

11.10.13**Copyright in Europe – Call for views****BCC response to IPO**

The British Copyright Council represents those who create, hold interests or manage rights in literary, dramatic, musical and artistic works, performances, films, sound recordings, broadcasts and other material in which there are rights of copyright and related rights.

Our members include professional associations, industry bodies and trade unions which together represent hundreds of thousands of authors, creators, performers, publishers and producers (see member list at Appendix I). These right holders include many individual freelancers, sole traders and SMEs as well as larger corporations within the creative and cultural industries. Our members also include collective management organisations which represent right holders and which enable access to works of creativity.

Background

The British Copyright Council welcomes this opportunity to contribute to the debate on the development of UK Government copyright policy in Europe, but it also looks forward to engaging on specific proposals as they are made.

We welcome UK Government's acknowledgement that the creative industries are one of Europe's most dynamic economic sectors, that the UK's creative industries make a major contribution to the European economy and the contribution of the UK creative industries as a net exporter of creative content. The UK's traditionally strong copyright framework ensures that the UK is a European leader whether by licensing to support digital markets, or in developing innovative models for future licensing (e.g. Copyright Hub) or in best practice for collective rights management (e.g. the BCC's Principles and self-regulatory initiative for CMOs). A strong copyright framework underlies the success of both the UK and Europe's creative industries and the substantial contribution these make to the British and European economies. Copyright also enables creators and performers to contribute to those economies and to earn a livelihood from their creativity.

The BCC sees no conflict between the desire to support and encourage the creative industries through a strong copyright framework and the desire to support technological development and the economy as a whole. They overlap and are complementary. Some creative sectors are part of technological development and innovation while others, by contributing content, enhance and increase consumer demand for technological products and digital and online services. A strong copyright framework ensures that all parts of the creative industries, including individual creators and performers, and companies from book publishers to digital start-up, can successfully contribute to and reap the rewards from technological development.

Preliminary Comments***A UK perspective on policy development***

With an industry as vital to the UK economy as its creative sector, the British Copyright Council expects Government to ensure that Europe, as a major market for UK creativity, also retains and maintains a strong copyright framework. The BCC, therefore, takes an interest in the role which IPO, on behalf of the British Government, plays in developing policy at European level. The BCC has, on several occasions, expressed concern about IPOs current approach to questioning the validity of the current framework and the selective use of IPO research work in the European context (and in the UK) to support its approach.

The EU, like the UK, must apply evidence based policy in order to justify change to the copyright framework. To achieve this, there needs to be a clear outline of the problem to be addressed, supported by thorough, balanced, economic evidence. Most importantly it should consider the consequences of any change. The British Copyright Council and its members are keen to co-operate with IPO to ensure that the most positive messages about the value (whether in terms of economic growth, or in cultural or social benefits) which the UK's creative industries bring to the UK and Europe, are available to the European Commission for inclusion in its reports and publications.

It is very welcome news, to hear from IPO officials during a recent Joint Consultative Meeting with the BCC that the UK Government is not pushing for change at European level and the BCC believes that the UK Government can best respond to the European policy debate by re-establishing itself as a champion for copyright and for the creative industries. IPO can, for instance, refer to the success of the UK's creative industries based on copyright licensing and also on the activities initiated by Richard Hooper through the Copyright Hub. The discussions leading to the setting up of the Copyright Hub and the report of the Copyright Licensing Steering Group published on 25th September 2013¹ should be widely promoted as good practice with a potential for pan European application.

Fair Use

While discussions on exceptions and limitations form a major part of current UK policy debate, they are a lesser priority in the context of a European IP Strategy. Nevertheless, following recent discussions at International level and from the point of view of developing an EU approach to protection of copyright, the BCC does not support the adoption of a "fair use doctrine" within Europe. Our reasons for not following this approach were given in our submission to the Hargreaves Review (Independent Review of IP and Growth, BCC response to the Call for Evidence, 4 March 2011)². We also attach (at Appendix II) a further copy of the paper prepared for the BCC, at that time, by Taylor Wessing which specifically addresses the economic and transparency concerns that arise from application of a "fair use doctrine".

