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**PAYING IT FORWARD: THE CASE FOR A
SPECIFIC STATUTORY LIMITATION ON
EXCLUSIVE RIGHTS FOR USER-
GENERATED CONTENT UNDER
COPYRIGHT LAW**

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This article examines the User-Generated Content (UGC) phenomena and the significance of re-inventions in the context of an increasingly user-centric Internet environment and an information sharing society. It will explain the need to provide a statutory limitation in the form of an exception or exemption for socially beneficial UGC on the exclusive rights under copyright law. This will also have the effect of protecting the Internet intermediary that hosts and shares UGC. Nascent but abortive attempts have been made by Canada to introduce just such a provision into her copyright legislation, while some principles and rules have also emerged from various interest groups and stakeholders in the attempt of providing a balanced approach towards UGC under the larger scheme of copyright objectives. Customary Internet usages and norms relating to UGC will also be examined. These will be evaluated with a view to extracting useful guidelines to construct the parameters of a fair statutory limitation proposed for the legal reform of copyright law.

“You. Yes, you. You control the Information Age. Welcome to your world.”

TIME Person of the Year, 2006¹

The evolution of Web 2.0 and other new digital technologies have enabled digital content to be easily reproduced and communicated online, without the permission of the copyright owner. The most prominent feature of Web 2.0 is the rise of User-Generated Content (UGC) and UGC-related technological services and platforms. Such a revolutionary model of human interaction inevitably raises legal ambiguity and tensions under copyright law. Copyright law and its complicated balance of public and private interests is once again the object of scrutiny and the appropriate subject of review. A proposal will be made for a statutory reformulation of the boundaries of copyright protection and liability in order to maintain the equilibrium of rights and interests over creative works in the context of the Internet Age and in the face of the empowered user.

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¹ Lev Grossman, *Time's Person of the Year: You* (13 December 2006), available at: <http://www.time.com/time/magazine/article/0,9171,1569514,00.html>. Time Magazine was referring to Internet users and the contributors of UGC (through “community and collaboration”), and indirectly, the WWW and UGC platforms that nurture and support such content (e.g. Wikipedia, Facebook, Second Life, MySpace and YouTube). It was thus no coincidence that the Person of the Year for 2010 was the founder of just such a platform. See, Lev Grossman, *Person of the Year 2010: Mark Zuckerberg* (15 December 2010), available at: http://www.time.com/time/specials/packages/article/0,28804,2036683_2037183,00.html.

Introduction

A major phenomenon of the Internet Age is the empowerment of the user and the rise of the “User-Creator”, which is facilitated by the development of information and communications technology geared towards “User-Generated Content” (UGC). These Internet-based technology (applications) and World Wide Web (WWW) platforms (websites) supply the tools and the forum for the devolvement of creativity to the masses for mass consumption. Much of the UGC can be original such as those materials generated through citizen reporting, but many UGC involve varying degrees of borrowed materials, which are the subject matter of concern and the main focus of this paper.

A clear policy and legal outcome to the status of UGC and the legitimacy of the players in the creation and dissemination chain for UGC is very important. The outcome of this inquiry will determine the socio-cultural landscape of the digital environment and the socio-economic growth of the industry behind it. The rise of powerful Internet giants like Facebook for social networking, YouTube for video-sharing, Wikipedia for collaborative learning and online Blogs and news sites for citizen-journalism is the engine that power the creation of UGC; and the proliferation of UGC is in turn redefining human relationships and the way we interact. On the other hand, the main impediments to UGC are restrictive and monopolistic copyright laws and measures (including Digital Rights Management (DRM), Technological Protection Measures (TPM), Anti-Circumvention Laws (ACL) and restrictive licensing requirements as well as other government regulatory controls.

The objective of this paper is to assess the legal standing of the User-Creator and UGC under copyright law, with specific focus on “downstream creators and innovators” and “follow-on creations” that re-use and re-define the existing and original works of others. The author will also examine and explain the significance of UGC that will justify legal accommodation under the copyright regime and the reason for choosing statutory limitation as the ideal solution.

User-Generated Content and the backdrop of Web 2.0 technology will be explained and defined in **Part 1**. The role and functions of the User-Creator and the assortment of UGC categorized by social function and type of content will be analyzed both with a view to evaluating their current legal status under the United States’ (U.S.) copyright regime, and eligibility to its current statutory protections. This is important in order to identify the characteristics and the forms of UGC as well as the technical and distribution platforms, based on their objectives and functions, which should be legally protected.

In **Part 2**, the author will examine how the fair use doctrine has been applied in order to protect the downstream User-Creator from copyright liability and highlight its inadequacies as the sole instrument of protection as well as the practical problems that can arise in attempting to protect the creation and distribution of UGC in the face of the current copyright protection regime (e.g. restrictive provisions and licensing terms) and a hostile and non-conducive online environment (e.g. blocking technology and litigation threats). The need to protect the parties privy to the entire chain of events from creation to delivery and receipt in order for legal protection of UGC to be effective will also be an integral factor.

The author will then revisit and review copyright objectives in the context of the digital age with a utilitarian outlook and with a view to justifying and proposing law reform for a statutory UGC carve out in order to fulfill the social objectives of UGC and serve U.S. policy interests. The options for UGC limitation will also be canvassed and their features and relative advantages will be assessed. This will be done in **Part 3**. In the process, the policy reasons for the type of UGC (as defined by characteristics) and the technological platforms (as defined by function) identified for legislative protection will be given. The various consequential and incidental effects of the proposal will be examined and its relationship vis-à-vis the fair use provision as well as the potential legal and technical hurdles to such an approach will also be examined. The follow-on issue of copyright protection for UGC will be briefly considered.

Inter-disciplinary scholastic studies, the Canadian draft UGC limitation provision, and the various stakeholder principles and guidelines will be examined with a view to identifying Internet custom relating to UGC and serve also as precedents and authorities for identifying a fair balance of rights between UGC and copyright ownership. They will also evidence the increasing recognition of user rights in relation to UGC. The balance of interests will be made by determining the scope of protection of the proposed UGC statutory limitation provision itself and two options will be given. Each feature or characteristic of UGC as defined will be explained – this is important, as the legal definition of UGC will determine the scope of its protection. The objectives of various forms of UGC that have been identified in Part 1 will also be relevant, and will be integral to defining the scope and level of protection.

To summarize, the aim of this paper is to justify and encourage the creation and delivery of UGC by protecting the User-Creator and UGC platforms from potential copyright persecution, and to provide a conducive environment for UGC taking into consideration its vulnerabilities in the face of extensive copyright protection, in a balanced and fair manner that will be ultimately beneficial to society as a whole, without carving out too much of the copyright owner's

exclusive rights. In fact, in the wider scheme of things and in a more holistic outlook, copyright owners as a part of society can also benefit by a “paying it forward” UGC provision in many ways that will be explained throughout the paper.

For the purpose of this paper, references to existing works include copyrighted works and other subject matter. References to UGC generally includes all categories of UGC as commonly understood by the layman unless in the context of a legal categorization (e.g. original, copied or derivative UGC; and UGC limitation, exception or exemption). References to a statutory *limitation* (and other synonyms such as carve out, exclusion and protection) covers any form of statutory protection from infringement liability (other than statutory safe harbor provisions for Internet intermediaries) unless otherwise specified (i.e. general *exception* or purpose-specific *exemption*).

1. User-Generated Content

1.1. *Web 2.0 and the Rise of User-Generated Content*

1.1.1. *Centrality of User Empowerment in the Web 2.0 Environment*

There is no consensus on the definition of “Web 2.0” or even that it is anything more than a buzzword. However, it does represent a clear evolution of digital technology from the inception of the WWW, and how the Internet is utilized by its stakeholders, to what it is today. Generally, “Web 2.0” is used to describe a set of characteristics that fall under a common theme, which is the development of information technology (IT) to make the WWW more user-friendly and in turn to encourage more active user interaction, involvement and participation in generating content and in creating a less generic interface.² These characteristics involve the development of WWW-based applications that are more user-centric in design (e.g. through customization and inter-operability); increasingly engage user collaboration such as “citizen journalism” (i.e. crowd sourcing and information sharing); and encourages user generated original and derivative content.³ Even the non-technologically sophisticated Internet user can now actively participate and contribute to the

² See, generally, Tim O’Reilly, *What is Web 2.0: Design Patterns and Business Models for the Next Generation of Software*, Communications & Strategies, No. 1, p. 17, First Quarter 2007 (describing Web 2.0 as the “architecture of participation” that produces “rich user experiences”).

³ For an example of the complicated overlap between “three major domains” of UGC identified in a study, that is, creative content, (user-developed) small-scale tools and collaborative UGC, and for an overview of those forms of UGC, see Samuel E. Trosow *et al.* (FIMS UGC Research Team), *Mobilizing User-Generated Content for Canada’s Digital Advantage* (FIMS Library and Information Science Publications, Faculty of Information and Media Studies at the University of Western Ontario, 1 December 2010), available at: <http://ir.lib.uwo.ca/fimspub/21/> (hereinafter the “FIMS Report”).

information shared on the WWW and to freely participate and interact online with relative ease.

This focus on the decentralization of power, individual engagement and 'grassroots culture building' in the Internet environment and in developing a 'digital society' is the main feature of Web 2.0. Web 2.0 describes a change in the nature and a shift in the social dynamics of the WWW rather than any technical changes in the Internet infrastructure itself. Web 2.0 thus encompasses the practices of social networking, blogging, video sharing, music mashups and other user-centric activities involving the user as a creator. It is obvious that the application platforms supporting such activities require a greater role to be played by Internet intermediaries, through the development of facilitative forms of web-based services technology and functions. These intermediaries inevitably influences user behavior and thereby shape the development of the WWW, even as they react to user demands.

1.1.2. User-Centric Trends in Many Jurisdictions

Meanwhile, concomitant with the development of Web 2.0 technology is the increasing awareness of the need for stronger user rights under the copyright regime. The way that the courts have recognized this trend is largely through more expansive interpretation and application of the fair use exception (in the U.S.) or fair dealing exemption (in other parts of the Commonwealth) that is available under the copyright legislation of many common law jurisdictions. Statutory limitations also exist in the copyright laws of other legal systems and countries. The national legislature in many countries have also reacted in a similar fashion and have done so by increasing the scope of the statutory limitations through expansive and liberal judicial interpretation and legislative amendment through the incremental incorporation of more purpose-specific statutory exemptions to supplement the existing provisions (to incorporate activities that have over time gained strong social acceptance and recognition for their social benefits).⁴

In Canada, for instance, the Canadian Supreme Court judges in the seminal case of *CCH v. Law Society of Upper Canada*⁵ clearly enhanced the users' status in the copyright equation in their oft

⁴ Some countries that have the fair dealing provision have gone even further and have also adopted, through amendment, the fair use regime in substance, even if not in form. For example, the Philippines, Israel and Singapore have done so in recent years. See e.g., section 35 and 109 of the Singapore Copyright Act (Cap. 63), which have relegated the purposes of research and study to an example of fair dealing instead of a requirement for protection from copyright liability as was the case prior to its amendment that took effect on 1 January 2005. Other countries such as the U.K., Canada and Australia have studied and considered incorporating the fair use regime into their copyright legislation.

⁵ [2004] 1 S.C.R. 339, 2004 SCC 13 (hereinafter "*CCH*").

quoted statement that “[t]he fair dealing exception, like other exceptions in the *Copyright Act*, is a user’s right”.⁶ The case actually involved an Internet intermediary and its service that benefitted its patrons. The Court also effectively extended the protection of the Canadian fair dealing exclusion to the intermediary servicing the user in order for the latter to achieve the benefits of the service.⁷

The trend in the U.S. and many other jurisdictions also indicate a stronger protection for user interests in the digital age and recognizes the benefits that new forms of technology accords to users. In the U.S., the flexible fair use exception has been used by the courts to cover many new types of uses and purpose, and the list of fair use factors have been supplemented by newer and more applicable tests over the years, many of which were formulated to deal with technology-related services and functions. The exception has also been utilized for the protection against indirect as well as direct infringement claims. Moreover, the U.S. has exported the essence of its fair use provision to other jurisdictions, such as Singapore, Israel and the Philippines, where the trend in technology-related cases also appear to favor users and technology creators.⁸

The increased creation and use of purpose-specific statutory exemptions is also a global trend.⁹ The legislature of many countries has made statutory amendments to accommodate Internet and WWW functions and to update their copyright statutes to include widely recognized user practices. Some examples of recent exemptions that have been popular include the backing up of computer programs, temporary reproduction made in the course of communication (i.e. caching), private and domestic or personal use, and parody or satire.

Finally, even the Digital Millennium Copyright Act safe harbor provisions that protect various fundamental Internet technological

⁶ And that “[i]n order to maintain the proper balance between the rights of a copyright owner and users’ interests, it must not be interpreted restrictively.” *Ibid.*, Note 5 at 48.

⁷ Amongst other issues, the Court interpreted fair dealing to the facts in that case more broadly than ever before when applying it to the photocopying of legal materials by the Law Society for its patrons. See, *CCH*, Note 5 at 51. See also, Parveen Esmail, *CCH Canadian Ltd. v. Law Society of Upper Canada: Case Comment on a Landmark Copyright Case*, 10 Appeal 13 (2005).

⁸ See e.g., *Record TV Pte Ltd v. MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830. In this case, the Singapore Court of Appeal did not even find copyright liability or infringement on the part of the Internet intermediary, an online digital video recorder (iDVR).

⁹ Esp. in countries that do not have or have rejected the U.S. fair use system, and that prefer an incremental approach through the expansion of purpose-specific exemptions. Countries that have done so include the U.K. (see, the recommendations in the Gowers Review, *infra.* at Note 144), Australia and Canada.

functions have the effect of protecting the intermediary that is an integral part of the chain for the storage and distribution of UGC.¹⁰

1.2. User-Generated Content Defined and Categorized

1.2.1. Generally Defined

UGC has rapidly proliferated and flourished in recent years due to the phenomenal growth in the public's demand for electronic channels of communication through the Internet and other mobile devices as well as their growing appetite for the diversity of views and information and the ease of interaction offered by modern digital media and platforms.¹¹ Many new forms of UGC-based businesses and new UGC-related economic models adopted by traditional businesses have developed online platforms and software applications to facilitate the creation and distribution of content by end-users.¹² In fact, the "monetization" of UGC and lucrative businesses that are emerging from it is the main contributor to the Web 2.0 bubble.¹³ This in turn feeds and encourages UGC and the cycle of growth is perpetuated for both user created content and technology alike. The popularity of UGC can also be attributed to the convergence of a set of technological, social, economic, legal and institutional drivers.¹⁴ The UGC value and publishing chain is also simplified and more accessible to users than traditional mediums.¹⁵ Moreover, the buzz is already developing on Web 3.0, involving the Internet web-based "clouds" taking over traditional desktop-based

¹⁰ Online Copyright Infringement Liability Limitation Act, Title II of the DMCA, 112 Stat. 2877 (codified as amended at 17 U.S.C. § 512 (2000)).

¹¹ Initial empirical studies and surveys have shown, in various contexts, the phenomenal growth rate of UGC and its socio-cultural popularity. See, The OECD Working Party on the Information Economy (Directorate for Science, Technology and Industry, Committee for Information, Computer and Communications Policy), *Participative Web: User-Created Content*, DSTI/ICCP/IE(2006)7/FINAL at pp. 9-12. Available at: <http://www.oecd.org/dataoecd/57/14/38393115.pdf> (hereinafter the "OECD Report"). However, measuring UGC is difficult given the various variables and the fluid, intangible and transient nature of online transactions.

¹² Traditional businesses are driven to diversify and transition to the electronic platform due to market and social forces, such as traditional media companies that have a presence online.

¹³ According to Alexa, a website offering Internet traffic data, UGC platforms currently occupy 50% of the top 500 sites on the WWW. Facebook is ranked second, YouTube is ranked third, Blogger.com is fifth, Wikipedia is seventh and Twitter is ninth. The others are major search engines and service providers. See the ranking, which is available at: <http://www.alexa.com/topsites>. The OECD Report has compiled the data on the new business models and investments made on UGC platforms, which amount to billions of dollars or more. See the OECD Report, Note 11, at p. 23 (Table 6).

¹⁴ See, the OECD Report, Note 11 at pp. 13-14.

¹⁵ This is due to lower entry barriers, increasingly simplified technology and sophisticated users, less-to-no cost support and distribution, diversity of works and increasingly limitless digital storage space and life.

applications, which will continue this trend of shifting control from organizations to individuals.¹⁶

There is no single widely accepted definition of UGC. In the 2006 OECD Report on the subject,¹⁷ “User-Created Content” (UCC), the equivalent of UGC, was defined for the purpose of the study as “i) content made publicly available over the Internet,¹⁸ ii) which reflects a “certain amount of creative effort”, and iii) which is “created outside of professional routines and practices”.¹⁹ The “public”, “creative” and “non-commercial cum amateur” nature of UGC are important features and will be relevant to the exercise in defining the boundaries of rights, duties and liabilities that can reasonably be placed on UGC creators and platforms. Based on this general definition of UCC or UGC, taxonomies of the categories of UGC based on the type of content and the categories of UGC hosting and distribution platforms (that form the technological backbone and that drive the UGC growth) based on the purpose that they facilitate can be drawn up. They encompass a wide range of content, technology and services.²⁰

The OECD definition of UCC is wide. The focus of this paper is to define the sub-category of UGC that gives rise to copyright disputes and that should be accorded legal protection. Hence, a narrower definition based on specific features of this sub-category of UGC will be identified and explained at a later stage.

1.2.2. Categorizations and Comparisons

UGC can come in many forms and as such it can give rise to various types of comparison. UGC can be text-based (e.g. blogs, articles, encyclopedias and books) or image-based UGC (e.g. pictures, photos, drawings and illustrations) and there can be audio and video UGC. UGC can also be categorized according to the type of platform or wider social objectives and functions. These forms of compartmentalization may be useful for other types of study. However, they are not particularly relevant here except insofar as to provide an overview of the common UGC types and platforms and for

¹⁶ See Nicholas Carr, *THE BIG SWITCH: REWIRING THE WORLD, FROM EDISON TO GOOGLE* (W. W. Norton & Company, 17 January, 2008) at pp. 21-23.

¹⁷ See, the OECD Report, Note 11.

¹⁸ Also making reference to the electronic medium is Daniel Gervais in his definition of UGC as “content that is created using tools specific to the online environment and/or disseminated using such tools”. See, Daniel J. Gervais, (2010), *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* (Irwin law, 2010) pp. 447-475 at p. 465. However, it should be noted that as UGC pre-dates the Internet, it is not entirely accurate to confine it to content created and disseminated in this medium alone.

¹⁹ See, the OECD Report, Note 11 at p. 4.

²⁰ See, the OECD Report, Note 11 at pp. 15-16 (Tables 3 and 4) respectively.

a better understanding of the general concept and layman's understanding of the scope, nature and character of UGC and its related technology.

Under the current fair use regime, it is primarily the purpose and character of *each* UGC, rather than the type of UGC platform or the general social objective, that is relevant to determining the protectability of the practices relating to the creation of such content. Thus, protection is not based on whether a copyrighted work is used without permission such as in the course of social networking and citizen journalism. However, the wider social purpose is still relevant as a fundamental consideration and justification for a statutory defense for UGC.

1.3. Copyright Issues Relating to User-Generated Content

1.3.1. Re-Use in UGC as the Subject Matter of Dispute

The current disputes over UGC between copyright owners and UGC creators or technology innovators revolve around derivative or copied works or the re-use or reproduction of copyrighted content without authorization (or license) respectively. The mere copying of content without more is generally not protectable under the fair use provision, unless they fall under a specific statutory exemption. Thus, there is little to no confusion over the permissibility of such practices. It is the derivative use of existing works that is the main subject matter of copyright liability disputes.

Original digital content, which falls within the "umbra" of creative content, is generated by users that are facilitated by web-based application services and platforms. The practice of re-inventing or re-creating digitized works using one or more existing copyrighted work forms a "penumbra" of digital user creations. The re-creation of third party content can involve a portion or full versions of existing works in any combination. "Vidding"²¹ and "Mash-Ups"²² are just some terms that have surfaced to describe these new forms of "re-creativity". As noted, these forms of re-use are the subjects of dispute in the copyright arena.

The protection or otherwise of UGC creators from copyright liability and the level of copyright protection that user-derived content can itself enjoy will have 'downstream' effects on subsequent derivative works as well. Although it is not the main focus of this paper, this

²¹ The use, editing and re-invention of copyrighted videos and music to produce fan videos for various potential purposes such as to change the storyline, for critique, to summarize and as parody. See, Sarah Trombley, *Visions and Revisions: Fanvids and Fair Use*, 25 Cardozo Arts & Ent. L.J. 647, 649 (2007).

²² To remix or sample by combining parts or components of more than one piece of music (i.e. lyrics and melody).

issue will also be briefly considered and some thoughts and suggestions will be given later in this paper.

1.3.2. An Uncertain Legal Environment for UGC Creators

Although the most prominent disputes are between the economic ‘goliaths’, namely the copyright owners consisting mainly of the media industry players against UGC technology services and platforms such as YouTube,²³ the threat of litigation and the prohibitory effects of current copyright provisions are also felt by the UGC creators themselves.

For the downstream creator and innovator who re-uses existing works, there is a lack of any guidance or a clear legal right to re-create copyrighted works. The legal environment is not only murky, it is also hostile with laws that now criminalize individuals for copyright infringement for downloading infringing UGC and that prematurely preempts potential fair uses through DRM, TPM and ACL provisions. Emboldened by these laws, copyright owners have also developed practices and processes that increasingly discourages UGC creators from uploading material onto the WWW, some of which are heavy-handed and without proper legal foundation.

The most prominent example of this is the case of *Lenz v. Universal Music Corp.*,²⁴ which is illustrative of the endemic problem of a protectionist copyright regime. This case was brought by a UGC creator and provider against a copyright owner and makes a statement about the latter’s role and responsibility in the statutory “notice-and-take-down” process.²⁵ Its implications on Internet intermediaries like YouTube are incidental but still of particular interest. Mainly, it shows the uncertain and hostile legal environment in which User-Creators operate.

The case involved the plaintiff, Stephanie Lenz who had made a home video of her 13-month-old son dancing to Prince’s song “Let’s

²³ See e.g., *Viacom International Inc. v. YouTube, Inc.*, S.D.N.Y. No. 07-Civ-2103, 718 F. Supp. 2d 514 (S.D.N.Y. 2010) (hereinafter “*Viacom v. YouTube*”). This case is currently under appeal.

²⁴ 572 F.Supp. 2d 1150 (N.D. Calif. 2008) (hereinafter “*Lenz*”).

