a vehicle to disseminate their works and reach a global audience. Users can gain profile, enhance reputation, and even move on to professional status because they have access to a platform that is visited by so many. Virtually an infinite amount of UGC is available online and websites such as those above serve as effective mediators that filter content appropriately. If the non-commercial requirement was applied to disseminators, then the user-generated exception would be rendered effectively useless. How are users supposed to reach a global audience without the help of such profit-making platforms?

⁴⁷ Steven Hetcher, "User-Generated Content and the Future of Copyright: Part Two—Agreements Between Users and Mega-Sites" (2008) 24:4 Santa Clara Computer & High Tech LJ 829 at 847.

⁴⁸ *Ibid* at 855.

Hence, it seems that the relation between an “amateur” user and a “commercial” corporation or intermediary is much more complex than the language of unconscionability and exploitation depicts. Lawrence Lessig has made a distinction between commercial economies, which build value with money at their core, and sharing economies, which build value, ignoring money.⁴⁹ He argues that most economies on the Web are hybrid economies, which utilize both sharing economies and commercial economies. Attempting to categorize the behaviour on the Web as purely commercial or purely value-based may no longer be possible. The most successful websites online have learned how to create hybrid models. Amazon, for example, integrates UGC into its commercial sales website.⁵⁰ Commercial entities increasingly value non-commercial users and attempt to maintain and negotiate relationships with them. Producers of the game *Second Life* allow users to retain their intellectual property rights over the modifications they create within the game.⁵¹ The terms of service let creators mark their modifications as “no copy,” “no mod,” and “no trans,” ensuring that others cannot copy, modify, or transfer their work without express permission.⁵² Similarly, the game developer Auran allows gamers to commercialize their add-on content.⁵³ The game *Trainz* has been so commercially successful because Auran has used fan content in order to outsource art production.⁵⁴ Auran deviates from the industry practice of having end-user licence agreements that exclude customers from commercializing add-on content for a game and this allows it to be more profitable than its competitors.⁵⁵ There may also be cases where an amateur UGC generates significant monetary value. *Counter-Strike*, which was created by a Canadian student at Simon Fraser University, started off as a modification of the game *Half-Life*, but was later sold as a standalone product for Xbox and PC.⁵⁶

All these examples show that limiting creative endeavour to non-commercial purposes may not fully exploit the talent out there. Instead of limiting UGC to non-commercial uses, the legislature or courts need to simply ensure that the UGC does not have an effect on the source material. At the moment, there are simply too many hoops to jump through before a person can make use of the UGC exception. The line between commercial and non-commercial UGC is quite fluid and the *Copyright Act* needs to have provisions that account for that. Rights holders in the gaming world are increasingly encouraging UGC creators to directly negotiate a

⁴⁹ Lessig, *supra* note 10 at 117.

⁵⁰ Trosow, *supra* note 38 at 27.

⁵¹ *Ibid* at 31-32.

⁵² *Ibid.*

⁵³ John Banks & Sal Humphreys, “The Labour of User Co-Creators: Emergent Social Network Markets” (2008) 14:4 Internet Journal Research into New Media Technologies 401 at 407-8.

⁵⁴ *Ibid* at 408.

⁵⁵ *Ibid* at 407-8.

⁵⁶ Trosow, *supra* note 38 at 35.

commercial licence,⁵⁷ but that is not possible in a lot of other areas such as mashups or fan fiction, where original authors or musicians do not see a benefit in agreeing to licensing agreements.

Nonetheless, for-profit corporate intermediaries should have to make payments for disseminating UGC if they gain revenue from it. Collective societies or compulsory licensing regimes could play a role in facilitating payment to original authors when disseminators or intermediaries profit from disseminating commercial UGC. A licensing regime where the law specifies a price or lays out a process for obtaining rights for commercial UGC may provide a basic framework in order to facilitate commerce within the UGC market. Grace Westcott, in her article “Friction over Fan Fiction,” states:

What is needed is a kind of digital civility, an online code of respect in engaging in cultural works that recognizes and addresses authors’ rights and legitimate concerns. This, together with the recognition that fan fiction comes from basically “a good place,” should encourage authors, media owners and fans to develop a code of fair practices to define what is fair in fandom, to allow fans to engage creatively with the works they so sincerely admire.⁵⁸