The UK Government consulted in detail on this issue as part of the Hargreaves Review and has discounted the fair use approach in taking forward other recommendations (also see BCC responses to the Technical Review of draft legislation on copyright exceptions dated 17 July³ and 2nd August 2013⁴ and on an exception for people with disabilities, BCC response dated 11 September 2013⁵). More specifically, the review was tasked to "look at what the UK can learn from the US's "fair use" rules covering the circumstances in which copyright material may be used without the rights-holder's express permission." In his report, as subsequently accepted by the UK Government, Professor Hargreaves concluded that the wholesale adoption of a fair use approach into the UK legal framework would not be advisable. In particular he recognised that the success of the US technology sector is based on factors other than fair use such as the availability of a skilled work force and the different approach in the US to investment. In fact, the original statement that fair use was the key element for the establishment of Google in the US has been proven to be wrong.

The BCC would, therefore, ask that the Government actively encourages the EU to discount the fair use approach.

Research

We hope that, in the coming months, IPO will focus its resources on providing solid economic impact assessments on the UK's new exceptions. The impact assessments provided by Professor Hargreaves as well as the ones accompanying the draft statutory instruments were disappointing and, in our view lacked rigor and were not of an acceptable standard. Given the substantial impact of these changes for BCC members we continue to urge Government to undertake proper impact assessments. Only with adequate research of a sufficiently high standard, can the UK Government comply with its own calls for evidence based policy making. This is essential if the UK is to set an example of best practice at European level and if the UK role in policy

¹ Accessible via www.clsq.info

² <http://www.britishcopyright.org/page/223/independent-review-of-intellectual-property-growth-by-professor-hargreaves/>

³ <http://www.britishcopyright.org/page/402/technical-review-of-draft-legislation-on-copyright-exceptions-first-part/>

⁴ <http://www.britishcopyright.org/page/406/technical-review-of-draft-legislation-on-copyright-exceptions-2/>

⁵ <http://www.britishcopyright.org/page/414/technical-review-of-draft-legislation-on-an-exception-for-people-with-disabilities/>

development within the wider European context is a credible one.

B. A Single Market for IPRs

A number of items included in the Commission's paper "A Single Market for IPRs" have already been achieved or are under way. On other points we feel it is essential that their impact is fully assessed (see our point on UK Perspective above) before any further decisions are made.

1. Creation of a comprehensive framework for copyright in the digital single market

BCC members recognise that it is essential for copyright to keep pace with technological developments but firmly believe that to do this the framework that has been established under the Copyright Directive 2001/29 must remain as the secure basis from which policy is developed.

It is therefore of fundamental importance that the UK Government continues to ensure that examination of issues in the area of copyright does not lead to a reopening of the Copyright Directive. The Copyright Directive provides the framework for the other issues to be debated and appropriate policies developed.

The Copyright Directive has proved to be sufficiently flexible to adapt to the changing environment, providing a framework within which issues can be debated and appropriate policies developed. It should be allowed to stand. Furthermore, we note the increasing number of decisions by the Court of Justice of the European Union interpreting the Copyright Directive, thus supporting a harmonised approach to copyright throughout the European Single Market. Any changes to the underlying framework endanger this harmonisation.

It is vital that this framework remains in place to provide a clear basis from which copyright based industries within EU Member States can continue to develop new and innovative communication models that will be world leaders.

So far the combination of licensing and exceptions promoted by the Directive has provided an excellent solution to most issues, and with initiatives in the UK such as the Copyright Hub and at European level, within the Licences for Europe stakeholder debates, licensing is being successfully streamlined for the needs of the digital environment.

We urge the UK to engage fully in the current discussions, whilst recognising that the only way to shape them in the overall UK interest is to continue to argue clearly and unequivocally that the Copyright Directive should not be reopened.

On a practical level, the Copyright Directive has only been in place since 2001. It was, reputedly, one of the most lobbied Directives of all time and it took close to five years to get it adopted. The uncertainty engendered by a prolonged period of review (in the light of history) and revision, that re-opening the Directive would cause would be damaging to all stakeholders, but to the creative industries in particular and should be avoided.

It is the BCC's view that, in the absence of proven failure, re-opening the Copyright Directive would be premature.

European Copyright Code

The BCC also notes the reference to a "European Copyright Code" in the Copyright in Europe consultation document. While the previous European debate on a possible code was interesting and encouraged academic debate, the results of the Wittem Project were not fit for purpose and took very little account of the needs and interests of creators and performers or the perspective of the creative industries. We see little point in revisiting this debate.

2. European copyright governance and management

Collective rights management is one of the areas identified in the Single Market strategy as requiring further harmonisation. The BCC welcomes the pragmatic approach of the draft Directive and we ask IPO to support its swift adoption in one Reading before the election of the European Parliament in May 2014 while taking into account the practical concerns that are raised by CMOs in the context of the current trilogue discussions.