²⁵ Under Title II (Online Copyright Infringement Liability Limitation Act) of the Digital Millennium Copyright Act (DMCA) 112 Stat. 2860 (1998), which amended the U.S. Copyright Act of 1976, online service providers are given safe harbor protection against copyright liability if they meet the requirements of the provisions (i.e. fall under any category of eligible Internet intermediaries) and adhere to the requirements of the provisions including the “notice-and-take-down” process. Under the process, if the intermediary receives a notification claiming infringement from a copyright holder (or the copyright holder’s agent), they must block access or remove the allegedly infringing material. There is a counter-notification provision for users to have the material in question “put-back”.

Go Crazy” but only posted a 29-second clip of the video on YouTube.²⁶ The defendant, Universal Music, which was the owner of the song, sent a notice to YouTube demanding that the video be taken down in accordance with the Digital Millennium Copyright Act requirement that was complied with.²⁷ YouTube notified Lenz who sent a counter-notice to have the video reposted citing fair use, which was also complied with. The plaintiff then sued the defendant claiming misrepresentation under the DMCA, seeking a court declaration that her use was non-infringing.

On 20 August 2008, a U.S. federal district court ruled in the case that copyright holders cannot order the removal of a digital video file available online, which in this case was uploaded onto YouTube, without first determining, that is, without first attempting to pre-judge or anticipate judgment based on its merits, whether the posting constituted fair use of the copyrighted material contained therein.²⁸

The court’s decision is a significant statement on the operation and status of the fair use doctrine, the limits of the “notice-and-take-down” process and the responsibilities relating to such a process on the copyright holder. The good faith requirement is judged from the perspective of the copyright owner who must make an effort to evaluate the fair use doctrine in any given case.²⁹ If the copyright owner uses a mechanical procedure or automatically gives notice without considering fair use, then bad faith claims can be made.³⁰ This should be reflected in the notice.³¹

²⁶ The video can be viewed at: <http://www.youtube.com/watch?v=N1KfJHFWlhQ>. The case exemplifies the struggle over who should bear the greater burden in policing real copyright infringement online. See, Steven Seidenberg, *Copyright in the Age of YouTube: As User-Generated Sites Flourish, Copyright Law Struggles to Keep Up*, 95 A.B.A.J. 46 (February 2009). See also, Ian Chung, *Be Wary of Adding Your Own Soundtrack: Lenz v. Universal and How the Fair Use Policy Should be Applied to User Generated Content*, 29 Loy. L.A. Ent. L. Rev. 163 (2009) and Kathleen O’Donnell, *Lenz v. Universal Music Corp. and the Potential Effect of Fair Use Analysis under the Takedown Procedures of § 512 of the DMCA*, Duke L. & Tech. Rev. 10 (2009).

²⁷ See, Note 25 (*supra.*). 17 U.S.C. § 512(c).

²⁸ The court held that a copyright owner who seeks to enforce a DMCA notice-and-take-down request must first “consider the fair use doctrine in formulating a good faith belief that ‘use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.’” *Lenz*, Note 24 at 1154.

²⁹ A “full investigation” is not required, pursuant to precedent from the Ninth Circuit Court of Appeals in *Rossi v. Motion Picture Ass’n of America, Inc.*, 391 F.3d 1000, 1003-04 (9th Cir. 2004). The subjective “good faith” evaluation is assessed from the copyright holder’s perspective, pursuant to §512(c)(3)(A)(v). *Ibid.* at 1004.

³⁰ Among other allegations, Lenz accused Universal of misrepresentation under §512(f) of the Copyright Act. Section 512(f), which is designed to prevent abuse of DMCA take-down notices, provides that “anyone who knowingly materially represents...that material is infringing...shall be liable for any damages, including cost and attorneys’ fees, incurred by [anyone] injured by such misrepresentation.”

³¹ Lenz’s “bad faith” argument hinged on the requirements for a “take-down” notice as elaborated in 17 U.S.C. § 512(c)(3)(A)(i-vi), which essentially provides a checklist for the information that needs to be included. Specifically, § 512(c)(3)(A)(v) specifies

The decision is yet to be tested in a higher court of authority, but the case is interesting to note as it highlights the difficulties in apportioning the policing responsibility between the parties (to achieve a balance of convenience and fairness), the potential for abuse of the “notice-and-take-down” process as well as the burden of manual and value-judged policing of UGC platforms such as YouTube as opposed to automatic computer policing technology that is unfortunately not fool-proof. It also illustrates the difficulties faced by UGC creators against zealous copyright claims, since *Lenz* is more the exception than the norm when it comes to reactions to the DMCA notice process.

Before UGC, liability issues surrounding copyright infringement were on Peer-to-Peer (P2P) file sharing activities, which technology allows for the reproduction and dissemination of content and where the issue of liability was mainly determined by the applicability or otherwise of copyright exceptions, namely the fair use provision. This is similar to the situation facing UGC. Thus, the fair use test should first be evaluated in order to determine whether it is adequate as a response to UGC protection or whether there is the need for a new and additional statutory limitation.

2. Constraints of Fair Use

2.1. *The Jurisprudence of Fair Use and New Media*

2.1.1. *The Three Phases of Fair Use Development*

The first phase in the legal development of the fair use doctrine in the U.S. dates back to its inception as a counterweight to copyright protection. It post-dates the narrower fair dealing defence that is still predominant in Commonwealth copyright laws. In fact, judges have applied the concept of fair use since 1976 as an exception to what would otherwise constitute an infringement of copyright before it was even codified into statute.³² Its earliest incarnation was as a legitimate action-based form of protection for “fair abridgment”.³³ It has since evolved to encompass many forms of uses including, and in particular, derivative works. This carve out of otherwise exclusive rights for the derivative use of existing works without authorization

that such notice must include “[a] statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.” Broad objections in principle to online posts without reference to context do not suffice. *Lenz*, Note 24 at 1152-53.

³² 17 U.S.C. §107. See, *Gyles v. Wilcox*, 26 Eng. Rep. 489 (1740), an earlier case that dealt with “fair abridgement” that subsequently evolved into “fair use”. *Ibid.* at 490. See further, Jay Dratler Jr., *Distilling the Witches’ Brew of Fair Use in Copyright Law*, 43 U. Miami L. Rev. 233 (1988).

³³ *Gyles v. Wilcox*, Note 32 at 490.

continues to be relevant, especially with the growing emphasis on re-creativity and re-invention.³⁴

The second significant milestone of its development is tied to the mechanical and electronic age and the advent of technology with the social utility and benefits of mechanical and electronic duplication, and is defined by the *Sony Betamax* milestone.³⁵ Fair use adapted as a form of defense to indirect infringement actions that became prevalent against the technological inventors and intermediaries that were providing facilitative devices and services for direct infringement by their users. Development in the law to deal with the socio-economic changes was still predominantly case law driven in common law countries.

The invention of the Internet, WWW and increasingly efficient wireless/remote electronic communications, storage and transfer technology as well as the analog-to-digital transition heralds a whole host of new media technology that has given rise not only to the third phase for fair use development,³⁶ but it has also given rise to other significant forms of statutory carve-outs such as (function and subject-based) safe harbor protections as well as (function and objective-based) purpose-specific statutory exemptions, which were necessary to cope with the changes in societal context and needs. This third phase of development also covers the UGC phenomena and the devolvment/devolution of creativity, especially follow-on creations to the masses. It is this stage that we are concerned with and that we should see an increased role for the legislature to play in the development of limitations to rights in creative works and subject matter beyond the traditional types of exclusions and even beyond the confines of fair use, however flexible the doctrine have proven to be and despite its continued importance and relevance as an exception.

2.1.2. Fair Use Distinguished from Fair Dealing

³⁴ E.g., the Creative Commons Movement puts it as its objective: "Share, Remix, Reuse - Legally". See the Creative Commons website at: <http://creativecommons.org/>. The Creative Commons suite of licenses encourages copyright owners to loosen the rights over their works so as to render third party re-use legal.

³⁵ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448 (1984) (hereinafter "*Sony Betamax*").

³⁶ The seeds of mass re-creativity have now grown and have been made easier by digitization, mass-appeal software applications and remote access that have spawned many new industries and new players or intermediaries. Power over disseminated works has gone from centralized control to mass dispersal. The Internet user is now the main subject of these changes and of fair use interests. Thus, it is not surprising that fair use as a doctrine have also expanded in its role.

The modern copyright regime developed from the laws of England about 270 years ago,³⁷ and has been transposed into the laws of other countries through cases and statutes and harmonized to some extent through international and regional conventions.³⁸ The limitations to the scope of copyright protection have also developed in tandem to provide a balance of public and private stakeholder interests.³⁹ For the purpose of this paper, statutory “limitations” refers collectively to all the carve-outs to copyright including the fair use/dealing “exception” and other purpose-specific statutory “exemptions”.⁴⁰

There are some important distinctions between the scope and applicability of the fair use/dealing defense as it manifests or appears in various national statutes particularly in relation to the issue of “utility”, although there is major overlap between them with respect to the assessment of “fairness”. For the generally purpose-specific Commonwealth “fair dealing” regimes,⁴¹ the first component has to be satisfied; whereas for the non-purpose specific U.S. “fair use” regime,⁴² the type of use is only relevant insofar as it is relevant to an assessment of fair usage.⁴³

³⁷ Copyright itself emerged in the English Statute of Anne of 1709. Copyright Act, 1709, 8 Anne, c.19 (Eng.). See further, 4 Melville B. Nimmer & David Nimmer, NIMMER ON COPYRIGHT § 13.05 (2006) and William F. Patry, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW 6-17 (1st ed. 1985).

³⁸ I.e. the Berne Convention for the Protection of Literary and Artistic Works, 9 September, 1886 (as amended 28 September, 1979), available at <http://www.wipo.int/treaties/en/ip/berne/trtdocs/wo001.html>; the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), 15 April, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 108 Stat. 4809, 1869 U.N.T.S. 299, available at <http://www.wto.org/english/docs/e/legal/e/27-trips.pdf>; the World Intellectual Property Organization (WIPO) Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), WIPO/CR/KRT/05/7 (February, 2005), available at http://www.wipo.int/edocs/mdocs/arab/en/wipo_cr_krt_05/wipo_cr_krt_05_7.pdf; and the Report to the Council, the European Parliament and the Economic and Social Committee on the Application of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society (EU Copyright Directive), 30 November, 2007, available at http://ec.europa.eu/internal_market/copyright/docs/copyright-infso/application-report_en.pdf.

³⁹ Dinusha Mendis, *The Historical Development of Exceptions to Copyright and Its Application to Copyright Law in the Twenty-first Century*, Vol. 7.5 EJCL, (2003), available at: <http://www.ejcl.org/ejcl/75/art75-8.html> (tracing the development of copyright law in the United Kingdom). See also, Leon Seltzer, EXEMPTIONS AND FAIR USE IN COPYRIGHT: THE EXCLUSIVE RIGHTS TENSIONS IN THE 1976 COPYRIGHT ACT (Harvard University Press, 1978).

⁴⁰ Any reference to statutory “protections” refers to safe harbor provisions that shield Internet intermediaries from indirect liability for third party material and user’s actions.

⁴¹ See e.g., the origins of the provision in section 2(1)(i) of the U.K. Copyright Act, 1911 and section 16(1)(i) of the Canadian Copyright Act, S.C. 1921, c. 24.

⁴² In the U.S., judges applied the concept of “fair use” long before it became codified in law since 1976 (17 U.S.C. §107) as an exception to what would otherwise constitute an infringement of copyright. See, *Gyles v. Wilcox*, 26 Eng. Rep. 489 (1740), an earlier case that dealt with “fair abridgement” that subsequently evolved

2.1.3. The Basic Tenets of Fair Use

The purpose of fair use and its role under copyright law serves the larger objective of this area of law and has to be considered within the regime as a whole. The United States Supreme Court have noted that it serves two primary objectives: “[T]o assure contributors to the store of knowledge a fair return for their labors” and “motivate the creative activity of authors and inventors” “in order to benefit the public.”⁴⁴ The public benefit consideration encapsulates the overarching public interest and social utility concerns. Fair use as a defense is an “equitable rule of reason” to serve as a salve to the strict copyright regime.⁴⁵ It allows third parties to develop and further enhance earlier copyrighted works without otherwise having to seek permission from the copyright owner to do so if certain conditions are met.⁴⁶ It remains a flexible and evolving standard, and as such is versatile while unpredictable.⁴⁷

The fair use exception has seen its fair share of judicial activism. For instance, the types of factors considered in analyzing fair use have expanded, and its protections have extended to protect the

into “fair use”. *Ibid.* at 490. See further, Jay Dratler Jr., *Distilling the Witches’ Brew of Fair Use in Copyright Law*, 43 U. Miami L. Rev. 233 (1988).

⁴³ See, *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (the origins of the fair use factors). “[W]e must...look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.” *Ibid.* at 348. The listed factors vary from jurisdiction to jurisdiction. For example, in Singapore there is a fifth factor based on availability and price (section 35(2)(e) of the Singapore Copyright Act (Cap. 63)) based on the Australian provision and in Canada there are six elucidated factors that consists of the purpose, character and amount of the dealing, alternatives to the dealing, nature of the work and effect of the dealing on the work (*CCH*, Note 5 at para. 53). These factors are not exhaustive and are often supplemented by other factors and tests.

⁴⁴ *Harper & Row, Publ’rs, Inc. v. Nation Enter.*, 471 U.S. 539, 545-46 (1985).

⁴⁵ H.R. REP. NO. 94-1476, at 65 (1976). Because of this, there is no clear or generally applicable definition. See also, *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448 (1984) (hereinafter “*Sony Betamax*”).

⁴⁶ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577-78 (1994) (hereinafter “*Acuff-Rose*”). The U.S. Supreme Court recognized the importance of relaxing exclusive rights to allow works that build upon, reinterpret, and re-conceive existing works to avoid “stifling the very creativity which the law is designed to foster”. *Ibid.* at 575-77. The fair use doctrine “creates a limited privilege in those other than the owner of a copyright to use the copyrighted material in a reasonable manner without the owner’s consent”. *Fisher v. Dees*, 794 F.2d 432, 435 (9th Cir. 1986).

⁴⁷ “The factors are broadly stated, overlapping, and vague, and the legislative history provides little insight as to their meanings, what weights to give them, or how they interrelate.” Marshall Leaffer, *UNDERSTANDING COPYRIGHT LAW* (New York: Matthew Bender & Company, Inc., 1989) at 299. See also, Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105 (1994).

development of new technologies and practices that have become acceptable in society.⁴⁸

2.1.4. Looking Beyond Fair Use

Fair use is the foremost, but by no means is it the only, statutory carve-out to be made to strict liability copyright infringement. Today, there are also purpose-based statutory exemptions (to protect against primary liability) and safe harbor laws (to protect intermediaries from secondary infringement). The emerging importance of supplementary statutory protections and exemptions to the fair use exception serve several purposes: They provide certainty and reduce unnecessary disputes where there is a need to address and legitimize specific activities and entities, especially where they are identified as having important socio-cultural and economic benefits that outweigh copyright protection. They also obviate the need to resort to the slower evolution of the law through judicial law making in the common law system. Statutory protections, exceptions and exemptions also have the advantage of predictability and automatic applicability, which offers an almost instantaneous solution to the problems and conflicts posed by developments in the electronic age and technological advances that often provides the impetus for significant amendments to copyright legislation to accommodate these changes.

Many academics have rightfully criticized the preemptively chilling and prohibitive effects of “digital locks”, namely, DRM, TPM and anti-circumvention provisions.⁴⁹ Although Internet users are becoming more sophisticated, they still generally lack the technical know-how and technological skills to get around these measures even if it is to perform a fair usage.⁵⁰ Also, despite the *Lenz* case,

⁴⁸ Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, William and Mark L.R. (2004). The trend in cases after *Sony Betamax* attests.

⁴⁹ In many instances, however, an individual could commit an offence by circumventing a TPM to do something that the individual has the right to do under the Copyright Act. See, 17 U.S.C. § 1201-5. DRMs allow copyright owners to restrict access to and/or use of copyright-protected expression automatically without distinction for fair use exceptions and other statutory exemptions. Only making it an offence to circumvent a DRM for an infringing purpose may provide such a carve-out, but it requires users or watchdog organizations to make a pre-determination of their eligibility to use (i.e. their right to fair use).

⁵⁰ See, Rebecca Tushnet, *I Put You There: User-Generated Content and AntiCircumvention*, 12 Vand. J. Ent. & Tech. L. 889 (2010). See also, Darren A. Handler, *The Copyright & Digital Mismanagement Chasm: Fair Use Implications of Digital Rights Management Technologies Upon the Digital Versatile Disk Medium*, 7 Wake Forest Intell. Prop. 173 (2007) and Jessica Litman, DIGITAL COPYRIGHT: PROTECTING INTELLECTUAL PROPERTY ON THE INTERNET (Prometheus Books, 2d ed. 2006) at pp. 125-26, 135-36 and 144-45. See also, Jerome H. Reichman et al., *A Reverse Notice and Takedown Regime to Enable Public Interest Uses of Technically Protected Copyrighted Works*, 22 Berkeley Tech. L.J. 981 (2007); Bill D. Herman & Oscar H. Gandy, Jr., *Catch 1201: A Legislative History and Content Analysis of the DMCA Exemption Proceedings*, 24 Cardozo Arts & Ent. L.J. 121, 135-38 (2006) and

individual users generally lack the resources and knowledge to defend themselves from threats of copyright action, which would allow legitimate fair uses to be *preemptively* blocked. Meanwhile, current practices seem to show that copyright owners automatically give notice of infringement irrespective of the nature of the use, and at least some Internet intermediaries tend to err on the side of caution in order to protect itself from copyright liability and to ensure that statutory safe harbor protections extend to them by *subsequently* blocking or removing what may actually be legitimately posted UGC.⁵¹ Developing a specific and defined statutory exception or exemption will also be an important step towards incorporating UGC as an exception to the effects of DRM and anti-circumvention laws,⁵² something which is much more difficult to justify or accomplish in the case of the fair use exception due to its general and amorphous nature. In this sense, there are practical and legal impediments to the fair use exception as the primary form of protection for UGC.

The default position for UGC should be one of non-infringement unless proven otherwise and it should not be left to the individual user, with his or her limited resources, to prove non-infringement. The burden of proof should be on the complainant copyright owner to prove that there was 'net infringement' (i.e. infringement and no legitimate statutory limitation) in the case concerned.⁵³ To be fair, as fair use is a judgment and merits-based assessment and involves a case-by-case analysis, it would be quite burdensome for them to make this assessment. This was a point made by the defendant in the *Lenz* case. Thus, a more specific and explicit statutory limitation provision will also help to alleviate this burden somewhat by making clear what type of UGC related activity are allowed.⁵⁴ It will also lend greater weight, legitimacy and authority to these UGC activities.

Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised*, 14 Berkeley Tech. L.J. 519 (1999).

⁵¹ Under the statutory notice-and-take-down regime. See, Note __ (*supra*.).

⁵² See, Letter from Fred von Lohmann and Jennifer S. Granick of the Electronic Frontier Foundation to the U.S. Copyright Office, Library of Cong. 22 (2 December 2008), available at: <http://www.copyright.gov/1201/2008/comments/lohmann-fred.pdf>.

⁵³ Users will retain the burden of proving non-infringement for protection under the general fair use exception unless and until changes are also made to that position, such as through the recognition of stronger user rights vis-à-vis fair use. See, Warren Chik, *Better a Sword than a Shield: The Case for Statutory Fair Dealing/Use Right as Opposed to a Defence in the Light of the Disenfranchising Effect of Digital Rights Management and Anti-Circumvention Laws*, International Journal of Private Law, Vol. 1 Nos. 1/2, 157 (2008). Another possible reform is to statutorily provide a procedure for users to seek a declaration of fair use. *Ibid.* at X.

⁵⁴ There should also be sanctions for groundless threats of legal action based on copyright infringement for acts that fall within clear and specific statutory exceptions or exemptions (e.g. by a fine or by an injunction from using the DRM or TPM) as well as for meritless take-down notices sent to UGC intermediaries and platforms (as in the *Lenz* case). UGC platforms should not be subject to any such assessment due to the sheer volume of materials that they convey. The burden of

Thus, the existing DRM, TPM and anti-circumvention provisions as well as the “notice-and-take-down” process and should be amended to accommodate UGC following the enactment of a statutory UGC limitation provision.⁵⁵

The uncertainties posed by the fair use doctrine are a perennial problem as it creates uncertainty and consequential issues. The other is the fact that the enumerated list of fairness factors constitutes considerations that were more relevant to a different non-digital context and the pre-Internet society, with its changes to social ordering, is thus less relevant and appropriate to the UGC context.⁵⁶ Although fair use does extend as a form of defense to alleged indirect or secondary infringers,⁵⁷ the doctrine faces several inadequacies in application. The enumerated fair use factors are currently still specific to and focused on the primary infringement context and from the perspective of the copyright owners’ interests.⁵⁸ Hence, the recent judicial developments of additional and novel tests to supplement these factors, most of which have emerged from U.S. jurisprudence and many of which were in direct response to technological progress. There is also some confusion in attributing the beneficial outcome of the UGC service to end-users and society at large in the assessment of

assessing fair use and applicability of exemption should be apportioned between the copyright owner and the user.

⁵⁵ In relation to the former, law reform should also look into accessible technical means to legitimately circumvent such measures. Methods such as a user declaration procedure to obtain a “digital key” can be instituted to overcome the problem of “digital locks” that do not distinguish between infringing and legal uses (i.e. anti-circumvention provisions that prohibit all circumvention technological tools without distinction as to its use). With regard to the latter, it is interesting to note the merits of the proposed “notice-and-notice” process in the Canadian Bill C-32 (*infra.*).

⁵⁶ Thus, the Canadian Bill C-32 proposal did not have the equivalent of an explicit fair use factors list. The judicial development of supplementary tests and new factors in the U.S. courts and even multiple times by the Supreme Court is itself a testament to the inadequacies of the existing statutory list of factors with their copyright owner-centric perspective. Countries without a rich heritage of judicial doctrine will suffer even more from a deficit of clear rules in favor of UGC.

⁵⁷ Secondary liability (i.e. contributory and vicarious copyright infringement) requires proof of direct infringement. See, *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004). Because of this association, fair use is also relevant to secondary claims and has indeed been put to the test in technology-related cases involving Internet intermediaries.

⁵⁸ This has motivated proposals for technological fair use factors for technologies that can give rise to copyright infringement, whether in the face of direct or secondary liability claims. See e.g., Edward Lee, *Technological Fair Use*, 83 S. Cal. L. Rev. 797 (2010) for some proposals for analyzing “technological fair use”, which is a re-working of the fair use factors to take into account the special characteristics and considerations relevant to “speech technologies”, but still within the context of the fair use exception. In contrast, in lieu of factors, and for greater certainty and predictability, the proposals in this are based on conditions for copyright exclusion (from infringement) that are largely objectively assessed (except, in particular, for the Option 1 flexible open “transformative” test). *Infra.*

the relevant factors and tests in favor of the service provider.⁵⁹ Potential User-Creators can also be deterred from producing UGC even if it could fall within the scope of fair use, because of threats of legal action and what it could entail, such as long drawn out disputes and high legal fees. The greater uncertainty and unpredictability of the fair use approach is therefore also a problem.