Such informal civility, though entirely possible in the digital age, should not be relied on without legal backing. Commercial disseminators of UGC should be required to pay a fraction of their money from advertising or access fees to compensate authors whose source work is used. In a 2014 case before the Copyright Board, SOCAN filed statements of royalties for audiovisual UGC.⁵⁹ It argued that tariffs should be applied to all service providers providing UGC, such as Facebook and Vimeo.⁶⁰ Facebook argued that the works are exempt from tariffs pursuant to section 29.21 of the *Copyright Act*.⁶¹ The Copyright Board decided that if Facebook does not engage in the protected acts whose price the tariffs set, then it does not have to pay the tariff.⁶² However, the Board refused to make a finding of fact that Facebook does not engage in these acts pursuant to section 29.21.⁶³ For a tariff to apply, the UGC would have to legally infringe copyright. However, since the content is permissible in law and disseminators receive indirect benefits, Facebook can make that argument. Hence, the legislature would have to fix this flaw in the UGC exception. It should not prohibit disseminators or intermediaries from disseminating UGC, but it could require profit-making intermediaries to make small payments despite disseminating content that does not legally infringe copyright.

⁵⁷ Hayes, *supra* note 13 at 581.

⁵⁸ Grace Westcott, “Friction over Fan Fiction: Is This Burgeoning Art Form Legal?” (2008), online: *Literary Review of Canada* <<http://reviewcanada.ca/magazine/2008/07/friction-over-fan-fiction>>.

⁵⁹ *Public Performance of Musical Works, Re*, 2014 CarswellNat 2616 at para 1 (Copyright Bd).

⁶⁰ *Ibid*.

⁶¹ *Ibid* at para 26.

⁶² *Ibid* at para 49.

⁶³ *Ibid*.

8.0 SUBSTANTIAL ADVERSE EFFECT

Section 29.21(1)(d) states that an individual may use UGC or authorize an intermediary to disseminate it if “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 on an existing or potential market for it.”⁶⁴ The terms “substantial,” “adverse,” “effect,” and “potential exploitation” are not defined in the Act. The vague nature of this limitation makes the scope of the UGC exception considerably uncertain and unpredictable. The creator cannot really know if his or her use is covered under the exception without costly and time-consuming litigation. A rights holder may argue that there is a market for licensing further works from the same series that is undermined by the creator’s fan fiction. It is possible for a new work to go viral on the Internet and cause the original creator to lose a deal or opportunity to license a subsidiary work of his or her own. Assessing the availability of such a market will become a difficult fact-finding exercise. It will most likely come down to where the burden of proof is placed. If a user is required to prove an absence of “substantial adverse effect,” then this will be a heavy burden on the user and the exception will mostly likely be rarely used. If the burden of proof is placed on the original creator, this would also require significant resources on the part of the creator to make a claim of infringement. For example, arguing that listeners do not or will not purchase an original track from the creator because a free remix is readily available may be difficult to prove since the creator would have to show a causal connection between the popularity of the UGC and a decline in sales of the original.

In fair-dealing cases, the courts have often placed the burden of proving an adverse effect on the party making the claim for infringement. In *CCH*, the Supreme Court of Canada stated:

Although the burden of proving fair dealing lies with the Law Society, it lacked access to evidence about the effect of the dealing on the publisher’s markets. If there had been evidence that the publisher’s market had been negatively affected by the Law Society’s custom photocopying service, it would have been in the publisher’s interest to tender it at trial. They did not do so.⁶⁵

Here, the court accepted that the burden to prove that there is no effect of the dealing on the original work is on the person claiming fair dealing, but at the same time the court was unwilling to penalize the Law Society for this lack of evidence. Instead, it expected the publishers to bring forward evidence showing adverse effect. Moreover, the court in *Alberta (Minister of Education) v Canadian Copyright Licensing Agency* required a direct link between the decrease of textbook sales in the previous 20 years and the practice of photocopying done by teachers.⁶⁶ It listed several other

⁶⁴ *Copyright Act*, *supra* note 4, s 29.21(1)(d).