The BCC developed and adopted Principles of Collective Management Organisations' Codes of Conduct⁶ which have since been implemented by the majority of the UK's collecting societies. Subsequent developments in the BCC's self-regulatory process have included each society subscribing to an Ombudsman Services for resolution of complaints and the appointment of an Independent Code Reviewer. We ask the IPO to promote the BCCs Principles and the wider self-regulatory process adopted by collecting societies subscribing to that process, as best practice during the discussions on the draft Collective Rights Management Directive.

3. User-generated content

The British Copyright Council has recently (17th September 2013) engaged in a debate with IPO on the matter of User Generated Content. Our paper prepared for that meeting follows at Appendix II to this submission. We use this opportunity to reiterate our summary and recommendations to IPO:

Summary and key recommendations

- Consumer adaptation of creative content is a rapidly developing, complex area.
- Licensing user-generated content (UGC) is an important and growing source of revenue for UK creators and businesses.
- Any regulatory intervention in these markets should be preceded by thorough impartial well-evidenced research.
- Areas in which research could valuably be carried out:
 1. Consumer understanding of copyright and licensing and to consider whether improvement of information is required.
 2. Whether there are gaps in licensing, weaknesses in website data provision to collecting societies or website takedown procedures and whether improvements should be sought.
 3. Whether the rights of consumers in their own creative content are adequately protected.

Consumer adaptation of creative content, Paper for BCC-IPO Joint Consultative Meeting, 17th September 2013

4. Private copying levies

As the UK Government's current proposals for a private copying exception do not comply with EU legislation, we doubt if there is anything which the UK can usefully say on this. We would welcome any move by the UK to bring its proposals into line with EU legislation. In particular, it is our view that any exception for private copying must provide fair compensation for rights holders.

5. Access to Europe's cultural heritage and fostering media plurality

The BCC welcomes the Commission's intention to improve access to European cultural heritage and foster media plurality. The BCC has itself been pro-active on the issue of Orphan Works and first presented its own proposal for an Orphan Works Licensing Scheme to IPO in 2008.⁷

6. Performers' rights

The BCC would welcome UK Government encouragement of:-

- Speedy introduction of the Beijing Treaty with the addition of the term of protection in audiovisual productions being increased to 70 years to match the increase in term for sound recordings;
- Strengthening of performers' moral rights, part of which should be an unwaivable right for a performer to be identified with their performance;
- One area which has not been harmonised by European legislation is moral rights; we ask IPO to work with their European colleagues to assess the

⁶ <http://www.britishcopyright.org/page/276/principles-of-collective-management-organisations-codes-of-conduct/>

⁷ <http://www.britishcopyright.org/page/225/licensing-of-orphan-works/>

impact of further harmonisation of moral rights.

7. Audio visual works

The BCC believes that greater understanding of the economics behind application of new on-line business models is needed to improve understanding of the way in which existing copyright law supports the delivery of audio-visual works in ways that provide choice and innovation within new business models.

Improving understanding of the way in which the communication to the public right (involving electronic transmission) should be distinguished from the economic effect of what is done with an audio-visual work after reception (whether in the form of retransmission, reuse or storage for subsequent reuse) will be of increasing economic importance. The work of the Licences for Europe dialogue is seen as particularly important in this regard.

8. Artists' resale right

The ARR Directive has harmonised the Artist's Resale Right successfully across Member States and the right has been fully implemented into UK law. The BCC supports the view of its members representing creators of artistic works, which is that the Artist's Resale Right Directive should not be re-opened and any further focus should be on the adoption of the right universally.

9. Enhanced fight against counterfeiting and piracy

The BCC supports the active role which UK Government takes in the fight against counterfeiting and piracy and welcomes its involvement in initiatives at EU and international level. The BCC would like to see more action to address the commercial impact of internet intermediaries and improvements to the ease with which online infringement can be discovered and accessed. We also ask the UK Government to keep up pressure for the expansion of the European Observatory on Counterfeiting and Piracy.

10. Enhancing IP protection in non-EU countries

The BCC welcomes IPOs recent involvement in promoting awareness, respect and enhanced protection for IP at international level through the appointment of IP attaches in key developing economies. We hope it will support and encourage the EU in any similar initiatives.

Of the four areas highlighted by the European Commission for their "Licences for Europe" dialogues, are there particular points that you would like to raise?