The follow-on effect of legally permitted UGC and an explicit statutory UGC limitation is very important also because complaints are currently brought against UGC platforms that cultivate and promote UGC. As indirect infringement (and authorization of infringement) actions are reliant on the existence of primary infringement, carving-out UGC will have the effect of legitimizing such technologies, thus shielding them from threats of action and provide a conducive environment for the development of such technology and services. It is also a prelude to the development of a potentially more sensible tiered copyright protection regime with different levels or 'packages' of exclusive rights. A more specific defence will also be more likely to pass the Berne three-step test for possible limitations to exclusive rights under national copyright law that is imposed under the major international trade and copyright law conventions. A more comprehensive, clear and relevant solution is required. A statutory UGC limitation provision can resolve many of these problems.

3. Crafting a Statutory UGC Exemption

"You don't pay love back; you pay it forward."⁶⁰
In the Garden of Delight, 1916⁶¹

⁵⁹ For example, the *Sony Betamax* "substantial non-infringing uses" test does take into consideration the statistical and empirical evidence of usage by end-users, and the benefits to such users through time-shifting of content, in assessing the usefulness and fairness of allowing the recording device. Similarly, although the nature of the usage in *Campbell v. Acuff-Rose* related to the change in purpose and utility of the original subject matter (i.e. the "transformative use" test), the ultimate objective is also the benefit to users and to society, which was also relevant to the determination in favor of the defendant there. See also, the *Kelly v. Arriba* and the *Perfect 10* cases (Note X). Perhaps the seminal Canadian Supreme Court decision in the *CCH* dispute puts it the most clearly when it identified the service provider as an integral link or chain in the process for which the ultimate purpose or "end" do justify the protection of the "means". The Court stated that the provision of the service by the intermediary was a "necessary condition" and "part of the process" to achieve the end-user's objective and the outcome that is the time-shifting of programs. See, *CCH*, Note 5 at para. 64, where the fair dealing defence was available to the copyist even though the actual use of the work copied for the relevant purpose was by another. It may be added that technology creators of editorial software and other instruments that permit users to create and re-create works should also form part of the process that facilitate the development and distribution of UGC.

⁶⁰ In a way, carving out a limitation for UGC at the detriment of the copyright owner is a mandatory form of the "pay it forward" concept.

3.1. General Considerations Justifying a Statutory Carve-Out

This Part contains the justification and proposed model for statutory protections for UGC that meets a certain set of conditions or pre-requisites. Non-statutory precedents such as proposed draft legislation, private undertakings and best practices are canvassed for inspiration; and common or customary UGC practices are examined with a view to a role for specific purpose or usage in the proposed limitation.

3.1.1. Public Interest

Based on a utilitarian analysis, the optimal point of utilization of a work does not end with the protection of original creations. It goes beyond that to include secondary forms of creations that build upon those materials, and that extend the interest in and enjoyment of the original works. Many forms of UGC, especially those that have a different purpose from the original, add intangible value to the work, reach a different audience and serve a different set of objectives. The increased distribution and retention of such works also extend and prolong its social benefits (i.e. sustaining its utility through continued interest and enjoyment). Even taking into consideration the potential market impact on the copyrighted works, the net returns from legally protecting a carefully defined group of UGC from copyright infringement (by permitting their creation without requiring prior authorization from owners of existing works used) is greater than if no such exclusion is made. The type of UGC that should enjoy protection should of course be limited in such a way that the moral and economic returns to the original author is minimally affected in order to achieve optimization. In fact, the same arguments have been made in support of the fair use exception and other statutory exemptions.

Other copyright jurisprudential theories can also be interpreted as largely supporting re-use,⁶² especially when viewed in the context of society as a whole and by accepting that the advancement of knowledge and inventions exists holistically and in a continuum.⁶³

⁶¹ Lily H. Hammond, *IN THE GARDEN OF DELIGHT* (Thomas Y. Crowell: N.Y., 1916) at p. 209.

⁶² E.g. Natural rights theory can be interpreted as supporting re-use. See, John Locke, *Of Civil Government*, in *TWO TREATISES OF GOVERNMENT*, 269-78 (Peter Laslett ed., Cambridge Univ. Press 1967), on the theory of transformative labor. See also, Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 Yale L.J. 1533 (1993).

⁶³ See, Blaise Pascal, *PREFACE TO THE TREATISE ON VACUUM* (The Harvard Classics 1909-14), available at <http://www.bartleby.com/48/3/10.html>. "But as subjects of this kind are proportioned to the grasp of the mind, it finds full liberty to extend them; its inexhaustible fertility produces continually, and its inventions may be

The concept of marginal utility in economics also supports the idea of utility gaining from an increase in consumption (such as through re-invention and re-interpretation of existing works) albeit at a diminishing rate. The greater the reach and the more utilization that can be made of a work, the greater the utility that can be gained from it.

Given the socio-economic utility of UGC and its contributions to human intercourse, re-invention and the dissemination of knowledge, both the technology behind it (the catalyst) and the source of such content (the subject) should be given value and offered some protection. The nature of UGC and the profile of its subject make the usual requirement to seek approval and permission from copyright owner before use unsuitable to the sustainability of UGC. The difficulties of copyright licensing as a viable, feasible or reasonable alternative for users require a more fundamental shift in the rights protection regime if UGC is to be allowed to perpetuate.

The social goals of UGC are multifaceted and encompass existing public and social interest considerations as well as new ones. They include:⁶⁴

1. The maximization of social wealth in knowledge and information as well as the promotion of social interactivity. Citizen journalism on blogs and online media platforms as well as user collaboration platforms like Wikipedia contribute to the diversity in the source of information, the quantity of information, the dissemination, accessibility and sharing of knowledge, and an overall a greater spectrum of views that top-down reporting from a few industry sources fail to provide.⁶⁵

multiplied altogether without limit and without interruption". *Ibid.* at para. 10. "As their perfection depends on time and pains, it is evident that although our pains and time may have acquired less than their labors separate from ours, both joined together must nevertheless have more effect than each one alone." *Ibid.* at para. 12. "[N]ot only does each man advance from day to day in the sciences, but all mankind together make continual progress in proportion as the world grows older, since the same thing happens in the succession of men as in the different ages of single individuals. So that the whole succession of men, during the course of many ages, should be considered as a single man who subsists forever and learns continually..." *Ibid.* at para. 21.

⁶⁴ See also, the OECD Report, Note 11 at pp. 28-39 on the economic and social impact of UGC, which is overwhelmingly positive.

⁶⁵ Cultural hegemony, which is prevalent with traditional media is not endemic to UGC with its diversity of sources, especially for the discerning reader that can reach their own conclusions and select or sieve through the volume of content for quality and accuracy. In fact, another category of UGC – group-based aggregation – can also help to perform and fulfill this function.

2. Human rights interests, particularly free speech and self-expression,⁶⁶ political and artistic truth, free press and other related interests. Through the efficiency of peer production,⁶⁷ there is greater democratization of access to and source of information as well as more transparency through a greater diversity of sources, opinions, views and perspectives. For example, UGC websites that allows any form of commentary or that triggers and promote discussion and feedback can help achieve these goals. UGC also acts as a 'social leveler' as anyone with a computer and Internet access have the same powers of spreading and obtaining information.⁶⁸ Greater access to and sharing of information and knowledge on UGC platforms also have an educational and archival role,⁶⁹ and as noted, can prolong the lifespan and enjoyment of all types of content (by extending the life of information through the evolving and re-cycling of materials).
3. Other intangible and tangible benefits include the creation of new forms of social ordering and interaction for social life enrichment and the development of business and social relationships beyond the confines of physical proximity such as through social networking websites like Facebook and Google+. There is also great entertainment value in UGC. Moreover, creators can also build their reputation (e.g. through self-promotion and third party word of mouth) and autonomously or independently develop a career and also hone their skills through UGC (e.g. using video and music sharing platforms like YouTube and MySpace).

These considerations will influence the definition of UGC that determines the eligibility requirements for copyright limitation as well as the purposes that will play a role in it.

⁶⁶ See, *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003), where it was stated that copyright law "contains built-in First Amendment accommodations." The U.S. fair use exception was described as providing just such a role in balancing copyright ownership with freedom of expression by Paul Aiken stating that helps to "define the boundary between commerce and free expression, between the commercial incentives secured by copyright and the right to free expression protected by the First Amendment". See, S. Katyal *et al*, *Copyright Panel III: Fair Use: Its Application, Limitations and Future*, 17 Fordham I.P., Media & Ent. L.J. 1017, 1022 (2007).

⁶⁷ See Yochai Benkler, *Coase's Penguin, or, Linux and The Nature of the Firm*, 112 Yale L.J. 369, 381 (2002), where the writer defined the term as the "production by peers who interact and collaborate without being organized on either a market-based or a managerial/hierarchical model".

⁶⁸ There are, of course, still limitations depending on the jurisdiction and the level of content regulation in any country as well as on the accessibility to computer resources and Internet access, especially in poorer countries and less computer-literate societies.

⁶⁹ Esp. UGC platforms that performs system caching on top of user caching.

3.1.2. Private Interests

The copyright equilibrium in the apportionment and distribution of rights involves balancing the interests of individual users and copyright owners as well as UGC technology innovators and Internet intermediaries. As users become more empowered by the UGC tools provided by UGC technology creators, suppliers and distributors, there is a change in context that should also translate to copyright law.⁷⁰ This involves redrawing the boundary between proprietary copyrights and the digital commons. For this reason, a relatively moderate and incremental approach is still preferred, and the proposed exclusion should not apply to all UGC but only to those that fulfills a certain criteria. The reasons for those criteria will be given after the UGC limitation is introduced in this paper.

It should be noted at this point that public and private interests may overlap and their considerations are not mutually exclusive, especially since many private interests factor in the public interest analysis. As we have seen, the tangible and intangible benefits of derivative works, whether sole adaptations or a collective combination or 'mash-up' of several works applies to and goes beyond individual interests.⁷¹

The objective of the recommended model of statutory limitation or copyright 'carve-out' that will follow is to recognize UGC and re-use as a legal and legitimate form of utility and to at least provide a legal presumption in favor of certain categories or types of use emerging from user custom on the Internet, provided that other necessary requirements and safeguards are met. Before doing that, there are some precedents to the recalibration of rights, both private and public initiatives, which should be considered.

3.2. UGC Principles, Guidelines and Studies

While copyright owners do deserve reward and recognition for their works and as incentives for creativity, as we have noted above, it is

⁷⁰ Also, "customary Internet norms" and the "new global social consciousness" that users hold towards the predominant form and purpose of re-use inherent in UGC should be instructive in identifying 'digital norms'. See, Warren B Chik, '*Customary Internet-ional Law*': *Creating a Body of Customary Law for Cyberspace. Part I: Developing Rules for Transitioning Custom into Law*, Computer Law & Security Review, Vol. 26, Issue 1, 2010, p.3-22 and Warren B Chik, '*Customary Internet-ional Law*': *Creating a Body of Customary Law for Cyberspace. Part II: Applying Custom as Law to the Internet Infrastructure*, Computer Law & Security Review, Vol. 26, Issue 2, 2010, p.185-202.

⁷¹ As noted, the increase in the pool of potential adapters coupled with the innovative and technological instrument to perform that function as well as to distribute and share the re-creation will contribute to the optimal usage and advantages that can be derived from it by society as a whole; more so than if the protectionist attitude towards original work is perpetuated by a strict copyright regime.

not necessary to provide them the full social value of their work especially where other valid interests and benefits can be gained from freeing the restrictions on their works.⁷² In certain cases, this balance is recognized even by the stakeholders themselves leading to attempts at private compromises within the framework of the law.

One notable initiative that purportedly attempts to reconcile the interests of UGC technology services with industry copyright owners,⁷³ and to identify some general guidelines on the rights and responsibilities of the former in its practices, are the set of “Principles for User Generated Content Services” (UGC Principles)⁷⁴ that was issued on 18 October 2007 by “[s]everal of the world’s leading Internet and media companies”.⁷⁵

Notable among the principles are self-regulatory guidelines, which places a duty on the UGC services to include IP policy statements and terms of use (as preemptive measures); implement filtering technology and upgrade it when commercially reasonable (as preventative measures); and regularly find and actively remove infringing content discovered by either party (as remedial measures).

⁷² See, Shubha Ghosh, *The Fable of the Commons: Exclusivity and the Construction of Intellectual Property Markets*, U.C. Davis Law Review, 40, 855-890 (2007).

⁷³ Profit-sharing co-operative agreements for media outlets to utilize UGC services as a mutually beneficial technology-based business model is another way of resolving conflict between these parties although these private arrangements should have no significant impact on the main issues and do not take into account public and users’ interests. For instance, while most YouTube content are uploaded by individuals, media companies including CBS, the BBC, UMG and other organizations, even Viacom, have put up their content on YouTube, some as part of the YouTube partnership program, mainly to advertise and provide exposure to their shows and videos by leveraging on the ‘viral video’ effect or to generate profit sharing revenue. In November 2008, YouTube reached an agreement with MGM, CBS and Lions Gate Entertainment that allows those media companies to post full-length films and television episodes on its website, accompanied by advertisements in a section for U.S. viewers known as “Shows”. In November 2009, YouTube users in the U.S. can rent full-length films, a service that is intended for a global launch. Another example is the free online broadcast through streaming of all the cricket matches of the Indian Premier League worldwide in March 2010.

⁷⁴ “Principles for User Generated Content Services: Foster Innovation. Encourage Creativity. Thwart Infringement.” (hereinafter the “UGC Principles”), available at: <http://www.ugcprinciples.com/>. See further, Alan N. Braverman and Terri Southwick, *The User-Generated Content Principles: The Motivation, Process, Results and Lessons Learned*, 32 Colum. J.L. & Arts 471 (2009); Brette G. Meyers, *Filtering Systems or Fair Use - A Comparative Analysis of Proposed Regulations for User-Generated Content*, 26 Cardozo Arts & Ent. L.J. 935 (2008-2009) and Anon, *The Principles for User Generated Content Services: A Middle-Ground Approach to Cyber-Governance*, 121 Harv. L. Rev. 1387 (March 2008).

⁷⁵ See the Official Press Release of the UGC Principles at: http://www.ugcprinciples.com/press_release.html. These companies include CBS Corp., Dailymotion, Fox Entertainment Group, Microsoft Corp., MySpace, NBC Universal, Veoh Networks Inc., Viacom Inc. and The Walt Disney Company. However, they clearly exclude the top echelon of Internet companies like Google, Facebook, YouTube as well as the involvement of civil society.

In return for these undertaking, the participating copyright owners undertake not to bring an infringement action against services that practices “good faith” adherence to these responsibilities. Also, fair use has been recognized as an important exception and it is an expressly stated exclusion to filtering technology and copyright enforcement. The copyright owners undertake to “accommodate fair use” when sending notices and making claims of infringement,⁷⁶ and when applying “identification technology” and exercising manual (human) review.⁷⁷

However, as an initial attempt at self-governance and self-regulation, the UGC Principles suffer from many flaws and also do not address the root cause of the UGC problem and the concerns of the UGC users (and even other major UGC intermediaries). The main criticisms are as follows:

1. The most important and influential UGC platforms and services, including YouTube and Facebook, were not involved in drawing up the Principles either because they were not engaged or declined to join the effort, perhaps because they do not accept the agreement with its arguably copyright owner-centric wording.
2. Users and civil rights groups were also not consulted and are likely to have the same concerns as UGC intermediaries, and they are the main subject of UGC creation and dissemination.⁷⁸
3. The UGC Principles are only a private arrangement between the signatories that form only a small percentage of the stakeholders in the global creative industry as a whole; and if users are included into the equation, then the significance of the Principles will be even smaller.
4. As noted, the main intention and tenor of the UGC Principles is the protection of copyright ownership. For instance, the burden of policing and identifying infringing content is on the UGC

⁷⁶ UGC Principles, Note 74 at para. 6. This is probably in response to *Lenz*, and is something that they are already legally required to do. Both parties should also institute procedures for promptly addressing claims (i.e. “put back” requests) that such content was blocked in error.

⁷⁷ UGC Principles, Note 74 at para. 3d and 3f respectively. This means that they will develop blocking technology in such a manner that it that will not filter out fair use content. However, the possibility of creating such a technology that can apply fair use doctrine is doubtful, especially one that does not filter out a good amount of such content. See e.g., Michael S. Sawyer, *Filters, Fair Use & Feedback: User-Generated Content Principles and the DMCA*, 24 Berkeley Tech. L.J. 363 (2009).

⁷⁸ In fact, users may be even less protected from threats of direct infringement action if actions against the UGC services themselves are less frequent and the UGC platforms have less incentive to advocate their right. They may also be legally bound by the UGC Principles if the Principles are incorporated into the terms of service.

platforms and the focus is on the development of technology to protect against third party use.

5. Although there is language on accommodating fair use, there is no real solution offered as to how this could be done through current technology, especially when the statutory-sanctioned DRM and TPM “digital locks” preempt and prevent fair uses in general and UGC in particular without distinction, and anti-circumvention laws further discourage, deter and disallow such uses in the first place.⁷⁹
6. There are no legal sanctions if the undertakings in the UGC Principles are not met.

It was in response to the perceived bias towards copyright protection in the UGC Principles and the abovementioned concerns that the Electronic Frontier Foundation (EFF) and other public interest groups produced and proposed in response a set of “Fair Use Principles for User Generated Video Content” (Fair Use Principles).⁸⁰ The Fair Use Principles seek the cooperation of all the parties, particularly copyright owners and UGC services, to preserve and accommodate fair use in their practices and operations rather than to create and implement technological filters that implement a stricter reading or interpretation of what constitutes fair use. It provides more guidance, in the form of supplementary guidelines, on how UGC services can fulfill their stated commitment to respect fair use for UGC.

Certainly, the reliance on good faith on both sides and on the current fair use doctrine in the context of the legal and technical protections do not resolve the issues concerning UGC. However, the fact that these Principles are even produced by the relevant stakeholders shows that there is genuine concern that the current copyright law provisions are inadequate and do not meet each of their needs and that the current fair use regime is unclear and thus require supplementary guidelines and standard-setting.

⁷⁹ The former should be required, by way of sanction, not to prevent lawful purposes and the latter should not make it an offence to circumvent (and to facilitate or provide) a TPM for lawful purposes. As noted, many academics have criticized these provisions and some have proposed amendments to the law to the same or similar effect. See, Note __. However, as it is currently drafted, there appears to be no fair use exception to the digital locks provisions under the DMCA (as there is for copyright infringement) except for the few defined exceptions. Hence, the possibility of incorporating an exclusion in the form of a purpose-specific statutory exemption for UGC may, at this stage, be a more realistic solution.

⁸⁰ “Fair Use Principles for User Generated Video Content” (hereinafter the “Fair Use Principles”), available at: <http://www.eff.org/issues/ip-and-free-speech/fair-use-principles-usergen> & http://www.eff.org/files/UGC_Fair_Use_Best_Practices_0.pdf.

3.3. The Statutory UGC Exception Proposal in Canada

A proposal to amend the Canadian Copyright Act was tabled on 2 June 2010 in the Canadian Parliament.⁸¹ Among the proposed amendments that were a mixture of pro-copyright and pro-user provisions, Bill C-32 included proposed fair dealing limitations and purpose specific exemptions for education, time-shifting, format-shifting, the making of back-up copies of legally acquired content, the development of interoperable programs, encryption research, network security testing and technological processes. The proposed provisions that are of interest are the exceptions made for individuals, in particular the provision for a UGC exception. The Bill met the same fate as previous similar legislative attempts,⁸² and failed to advance further to crystallize into law.⁸³ However, its proponents are still optimistic for a breakthrough in the future.

The use of existing copyright-protected works in the creation of new works for non-commercial purposes, subject to certain restrictions, was proposed as an exception from copyright liability in the following manner:

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 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

⁸¹ Bill C-32, *An Act to amend the Copyright Act* (40th Canadian Parliament, 3rd Session), also known as *The Copyright Modernization Act*, was tabled by the Minister of Industry Tony Clement and the Minister of Canadian Heritage James Moore. It has also been called the "mashup exception" and the "YouTube exception", perhaps noting the follow-on effect in protecting such UGC technological services. The proposed amendments align the copyright regime closer to the U.S. model. The full text of the Bill is available at:

<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4580265&Language=e&Mode=1> &

<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4580265&file=4>

. A government information website on the Bill is available at: www.balancedcopyright.gc.ca.

⁸² It follows the failure of earlier efforts - Bill-C61 (39th Canadian Parliament, 2nd Session) in 2008 and C60 (38th Canadian Parliament, 1st Session) in 2005, which failed against criticisms of a lack of balance in favor of copyright owners.

⁸³ The Bill failed at the prorogation of the 40th Canadian Parliament on 26 March 2011, and with it went the first seriously proposed UGC copyright exception. See, Giuseppe D'Agostino, *There is No Two Without Three: Bill C-32 is Dead*, (IP Osgoode, 26 March 2011), available at: <http://www.iposgoode.ca/2011/03/there-is-no-two-without-three-bill-c-32-is-dead/>.

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.⁸⁴

The following are some criticisms and comments on the provision and its requirements (numbered in accordance to the section of the provision it concerns/addresses):

- 3) First, the protection from infringement should not be limited to the “individual” user as UGC is increasingly a collaborative work, hence a “group of individuals” should also be considered.

Second, it is curious why there is a need to extend the protection to only a “member of their household” for the “use” of the UGC upon authorization – should the UGC creator not be entitled to authorize anyone, including friends and even acquaintances to use *and disseminate* the new work or subject matter (subject to the same restrictions)? If third party use and *further re-use* of the UGC work itself satisfies the exception requirements, then they too should be protected from infringement in the same manner as the UGC work in question regardless of any authorization (if copyright exists in the work used, which in the case of the UGC is the subject of a separate inquiry).

Third, it may be superfluous to include the reference to a right to authorize an intermediary to disseminate a work or subject matter that is excepted from copyright infringement since an exception will permit doing any of the acts otherwise reserved for the copyright owner, including the right to disseminate.⁸⁵ However, this reference reflects a clear intention for the exception to extend to the protection of UGC intermediaries, as well it should.

⁸⁴ Bill C-32, section 29.21(2) defines “intermediary” and “use” in the context of subsection (1) as: “a person or entity who regularly provides space or means for works or other subject-matter to be enjoyed by the public” and “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” respectively.

⁸⁵ This provision does not address intermediary liability. Intermediary protection is the subject of separate safe harbor provisions (for third party infringing materials) under the DMCA and an intermediary is also protected from indirect infringement actions (or the authorization of infringement basis in other Commonwealth copyright legislation) if there is no primary infringement of the work in question upon which an action could be based.