⁶⁵ *Supra* note 23 at para 72.

⁶⁶ *Supra* note 45 at para 33.

hypothetical causes that could have contributed to the decline in textbook sales, such as the adoption of semester teaching, a decrease in registrations, the longer lifespan of textbooks, increased use of the Internet and other electronic tools, and more resource-based learning.⁶⁷ A decrease in sales can be explained away in a wide variety of ways and this places a high burden on the creator of the original work. A user could simply argue that a creator's works have fallen out of public favour or that another competitor has increased its hold over the author's market. Moreover, the court in *Alberta* stated that there was an "evidentiary vacuum" with respect to whether photocopying short excerpts from books caused a decline in textbook sales.⁶⁸ This clearly shows that court will require some evidence to demonstrate an adverse effect on the original work and not simply bald allegations.

An evidentiary burden on the original creator makes some sense since the UGC exception is aimed at the users who want the security of knowing that their works are sufficiently original so as not to infringe the source material. Nonetheless, Marian Hebb points out one significant drawback of the current scheme:

Clearly, paragraph 29.21(1)(d) is well-intentioned. But its likely to be ineffective because [of] the difficulty the original author would have in demonstrating the required degree of harm until after the harm had occurred—by which time the market for the original work could already have been severely damaged or destroyed. Once a work of fan fiction is available on the Internet it will be impossible or close to impossible [to] remove it entirely from circulation.⁶⁹

It may be true that a chilling effect can be beneficial in cases where any reworking of a creator's work will cause irreparable harm. Moreover, the Court of Appeal in *CCH* has stated that determining whether a particular dealing has diminished the market for a particular work is largely a fact-finding exercise,⁷⁰ which makes it somewhat arbitrary because harm will be determined on a case-by-case basis. However, it is also possible that over time, as jurisprudence accumulates on this provision, there may emerge existing categories that are presumptively adverse and the original creator would then have a lower burden of proof.

9.0 MORAL RIGHTS

Original creators can sue UGC creators for moral rights infringement in two ways. Section 29.21(1)(d) requires that there be no "substantial adverse effect, financial or otherwise" on the exploitation or potential exploitation of the existing work. A rights holder can claim that a UGC expresses a different morality or politics from

⁶⁷ *Ibid.*

⁶⁸ *Ibid* at para 34.

⁶⁹ Marian Hebb, "UGC and Fan Fiction: Rethinking Section 29(21)" (2014) 26:2 IPJ 237 at 243.

⁷⁰ *CCH Canadian Ltd v Law Society of Upper Canada*, 2002 FCA 213, [2002] 4 FCR 213, rev'd 2004 SCC 13, [2004] 1 SCR 339.

the original and has an impact on the market for the original. For example, the creator of a children's cartoon may argue that fan fiction that strays into pornography tarnishes the reputation of the work or diminishes its cultural significance. Second, Fraser Turnbull argues that the UGC exception protects creators from being sued for copyright infringement but it doesn't protect them from moral rights infringement.⁷¹ The court in *Théberge v Galerie d'Art du Petit Champlain* confirmed that the separate structures in the *Copyright Act* to cover economic rights on the one hand and moral rights on the other show that a clear distinction and separation was intended.⁷² Moral rights "treat the artist's *oeuvre* as an extension of his or her personality, possessing a dignity which is deserving of protection."⁷³ This could mean that if a certain novel is premised on a particular idea of Canada, such as *Anne of Green Gables*, then that novel may suffer disrepute or dilution if transported to a foreign context where all its main motifs are no longer relevant.

Moral rights are dealt with in sections 14.1, 17.1, 28.1, and 28.2 of the *Copyright Act*. Section 14.1(1) states that "[t]he author of a work has ... the right to the integrity of the work and ... the right, where reasonable in the circumstances, to be associated with the work as its author ... and the right to remain anonymous."⁷⁴ Section 28.2(1) clarifies when the creator's right to the integrity of a work is infringed:

Nature of right of integrity

28.2(1) The author's or performer's right to the integrity of a work or performer's performance is infringed only if the work or the performance is, to the prejudice of its author's or performer's honour or reputation,

- (a) distorted, mutilated or otherwise modified; or
- (b) used in association with a product, service, cause or institution.