Fourth, it may not be appropriate to assume that copyright will subsist in a UGC that is protected under an exception. The implication of such an assumption is that the standard of originality and other legal requirements for copyright protection have to be satisfied in order for eligibility to the exemption. There may not necessarily be a convergence between ‘copyrightability’ and ‘exceptionability’, or between transformative use and originality. Perhaps, with this in mind, even the type of copyright rights that should be accorded to a UGC that consists of third party copyrighted works should be reconsidered, which is an issue that requires more in-depth consideration.

- (a) The focus of protection should not be based on the skill set of the UGC creator but rather the capacity in which the skills is put to use (e.g. work-related versus personal hobby). Hence, the objective factor that can achieve this distinction, without requiring a subjective analysis of the skill and intentions of the user who may be a amateur or a professional working in a personal capacity, is the requirement of non-commerciality.⁸⁶ Non-commerciality is a key factor in the eligibility for the UGC exception as it is recognized as an important feature of UGC. It is also recognized elsewhere as an important consideration to moderate stakeholder interests and to establish a fair balance of rights.⁸⁷ For example, statutory damages have been reduced where an infringement is committed for non-commercial purposes.
- (b) Attribution is good practice and should be encouraged, although this author is not sure about that the benefits of making it a requirement outweighs the detriment, especially one based on a “reasonableness” analysis (presumably an objective basis of assessment) that may be subject to dispute.⁸⁸ This is especially so given the transient and speedy nature of UGC creation and interest in UGC. Attribution should not be a pre-requisite as it is not a common enough feature/behavior of all UGC (i.e. not customary in all cases). It is not a common practice in relation to some forms of UGC like home videos. In other cases, such as fan fiction and mash-ups and remixes, the reference to the source

⁸⁶ Other factors can also be considered including the time and place of the UGC creation, its subsequent use and mode of delivery and the effects (vis-à-vis the employer or company in the case of the professional).

⁸⁷ Even though non-commercial use here may affect the market, value and profitability of the source material. Commerciality and its potential effects is an important component of the fair use factors.

⁸⁸ Attribution can still be a consideration in a fairness assessment where relevant (e.g. in a fair use analysis). E.g., quotations and excerpts have been determined as fair use for publications (*Maxtone-Graham v. Burtchaell*, 803 F.2d 1253 (2d Cir. 1986), cert. denied, 481 U.S. 1059 (1987), after permission was sought but rebuffed) and research (*Sundeman v. The Seajay Society, Inc.*, 142 F.3d 194 (4th Cir. 1998), for an unpublished piece of work).

such as the actual author, song and performer are often incidentally included as identifiers (in headings and keywords). It is also likely to be 'unreasonable' to require attribution in circumstances that require immediacy (e.g. commentary, news reporting) and where the information as to the source cannot be found or easily discovered (e.g. in the use of orphaned works).

If it has to be included, then a necessary or "reasonable", rather than a mandatory, requirement is a fair compromise.⁸⁹ In such a case, it should be considered whether lack of attribution can be 'subsequently cured' and whether it can be done by a party other than the UGC creator. That is, attribution of source can be in any form and indirectly from any other person or entity, manually or automatically. This is especially given the nature and purpose of some types of UGC and the objectives and architecture of certain UGC platforms. For example, attribution can be in the form of the original tagline or keyword attached by the creator or the intermediary to the work, emerge through comments or in a discussion forum from the user or third parties or through group-based aggregation. The attribution may even be indirect or implied in the work itself.⁹⁰

- (c) In this author's opinion, this "reasonable grounds to believe" requirement is too onerous, unrealistic and unnecessary taking into consideration the nature of UGC, the profile of its creators and the circumstances surrounding its creation. Since the provision is meant to protect the UGC creator from infringement liability in the first place, there is no good reason to impose on the user the duty to make a judgment in relation to the source from which the work is obtained (i.e. whether the source is an unauthorized third party copyist). The UGC creator should not be given the role of a watchdog for the copyright owner and should not be required to search for a non-infringing copy when the utility of any copy on the Internet would serve his/her purpose.⁹¹

⁸⁹ Compare this to the criticism, review and news reporting statutory exemptions, which ordinarily gives some leeway for non-attribution in circumstances where it would be unreasonable taking into consideration the immediacy and transient nature of the information where time is of the essence. It is provided in those legislations that have such an exemption that acts done for these purposes, provided they are deemed fair, will not infringe copyright if certain attribution requirements are satisfied. With respect to a work, for instance, both the source of the work and the author (if given) must be mentioned. This requirement will not provide a significant impediment to individuals who wish to create, distribute, or enjoy transformative works. Attribution can be given, for instance, in the title page of fan fiction, the end credits of a machinima and a file name of a mash-up.

⁹⁰ A suggestion has been made in the OECD Report for the creation of clearing houses/centers for rights attribution to creators including UGC makers. OECD Report, Note 11 at p. 47.

⁹¹ The problem can be compounded in follow-on UGC creations where the subsequent creators would be required to trace and consider the development history, and determine the legal status, of the preceding UGC. If a UGC creator

- (d) With the non-commercial requirement in place, the objective of this requirement would dilute the force of protection and exclude many UGC based solely on an impact assessment that the user is ill suited to perform. The duty is multi-faceted and onerous. First, the user must determine that it “does not have a substantial adverse effect, financial or otherwise”; second, the user must predict that the effect must be “on [both] the exploitation or potential exploitation of the existing work or other subject-matter [or copy of it]” by the copyright owner; third, the user must have the foresight to predict the preceding in the context of the “existing or potential market for it” (“including that the new work or other subject-matter is not a substitute for the existing one”).⁹² This would defeat the very objective of the protection and once again does not take into practical consideration the profile of UGC creators and the reality of the nature of UGC.⁹³

The usefulness of a general provision such as the proposed UGC exception under Bill C-32, that is, without identifying the type or purpose of the UGC work or subject matter in question, is that all categories of UGC are potentially covered under the provision and they are not limited to certain types of uses. It is for the court to decide on a case-by-case basis on the eligibility of the UGC and its creator to the exception. On the other hand, identifying the most prominent types of UGC can serve several useful purposes: It can merely provide guidance on what are likely to constitute protectable UGC; it can give rise to legal presumptions in order to transfer the onus of proof (in relation to one or more requirements for the exception to apply) from the user to the copyright owner or it can be used to create a purpose-specific UGC exemption. The options that incorporating type or purpose of a UGC into the equation can give rise to will be presented later in this Part.

It is of interest to note that there were also proposed fair dealing exemptions for parody and satire under the draft legislation,⁹⁴ which together with commentary and other relevant uses, could also fall

uses his/her own copy of a work, perhaps a private copying/use exemption (for UGC of limited sharing), and even the fair use exception (for publicly disseminated UGC), will be more appropriate.

⁹² “The terms “substantial,” “adverse,” “effect,” and “potential exploitation” are not defined in Bill C-32. It is therefore possible, notwithstanding the statement of the SCC that defences to copyright infringement are users’ rights that should not be unduly restricted, that these terms could be interpreted in such a way that significantly narrows the ambit of the defence.” *Reynolds*, Note 197 at 414.

⁹³ It also merely duplicate and add to the fourth factor in the fair use analysis (i.e. the effect upon the work’s value). The importance of this factor have somewhat been moderated by the U.S. Supreme Court, preferring a holistic assessment of all the factors against copyright objectives since *Acuff-Rose*.

⁹⁴ Bill C-32, section 29. Under the proposed amendment to the fair dealing provision, it was provided that: “Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright.” (emphasis added).

under the scope of the UGC provision (provided that the other different requirements are met). Hence there may be some overlap in the exceptions that other jurisdictions might like to consider in determining whether these specific purposes require their own exemption independent from the UGC limitation provision with its own specific requirements.

It is of further interest to note that the proposed amendment under Bill C-32 also included a different and more moderate approach to the copyright monitoring and complaints procedure. A “notice-and-notice” approach is proposed rather than the U.S. “notice-and-take-down” version. Under this system, the copyright owner will notify the intermediary Internet providers of possible piracy on the part of their customers.⁹⁵ The intermediary would in turn be required to notify the customer of the possible violation of the law. The customer’s personal information could then be released to the copyright holder with a court order for the dispute to be resolved in a court of law if the customer defies the notice.

The responses to the proposal have been mixed with the usual reactions from the various stakeholders.⁹⁶ Predictably, the copyright owners such as the Alliance of Canadian Cinema, Television and Radio Artists (ACTRA) against the provision⁹⁷ (citing that it would take away economic and moral rights from creators), while other stakeholders such as the Canadian Federation of Students (CFS) supported the proposed provision to “legalise practices that are already commonplace”⁹⁸.

⁹⁵ Bill C-32, sections 41.25 and 41.26. See also, *Gervais* (2010), Note 18 at 448 (describing it as a form of “*ex poste* control”).

⁹⁶ For short evaluations of a cross-section of stakeholders, see Leslie Chong, *Techies, Artists and Collective Societies Weigh in on Bill C-32* (IP Osgoode, 23 March 2011), available at: <http://www.iposgoode.ca/2011/03/techies-artists-and-collective-societies-weigh-in-on-bill-c-32/> and Iby Tsui, *Musicians and Radio Broadcasters Speak Up on Bill C-32* (IP Osgoode, 18 March 2011), available at: <http://www.iposgoode.ca/2011/03/musicians-and-radio-broadcasters-speak-up-on-bill-c-32/>.

⁹⁷ See, Alliance of Canadian Cinema, Television and Radio Artists (ACTRA), *Bill C-32 Update: Canadian Content – Free Today, Gone Tomorrow* (5 November 2010), available at: <http://www.actra.ca/main/press-releases/2010/11/bill-c-32-update-canadian-content-free-today-gone-tomorrow>. “Bill C-32 makes it legal for Canadians to remix creative content into new works. This mash-up provision could allow third party providers, such as Youtube, to benefit financially from these creations but fails to compensate creators, all the while trampling on their economic and moral rights. No other country in the world has a law like this that gives away creators’ rights”. See also, The Creator’s Copyright Coalition, *Creators Speak Out Against Copyright Bill: C-32 Reforms Shut Us Out of Digital Economy* (6 December 2010), available at: <http://www.creatorscopyright.ca/>.

⁹⁸ See, Canadian Federation of Students Submission, *Special Legislative Committee on Bill C-32, Maintaining the Balance* (January 2011) at p. 5, available at: http://www.cfs-fcee.ca/html/english/campaigns/CFS-Submission_C-32_Copyright_Modernization.pdf. This also recognizes the importance of existing practices and attitudes towards UGC and the increasing acceptance of its legitimacy irrespective of their legal status. The proposal also recommended a non-

It remains to be seen if these recommended amendments will eventually be passed into law,⁹⁹ and if so, whether they will remain in this form. If it had become legislation, Canada would have been the first country to provide statutory protection for UGC. As it stands, the U.S. remains the only country with some form of protection for UGC under its fair use exception).¹⁰⁰ If and when it does become law, whether in Canada or in another jurisdiction, a UGC limitation provision will be a milestone for UGC in more ways than one. It will legally recognize UGC as a legitimate social activity as well as politically and legally affirm its social importance and recognize its social benefits.

3.4. The Relationship between Customary Internet Law and User Rights and their Potential Impact on the Future of the Copyright Regime

Customary norms are a rich source of law in many areas of law to be identified and discovered. For example, it is a primary source of law in public international law.¹⁰¹ In other areas of law, custom, usage and social practices is a tool for judges to be applied in relation to a standard or test and for the development of common law. It has a role to play in identifying “implied terms” under contract law,¹⁰² the application of the “reasonable man test” in tort law and determination of “common law marriage” in family law. Thus, custom can have a central role to play in the development of the law and legal norms.

Some academics including myself have argued for the greater utilization of common usage and practices in the development of IT

exhaustive list of categories for the fair dealing provision in line with the U.S. fair use exception. *Ibid.* at p. 3.

⁹⁹ On the latest state of affairs, see Jessica Murphy, *New Copyright Bill to Duplicate C-32: Tories* (Toronto Sun, 17 May 2011), available at: <http://www.torontosun.com/2011/05/17/new-copyright-bill-to-duplicate-c32-tories>. See also, Karen Bliss, *Canadian C-32 Copyright-Reform Bill Dies (Again) with Election Call*, (Billboard.biz, 28 March 2011), available at: <http://www.billboard.biz/bbbiz/industry/global/canadian-c-32-copyright-reform-bill-dies-1005097402.story>. These articles show how politicized the issue of copyright amendment is.

¹⁰⁰ The “transformative use” test within the context of the fair use analysis has indirectly been providing some form of limited protection for UGC in the U.S.

¹⁰¹ Custom is a source of public international law under Article 38(1)(b) of the Statute of the International Court of Justice where it is stated that: “The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply...international custom, as evidence of a general practice accepted as law.”

¹⁰² Under contract law rules in common law countries, terms can be implied into contracts according to usage and custom in the market that the contracting parties operate. The custom must be “certain, notorious, reasonable, recognized as legally binding and consistent with the express terms.” *Cunliffe-Owen v Teather & Greenwood* [1967] 1 WLR 1421.

law.¹⁰³ User behavior and attitude in cyberspace is an interesting study and patterns of activities can be empirically derived and examined.¹⁰⁴ Especially in the case of UGC where the users are the drivers of creation and where the sheer mass of social activity can give rise to customary practices, the conventions surrounding UGC together with the increasing recognition of user rights under the copyright regime should result in the legitimization and legalization of UGC.¹⁰⁵

There is already a groundswell of opinion from academics to practitioners and civil rights organizations to even lawmakers to the effect that users should be given greater rights in the form of freedom of access to and use of creative works. As we have seen, the Electronic Frontier Foundation (EFF) have been one such watchdog for user rights (that have produced an alternative manifesto to the UGC Principles) and the Creative Commons Movement driven by a leading academic in this field, Lawrence Lessig, have sought to promote a culture of sharing and re-use of copyrighted works within the existing copyright framework.¹⁰⁶ Meanwhile, the Free Software, Free Culture and Open Source Movements have likewise preceded and paved the way for a culture of sharing.¹⁰⁷

The courts in various jurisdictions have also become more sympathetic to user rights, with the Supreme Court in Canada taking

¹⁰³ See, *Chik* (2008), Note 53.

¹⁰⁴ E.g., “web analytics” is the study through collection, measurement, analysis and reporting of Internet data in order to understand and optimize web usage. See, the Web Analytics Association website at: <http://www.webanalyticsassociation.org>. Of course, such studies are also suitable for Schools of Information Systems and Technology as well as other fields of scholarship such as within the Social Science category for the study of human behavior and society.

¹⁰⁵ “It cannot be that copyright law would have thieves of us all.” Justice Ang in his opinion in the Singapore High Court case of *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2010] 2 SLR 152 at para. 114. The judge also noted that “[a] construction of the copyright law in a manner that leads to widespread unenforceability would only serve to undermine the very regime upon which copyright relies.” *Ibid.* See also, John Tehranian, *Infringement Nation: Copyright Reform and the Law/Norm Gap*, [2007] Utah L. Rev. 537.

¹⁰⁶ See, Taking Stock of the Creative Commons Experiment: *Monitoring the Use of Creative Commons Licenses and Evaluating Its Implications for the Future of Creative Commons and for Copyright Law*, a working paper presented by Warren Chik and Giorgos Cheliotis, at the 35th Annual Telecommunications Policy and Research Conference, George Mason University School of Law, 29 September 2007. In fact, Lessig should be credited for many of the arguments in the context of re-use in general that also serve to legitimize UGC including recommendations for removing or deregulating noncommercial amateur re-use from copyright law and simplifying copyright law for greater clarity for users, including easily understood exemptions to complement fair use. See, Lawrence Lessig, *REMIK: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY* (2008) at pp. 254-73.

¹⁰⁷ At the extreme, certain socio-political organizations and websites like Pirate Parties International (PPI) and Pirate Bay take things further by attempting to subvert copyright law by appealing to populist notions of Internet and online freedom.

a strong stance on user rights in the seminal case of *CCH Canadian Ltd. v. Law Society of Upper Canada*.¹⁰⁸ Even the outcome in the *Lenz* case favors the user's fair use as more of a right than an exception.¹⁰⁹ As customary Internet law will feature the attitudes and practices of users,¹¹⁰ the assessment of lawful activities should stem from the acceptance and extent of any UGC practice.

Daniel Gervais have noted in one of his thesis that there is a "meme, with a strong built-in feedback loop, that many forms of UGC are "acceptable" within undefined parameters".¹¹¹ This 'new morality' or

¹⁰⁸ See, the text accompanying Note 5 (*supra.*).

¹⁰⁹ After responding to the take down notice and getting the video reinstated, Lenz launched a counter-offensive action with the assistance of the free speech advocacy group EFF against Universal, which filed the complaint. It is interesting to note that Universal answered with a motion to dismiss Lenz's case for failure to state a claim upon which relief may be granted, and spearheaded its argument with the assertion that the fair use doctrine only excuses infringement after the fact and does not pre-authorize infringement. That is, fair use is a defense to be raised in response to an infringement claim rather than a right in itself that they had to overcome. The judge denied the dismissal motion and allowed Lenz's claim. In his ruling on the case, Judge Fogel framed the question before the court as an issue of first impression as to "whether fair use qualifies as a use 'authorized by law' in connection with a take-down notice" under 512(c)(3)(A)(v)." He answered this question in the affirmative: "[T]he Court concludes that the plain meaning of "authorized by law" is one permitted by law or not contrary to law. Though Congress did not expressly mention the fair use doctrine in the DMCA, the Copyright Act provides explicitly that "the fair use of a copyrighted work is not an infringement of copyright." 17 U.S.C. §107. Even if Universal is correct that fair use only excuses infringement, the fact remains that fair use is a lawful use of copyright." *Lenz*, Note 24 at 1154. The judge cited the *Sony Betamax* opinion where the court stated that: "Anyone...who makes a fair use of the work is not an infringer of the copyright with respect to such use." *Sony Betamax*, Note 35 at 433. *Lenz*, Note 24 at 1154. On the distinction between a right and a defence and issues pertaining thereto, see *Chik* (2008) at Note 53.

¹¹⁰ It will involve the empirical study of user attitude and practices that drive their online behavior in order to decipher and to track customary trends. For an analysis and assessment of how this could be done and a recommendation of the rules and principles that can be adopted for lawmaking based on customary Internet law as a source of law, see: Warren Chik, 'Customary Internet-ional Law': *Creating a Body of Customary Law for Cyberspace. Part I: Developing Rules for Transitioning Custom into Law*, Computer Law & Security Review, Vol. 26, Issue 1, 2010, p.3-22; and Warren Chik, 'Customary Internet-ional Law': *Creating a Body of Customary Law for Cyberspace. Part II: Applying Custom as Law to the Internet Infrastructure*, Computer Law & Security Review, Vol. 26, Issue 2, 2010, p.185-202.

¹¹¹ Daniel J. Gervais, *The Tangled Web of UGC: Making Copyright Sense of User-Generated Content*, 11 Vand. J. Ent. & Tech. L. 841, 854 (2009). The author also noted the complication of what constitutes "private use" with regards to UGC and hosting platforms where private creations and re-creations can be disseminated to a whole spectrum of recipients. Is private use to be defined by the nature of the creation (which may be considered private by analogy to recognized and accepted private uses) or its purpose and effects (possibly seen as public)? "[T]he disconnect between social and legal norms lies in the blurring of the private/public distinction. We can conclude from this analysis that traditionally there were two distinctions: one between private and public use, and another between professional and amateur use. The technological environment until approximately the year 2000 meant that the two different distinctions overlapped; amateur meant private and

'global social consciousness' of users towards UGC can be used to determine what is acceptable and should be legalized. The parameters of acceptability can be defined by the established practices and attitudes of users.¹¹² The development of principles and guidelines by the relevant stakeholders to any subject matter or area of law can also influence the direction and development of such customs as well, insofar as it reflects the consensus of the majority.¹¹³ Gervais also noted that: "Whether a court will acknowledge that a customary practice has developed and give legal effect to such practice is unclear. It would make sense, however, to consider implied consent if the practice in question can be linked to the copyright holder or if it can be shown that it is commonplace within its industry."¹¹⁴

Edward Lee has also suggested "accepted informal copyright practices" as "gap fillers" in "formal copyright law [which] is riddled with gray areas and gaps."¹¹⁵ Whether such 'custom' is for the courts

professional meant public. The shift from one-to-many to many-to-many dissemination modes destabilized this system, and amateur no longer meant private. Normatively, the question is this: should amateur use prevail over public use when the two realms are separated?" *Ibid.* at 855-56. Consider the court's decision in the *Lenz* case.

¹¹² Customary Internet law is therefore also important in order to relieve the disjuncture between changing morality and the law. It is also important not to criminalize large segments of society that are otherwise law-abiding citizens. See, Note 105.

¹¹³ The bottom-up approach should apply with the society of users as the primary determinant of customary and social norms with regards to UGC. See e.g., the UGC Principles (by a group of copyright owners and UGC services) and the Fair Use Principles (for User Generated Video Content prepared by the EFF for and on behalf of users) for two different perspectives. These were principles that were examined earlier in this Part, which arguably represent the expectations and attitudes of their proponents.

¹¹⁴ Gervais (2009), Note 111 at 897. The question remains as to what extent the lack of sustained and "persistent objection" on the part of the copyright owners to certain UGC practices reinforce a practice as custom (i.e. a valid exception/exemption), and to what extent such objection in itself can constitute a source of customary norm (e.g. "implied consent").

¹¹⁵ "At a systematic level, the Copyright Act is not constructed to address ex ante the welter of circumstances involving uses of copyrighted works. Besides a few very detailed, but mostly industry-based, exemptions, the Copyright Act is written at such a high level of generality that many of the key concepts are often too indefinite to inform the public as to whether an anticipated use is infringing, fair use, or otherwise permitted." Edward Lee, *Warming Up to User Generated Content*, 2008 U. Ill. L. Rev. 1459, 1474-75 (2008). "The informal practices associated with user-generated content make manifest three significant features of our copyright system that have escaped the attention of legal scholars: (i) our copyright system could not function without informal copyright practices; (ii) collectively, users wield far more power in influencing the shape of copyright law than is commonly perceived; and (iii) uncertainty in formal copyright law can lead to the phenomenon of "warming," in which - unlike chilling - users are emboldened to make unauthorized uses of copyrighted works based on seeing what appears to be an increasingly accepted practice." *Ibid.* at 1459. "The formalist understanding of copyright law ignores reality." *Ibid.* at 1460. The writer proposes a "five-factor informality test" for informal copyright practices. *Ibid.* at 1494.

to discover and how the courts will approach it is another issue. Certainly, it will supplement the all too slowly growing body of case law that may provide elucidation to all parties concerned, particularly the user. The legislature is still in the best position to create a consistent and harmonized approach and to instantly crystallize customary norms into law by 'discovering' and codifying such practices into specific statutory limitation provisions.

Debora Halbert distinguishes the active "cultural producer" (user-creator) from the erstwhile passive "cultural consumer" (end-user) in relation to UGC and describes the former phenomenon as "a culture of the masses" taking power and control of technology and making culture. It may be an overstatement that Internet users are taking control of technology, as it is the technology creators and UGC intermediaries and platforms that are molding the evolution of UGC culture and influencing user behavior behind the scenes. However, the UGC creators are certainly *harnessing* the powers of the technologies and services that are made available to them in creating a culture producing movement.¹¹⁶ The creative movement is one that is shifting away from the commoditization of creative goods. With regard to dissemination of works and other subject matter, it has also gone from a predominantly top-down approach of creative sharing to a linear 'peer-to-peer' and a public 'user-to-user' form of sharing.

3.5. Identifying Customary Practices and Purpose Relating to UGC and the Formulation of a Proposed Statutory UGC Exemption

The expansion of a fair use-type of protection to non-commercial derivative works of third parties that involve more than mere copying (i.e. that have transformative value) have been proposed before based on the same utilitarian arguments put forth above that the re-use of copyrighted works can benefit society and even to some extent the copyright owner (through continued or increased interest and exposure of their works, which can offset any detriment from such use).¹¹⁷ The rise of the public interest in, and social benefits of,

¹¹⁶ Debora Halbert, *Mass Culture and the Culture of the Masses: A Manifesto for User-Generated Rights*, 11 Vand. J. Ent. & Tech. L. 921 (2009). The author proposes a manifesto by users and the copyright critics to support what she describes as a UGC 'movement'. Such a manifesto can be an expressed manifestation of the developing attitudes and shifting social consciousness and morality towards the re-use culture and is symbiotic to the notion of user custom as a source of Internet law and norms, especially given that the *acceptance* (*opinio juris* in public international law parlance) is as integral an element as the *practice* itself in the crystallization of customary law. There are shades of communitarianism and digital commons movement thinking within the article.

¹¹⁷ See e.g., Jessica Litman, *Creative Reading*, 10, 70 Law & Contemp. Probs. 175 (2007), originally published in Symposium, *Cultural Environmentalism* (James Boyle & Lawrence Lessig, eds., Spring 2007), available at: [http://www.law.duke.edu/shell/cite.pl?70+Law+%26+Contemp.+Probs.+175+\(spring+2007\)](http://www.law.duke.edu/shell/cite.pl?70+Law+%26+Contemp.+Probs.+175+(spring+2007)).

UGC makes the argument even more compelling for the unbundling of this exclusive right and the re-apportionment of rights through statutory exclusions.

Indeed, it is important that more empirical studies are made into the usages relating to UGC and the rapidly emergent customary norms, through user behavior and attitudes to UGC, in order to craft a fair set of rights. One such study was conducted by the American University School of Communication's Centre for Social Media (CSM) in January 2008 where the main types of purpose relating to UGC were identified.¹¹⁸ The Program on Information Justice and Intellectual Property (IJIPI) and the American University Center for Social Media also produced a set of code of best practices in fair use specifically for creators of online video.¹¹⁹

Some types of UGC are already widely recognized statutory exceptions (under fair use) or exemptions (as stand-alone provisions) such as commentary, parody and satire, albeit in a more generalized context. 'Newer' forms of UGC include home videos or tribute videos, fan fiction, music mash-ups, remixes, and so on. Whether there are already general limitations for such purposes or otherwise, the categories of usual purposes for which UGC are created should collectively be incorporated into the list of common uses that fall within the general description of UGC for a statutory formulation of UGC exclusion from infringement. Extending the existing purposes, which may or may not already be the subject of a statutory exclusion, to a specific UGC limitation provision is but a natural progression and recognition of the changing contexts of usage.

It should be noted that despite such a limitation as proposed below and even that proposed in Canada as examined above, there will be many other UGC practices that may not crystallize into legal norms

¹¹⁸ Pat Aufderheide, Peter Jaszi, *Recut, Reframe, Recycle: Quoting Copyright Material in User-Generated Video*, American University School of Communication's Centre for Social Media (January 2008), available at: <http://www.centerforsocialmedia.org/fair-use/best-practices/online-video/recut-reframe-recycle> (hereinafter the "CSM Report"). The Report listed nine main categories of uses of copyrighted works for UGC. Consider also the Creative Commons Movement, which slogan is: "Share, Remix, Reuse – Legally". See the Creative Commons website at: <http://creativecommons.org/>. See also, the text accompanying Note 106 (*supra.*). This movement can be considered a concurrent *private law* licensing movement to the *public law* expansion of statutory copyright exclusions.

¹¹⁹ It identified six kinds of unlicensed uses that may be considered fair, including: Commenting or critiquing of copyrighted material; use for illustration or example; incidental or accidental capture of copyrighted material; memorializing or rescuing of an experience or event; use to launch a discussion and recombining to make a new work, such as a mash-up or a remix, whose elements depend on relationships between existing works. These uses are similar to the main types of purposes identified in the earlier study. See, Code of Best Practices in Fair Use for Online Video, available at: <http://www.wcl.american.edu/pijip/go/bestpractices>.

(perhaps because of a lack of consistency in *behavior* or an *attitude* or recognition of its legal/moral weight) or that are not necessary or appropriate for codification into the form of a statutory limitation (perhaps as a compromise or trade-off for a fair balancing of copyright interests).

Finally, an important observation must be made on the issue of the fairness. It is not accurate to say that the Canadian Bill C-32 model or the proposed model in this paper permits UGC as legally defined “without reference to the tempering effect of “fairness.”¹²⁰ It is true that there is no mandated or recommended list of factors that helps determine the fairness of use (as in the case of the fair use exception). However, the fairness of uses in relation to UGC is carefully *built into* the very definition of the UGC provision, which has to be fulfilled in order for the exception or exemption to apply.¹²¹ Thus, if the conditions are proven, the use is deemed fair. The legislature will of course have to consider what form of compromise through the allocation of rights is fair and to debate and consult on this issue before determining the appropriate solution. This is because whether the limitation is in the form of a general exception or specific exemption (with the list of conditions that have to be fulfilled by the UGC creator and the allocation of the legal burden of proof that is specific to each) will determine the extent of the protection accorded and what the state considers fair to all the stakeholders concerned.

For that reason, two options are presented below. Option 1 is a more ‘liberal’ general UGC *exception* while Option 2 is a more ‘conservative’ purpose-specific UGC *exemption*. For the purpose of this paper, especially this part, “exception” will be used to describe a wider and more amorphous form of limitation closer to that of the flexible fair use test while an “exemption” is closer to the more predictable fair dealing and other purpose-specific model of limitation. In actuality, the options fall somewhere in between the sliding scale marked at both extreme by the current fair use exception on the one side and existing and more restrictive purpose-specific exemptions on the other side. As noted before, the options will collectively be referred to as a statutory “limitation” (or “carve-out”, “exclusion” or “protection”) for UGC.

The formulation of the statutory protection from infringement is determined by ‘3Ps’: “Profile”, “Process” and “Purpose”/“Product”,

¹²⁰ Andrea Rush, *What Anna Karenina Might Have Said About Copyright Qualifications Under Canadian Law*, 57 J. Copyright Soc’y 667, 669 (2010).

¹²¹ Purpose-specific statutory exemptions are the counterpart to the fair use or fair dealing factors. In other words, the application of the fair use factors and the conditions for UGC exemption perform the same function, even though the approach may be different. The UGC exemption approach can also be compared to the specific exemption provisions relating to back-up copies, library and archive exemptions and others, which are also considered fair limitations to the default copyright protection. See e.g., 17 U.S.C. §108-112, 117, 119, 121 and 122.

which form the pre-requisites or conditions for the following options for a UGC limitation provision.

3.5.1. Option One – A General UGC Exception

User Generated Content

Section X.

(1) User Generated Content shall not constitute copyright infringement.

(2) User Generated Content are works created by a person or a group of persons:

- a. consisting of any combination of one or more [existing][copyrighted] works, whether or not with original material;
- b. in a manner that is transformative;
- c. as an amateur or in a non-professional capacity; and
- d. for a non-commercial purpose.

(3) For the purpose of this section, works that shall be [deemed][presumed] to be transformative under subsection (2) shall include works for the following purposes:

- a. Commentary;
- b. Parody and satire;
- c. Pastiche or collage;
- d. Personal reportage or diaries;
- e. Re-interpretations;
- f. Incidental use; and
- g. Information and knowledge sharing.

(4) For the purpose of this section, references to [existing][copyrighted] works include other [existing][copyrighted] subject-matter.

This is a moderate option in between the open concept of the U.S. fair use doctrine and an exhaustive and consolidated list of purpose-specific exemptions. Thus, subsection (2) provides for the conditions to be fulfilled before a UGC can avoid direct liability for infringement. These conditions are based on a *core* set of *common* characteristics of UGC that at the same time provides a fair balance of interest between the stakeholders. Hence, it may not cover every type of UGC in the layman's understanding of the definition, which is much wider.¹²²

This option also provides a list of the most *customary* forms of UGC in subsection (3) based on the use of existing works or other subject-matter that have been identified by studies.¹²³ As the list under subsection (3) is non-exhaustive, the judges can incrementally and gradually expand the boundaries of this exception to include other purposes (and sufficiently original derivative UGC), which can expand to other categories of uses or purposes. This will involve a

¹²² It is to be noted that under either option, totally original (i.e. containing no existing works) and unoriginal (i.e. involving mere duplication) UGC are also not covered under the provision. The status of these categories of UGC will be examined later in this Part.

¹²³ See e.g., the CSM Report at Note 118 and the OECD Report at Note 11.

smooth evolution and build-up of the law in this area. The list of purposes is not merely illustrative, as the further choice between a deeming and presumptive effect will determine the standard of proof and where the burden of proof lies in showing the 'transformativeness' (or otherwise) of use or purpose.

3.5.2. Option Two – Purpose-Specific UGC Exemption

User Generated Content

Section X.

(1) The use of [existing][copyrighted] works for the purpose of:

- a. Commentary;
- b. Parody and satire;
- c. Pastiche or collage;
- d. Personal reportage or diaries;
- e. Re-interpretations;
- f. Incidental use; and
- g. Information and knowledge sharing,

shall be [deemed][presumed] transformative and is not an infringement of copyright provided that the requirements in subsection (2) are met.

(2) User Generated Content are works created by a person or a group of persons for any of the purposes under subsection (1):

- a. consisting of any combination of one or more [existing][copyrighted] works, whether or not with original material;
- b. as an amateur or in a non-professional capacity; and
- c. for a non-commercial purpose.

(3) For the purpose of this section, references to [existing][copyrighted] works include other [existing][copyrighted] subject-matter.

A more conservative approach to incorporating a UGC limitation would be to render the list of identified purposes exhaustive thereby making it a purpose-specific exemption, while requiring proof of the other usual pre-requisites based on core UGC characteristics. The discrete activities that are permitted are listed and categorized based on the legitimacy of purpose, which also determines the transformative issue. Therefore the UGC creator must first show that the work was used in the course of any one or more of the purposes set out in subsection (1) before he/she can go on to prove the requirements under subsection (2).

Based on such a parliamentary intent, the only way that the category of eligible purpose-based UGC can expand is through legislative amendment, which would require fresh parliamentary debate and consultations at each stage, taking into consideration developments in custom and practices. This process will likely lead to a more gradual development of the law than in the case of Option 1. National legislative approach as well as international law-making platforms such as within the World Trade Organisation (WTO) and World Intellectual Property Organisation (WIPO) (in relation to the provisions in the TRIPs and Internet Treaties respectively) can incrementally allow for a greater combination of exclusive rights and

carve-outs. These limitations can be amended from time to time, but as noted their reaction time will often be slower and it will require greater effort and political will.

3.5.3. *The Basic Requirements*

UGC can be the outcome of an individual endeavor or collaboration. This must be reflected and recognized as a common characteristic of UGC. Collaborative works appear on platforms such as wikis and other text-based cooperative portals (Wikipedia being the most prominent example), group-based aggregation websites (e.g. Digg and del-icio-us) and open source projects (e.g. the Linux operating system, Mozilla Firefox and the Apache platform). It is also common for audio-visual and video content that are commonly uploaded to multi-media sharing platforms.

Thus, this is not a pre-requisite but rather an acknowledgement that UGC can be the result of a collaborative effort and that such works should also be eligible for statutory protection.

UGC may be technically re-formatted for compatibility with the system support of a particular platform, but it should not be substantively/substantially edited or moderated by an intermediary or any other third party. Otherwise, it may become the work of another.

3.5.3.1. Combination of Works ("Process")

The essence of UGC is that it can be a combination either of several existing works, an original take of an existing work or both. It can also incorporate original elements by the UGC creator. This definition refers to the *derivative* forms of UGC and not merely copied works. It would apply, for example, to mash-ups and remixes. Because of the conditions set out here that are peculiar to UGC, the remainder of derivative rights (such as adaptations for commercial exploitation) rests with the copyright owner, hence it does not fully negate the exclusive right to make derivative works in this regard.

UGC may have the possible effect of diluting the commercial value in the existing work (i.e. the commercial exploitation of derivative works such as the production of sequels, adaptations, translations and an abridgment, the profitability in syndication, and so on). However, there are also benefits of exposure that can have the opposite effect of equalizing or even actually increasing the net value in the work.¹²⁴

¹²⁴ This is one of the justifications in favor of a UGC limitation and together with the other factors that have been canvassed outweigh the possible net detriment to the copyright owner.

Substantiality of the taking of existing works should generally not be an issue, especially where there many changes made to the UGC as a whole or the use is quantitatively or qualitatively lesser relative to the other materials. For example, a collective work or a compilation of works (such as a “best of” tribute or a megamix) can also constitute UGC, although in such instances it should not merely be a combination of entire pieces of works.¹²⁵ In any case, the “transformative use” requirement will also factor in and outweigh considerations of substantiality of taking.¹²⁶

3.5.3.2. Transformative Use (“Purpose”)

The transition from passive user/consumer and a top-down model of the cultural production and consumption chain for creative works have undergone a swift radical evolution to an active user-consumer peer-to-peer model of social creations and a culture of “follow-on recreations”, peer sharing and information dissemination across platforms,¹²⁷ collaborative tagging and social classification.¹²⁸ The ‘social engineering’ technologies concerned generally fall under the umbrella of “social software applications”. In short, re-creativity is not new,¹²⁹ but the context of UGC and the way it is “democratized” through the use of networked digital technologies is.¹³⁰

The two most significant achievements and outcome of this socio-cultural renaissance in the WWW are in the form of secondary expression itself and in peer sharing and information dissemination.¹³¹ The former relates more to a derivative work with a

¹²⁵ This is an example of an area where intermediaries can play a part in moderating use and limiting the possibility of abuse of existing works. For example, YouTube limits the length of the video clips that can be uploaded and filtering technologies are developed to weed out potentially infringing materials.

¹²⁶ Hence there is no need for a separate and additional non-substantiality requirement or factor.

¹²⁷ E.g., through social bookmarking (i.e. referencing) such as via the “ShareThis” button (see: <http://sharethis.com/>) or the more ‘traditional’ methods of hyperlinking, deeplinking and in-line linking.

¹²⁸ Also known as “folksonomy” or a system of collective and collaborative classification or indexing by users through the creation and management of tags to annotate digital content. An increasingly popular method is the use of “tag clouds” as a visual form of tagging in a folksonomy.

¹²⁹ *Reynolds*, Note 197 at 396. In fact, the fair use exception and fair dealing exemptions have been dealing with, *inter alia*, various forms of re-use for decades – however, not in the current form or volume/level.

¹³⁰ See Yochai Benkler, *From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access*, 52 Fed. Comm. L.J. 561 (1999-2000). “Technology now makes possible the attainment of decentralization and democratization by enabling small groups of constituents and individuals to become users - participants in the production of their information environment - rather than by lightly regulating concentrated commercial mass media to make them better serve individuals conceived as passive consumers.” *Ibid.* at 562.

¹³¹ See further, Henry Jenkins, *CONVERGENCE CULTURE* (New York: NYU Press, 2006) and Henry Jenkins, *FANS, BLOGGERS, AND GAMERS* (New York: NYU Press, 2006).

different and perhaps incidental or consequential purpose from the original work while the latter relates more to the methods of transmission, broadcast and dissemination (while sometimes also involving re-creative works, e.g. wiki entries, which are writings that often involve a collation facts from a variety of sources).

Even the creative industry of old has not exactly been placid and some have jumped onto the UGC bandwagon through different avenues and techniques. For example, some uses more direct online advertising (including uploading of trailers on YouTube); others use more subtle methods such as viral marketing campaigns, mash-up or remix competitions, and so on.

Transformative Use under the Fair Use Exception

The “transformative use” test has undergone several stages of development to deal with new situations since it was introduced into law in 1994 in the seminal case of *Campbell v. Acuff-Rose Music, Inc.*¹³² The U.S. Supreme Court established in *Campbell v. Acuff-Rose* that even a blatant commercial parody could constitute fair use, as long as it is sufficiently transformative.¹³³

We have seen an evolution of the “transformative use” test to protect fair uses by alleged primary infringers (i.e. users) for re-creations that are for different purposes from that of the existing work or works used. We have also seen it applied to protect fair uses by alleged secondary infringers (i.e. Internet intermediaries) for purposes different from that of the original work such as to achieve an archiving function (e.g. system caching)¹³⁴ and cataloguing function (e.g. image search engine indexing)¹³⁵.

The test was formulated in the context of the fair use doctrine and as a supplementary consideration to the four explicitly listed factors (often usurping them in priority and weight where the case demanded, as in the *Campbell v. Acuff-Rose* case itself). The most significant fair use factor, and the one that is often determinative in a finding of fair use, is the first factor under which, where relevant, a new work is examined as to how “transformative” it is in relation to the existing work upon which it is partially based. The creation of transformative works has been seen as “at the heart of the fair use

¹³² 510 U.S. 569 (1994) (hereinafter “*Campbell v. Acuff-Rose*”).

¹³³ Neither permission nor payment is required for the right to *make* the parodied song, although payment would be required for the right to *perform* it.

¹³⁴ See, *Field v. Google Inc.*, 412 F. Supp. 2d 1106 (D. Nev. 2006) (hereinafter “*Field*”), where Google successfully defended a lawsuit for copyright infringement relating to its practice of caching webpages.

¹³⁵ See, *Kelly v. Arriba Soft Corporation* (280 F.3d 934 (CA9 2002) *withdrawn*, re-filed at 336 F.3d 811 (CA9 2003) (hereinafter “*Kelly v. Arriba*”); *Perfect 10 v. Google, Inc., et al.*, 416 F. Supp. 2d 828 (C.D. Cal. 2006) and *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701 (9th Cir 2007) respectively (hereinafter “*Perfect 10*”).

doctrine's guarantee of breathing space within the confines of copyright."¹³⁶ Transformative use is important to the survival of modern technologies as exemplified by the outcome in the Google Images Search cases.¹³⁷ "[It] is central to the creation of many virtual objects through modification and collaboration."¹³⁸ Even though the fair use analysis involves a balancing of all the factors, in cases where transformative use features, it tended to be the pivotal determinant and one that transcends the first factor (with the courts making a holistic assessment in the case). The courts will place a lot of weight on the substantial incorporation and modification of existing works (even when the copyrighted work is substantially utilized).¹³⁹

Non-substitution of the existing work and its market through the use of the work for a different purpose (i.e. the "re-purposing" of content) can constitute 'transformativeness'. Hence, the use for critical discussion of unpublished materials,¹⁴⁰ the use of a work as part of a biographical account,¹⁴¹ and other purposes that do not relate to the 'borrowed' work have constituted transformative fair use. This is the reason for linking transformative use to the categories of most customary purposes relating to UGC in the proposed provisions.

Transformative Use Under the UGC Limitation Provision

Its very essence in support of UGC does not fall far from the original meaning of "transformative use" as it appeared in earlier literature,¹⁴² and as it was adopted and applied by the U.S. Supreme Court in *Campbell v. Acuff-Rose*. In that case, Court stated that a use is transformative if it "adds something new, with a further purpose or different character, altering the first [work] with new expression, meaning, or message."¹⁴³ This users' right to "rework [copyright-protected] material for a new purpose or with a new meaning" has

¹³⁶ *Campbell v. Acuff-Rose*, Note 132 at 579.

¹³⁷ I.e. the *Kelly v. Arriba* and the *Perfect 10* cases.

¹³⁸ Todd David Marcus, *Fostering Creativity in Virtual Worlds: Easing the Restrictiveness of Copyright for User-Created Content*, 52 N.Y.L. Sch. L. Rev. 67, 87-88 (2007-2008), available at: http://www.nyls.edu/user_files/1/3/4/17/49/NLRvol52-102.pdf. The author argues that "because of the nature of the type of creation virtual worlds enable, the transformative factor should weigh more heavily than in an ordinary analysis." *Ibid.* at 88.

¹³⁹ See, *Campbell v. Acuff-Rose*, Note 132 at 581, n.14. Less weight is accorded to other factors, leading to more liberal findings of fair use.

¹⁴⁰ *NXIVM Corp. v. The Ross Institute*, 364 F.3d 471 (2d Cir. 2004).

¹⁴¹ *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006). See also, *Warren Publishing Co. v. Spurlock*, 2009 WL 2412542 (E.D.Pa. 2009).

¹⁴² Many commentators take the position that the starting point for the introduction of the term "transformative use" is Judge Pierre's Leval's article (see, *Leval*, Note 47). Judge Leval defines the term "transformative use" as follows: "The use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original." *Leval*, Note 47 at 1111.

¹⁴³ *Campbell v. Acuff-Rose*, Note 132 at 579.

been recommended in the 2006 Gowers Review of Intellectual Property in the U.K. on the subject as well.¹⁴⁴ Such a right of creation also includes the incidental right to disseminate such works.¹⁴⁵

Originality is a requirement for copyright protection and although it is not a requirement for a statutory exception or exemption, it is still a factor in any “transformative use” assessment.¹⁴⁶ The purpose of the use can give rise to a high likelihood or probability of originality in a work.¹⁴⁷ The change in purpose of a work is itself a transformative use, that usually requires a modification of the original copyrighted works used in order to carry out the change in purpose. For example, the very changes made to an existing work or the extraction of the work in question for parody or for critical comment will thus constitute transformative use.¹⁴⁸ A mere repackaging or republication of a copyrighted work is unlikely to succeed, especially if it can be mechanically and automatically performed without human intervention or judgment.¹⁴⁹

¹⁴⁴ Andrew Gowers, GOWERS REVIEW OF INTELLECTUAL PROPERTY (London: HM Treasury, 2006) at p. 66, para. 4.85 (hereinafter the “Gowers Review”), available at: http://www.hm-treasury.gov.uk/independent_reviews/gowers_review_intellectual_property/gowers_review_index. Cfm.. It was commissioned by then-Chancellor of the Exchequer Gordon Brown. The mandate of Gowers Review was to comment on whether the U.K. Intellectual Property system “was fit for purpose in an era of globalisation, digitisation and increasing economic specialization”. It was “charged with examining all the elements of the IP system, to ensure that it delivers incentives while minimising inefficiency”. *Ibid* at 1. It recommended that the U.K. government take steps to create a copyright exception for transformative use. *Ibid.* at 68. The so-called “rework material” can create “new meaning”, “new value” and “new markets”. *Ibid.* at 66.