Where prejudice deemed

(2) In the case of a painting, sculpture or engraving, the prejudice referred to in subsection (1) shall be deemed to have occurred as a result of any distortion, mutilation or other modification of the work.

The court in *Snow v The Eaton Centre* determined that prejudice to the author's honour or reputation involves "a certain subjective element or judgment on the part of the author so long as it is reasonably arrived at."⁷⁵ It requires "an objective evaluation of the prejudice based on public or expert opinion."⁷⁶ This means that the test

⁷¹ Turnbull, *supra* note 4 at 226.

⁷² *Théberge v Galerie D'art Du Petit Champlain Inc*, 2002 SCC 34 at para 59, [2002] 2 SCR 336.

⁷³ *Ibid* at para 15.

⁷⁴ *Copyright Act*, *supra* note 4, s 14.1.

⁷⁵ *Snow v The Eaton Centre Ltd* (1982), 70 CPR (2d) 105 at para 5 (Ont HC).

⁷⁶ *Prise de Parole Inc v Guérin, éditeur Ltée* (1995), 66 CPR (3d) 257 at para 26 (FCTD).

for a moral rights infringement involves both a subjective element and an objective element. Bringing in an objective element makes it more difficult to prove a moral rights infringement and courts have been somewhat reluctant to find one. In *Théberge*, the court stated that “respect must be given to the limitations that are an essential part of the moral rights created by parliament.”⁷⁷ In *Prise de Parole*, the court agreed that the plaintiff’s work was distorted, mutilated, or otherwise modified:

Doric Germain felt frustrated by the publication of a shortened version of his work . . . [A] substantial amount of his novel was reproduced but with essential omissions such as the subplot and a number of details about northern Ontario that were an important part of his original work; in addition, the order in which the plot was presented was altered and the novel’s divisions and subdivisions were left out or changed.⁷⁸

The court was clearly satisfied that the work was sufficiently modified, but it still declared that the modification was not to the prejudice of the author’s honour and reputation on an objective basis.⁷⁹ In coming to this conclusion, the court noted that Germain had not been ridiculed or mocked by his colleagues or the newspapers and had not personally heard any complaints after the work was published.⁸⁰ To find a moral rights infringement, there is a clear requirement of a palpable and measurable difference in the author’s honour or reputation. Such a high threshold is beneficial in the UGC context since there is a substantial proliferation of UGC and most users may not be overly concerned with the original author’s subjective feelings about their work. A lower threshold would create a burden on the system and uncertainty for UGC creators.

An extremely pertinent case in this context is *Nintendo of America Inc v Camerica Corp*,⁸¹ which involved an application for an interlocutory injunction seeking to restrain the selling, advertising, and manufacturing of a product called “Game Genie.” This was a hardware tool designed to be used with the Nintendo Entertainment System, which allowed a player to choose certain play settings such as the number of lives a player has; how many enemies, obstacles, or ammunition they must face; and the game level where the action starts.⁸² Individual players could use the Game Genie to modify the game settings. A Canadian company, Camerica, produced this product and it had no relation to Nintendo America. This is not so different from a user-generated work creator who takes an existing game and modifies it to suit their preferences without express permission from the original producer. Nintendo’s creator, Mr. Miyamoto, alleged that the Game Genie distorted his work by changing

⁷⁷ *Supra* note 72 at para 22.

⁷⁸ *Prise de Parole*, *supra* note 76 at para 26.

⁷⁹ *Ibid* at para 29.

⁸⁰ *Ibid* at para 27.

⁸¹ *Nintendo of America Inc v Camerica Corp* (1991), 34 CPR (3d) 193 (FCTD), *aff’d* (1991), 36 CPR (3d) 352 (FCA).

⁸² *Ibid* at para 9.

the original game settings and this had a detrimental effect on game play.⁸³ However, the Federal Court dismissed the interlocutory motion because the change was not deemed to be substantial enough:

The Game Genie does not make any change in the data which is stored in the game cartridge. Its interception and substitution of data occurs only as long as it is attached to the game cartridge and the controller's power is on. The individual changes that a player makes through entering codes alter the audiovisual display temporarily but do not change it or the Nintendo game permanently.⁸⁴

Because the actual game was not modified, the court did not find that this modification prejudiced the original game. Most UGC does not directly manipulate the original source but instead manipulates a copy that may not necessarily be associated with the original creator or the original work. Hence, an allegation for moral rights infringement will be hard to make out except in egregious cases. Nonetheless, moral rights will serve an important, although limited, gatekeeping function with regard to UGC and ensure that the existing reputation of the original artist is not being damaged.

10.0 TECHNOLOGICAL PROTECTION MECHANISMS

In a discussion about UGC, it is important to note that technological protection mechanisms can be used to restrict access to copyright material and prevent creators from using that material in ways that would be covered under section 29.21 or fair dealing. Sections 41 and 41.1 of the *Copyright Act* need to be carefully applied in order to ensure that digital locks do not create unreasonable barriers to the use of content in ways that may be lawful and beneficial.

11.0 CONCLUSION

From an analytical perspective, the two most important criteria in a section 29.21 analysis are (1) to determine whether copyright subsists in the new work and (2) if it does, to ensure that it doesn't have a substantial adverse effect on the original work. If the work is transformative enough to have copyright subsist in it, then substantial adverse effect to the source work will be harder to make out. For example, even though Girl Talk uses samples from both Elton John and Destiny's Child, his work is sufficiently different from their work that a person who wants to listen to Destiny's Child will not be satisfied by simply downloading Girl Talk's mashups. If sufficient originality and authorial effect are established, then even an existing commercial purpose would not have a substantive adverse effect on the source musicians. Further, note that a "substantial" adverse effect is required, not simply any adverse effect. The current UGC scheme does not protect artists like Girl Talk because they have a commercial purpose. Girl Talk would not be able to make a case

⁸³ *Ibid* at para 22.

⁸⁴ *Ibid* at para 12.

for fair dealing because his work does not fit into any of the enumerated categories of education, parody, satire, research, private study, criticism, or news reporting. He could attempt to make a case under parody or satire, but this would most likely fail given the purpose and character of his dealing. Commercial dealing tends not to be seen as fair as dealing for charitable purposes. Moreover, Girl Talk's albums are widely distributed, so it is not the case that only a single copy of the underlying work is dealt with. Some may even argue that an alternative to dealing would be creating "original" music. All these factors seem to point to the fact that a fair-dealing defence would be futile in this case. Hence, Girl Talk can seek protection under neither the UGC exception nor the fair-dealing defence.

It makes more sense to focus on whether a UGC creator has demonstrated enough originality and authorial effect to have copyright subsist in his or her work and to ensure that the new work does not have a substantial adverse effect on the pre-existing work. This examination could assess monetary impact and have a moral rights analysis. This would fit Parliament's intention to create an exception for UGC creators so they do not have to rely on a complex, after-the-fact, fair-dealing analysis. The current scheme, with its focus on non-commercial content, is too onerous and forces creators like Girl Talk to operate within the shadow of the law. When copyright law is unable to keep up with everyday reality, informal practices emerge that call into question the fairness of the law. Canada's UGC exception is a major step in the right direction, but it needs further revisions that deal with issues of non-commercial use.

12.0 REFERENCES

12.1 Primary Sources

12.1.1 Legislation

Copyright Act, RSC 1985, c C-42.

12.1.2 Case Law

Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright), 2012 SCC 37, 2 SCR 345.

Allen v Toronto Star Newspapers Ltd (1997), 36 OR 201 (Gen Div).

CCH Canadian Ltd v Law Society of Upper Canada, 2002 FCA 187, [2002] 4 FCR 213.

CCH Canadian Ltd v Law Society of Upper Canada, 2004 SCC 13, [2004] 1 SCR 339.

Nintendo of America Inc v Camerica Corp (1991), 34 CPR (3d) 193 (FCTD), aff'd (1991), 36 CPR (3d) 352 (FCA).