¹⁴⁵ The public nature of its sharing distinguishes UGC from personal use.

¹⁴⁶ However, originality will remain a pre-requisite for UGC to itself gain copyright protection (even for user-derived content where the proposed form of protection will be proposed to be lowered). On the issues regarding the level of originality that should be met and the relationship between the two, see generally, Mary W. S. Wong, “Transformative” User-Generated Content in Copyright Law: *Infringing Derivative Works or Fair Use?*, 11 Vand. J. Ent. & Tech. L. 1075 (2009).

¹⁴⁷ ‘Transformativeness’ is not synonymous with originality of a work per se, but it can also be an objective that imbues a new or different meaning or feelings through a difference in the message and expression. Thus, the transformative requirement relates to the purpose as well as to the distinctive changes made to the original work or works.

¹⁴⁸ “If, on the other hand, the secondary use adds value to the original - if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings - this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society. Transformative uses may include criticizing the quoted work, exposing the character of the original author, proving a fact, or summarizing an idea argued in the original in order to defend or rebut it. They also may include parody, symbolism, aesthetic declarations, and innumerable other uses.” *Leval*, Note 47 at 1111.

¹⁴⁹ “In Justice Story’s words, it would merely “supersede the objects” of the original.” *Folsom v. Marsh*, Note 43 at 345, cited by *Leval*, Note 47 at 1111.

In summary, the re-working of different types of copyrighted works through various methods and in different degrees for a new purpose or infusing such works with new meaning or interpretations constitutes “transformative use”.¹⁵⁰ Whatever the case, it must involve some modification or alteration of existing works, even if it may be contextual.

There is good reason to include a list of UGC categorized by their objectives that have been identified as the most common purposes of UGC to date into a statutory UGC limitation, especially if the scope of the protection is required to be restrictive relative to the fair use doctrine and in line with international legal obligations (i.e. the Berne three-step test, briefly examined below). They also involve modification of content by their very nature and definition. They constitute value-added substantive expression (e.g. additional pleasure and different interest generated in the re-make on top of the value of the original).¹⁵¹ These user objectives are distinct from the original purpose of the work (although they may all fall under larger categorizations such as “social networking” or “citizen journalism”, “entertainment” or “knowledge sharing”). Hence, the proposed evidential link to the transformative use requirement.

Transformative Use: Deemed or Presumed?

There are two further choices for consideration under each of the above options (i.e. Options 1 and 2) that relate to the “transformative use” requirement:

1. The listed purposes can by their very nature be considered transformative and as such they may be *deemed* transformative. This will provide certainty and predictability, based on an objective assessment. However, it does not allow the judges to consider the quality of the content and the real intentions of the UGC creator. Since “transformative use” here is intricately linked to the change of specific purpose that is also the main justification and features strongly in the jurisprudential analysis favoring a statutory limitation for UGC, there is good reason for preferring a deeming provision.
2. The other choice is to provide for a *presumption* of ‘transformativeness’, which would transfer the legal burden of proof to the copyright owner to convince the court that the UGC in question is not transformative (by rebutting the said

¹⁵⁰ See, the *Gowers Review*, Note 144, where it is noted that the purpose of the transformative works exception is to “enable creators to rework material for a new purpose of with a new meaning.” *Ibid.* at 66.

¹⁵¹ The less of a direct substitute that the UGC is for the original, the better (especially for Option 1 where other forms of usage or purpose can be eligible for its protection).

presumption), perhaps based on the assertion that the UGC is not creative or original or that the real intention of its creator is not consistent with the apparent/ostensible purpose of its creation. However, there will be greater subjectivity in analysis by the courts and the outcome can be more unpredictable. The safeguard for this option, especially in relation to Option 1, is that UGC that is unoriginal or that serve a bad faith ulterior motive will not be able to obtain protection on the ostensible basis of a genuine change of purpose.

The question here is whether we should equate 'transformativeness' to the change in purpose from the existing work (other than an overarching common objective, such as an educational or entertainment value). If that is the case, there may be a disjuncture between the protection of a UGC from infringement liability and a possible right of the same work for copyright protection. On the other hand, if 'transformativeness' is linked to the creativity or originality of a UGC or if the motive or intention of the UGC creator can be considered, then in the case of the former there may be a convergence between the UGC exception or exemption and the question of copyrightability.

Whatever the case may be, a suggestion for a modified form of protection for UGC generally will be proposed later in this Part, which will be compatible with either outcome, based on the nature and purpose of UGC (i.e. borrow, share and re-use) that supports the idea of "generalized reciprocity" or "generalized exchange" as well as the fact that the same arguments and reasons for its protection also extends to subsequent re-use (i.e. the perpetuation and prolongation of interest and enjoyment).

3.5.3.3. Capacity ("Profile")

Amateur (and non-commercial) users have different incentives to create, use and share their works compared to the professional cum commercially driven content owners.¹⁵² These incentives have strong social and cultural impact.¹⁵³ The restrictive effects of the exclusive rights to create derivatives have long been criticized by eminent experts in this field as stifling both continued 'run-on' creativity and digital technology innovations that facilitates it.¹⁵⁴

¹⁵² Other terms referring to UGC that have been used interchangeably to describe these types of works include "user created content" or UCC (utilized in the OECD Report), "consumer generated media" as well as "amateur digital content" (describing the predominant profile of its subject). These terms reflects more clearly the central role of the amateur and non-commercial professional creator in UGC.

¹⁵³ See e.g., the OECD Report for related discussions and follow-up discussions of the World Summit on the Information Society.

¹⁵⁴ See generally, Lawrence Lessig, *FREE CULTURE: THE NATURE AND FUTURE OF CREATIVITY* (Paw Prints, 2008); Lawrence Lessig, *REMIX: MAKING ART AND COMMERCE*

There are also many legitimate reasons for non-amateurs to create content outside of their professional practices and routines. It could be to claim ownership of a content (as opposed to content created for an employer, which belongs to the latter), to establish a reputation or to create as a hobby. This category of creators should also be included, qualified by the non-commercial purpose condition and on condition that it is not work-related. It will also ensure that the new work belongs to them and not to the employer.

3.5.3.4. Non-Commerciality ("Purpose")

Commerciality is one of the fundamental weights in the apportionment and balance of rights under the copyright regime. This is particularly so in common law countries such as the U.S. where commercial use and profit-making is a key reason behind the exclusive rights accorded to authors (as motivation and reward) and is an important component of fair use analysis (to discourage unjust enrichment).¹⁵⁵ It is also the reason for the predominantly civil legal and equitable remedies for infringement and the awarding of monetary damages and sanctions.¹⁵⁶

It is this requirement that embodies the spirit, if not the form, of *fairness* - otherwise there is really no reason for this restriction to a more generous UGC protection. After all, as noted, commercialization of UGC does not necessarily affect the value or profitability of the existing work that is used. There is not necessarily any direct relationship between profitability to the copyright owner and the manner of exploitation by others.¹⁵⁷ In fact, in certain cases, it can

THRIVE IN THE HYBRID ECONOMY (Penguin Books, 2009) and Lawrence Lessig, *Free(ing) Culture for Remix*, Utah L. Rev. 961 (2004).

¹⁵⁵ As is the case with other intellectual property doctrines, copyright law attempts to reach an optimal balance between the potential conflicting public interests of, on the one hand, encouraging creativity by giving exclusive property rights to the creator, and on the other hand, giving the public access to these works for various social and personal benefits.

¹⁵⁶ Under Article 1, section 8 of the U.S. Constitution, the purpose of copyright law is: "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." The U.S. does not recognize an absolute, natural right in an author to prevent others from accessing, copying and otherwise exploiting his or her work. U.S. copyright law do give authors limited proprietary rights in their works, but as stated, it is for the ultimate purpose of benefiting the public such as through the creation, distribution and dissemination of more works. Hence, the public's right has primacy and the author's interest is secondary.

¹⁵⁷ The difference between commercial usage (on the part of the user) and profitability (to the copyright owner) can complicate things. The two are not necessarily related. Just as non-commercial uses can have an adverse impact of profitability, commercial uses need not (although it may in most cases) have any adverse impact on profitability. The exposure given to a copyrighted work used in a UGC without permission can also outweigh any negative effect on the profitability of that work.

even add value to the original work, such as by giving it added exposure.¹⁵⁸ Moreover, even if there is some financial detriment to the copyright owner, the counter weight of public interest in re-creativity and innovations for social benefits can also justify non-commercial usage as a fair compromise between the parties. Fairness is relative in the quest to achieve copyright equilibrium. From the perspective of the copyright owner, a non-commercial use requirement renders the exception or exemption a narrower one, which should be a more acceptable position for them.

But what is “commercial purpose” and what does the condition entail? For example, there may be some confusion in cases where the user generates content and acts as his/her own host. Celebrity bloggers have been known to derive *indirect* benefits such as from advertisement revenue merely based on the popularity of the website alone (i.e. based on traffic or visits). In cases where the commercial benefits are incidental, the motives of the UGC creator and his/her profile should be irrelevant. On the one hand, if profit is generated directly from the UGC (such as the use of existing works in product placement or endorsement on a blog) or where UGC and the commercial objective of the website is intricately linked (e.g. the original objective of the website hosting UGC is to profit from it such as a music or DJ remix sharing website).

We should we separate the blogger as a UGC creator (non-profit) and as his/her own content host and allow *indirect* benefits, whereas *direct* commercial usage similar to file sharing websites should not obtain protection.¹⁵⁹ This also acknowledges that motivations of derivative users generating content are different from original creators (thus, disallowing direct profits) although the overarching copyright objective of rewarding creators, even re-creators, is still relevant (hence, allowing indirect rewards).

On the other hand, the commerciality of the intermediary is not relevant here. Thus, YouTube can generate advertising revenue for its services, as long as the revenue is not shared or fed back to the uploaders (although an exception may be made for contractual cross-marketing/advertising agreements between the intermediary and the

¹⁵⁸ For example, a songwriter can benefit from increased sale of the original version of the song, obtain statutory royalties, reap greater profits from greater exposure such as stronger attendance and profits from concerts and broadcast or licensing interest.

¹⁵⁹ In the opinion of this author, this is a fair compromise especially after the subtle shift in the judicial opinion after *Campbell v. Acuff-Rose* where Souter J. stated in his opinion that: “If, indeed, commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of s 107, including news reporting, comment, criticism, teaching, scholarship, and research, since these activities ‘are generally conducted for profit in this country’”. *Campbell v. Acuff-Rose*, Note 132 at 584, quoting from *Harper & Row v. Nation Enterprises* 471 U.S. 539, 592 (1985).

copyright industry). If a user uses MySpace to sell remixed music, then the user himself/herself will be making commercial use of the music, which will clearly be a case of direct benefit (on the other hand, there will not be any problem with an artiste providing samples and selling his/her own music as there is no issue of copyright infringement in the first place).

In summary, the test of commercial purpose is an objective one based on the purpose of the UGC rather than actual and *indirect* commercial gain. An objective test is thus actually formulated from the user's perspective and based on the *bona fides* of his/her motives and intentions. The incidental and general effects on the profit concerns of the copyright owner is irrelevant here.

3.5.4. *The Customary Purposes*

The reasons for working explicit UGC purposes into the statutory limitation, which serve as more than mere illustrations, and the role that it will play have been made earlier. Moreover, the genesis and existence of UGC is intricately tied to the objectives of its creators, and the purpose behind UGC creation is an important part of its character. Before examining and explaining the list of purposes proposed for inclusion into the limitation provision, a few general observations will be made to put into greater context its role and importance in the scheme of things.

First, it must be acknowledged that there will be a possible overlap between some existing statutory carve-outs with the proposed UGC provision, in particular, the scope of fair use coverage. The extent of overlap with statutory purpose-based exemptions will depend on the list of enumerated purposes to be included into the UGC exemption as well as any other possible objectives (in the case of Option 1). However, it must also be stated that overlapping defenses are not new and they are also not objectionable, especially when they make a political or policy statement, meet different objectives and also cover areas that may not be fully within the scope of one or the other.¹⁶⁰

Second, the UGC proposal under its different permutations can have different effects. Under both options, it can serve to protect a host of activities as defined by their purpose without the need for separate or additional statutory enactment. The incremental rate of extending protections to the existing enumerated list of purposes have been slow, especially in countries with only a narrow fair dealing protection and other closed-list purpose specific exemptions. Also,

¹⁶⁰ E.g., it is not likely that all the recommended purposes will be covered by statutory exemptions; and in particular, the extent of overlap will be smaller in other Commonwealth countries that have the narrower fair dealing provision under their copyright laws. The extent of overlap will also be smaller if Option 1 is preferred, given its potentially wider scope.

protection for UGC have thus far not been statutorily enacted and have rarely been sought in the courts, thereby giving rise to a lack of jurisprudence and precedents in relation to the usefulness of existing protections for UGC (that would otherwise be useful for legal certainty and as guidance for users and copyright owners alike). As we have seen, Canada have come the closest to an enactment of such a limitation, in a clear recognition of the rising importance of UGC.

Third, the purposes will have special status in either options as the proposal is for them to be deemed or at least presumed to be transformative, which elevates their legal status (as the only protectable purpose under Option 2 and vis-à-vis other purposes under Option 1) and the nature of the protection (i.e. the removal or the shifting of the burden of proof). The very “re-purposing” of content from the original works renders such re-use transformative. Their inclusion is another way of recognizing user *rights* as opposed to the much weaker user *defenses*.¹⁶¹

Fourth, the focus, as noted above, is on a very specific type of protection for a specific (albeit a large) class of stakeholders and in recognition of a new social phenomenon and order. A statutory enactment focusing on specific purposes with definable limits will also provide order and clarity to the protection and in a sense confine it in a manner that will fulfill the Berne three-step test rather than to detract from it.¹⁶² The challenge of the three-step test and how the proposal in this paper will survive it will be examined later.

Given the justifications made for an enumerated list of purposes that can be recognized as customary derivative uses of existing content for the purpose of creating UGC, the next question relates to the identification of the types of purposes that are commonly accepted, socially and culturally, in cyberspace society as well in the policy context and political climate of the jurisdiction in question that is considering such a provision – which in this context is the U.S.¹⁶³ Inclusion of purposes into this list gives it clear legal recognition and strengthens the importance of these functions in society.

The purposes are categorized below according to the similarity of their function although they may differ in form (e.g. satire and parody; comments and discussions) and effect (e.g. positive and

¹⁶¹ See, *Chik*, Note 53.

¹⁶² Also, it will provide a further platform to create. It also sets the stage for the proposal of a unique and more limited form of protection for these types of works that may not justify full copyright protection given their idiosyncratic nature and the purpose of their creation.

¹⁶³ The same considerations would apply to determine the acceptable explicit list of purposes in the context of other countries, where the fundamental principles of socio-political order may differ, such as the emphasis on human rights and the freedom of speech and expression, which is a major justification for (and an important factor in support of) a UGC limitation.

negative comments). Some of these purposes may also overlap as UGC can be created with several purposes in mind, hence they may not be mutually exclusive. This author acknowledges that more social and empirical study needs to be done to determine users' attitudes towards, and societal expectations in relation to, UGC purposes. More substantive data will also have to be obtained on the extent of the use of existing works for such purposes (e.g. the volume of transactions and the level of usage vis-à-vis other common UGC purposes, etc.).

The recommended purposes are identified by the author's assessment and determination of the most common and popular forms of UGC as categorized by purpose, which is admittedly subjective. However, they do substantially match categories that can be derived from the CSM Report.¹⁶⁴ The six types of uses forming the core purposes are selected based on their widespread use and acceptance as UGC. As noted, similar types of uses are also combined into one. Thus, for example, "commentary" relates to negative or critical and positive commentary as well as stand-alone commentary or commentaries that are meant as triggers for discussion. There are some other types of uses identified in the study that this author considers less commonly identified with UGC, which are therefore not specifically included in the proposal (i.e. archiving of materials, although it is assimilated with the information and knowledge sharing objective).

3.5.4.1. Commentary

"Commentary" is a more general form of expression and can constitute one or a series of notes/statements in one or more forms of expression. The *purpose* of commentary is to provide a perspective that may or may not be meant to elicit debate or discussion (i.e. it may be intended to be a one-off statement). It can address any topic, in particular, social, political or cultural subjects and/or causes or works other than the 'borrowed' material, or it may relate to the 'borrowed' content itself (e.g. serving as a critique of the existing work or works). Whatever the case, unlike personal reportage or diaries, it relates to the work of others.

A commentary can take many forms and, mostly because of the nature of the form, can be direct or indirect, although it is more likely to be the former.¹⁶⁵ For example, a blog post can directly post

¹⁶⁴ See the text accompanying Note 104, above. More in-depth empirical studies and statistical data collection in the form of inter-disciplinary studies will be most useful.

¹⁶⁵ See, *Rogers v. Koons*, 960 F 2d 301 (1992) concerning the use of a copyrighted image for the purpose of social commentary. Jeff Koons, an artist, was sued for allegedly infringing the copyright of the plaintiff's commercial photographic image that appeared on a postcard. The defendant had built a model of the image in the photograph for the purpose of public display in an exhibition entitled the "Banality Show", commenting ironically on the clichés that pervades mass media content.

subjective criticisms on a book or a piece of music, a piece of music can be critiqued for being unoriginal by comparisons made using snippets of the song with other music (i.e. through re-contextualization) and a video commentary can be made through a webcast or YouTube video. A commentary can also be in the form of an art piece or show.¹⁶⁶

It is subjective and can be neutral, positive or negative in nature, unlike information and knowledge sharing which requires a level of or at least a genuine attempt at objectivity. *Motive* is irrelevant.

A commentary is not a market substitute for the original material utilized and hence is more likely to bring attention to the existing work (which can be a positive development for the copyright owner) rather than directly and negatively affect the market in the latter (although the effect of a negative commentary may incidentally do just that).

When used to generate discussion or debate, the latter can be conducted within (e.g. where the UGC platform may provide the tools, e.g. discussion threads) or outside of the forum.

3.5.4.2. Parody and Satire

A parody or satire is a specific form of expression that can amount to an art. A “parody” is defined as “[a] work in which the style of an author or work is closely imitated for comic effect or in ridicule”, while a “satire” is “[a] work holding up human vices and follies to ridicule or scorn”.¹⁶⁷ Thus, whereas the former is a specific form of criticism relating to the author or work ‘borrowed’, satire on the other hand uses existing work to criticize the human

This case illustrates the strictures even of the fair use doctrine, as it is tied to the vagaries of judicial interpretation. Even in *Campbell v. Acuff-Rose*, the direct usage for parody was important to the outcome. These cases show that despite the potential breadth of fair use and the positive developments and trend in case law towards users’ re-use in the creation of new works, there are still restrictions to the unauthorized use of existing works for more indirect and subtle forms of expression.

¹⁶⁶ *Rogers v. Koons, ibid.*

¹⁶⁷ According to the Merriam-Webster Online Dictionary, available at:

<http://www.merriam-webster.com/>. “In conventional copyright law, parody is among the most common and uncontroversial examples of “transformative” fair use. It also is near the core of the fair use doctrine as an enabler of free expression. When a parodist quotes existing text, image, or music to comment upon it, this practice is really nothing more than criticism carried on by other means...Satire (the use of media content to poke fun at other objects, such as politicians) is also eligible for fair use consideration, although not as readily as parody. But if the essential hallmark of ‘transformativeness’ is the repurposing of existing content (thus adding value to it), then many satiric uses—such as occur in the online videos researchers found here—also should qualify as fair use.” See, CFM Report, Note 118 at pp. 7-8.

condition/nature generally. Parodies can flatter or cast a negative light on the existing work whereas satire is negative in nature.

For example, it is common for parodies of music videos to be made and uploaded onto YouTube immediately after the release of an official video. It may involve copying or changing the choreography, melody or lyrics and also other things like lip syncing, caricatures and so on. Movies that depict the human condition can be spoofed such as in a “mockumentary” on reality television and human obsessions.

It should be noted that this category of purpose could include the use of other existing works as well (since multiple works can be utilized concurrently).

Parody and satire are increasingly an important component of UGC as technology increasingly empowers the common user to express an opinion (that they already hold) and encourages them to do so (by dissemination to a potentially large audience).¹⁶⁸ However, parody and satire *in general*, and not limited to the UGC context, have increasingly been recognized as an important form of free speech and subsumed as a defence into the copyright legislation of many countries (i.e. recognized as a legitimate exemption from copyright infringement).¹⁶⁹

An example of a recent inclusion of just such a provision is the fair dealing exclusion for the purpose of parody or satire that was incorporated into the Australian Copyright Act in 2005 after the government conducted a review of the copyright legislation and the scope of the fair dealing provision.¹⁷⁰ Another example of a national provision for these and other valid social practices is the “parody, pastiche and caricature” provision in France.¹⁷¹ The provision states that once a work has been disclosed the author may not prohibit

¹⁶⁸ See e.g., *Campbell v. Acuff-Rose*, where sampling was used for direct parody and determined to constitute fair use despite the commercial aspect of the venture. Contrast this to the earlier case of *Grand Upright Music Ltd. v. Warner Bros Records Inc.*, 780 F Supp 182 (1991).

¹⁶⁹ E.g. parody and satire are relatively recent statutory exemptions in Australia and France.

¹⁷⁰ Section 41A of the Australian Copyright Act 1968 (Cth). See, M. Sainsbury, *Parody, Satire and Copyright Infringement: The Latest Addition to Australian Fair Dealing Law*, 12(3) MALR 292 (2007). During the review, several commentaries have argued for the expansion of the relatively narrow fair dealing defence to accommodate UGC. See e.g., D. O'Brien and B. Fitzgerald, *Digital Copyright Law in a YouTube World*, 9(6) & (7) Internet Law Bulletin 71 (2006) and D. O'Brien and B. Fitzgerald, *Mashups, Remixes and Copyright Law*, 9(2) Internet Law Bulletin 17 (2006).

¹⁷¹ Article L 122-5 of the French Copyright Law. In comparison, under the “free use” provision in Germany (Article 24 of the German Copyright Act), an independent work created by the free use of an existing work belonging to another may be published and exploited without the consent of the author of the work used.

parody, pastiche and caricature; provided that even though the works must be similar, the public must be able to differentiate between them.

Thus, there may be an overlap in those jurisdictions that have such an exemption or that have an exception that can cover these forms of expression. Where it overlaps with fair use, the user can choose the defense to take although the UGC defense is likely to be easier to fulfill if the conditions are right and the requirements met. Similarly, where it overlaps with a fair dealing exemption, UGC should accord an easier avenue of defense for the common user than the professional and commercial counterpart.