Prise de Parole inc v Guérin, éditeur ltée (1995), 66 CPR (3d) 257 (FCTD).

Public Performance of Musical Works, Re, 2014 CarswellNat 2616 (Copyright Bd).

Snow v The Eaton Centre Ltd (1982), 70 CPR (2d) 105 (Ont HC).

Society of Composers, Authors and Music Publishers of Canada v Bell Canada, 2012 SCC 36, [2012] 2 SCR 326.

Théberge v Galerie D'art Du Petit Champlain Inc, 2002 SCC 34, [2002] 2 SCR 336.

12.2 Secondary Sources

12.2.1 About Legislation

Bill C-11, *An Act to amend the Copyright Act*, 1st Sess, 41st Parl, 2012 (assented to 29 June 2012).

12.2.2 General

Banks, John & Sal Humphreys. "The Labour of User Co-Creators: Emergent Social Network Markets" (2008) 14: 4 *Internet Journal Research into New Media Technologies* 401.

Geist, Michael. "Fairness Found: How Canada Quietly Shifted from Fair Dealing to Fair Use" in Michael Geist, ed, *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Ottawa: University of Ottawa Press, 2013) 157.

Gervais, Daniel. "Derivative Works, User-Generated Content, and (Messy) Copyright Rules" (2012) 16: 1 *Copyright & New Media L Newsletter* 7.

Gervais, Daniel. "The Internet Taxi: Collective Management of Copyright and the Making Available Right, After the Pentalogy" in Micheal Geist, ed, *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Ottawa: University of Ottawa Press, 2013) 373.

Gervais, Daniel. "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 Digital Agenda* (Toronto: Irwin Law, 2010) 447.

Grossman, Lev. "You—Yes, You—Are TIME's Person of the Year," *Time* (25 December 2006), online: *TIME* <<http://content.time.com/time/magazine/article/0,9171,1570810,00.html>>.

Hayes, Christina J. "Changing the Rules of the Game: How Video Game Publishers Are Embracing User-Generated Derivative Works" (2008) 21:2 *Harv JL & Tech* 567.

Hebb, Marian. "UGC and Fan Fiction: Rethinking Section 29(21)" (2014) 26:2 *IPJ* 237.

- Hetcher, Steven. "User-Generated Content and the Future of Copyright: Part Two—Agreements Between Users and Mega-Sites" (2008) 24:4 Santa Clara Comp & High Tech LJ 829.
- Jamer, Steven D. "Copyright Aspects of User-Generated Content in the Internet Social Networking Context" (2012) 15:5 J Internet L 3.
- Lessig, Lawrence. *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (New York: Penguin, 2008).
- Reynolds, Graham. "A Stroke of Genius or Copyright? Infringement Mashups and Copyright in Canada" (2009) 6: 3 SCRIPTed 639.
- Reynolds, Graham. "Towards a Right to Engage in the Fair Transformative Use of Copyright-Protected Expression" in Michael Geist, ed, *From "Radical Extremism" to "Balanced Copyright": Canadian Copyright Digital Agenda* (Toronto: Irwin Law, 2010) 395.
- Rosen, Daniel. "Electronic Dance Music, Creativity, and User-Generated Content—A Canadian Perspective" (2014) 26:2 IPJ 153.
- Scassa, Teresa. "Acknowledging Copyright's Illegitimate Offspring: User-Generated Content and Canadian Copyright Law" in Michael Geist, ed, *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Ottawa: University of Ottawa Press, 2013) 431.
- Trosow, Samuel E et al. "Mobilizing User-Generated Content for Canada's Digital Advantage" (1 December 2010), online: Western Libraries <<http://ir.lib.uwo.ca/fimspub/21>>.
- Turnbull, Fraser. "The Morality of Mash-Ups: Moral Rights and Canada's Non-Commercial User-Generated Content Exception" (2014) 26:2 IPJ 217.
- Westcott, Grace. "Friction over Fan Fiction: Is This Burgeoning Art Form Legal?" (2008), online: *Literary Review of Canada* <<http://reviewcanada.ca/magazine/2008/07/friction-over-fan-fiction>>.