3.5.4.3. Pastiche or collage

A “pastiche” refers to “[a] work that imitates the style of previous work” and also “[a] composition made up of selections from different works” and a “collage” has a similar definition and is defined as “a creative work that resembles [a composition made of various materials] in incorporating various materials or elements”, although it is also commonly used to refer to smaller scale endeavors like individualistic and amateur works such as songs incorporating different musical styles and scrap-book making respectively. Imitation is a common practice and influence or inspiration is common in human history and development. For example, artists have followed a certain “art movement” or technique and subject of painting pioneered by influential artists; and architectural renaissance or style and a mixture of designs are common in the design of buildings. Styles can also be based on a combination of culture, race, religion and other factors.

Because of its nature, it can overlap significantly with “re-interpretations” since the purpose can be similar and compatible, which is to imitate in a positive way that can pay homage to, elevate and perpetuate an entire genre or artistic style, the legacy of an artiste or the lifespan of a work.

A pastiche or collage does not, however, include mere compilation of works such as greatest hits, best of or continuous play album of an artiste’s music or a director’s movies. Thus, the practice of splicing movies in parts on YouTube is still highly unlikely to pass either the fair use test or to be protected under this part of the provision. It may include a video montage or a music megamix.

Similar to parody and satire, this category of function have also been increasingly recognized as valid carve-out from copyright liability. In addition to the national examples given, the 2006 Gowers Review that was commissioned by the U.K. government have also suggested, among other things, the amendment of applicable EU copyright law

to allow for an exception for creative, transformative or derivative work, within the parameters of the Berne three-step test.¹⁷² The Review also endorsed broadening the list of exceptions to include protections for works of caricature, parody and pastiche.¹⁷³

3.5.4.4. Personal Reportage or Diaries

“Personal reportage” or “diaries” basically refer to the production of news, views and other information related to an individual, which in the UGC context is done publicly for sharing.¹⁷⁴ This is most common in the earliest popular manifestation of this practice – the blog. Since then, UGC platforms have made it easier for non-technically savvy individuals to join in the movement, including Tumblr (a blog hosting platform with customizable templates), Flickr (an online management and sharing application), YouTube (for video-sharing), Facebook (the preeminent social networking site, now facing a challenge from Google+), Twitter (a micro-blogging service), MySpace (another social networking website but with a strong focus on amateur music), and so on. It is the clearest manifestation of the ‘me’ generation with the focus on individualism. The form can be varied such as literary (diary entries), photos, pictures, music or video and other subject matter and any combination thereof.

3.5.4.5. Re-Interpretations

“Re-interpretation” here means the re-invention or re-combination of copyrighted works to create new meaning, expression or experience through the inclusion of other works or original material. “Fan laborers” form the biggest re-users for this category and their motives vary greatly, but the purpose is for personal self-expression and appreciation. The motive, however, is irrelevant and it can be positive (fan made tributes and re-use) or negative (like parody or satire); but the use must be intentional (unlike “incidental use”, below).

There are many examples of re-interpretations: For music, they can range from cover versions of songs, music mash-ups and remixes.¹⁷⁵

¹⁷² This recommendation would bring the EU copyright regime one step closer to the developments in U.S. jurisprudence that have produced new lines of defenses such as the “transformative use” doctrine.

¹⁷³ The Gowers Review, Note 144 at p. 68, para. 4.90 and Recommendation 12.

¹⁷⁴ “One common use of online video is sharing the record of an event in which the maker participated in some way. Typically, such a video provides value, not as evidence of the event as such, but as a reflection of its meaning for the individual maker - a part, so to speak, of his or her video scrapbook.” See, CSM Report, Note 118 at p. 12. “Videos in this category share the characteristic that they are not primarily about whatever material they quote. Instead, they are concerned with the personal experiences of the maker. They use copyrighted content to set the scene or establish the context for those experiences.”

¹⁷⁵ “Mash-ups” are songs made up of the combination of two or more different existing sound recordings; “remixes” are works that re-edit (and sometimes also

For vidding,¹⁷⁶ they include music video re-enactments (which may include actual singing or lip-syncing, original or new choreography and new sets or actual background effects), movie video re-enactment, video-mashups and fanvids. For literary works, fan fiction (which incorporates all or part of the characters, story and setting of an existing work or works in a re-interpretation that suits the fan's preference or fantasy) is common. In the gaming community, fan-made machinima (that are films made within video games) are also common.

Re-interpretation is most common in the music sharing community through the sampling of components of a song or parts of a choreography. This is perhaps because of the length of music and music videos (which can be played in their entirety on video-sharing websites like YouTube despite the length limitations), the availability of digital tools and the accessibility of existing works, the relative ease of use as well as the low labor and cost involved in the creation of such UGC.

It is also common for re-interpretations to contain original material that can be very inventive and creative in their own right. This may be achieved, for example, by the inclusion of new music, lyrics, subtitles, images, dialog, sound effects or animation to existing works. There are many tools and applications available online that facilitates such forms of expression even amongst the most amateur of users.

Re-interpretation should be distinguished from mere copying and should not be a pretext for abuse or exploitation. The more significant the changes made, whether to the material, context, meaning or experience, the more transformative it becomes.

3.5.4.6. Incidental Use

It may be contradictory to categorize "incidental use" as a purpose *per se* as the 'use' in this case can be unintentional or irrelevant to the actual purpose of utilizing an existing work, such as the accidental inclusion of background music in a home recording where the focus is on another subject matter. Incidental uses can also be intentional use such as the use of a work as an example to represent

combine) existing songs with added components, often to change the genre of a song (e.g. DJ mixes create dance/club versions of original music that can be pop, ballad, adult contemporary, hip-hop, rhythm and blues or that belongs to any other genre. Another example is the acoustic or 'stripped-down' version of popular songs.

¹⁷⁶ See, Rebecca Tushnet, *I Put You There, User-Generated Content and Anticircumvention*, 12 Vand. J. Ent. & tech. L. 889 (2010). This article examines the features of vidding and traces the proposal by proponents of UGC for an exemption for noncommercial remix video to address the *in terrorem* effect of anti-circumvention law on fair use, without which fair users are subjected to the prohibitory digital literacy test and digital poll tax for any UGC creation.

a genre or to illustrate a point of view.¹⁷⁷ However, they are not likely to relate directly to the work used (contrast this to a parody, which is a statement on the work used). Such uses can, for instance, be education and research related. It is also common in videos uploaded into video sharing websites like YouTube and it can overlap with some of the above categories (e.g. personal diaries where the focus is on the UGC maker).

3.5.4.7. Information and Knowledge Sharing (and Archiving)

Users individually share information and knowledge through social networking platforms and personal blogs. Online encyclopedias like Wikipedia and Citizendium are prominent examples of websites where users gather to share and collaborate on materials. Group-based aggregation websites also perform a useful function and have a clear objective or purpose. Dissemination is also an important component in this category, but one must be careful not to include archiving *per se* if the UGC merely involves copying, even if it is of materials that are in danger of extinction.

Knowledge is non-rivalrous and information empowers the individual. The greater the diversity of resources (and opinions), the more informed and inspired an individual is. Information and knowledge sharing is already acknowledged as an important factor in carving out copyright interests such as in the statutory exceptions or exemptions for research, study and 'librarying' activities. Similarly, permissible exclusions for private copying and 'librarying' contribute to the archiving of human knowledge and materials.

3.5.5. UGC and Licenses

UGC may be the subject of, and result from, a contract or license in which case the terms of the agreement will be relevant to the parties. Thus, the issue here relates more to the ownership and apportionment of rights between the parties concerned. Here, UGC may not even infringe copyright where there is expressed permission granted by the copyright owner, even if it may otherwise be covered by a limitation provision (e.g. open source software, creative commons licenses and virtual world games EULAs). Licenses should not be allowed to further expand owners' rights or restrict others to use existing works, whereas a voluntary loosening of restrictions should be encouraged.¹⁷⁸ Therefore, flexible licensing regimes as well

¹⁷⁷ E.g. *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir.) (in the context of fair use, the unauthorized reproduction of seven copies of old concert posters in a "coffee table book" documenting the thirty-year history and career of the Grateful Dead rock band was fair and transformative as the use was for "historical value" and not for "creative value").

¹⁷⁸ E.g. the Creative Commons Movement, see the text accompanying Note 106 (*supra.*).

as contractual conditions for usage, and perhaps even a statutory “share-alike” requirement for copyright protection for user-derived UGC (i.e. a statutory mandatory licensing regime in exchange for statutory protection for infringement), can further facilitate the release of creative works for follow-on UGC.

3.5.6. Conclusion to Part

For the U.S., this proposed UGC limitation provision would supplement and may overlap with the current fair use provision (and add to the purpose-specific exemptions), while for other countries such as Canada with purpose-specific fair dealing provisions, this would add to the list of purpose-specific exemptions (and incrementally expand the exemptions to infringement).

In summation, one option (Option 1) is to have a general exemption not tied to any type of use, which will be similar to the fair use exception and with a non-exhaustive list of purposes constituting, or presumed as, transformative uses. The other more limited option (Option 2) is to make the exemption purpose specific according to an exhaustive list of purposes that can also be deemed or presumed transformative in effect, which would be more likely to pass the Berne three-step test.

3.6. Overcoming the Berne Three-Step Test

The copyright legislation in most countries contain limitations in the form of statutory exemptions for specific activities and purposes such as personal use, teaching, research, comment, criticism, quotation, news reporting, librarying and so on.¹⁷⁹ In recent years, it has become more common to include more exemptions to give long-overdue recognition to certain legitimate social activities (depending on the country in question) including parody and satire as well as to make exemptions to protect the Internet infrastructure and other innovative forms of technology, which functions in a manner that may technically constitute strict liability infringement. These exemptions are for user caching, the temporary reproduction of

¹⁷⁹ The type and extent of limitations vary from jurisdiction to jurisdiction. See e.g., Article 5 on “Exceptions and limitations” of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (EU Copyright Directive) for an example of a list of purpose-specific exemptions that were suitable to the legal traditions and the socio-cultural environment of the EU member states. It also requires the member states to adhere to the three-step test. *Ibid.* at Article 5(5). The list of optional defenses is conditional to implementation in the individual members states and include the use of copyrighted works for private use, education purposes, quotations and parody.

materials made in the course of communication, to make a back-up copy of computer programs and so on.¹⁸⁰

The question naturally arises as to whether the inclusion of such a statutory limitation by the U.S. or any other jurisdiction constitutes a violation of its international obligations under the trade and copyright conventions to which it is a signatory. This is because there is a restriction to the creation of such limitations to copyright protection in the form of a “three-step test” under the major international legal instruments that relate to the copyright regime.

The three-step test was constructed to assess and thereby limit the validity of limitations made to the exclusive rights of copyright owners. Under the test, exceptions to the rights of copyright owners are restricted to certain special cases that do not conflict with a normal exploitation of the work or unreasonably prejudice the legitimate interests of the copyright holder.¹⁸¹ In other words, it acts as a filter to determine the compatibility of statutory limitations contained in national copyright laws. Any proposal to amend or add exceptions in the relevant copyright legislation of member states must be consistent with this test.¹⁸²

The three-step test is contained in Article 13 of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (otherwise known as the TRIPS Agreement).¹⁸³ That provision is in turn based on provisions contained in earlier copyright related treaties, namely, Article 9(2) of the Berne Convention,¹⁸⁴ Article 10 of the WIPO

¹⁸⁰ There are many other precedents of statutory exemptions enacted to accommodate important Internet and technological functions. E.g. the amendments to the Australian Copyright Act in 2006 added a number of other very specific and quite limited protections from copyright liability for personal use of AV material, including “time-shifting” (section 111) and “format-shifting” (section 110AA). Similarly, statutory safe harbor protections are accorded to Internet intermediaries, including UGC platforms if eligible, for certain functions including the provision of online services, network access or operating facilities for “transitory digital network communications”, “system caching”, “information residing on systems or networks at the direction of users” and “information location tools”. 17 U.S.C. § 512(a-d).

¹⁸¹ On the three-step test as applied to copyright law, see Martin Senftleben, COPYRIGHT LIMITATIONS AND THE THREE-STEP TEST (Kluwer Law International 2004) at pp. 283-93; and Daniel J. Gervais, *Towards A New Core International Copyright Norm: The Reverse Three-Step Test*, 9 Marq. Intell. Prop. L. Rev. 1, 1-37 (2005).

¹⁸² Eric Barendt, *Copyright and Free Speech Theory*, in COPYRIGHT AND FREE SPEECH: COMPARATIVE AND INTERNATIONAL ANALYSES (Jonathan Griffiths & Uma Suthersanen eds., 2005) at 47-50 and 163-64.

¹⁸³ Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Art. 13, Apr. 15, 1994, 1869 U.N.T.S. 299, 305. This Article was originally derived from the Berne Convention.

¹⁸⁴ Berne Convention for the Protection of Literary and Artistic Work of September 9, 1886, July 24, 1971, 1161 U.N.T.S. 3, 31.

Copyright Treaty,¹⁸⁵ and Article 16 of the WIPO Performances and Phonograms Treaty.¹⁸⁶ Because its earliest appearance was in the Berne Convention, hence it is still often known as the “Berne three-step test”.

The potential outcome of such an assessment is uncertain given the divergence in view of how the test should be applied.¹⁸⁷ However, in reality, the likelihood is that it will not be an impediment to the enactment of a UGC limitation for several reasons, both practical and academic.

Specific statutory exemptions are less likely to be contentious in the first place.¹⁸⁸ Thus, many purpose-specific exemptions such as for parody and satire as well as personal use activities have passed the three-step test. In particular, an exhaustive list of exemptions such as that proposed in Option 2 should likewise be acceptable. In fact, limitations in the form of enumerated exemptions enjoy widespread acceptance. International instruments themselves even contain some such provisions.¹⁸⁹

On the other hand, Option 1 is likely to be more controversial as it functions in a more flexible and amorphous manner that is closer to the fair use model and hence may give rise to opposition based on the three-step test. However, even though the U.S. has been subject to criticism for the open-ended nature of its fair use provision, which has a much wider scope than the Option 1 proposal,¹⁹⁰ it has successfully retained the provision for decades and its courts have applied it extensively.¹⁹¹ In fact, the U.S. government has even

¹⁸⁵ World Intellectual Property Organization Copyright Treaty, art. 10, Dec. 20, 1996, 36 I.L.M. 65, 71. The Agreed Statements concerning Article 10 that was adopted by the Diplomatic Conference underlined, at the same time, that the provision permitted signatory states to devise new exceptions and limitations appropriate to the digital network environment.

¹⁸⁶ World Intellectual Property Organization Performance and Phonograms Treaty, Art. 16, Dec. 20, 1996, 36 I.L.M. 76, 85-86.

¹⁸⁷ National approaches to the determination of limitations vary.

¹⁸⁸ But there are exceptions. For example, Section 110(5)(b) of the U.S. Copyright Act was found inconsistent with the test in 2000 by a World Trade Organization dispute-settlement panel. See Daniel Gervais, *THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS* (3d ed., Sweet & Maxwell U.K., 2008) at 237-48 and *Gervais* (2005), Note 181.

¹⁸⁹ E.g. Article 10 the Berne Convention includes a specific, albeit somewhat limited, exemption for quotation, educational use, and attribution; and Article 10bis provides for further possible free uses mainly for reportage.

¹⁹⁰ See, Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 Colum. J. Transnat'l L. 75 and (or at?) 113-14 (2000). Also on the possibility of developing international copyright norms, see, Jane C. Ginsburg, *Toward Supranational Copyright Law?: The WTO Panel Decision and the "Three-Step Test" for Copyright Exceptions*, 187 *Revue Internationale du Droit D'Auteur* (2001).

¹⁹¹ In the U.S., judges have even applied the concept of “fair use” long before it became codified in law since 1976 (under 17 U.S.C. §107). See, *Gyles v. Wilcox*, 26 Eng. Rep. 489 (1740), an earlier case that dealt with “fair abridgement” that

successfully exported this concept abroad to other countries including to Israel and Singapore.¹⁹² Many of its proponents have also made compelling and cogent arguments in defense of its scope and usefulness,¹⁹³ particularly in the context of the digital age where what may be considered “normal exploitation” may evolve or expand due to rapid technological progress, user behavior and preferences geared favorably towards UGC with its social utility and benefits.¹⁹⁴ Moreover, in the history of the WTO, there have neither been formal challenges brought against the fair use provision in any international dispute resolution forum nor many disputes over the three-step test.¹⁹⁵ Thus, in all likelihood, such a wider provision will also survive the threat of any possible complaint based on the test.

As an aside, it is recommended that proponents of a UGC limitation should pursue its prescription and incorporation into the relevant international trade and copyright treaties, which is currently being done for other forms of exemptions.¹⁹⁶ The development of these

subsequently evolved into “fair use”. *Ibid.* at 490. See further, Jay Dratler Jr., *Distilling the Witches’ Brew of Fair Use in Copyright Law*, 43 U. Miami L. Rev. 233 (1988).

¹⁹² The concept of an open-ended fair use-type of doctrine or similar “public interest” doctrine is adopted in substance, even if there is no change in the terminology from “fair dealing” to “fair use”. See, Richard J. Peltz, *Global Warming Trend? The Creeping Indulgence of Fair Use in International Copyright Law*, 17 Tex. Intell. Prop. L.J. 267 (2009).

¹⁹³ See e.g., *Senfileben*, Note 181. However, the problem has not been resolved in any forum. See, *Senfileben*, Note 181 at 113, and *Dworkin*, Note 195 at 153, 161-62. However, there are also opponents that argue that fair use fails the three-step test; see, Sam Ricketson, *THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986* (1987) at 482; Mihaly Ficsor, *THE LAW OF COPYRIGHT AND THE INTERNET: THE 1996 WIPO TREATIES, THEIR INTERPRETATION AND*

IMPLEMENTATION § 5.55 (2002) at 284 and Herman Cohen Jehoram, *Restrictions on Copyright and their Abuse*, 27 Eur. Intell. Prop. Rev. [E.I.P.R.] 359, 360, 362 (2005).

¹⁹⁴ Jo Oliver, *Copyright in the WTO: The Panel Decision on the Three-Step Test*, 25 Colum. J.L. & Arts 119 (2002) at 158. A more flexible and holistic “dynamic view” (which is more forward-looking in assessment) is preferred over a strict “fixed view” (with strict adherence to existing conditions). *Ibid.* at 159. See also, Annette Kur, *Of Oceans, Islands, and Inland Water – How Much Room for Exceptions and Limitations Under the Three-Step Test?*, 8 Rich. J. Global L. & Bus. 287 (2009) (for a more flexible interpretation of the test); Christophe Geiger et al., *Declaration: A Balanced Interpretation of the “Three-Step Test” in Copyright Law*, 39 Int’l Rev. Intell. Prop. & Competition L. 707, 708 (2008); Kamiel J. Koelman, *Fixing the Three-Step Test*, Eur. Intell. Prop. Rev., 407, 411 (2006) and *Gervais* (2005), Note 181 at 25.

¹⁹⁵ Gerald Dworkin, *Copyright, the Public Interest, and Freedom of Speech: A UK Copyright Lawyer’s Perspective*, in *COPYRIGHT AND FREE SPEECH: COMPARATIVE AND INTERNATIONAL ANALYSES* (Jonathan Griffiths & Uma Suthersanen eds., 2005), at 162-63. There are not many actual international disputes that required an interpretation of the test in relation to certain statutory exemptions. See, the World Trade Organisation (WTO) 2000 Dispute Resolution Panel *Report on Section 110(5) of the United States Copyright Act* (WTO Panel ruling 15/06/00 WT/DS160/R), available at: http://www.wto.org/english/tratop_e/dispu_e/1234da.pdf.

¹⁹⁶ E.g., the WIPO Standing Committee for Copyright and Related Rights (SCCR) or the WIPO Copyright Committee is currently considering exemptions for educational activities, libraries and archives and access for disabled persons

additional exemptions in an international fora like the WTO and WIPO will also ensure that it passes the test and the endorsement by such organizations and the incorporation into the international legal instruments will avoid disputes on this basis.

3.7. Relationship with the General Fair Use Exception and other Statutory Exemptions

Ineligibility for the UGC statutory limitation does not mean that a UGC creator cannot still rely on the general fair use exception as an alternative defense. As noted in the beginning of this article, there are many forms of UGC as a whole as well as other types of uses that may not fit into the scope of the proposed exclusion. For example, purposes that do not fall under the Option 2 list of activities or commercially produced parody and satire. In such a situation, fair use analysis applies in the same manner to determine the user's eligibility for protection.

The fair use exception is wider in scope than the proposed exemption in either of the two permutation or options.¹⁹⁷ It is possible for some UGC to fall within the scope of both types of statutory limitation. There is an overlap between the two, especially given the similarity in some of their considerations.¹⁹⁸ However, the UGC provision is not a subset of the fair use exception and is not merely a "perfect substitute" for fair use. There may be cases that can fall under the UGC provision, but which would fail the fair use test (e.g. due to substantiality of use).¹⁹⁹

Similarly, there may be some overlap between the proposed UGC exemptions and existing or future purpose-specific exemptions due

(especially the visually impaired). See the WIPO website at:

<http://www.wipo.int/copyright/en/limitations/>, where the organization specifically acknowledged the need for the balance between the various stakeholders to be recalibrated "[d]ue to the development of new technologies and the ever-increasing worldwide use of the Internet".

¹⁹⁷ E.g., uses that fall short of the legal definition of UGC and hence its defense, e.g. acts done for commercial gain, can still seek the protection of the fair use exception.

¹⁹⁸ "When Bill C-32 uses the word "use" in the context of a new user-generated content right, the indication demonstrates further rapprochement to the notion of fair use as a practical alternative to implied licence even if the right/exception is not expressly tempered by "fairness." *Rush*, Note 120 at 671.

¹⁹⁹ But because the "transformative use" test is used in both forms of limitation and other considerations are similar, this may happen only in a minority of cases. In countries with less generous statutory exemptions and case law interpretations, such as the majority of the Commonwealth fair dealing provisions, the disjuncture between them is likely to be larger. See e.g., Graham Reynolds, *A Stroke of Genius or Copyright Infringement? Mashups and Copyright in Canada*, (2009) 6:3 SCRIPTed 534 (in relation to "mash-ups" in the context of Canadian copyright law as of 2009).

to similarity of purpose.²⁰⁰ The main difference between the Option 1 UGC exemption and other statutory exemptions is that it is not purpose specific.

3.8. Limited Form of Copyright Protection for Copyright Infringement Exempted UGC Works: “Some Rights Reserved”

Thus far, the focus of this paper has been on the appropriate scope of a proposed statutory limitation for UGC. However, given the diversity of UGC in general, it will also be important to further consider the issue of copyright protectability for UGC. The issues on this matter will be briefly set out and some ideas will be suggested in this part although they need to be given further thought and addressed more substantively in a separate study.

There are three categories of UGC that we have to consider here: “User-Authored Content” (original user works), “User-Derived Content” (user derivative works containing third party copyrighted content) and “User-Copied Content” (merely duplicated works of others).²⁰¹

3.8.1. User-Authored Content

Fully original content raises the same copyright issues whether they are amateur or professionally created and whether user-generated (e.g. the product of unsigned artistes or budding inventors) or otherwise (e.g. the outcome of industry-based or work-related materials). The same level of copyright protection should be accorded if it passes the originality test and the other mandatory statutory requirements.

However, if they use a public UGC platform for this form of expression rather than a private platform (e.g. a personal blog), this category of UGC creators may be subject to terms and conditions of use or service that may require them to license or transfer away some or all of their rights in their works. For example, consider the terms of use under Wikipedia, which requires the text contributor to agree to license their works under a Creative Commons Attribution/Share-Alike License and for compatibility reasons under the GNU Free Documentation License as well.²⁰² ‘Downstream’ re-

²⁰⁰ E.g. there may concomitantly be statutory exemptions for commentary or reportage not based on commerciality under the copyright legislation, which is already in existence in some jurisdictions.

²⁰¹ See, Gervais (2009), Note 111 at 858.

²⁰² “To grow the commons of free knowledge and free culture, all users contributing to Wikimedia projects are required to grant broad permissions to the general public to re-distribute and re-use their contributions freely, as long as the use is attributed and the same freedom to re-use and re-distribute applies to any derivative works.” See the Wikipedia Terms of Use provisions, available at: http://wikimediafoundation.org/wiki/Terms_of_Use. There is a different regime for

users of such content benefit from the reduction of authors' rights and bear the responsibility of respecting the terms of use.

In short, UGC content that deals mainly with original content should remain under the existing copyright framework and under a contractual or licensing regime (e.g. virtual worlds and online games)²⁰³. The same level of originality should be required (and the same statutory conditions fulfilled) in order for such works to obtain copyright protection in its own right. There is no reason for a difference in standard.

3.8.2. User-Derived Content

The more interesting question is whether a UGC that is a derivative of others' existing works, which is protected under an exception or exemption, can itself obtain copyright protection based on the same legal pre-requisites; and if so, whether it should be the same level of protection offered to all types of copyrighted works.

On the first issue, there is no reason why a user-derived content should not obtain copyright protection especially if it does amount to an original work in its own right, which given the standard for originality required, is not a high threshold. The standard should not be lowered for copyright eligibility.

There are also merits to the idea of implementing a standardized threshold for the protection of copyright infringement exempted UGC works (i.e. based on an objective assessment) rather than to leave the question of originality for a separate analysis (i.e. based on a subjective analysis of the level of originality or creativity of each UGC). In order to do so, it is perhaps imperative to first clarify the relationship between, and to reconcile, 'transformativeness' (for protection from infringement liability) and originality (for a copyright interest) in relation to UGC.²⁰⁴

On the second issue, there is good reason for considering a second-tier type reduced form of protection for UGC. First, the nature of UGC

non-text media contributors but with the same overall objectives as stated above. Re-users are provided certain guidelines in order to legally and legitimately re-use Wikipedia content.

²⁰³ E.g. Virtual Worlds like that established by "Second Life" and Massively Multiplayer Online Role-Playing Game (MMORPG) platforms respectively. Most of these gaming platforms and companies incorporate terms of use into their services through End-User Licensing Agreements (EULA) that bind their users.

²⁰⁴ The form of 'transformativeness' involved in the creation of user-derived UGC may not necessarily be the same as or meet the originality requirement for copyrightability. See generally, *Wong*, Note 146, on an insightful analysis of the scope and role of 'transformativeness' in relation to fair use and copyrightability of derivative works.

work itself is that it is for public consumption and sharing.²⁰⁵ Second, the objectives for protecting the creativity involved in UGC extend likewise to follow-on works.²⁰⁶ Third, the right in a UGC work should ‘mirror’ the protection that allowed its existence in the first place – this is consistent with the notion of “paying it forward” that underlies the justification for a statutory UGC limitation.²⁰⁷ Fourth, reduced form copyright is actually a common feature in some UGC platforms and in their terms of service.²⁰⁸ As noted, Wikipedia, for instance, uses the Creative Commons licensing scheme extensively.²⁰⁹ Fifth, it is workable inasmuch and similar to the way that statutory compulsory collective licensing schemes work, where under certain conditions copyright materials can be used without direct authorization from the copyright owner, except without the royalty/tariff component.²¹⁰

²⁰⁵ I.e. made accessible to a large segment of society (but not necessarily all; e.g. the reach of social networking UGC) and is part of the nature and virtue of UGC, which is sharing and knowledge dissemination. If a UGC is meant for private consumption, then it may constitute private use and still be protectable separately from amateur use under other provisions, if available and applicable. See Alain Strowel, *Droit D’auteur Et Acces A L’information: De Quelques Malentendus Et Vrais Problemes A Travers L’histoire Et Les Developpements Recents*, 12 Cahiers De Propriete Intellectuelle 185, 198 (1999). The circulation of information, cultural and scientific development and the privacy defense constitute the three main justifications for copyright exclusions. Currently, private use as defined in various forms of use or purpose is a statutory defense to copyright in many jurisdictions; also, it is a factor for consideration in fair use assessment, directly or indirectly (e.g. commerciality, nature of use, accessibility, etc.).

²⁰⁶ E.g. it would remove potential restrictions on further derivative works based on UGC that would go against the utilitarian arguments for extending the utility and lifespan of works.

²⁰⁷ The limited rights attached to such secondary creative works should mirror that intent and purpose behind the rules that justify their exemption from copyright liability for the use of others’ works for their creation in the first place. This suits the fairness principle and will simplify the situation and can remove unnecessarily complicated processes and procedures to identify rights and liability vis-à-vis re-users and subsequent degrees of re-use.

²⁰⁸ According to a study in the OECD Report, most UGC websites provide terms that gives them a license to use hosted and disseminated UGC content for the website operator and some sites require users to agree that the content will be subject to a form of Creative Commons license for the benefit of other users. See the OECD Report, Note 11 at pp. 48-49, Table 9.

²⁰⁹ In fact, many UGC platforms have taken this into account and included these understandings into their terms and conditions of use or service. If this recommendation for general limited rights is incorporated into the copyright legislation, these contractual provisions will nevertheless be consistent with the general regime of protection, being merely reiteration or duplication of such rights. If this is so, there may be little distinction between user-authored and user-derived works, although some distinction can still exist (e.g. the Wikipedia licenses for text contributions do allow for commercial re-use), which should be kept to the minimal; and any conflict between the terms and law should be resolved in favor of the latter.

²¹⁰ I.e. the benefits of the UGC exclusion itself would justify non-payment along the chain of re-use; and in any event, payment for re-use is anathema to UGC and the objectives of the limitation itself.

This an opportunity for the Creative Commons licensing scheme and templates, with its reduced level of protection, to be partially brought into the statutory copyright regime itself (i.e. rendered mandatory rather than remaining voluntary). That is, CC licensing terms are a tagged-on condition for copyright protection that automatically reduces the extent of protection otherwise accorded to fully original works. The following core features of Creative Commons licenses may be built into the “some rights reserved” statutory regime recommended for copyright protection of UGC (as “UGC statutory licenses”), which are consistent with core UGC norms and characteristics:

1. Non-Commercial (CC NC) – use for non-commercial purposes is a requirement for protection *from* infringement and should be made a condition *for* copyright protection in turn (to permit subsequent derivative uses by other downstream UGC creators). It will also preserve the integrity and intent of the UGC that will be the ‘source’ of downstream re-use and the objective behind legitimizing UGC.²¹¹ This condition also reflects the largely amateur and non-commercial nature (“*re-creation as recreation*”) as well as the usual types/forms of UGC *use*.²¹²
2. Share-Alike (CC BY) – where all downstream works based on a UGC will carry the same license and freedom to use, which will also have the effect of discouraging infringement actions by UGC creators against other UGC makers.²¹³ Fairness and sharing is central to and an integral part of UGC.²¹⁴

²¹¹ Casey Fiesler, *Everything I Need to Know I Learned from Fandom: How Existing Social Norms Can Help Shape the Next Generation of User-Generated Content*, 10 Vand. J. Ent. & Tech. L. 729 (2008).

²¹² One definition of UGC offered by Halbert, Note 116 at 921, describes it as “the division between culture produced as a commodity for consumption and the culture that is generated by people acting as creative beings without any market incentive.” This is not so much a definition as it is a description of a key feature of UGC.

²¹³ Often compared to “copyleft” free and open source software licenses. The Attribution-ShareAlike (CC BY-SA) license is used by Wikipedia and recommended for UGC that would benefit from incorporating content from Wikipedia and other similarly licensed projects.

²¹⁴ Would this resolve the problem of a UGC limitation undermining software licensing including source code licensing models (e.g. GNU)? “Copyleft” open source licenses often require modifications that are published in executable format to also publish the source code of the modification. Without this requirement, UGC software developers could make modification to open source software and distribute these without respecting the licensing terms and without infringing copyright (i.e. it would allow the publication and distribution of open source code without the need to adhere to open source licensing conditions). This would defeat the objective for UGC limitation in the first place. Putting in place such a mandatory “share-alike” requirement can prevent the open source licensing models from being undermined. See, *Jacobson v. Katzer*, 535 F.3d 1373 (Fed. Cir. 2008).

3. Derivatives only – it may be stating the obvious, but this is a volte-face modification of the “No Derivatives” term for CC ND licenses and will ensure that downstream uses will also be derivative works and not mere copies.
4. Attribution (CC BY) – this should be included only if it is also a requirement for UGC protection from infringement, which would allow others to re-use and distribute as long as credit is given for the source creation.²¹⁵

The proposal is to ‘mirror-image’ the scope and form of protection for UGC works against infringement liability by granting the same limited copyright rights in the derivative UGC work:²¹⁶ A statutorily granted copyright with an automatic rider or carve-out for any subsequent (attribution)-derivatives-only-non-commercial-share-alike second, third or nth degree adaptations (to maximize or add value to a work).²¹⁷ This model will give users and consumers creative freedom in creating transformative works,²¹⁸ while maintaining the control needed to produce and nurture a self-perpetuating and self-regulating community, and at the same time to combat piracy. However, more thought need to be put into this suggestion as there may also be problems in introducing such a revolutionary two-tier system of protection, such as in the identification and enforcement of rights relating to the creation of downstream works.

²¹⁵ Again, as mentioned in the context of attribution as a condition in a UGC limitation provision, here it also need not adhere to a set format and can be direct or indirect, through third party and be in the form of, for example, a descriptive text, a comment (including by third parties) (which will retroactively ‘cure’ an earlier lapse in attribution), hyperlink to source, information on page history, and so on. What sort of attribution that can be expected and that will be reasonable under the circumstances will also depend on the *type* (i.e. category) and *form* (format) of the UGC in question. Attribution should only go as far back as the direct source material and not beyond – this will solve the ‘remoteness’ problem for downstream UGC creators.

²¹⁶ This mirror-imaging of UGC exception/exemption and UGC copyright rights could also get around the problem of the relationship between the fair use of an otherwise infringing work and the extent of its own copyright protection (as compared to the standard required of an author’s own or a legally permitted adaptation of the source material to obtain copyright protection independently of the original work) as well as the lack of clarity as to whether the nature of the transformative test is the same for both. See, *Wong*, Note 146.

²¹⁷ The more economically or socially ‘valuable’ a work, the more likely it will be the subject of derivative UGC. From an economics perspective, the law of diminishing marginal utility should apply to most works (over time and use), the problem of originality may be moot if it is logical to presume that an unoriginal work (or what becomes unoriginal) will not inspire re-use and hence is not likely to give rise to the issue of rights and infringement. In any case, a re-use that is infringing can never achieve copyright protection itself.

²¹⁸ One must keep in mind that the legality and regime should be simplified for its primary subject, which is the relatively unsophisticated user. Hence, the proposed simplified model of rights and protections.

As noted, Creative Commons, “copyleft” and other similar types of licenses is a common feature in the terms of service of many UGC platforms. Thus, the UGC statutory license’s relationship with private licensing requirements will have to be sorted out.²¹⁹ That is, it could either operate in addition to or replace more restrictive licenses or it could respect and defer to private licenses. In the opinion of this author, it should be the former as the public policy arguments for such a limitation extends beyond statutory regulation and recognizes that narrower private licensing terms are against public policy and the objective of freeing existing works for UGC in the first place. There is also something to be said for consistency and predictability. The issues here are, of course, more complicated than this and are beyond the scope of this paper and should be taken up in further studies on the feasibility of this proposal.

3.8.3. User-Copied Content

This category of UGC should remain to be determined by a general fair use assessment failing which it would constitute copyright infringement on the part of the creator. Direct appropriations could still constitute fair use if they pass the fair use assessment. For example, they may have direct social value independent of the fact that it is a UGC, such as the generation of cultural dialogue and social exchange, archival effects and the extension of the life of a work.²²⁰ They could also have minimal or limited adverse effects on proprietary rights (such as the uploading of short clips) and can in fact could even have beneficial effects in certain instances (e.g. the uploading of trailers and the spread of viral marketing materials).

3.9. Incidental Effects on UGC Technological Services and Platforms

UGC technological services and platforms have an integral role in providing the forum, the technical know-how and the tools for the creation (applications-based) and dissemination (service-based) of UGC.

The UGC technology platform is a web-based service and forum that promotes and facilitates the sharing of primarily UGC works by providing *core* services that includes: File caching or storage, indexing and search function, website for sharing and live streaming. It can also provide any combination of additional or *value-added* functions in order to encourage user participation (creation/usage) and wider sharing (sharing/dissemination) including: Simplified tools and user applications; format synchronisation, codes for cross-

²¹⁹ If at all, IP rights in relation to UGC are usually legally dealt with under the terms of end user license agreements (EULAs) with the UGC platform that facilitates the creation or that hosts such content or with the copyright owners.

²²⁰ Halbert, Note 116 at 935-39 and 958.

sharing (e.g. embedding codes); comment and response facilities; suggestions and recommendations; streaming and downloading options and so on.

Many of the most successful UGC platforms have pioneered new forms of social behavior or a digital analogue of a traditionally physical form of activity with a primary focus on the amateur or non-professional user. This will include wikis, social networking and video-sharing websites like Wikipedia, Facebook and YouTube respectively. This will exclude Internet intermediaries that do not primarily deal with UGC content or have as its objective the creation of such content, such as Peer-to-Peer (P2P) and file hosting sites that merely handle or manage content for storage or downloading,²²¹ which may only incidentally involve and peripherally include UGC.²²² Another distinguishing feature is the Peer-to-Public objective of UGC as opposed to the Peer-to-Peer nature of these other intermediaries, irrespective of the technical nature of the technology used.²²³

Currently UGC technology services and websites such as Facebook have not faced legal action under copyright law. Copyright actions have mainly been brought against video-sharing websites with little success thus far. For example, YouTube have won in the copyright disputes brought against it based on the coverage of safe harbor provisions in the case of *Viacom International Inc. v. YouTube Inc.*,²²⁴ and earlier in *Io Group Inc. v. Veoh Networks Inc.*,²²⁵ although

²²¹ I.e. file storage or hosting service providers/applications/websites like Megaupload, Mediafire and Rapidshare (whether or not requiring registration, security and technological safeguards allowing for only individual use for storage and transfer of data), which some considers a subset of file sharing technologies. So far, the courts have denied DMCA safe harbors for file-sharing sites. See e.g., *Arista Records LLC v. Lime Grp. LLC*, No. 06 CV 5936 (KMW), 2010 WL 1914816 (S.D.N.Y. May 11, 2010) and *Columbia Pictures Indus., Inc. v. Fung*, 2:06-cv-05578-SVW-JC (C.D. Cal. Dec. 21, 2009). Another category of intermediaries is digital recording devices/services for time, space or format shifting.

²²² Thus, UGC platforms do not include P2P services. Whereas UGC platforms are mainly geared towards enabling user rights in original and follow-on creations for various purposes including social networking and citizen journalism, P2P services provides a service on a digital online network that is designed primarily to enable file transfer and sharing that generally consists of acts amounting to copyright infringement.

²²³ However, the objective may incidentally define the form and development of technology. For example, video-sharing websites like YouTube *streams* hosted videos and provides a forum for comments and discussion, whereas P2P and file hosting sites like Bittorrent and Megaupload merely provides storage and *downloading*, in many cases without any restrictions on the recipient of the uploaded file.

²²⁴ *Viacom v. YouTube*, Note 23. Judge Louis Stanton produced its verdict on the case on 24 June 2010 and found for YouTube, granting its motion for summary judgment to dismiss Viacom's litigation. Similar to the *Io v. Veoh* case (*infra.*), the judge held that YouTube was protected from liability under the DMCA section 512(c) "online storage" safe harbor for third party material uploaded onto its website by users.

these disputes has yet to reach the apex of the U.S. legal system or obtained the endorsement of the U.S. Supreme Court.²²⁶

Thus, adopting either of the proposed UGC statutory limitation will accord the UGC intermediary “double protection”: First, the DMCA safe harbor provisions constitute an overarching protection for such intermediaries by allowing them to perform their functions with the minimal level of obstruction and a reasonable amount of responsibility.²²⁷ Hence, they are required to respond to notices but not screen or police content; that is, only specific and not general knowledge is required and they are not to directly profit from unlawful activities.²²⁸ Second, the specific activities that fall under the proposed limitation will also offer an additional layer of protection from an indirect infringement action against them for lack of the requisite primary infringement upon which the action could be based.

An important benefit of a clear UGC limitation is that it will at the very least remove the legal uncertainty of creating as well as hosting the elucidated categories of purposes and also provide more clarity in determining other UGC content (in the case of Option 1). This will remove the incentive (which still exists in the context of the current safe harbor provisions) for UGC intermediaries to err on the side of caution and to (preemptively) block or (subsequently) remove uses that can and should be allowed (currently under fair use or on another basis of exemption). This was indeed what happened in the *Lenz* case and in many other unreported cases or incidents and it was

²²⁵ No. C06-03926 HRL, U.S. District Court, Northern District of California, San Jose Division (hereinafter “*Io v. Veoh*”). This was a case between a copyright owner and a UGC service primarily based on secondary intermediary liability for copyright infringement. Io Group makes and sells adult entertainment products, including movies. Veoh Networks, like YouTube, allows users to upload and view videos online on its website. Io alleged that clips from some of its movies were uploaded and viewed on Veoh, and that Veoh should be held liable for direct and secondary copyright infringement. The court held that Veoh was protected from liability under the DMCA section 512(c) safe harbor.

²²⁶ See also, Jane C. Ginsburg, *User-Generated Content Sites and Section 512 of the US Copyright Act* in Irini A. Stamvoudi, ed., *COPYRIGHT ENFORCEMENT AND THE INTERNET* (Kluwer Law International 2010). Columbia Public Law Research Paper No. 10-255.

²²⁷ Online Copyright Infringement Liability Limitation Act, Title II of the DMCA, 112 Stat. 2877 (codified as amended at 17 U.S.C. § 512 (2000)). The Digital Millennium Copyright Act (DMCA) defines an Online Service Provider (OSP) as “a provider of online services or network access, or the operator of facilities therefor”. 17 U.S.C. §512(k)(1)(B). This can be interpreted expansively to encompass services hosting or distributing third-party content. Indeed, the current four safe harbor categories consists of OSPs that perform the following functions: “Transitory digital network communications”, “system caching”, “information residing on systems or networks at the direction of users”, and “information location tools” 17 U.S.C. §512(a-d).

²²⁸ See, the *Io v. Veoh* and *Viacom v. YouTube* cases. There should be some serious consideration on the merits of the “notice-and-notice” proposal under the Canadian Bill C-32 in the place of the current notice-and-take-down process.

also the reason for those UGC intermediaries involved in the negotiation and endorsement of the UGC Principles to agree to the terms that, as have been noted, is arguably more biased towards the copyright owner. This will also have the effect of providing guidance for copyright owners in policing and honestly reporting infringing cases as well as for UGC creators to walk the line. Finally, it will also contribute to the reduction of litigation relating to UGC.²²⁹

Conclusion

This paper highlights the significant impact that IT developments and the Internet, particularly the rise of UGC on the WWW, has on the reality of modern life. A fair and just balance has to be achieved between the parties (and their interests) under the copyright regime within the changing social context. The rights and interests of users and consumers as follow-on creators and other innovators should be recognized in the new digital environment with the technical tools available to them. The importance of protecting and nurturing the development of information and communications technology that facilitates and fosters user empowerment should also be recognized so that the social utility of these functions are preserved, and unnecessary costly disputes can be avoided.

A jurisprudential assessment of the objectives and principles upon which copyright regime is founded strongly suggests that a statutory UGC limitation, whether in the form of a more generalized exception or a purpose-specific exemption, is important to achieve this goal. This can be done through a minor revamping of the copyright legislation. Clarity in the law is an important driving force towards progress in the area of UGC. A universal solution will also help to achieve harmonization of the copyright regime and the treatment of UGC in the global arena.

The law reform proposals and recommendations based on the profile, type and nature of UGC to be protected shows that the protections extend largely to UGC hosted and distributed by certain types of UGC services including: Social networking (e.g. Facebook, Twitter, MySpace);²³⁰ content-sharing websites mainly meant for individual expression or as re-creative space (e.g. YouTube, MySpace, FanFiction.Net);²³¹ user-based collaborative websites (e.g. Wikipedia, Citizendium)²³² and citizen journalism portals (e.g. Blogs, Stomp).²³³

²²⁹ In the meantime, effective legal sanctions for groundless threats of copyright infringement and a concomitant exception to the digital lock provisions will also contribute towards a conducive environment for UGC creation and sharing.

²³⁰ Facilitating purposes such as commentary, parody and satire, collage and pastiche, etc.

²³¹ Supporting purposes like incidental uses, re-interpretations, etc. Where it involves use of owned material, it can be viewed as an extension of personal use/rights (provided the sharing is limited). There is competition but also inter-

The legal definition of UGC for the purpose of a statutory protection does not encompass all forms of UGC as generally understood by the layman. It is defined by a set of conditions and identified purposes. Legally permitted UGC content as proposed involves the original creation and the re-creation of existing works by non-commercially driven users (as opposed to commercial copyright owners), whether copyrighted or otherwise, in any combination thereof, which is meant for public sharing with other users. This narrower legal definition of UGC for the purpose of protection from copyright infringement is a fair compromise for all the stakeholders concerned. It is hoped that the impetus towards law reform will lead to the reality of its prescription and enactment.

connectivity or cross-carriage of content between these websites and services (e.g. Facebook allows video sharing from YouTube and other sites).

²³² Mainly for the purposes of generating information and knowledge sharing among user-contributors.

²³³ *Ibid.* This category of websites and services has other content-related issues beyond IP law and they are regulated, and the intermediaries often protected, by a different set of laws.