The BCC welcomes IPOs recent involvement in promoting awareness, respect and enhanced protection for IP at international level through the appointment of IP attachés in key developing economies. We hope it will support and encourage the EU in any similar initiatives.

Cross-border accessibility and portability of services

The BCC's view is that this is a matter determined by commercial agreement and not by the copyright framework. The fact that particular services are not available in a certain country is not predicated by copyright law but by commercial choices made by the businesses involved.

User-generated content and licensing for small-scale users of protected material

See 4. above and our paper at Appendix III. The BCC would welcome positive support and promotion at European level of digital licensing solutions via initiatives such as the Linked Content Coalition and the Copyright Hub.

Audiovisual sector and cultural heritage

We have already commented on access to cultural heritage under point 5 above.

Text and data mining for scientific research purposes

The BCC has previously questioned the need for copyright exceptions to support text and data mining for scientific research purposes, when licensing solutions can be provided that will address the issue.

In particular, further dialogue is needed to ensure that those who wish to mine the works of others have lawful access to the works to be mined, that the mining is only carried out for research that is neither directly nor indirectly commercial, that appropriate acknowledgement of sources are provided and the technological protection measures are not circumvented when mining occurs.

It is to be hoped that the UK Government will relay the concerns properly raised in the context of the recent Technical Review of draft UK Regulations touching on this subject

for consideration in any further debate at EU level.

As far as practical licensing solutions are concerned, UK publisher organisations have been active participants in the Licences for Europe Stakeholder Dialogue on Text and Data Mining in the course of this dialogue a number of innovating licensing solutions for Text and Data Mining have been presented to the European Commission including PLSclear and the Prospect service, developed by the scholarly publishing community. More information on these and more detailed response on these points can be found in the response to this consultation by our members ALPSPS and PLS. The BCC would welcome UK Government support for such solutions which are designed to resolve the logistical issues entailed in Text and Data Mining as well as providing a realistic alternative to introduction of an exception to copyright linked to future third party data mining of the content of right holders.

APPENDIX I - The British Copyright Council represents:-

BCC Members	Membership numbers	President/Chairman
Artists Collecting Society (ACS)	800 artists and estates	Harriet Bridgeman, Chairman
Association of Authors' Agents	99 agencies representing authors and other rights holders	Peter Straus Rogers, Coleridge & White Ltd Chairman
Association of Illustrators (AOI)	1,450 illustrators and artists	Andrew Coningsby, Chairman
Association of Learned and Professional Society Publishers (ALPSP)	210 publishers	Simon Ross Cambridge University Press Chairman
Association of Photographers (AOP)	950 professional photographers	-
Authors' Licensing & Collecting Society	85,000 authors	Maureen Duffy, FRSL, President
BPI (British Recorded Music Industry) Ltd	300 independent music companies and the 3 UK major record companies	Tony Wadsworth, CBE, Chairman
British Academy of Songwriters & Composers	2,000 composers and songwriters	Simon Darlow Chairman
British Association of Picture Libraries & Agencies	300 agencies and libraries	David Redfern President
British Equity Collecting Society (BECS)	CMO with 27,000 performer members	Jean Rogers Chairman
British Institute of Professional Photography (BIPP)	3,200 professional photographers	Roy Meiklejon, FBIPP President
Broadcasting, Entertainment, Cinematograph & Theatre Union (BECTU)	25,000 including staff, contract and freelance workers in the audiovisual sector	Christine Bond President
Chartered Institute of Journalists (CIOJ)	2000 members	Charlie Harris President
Copyright Licensing Agency (CLA)	CMO with 2 members and 1 agency agreement	Tom Bradley Independent Chairman
Design and Artists Copyright Society (DACS)	CMO representing 60,000 visual artists & artists estates worldwide	Mark Stephens CBE Chairman
Directors UK	CMO and professional body with 4500 director members	Paul Greengrass President
Educational Recording Agency Ltd (ERA)	CMO with 20 members including broadcasters	Deborah Annetts Chairman
Equity	36,000 performers	Malcolm Sinclair President
Incorporated Society of Musicians (ISM)	6500 musicians	Richard Hallam MBE President
Music Publishers Association (MPA)	259 companies	Chris Butler Chairman
Musicians' Union	30,500 musicians and performers	Kathy Dyson Chairman
National Union of Journalists (NUJ)	32,000 staff, contract and freelance journalists	Barry McGall President
PPL	CMO with 65,000 record company and musician members	Fran Nevrla President
Professional Publishers Association (PPA)	250 publisher members	Kevin Hands Chairman
PRS for Music (MCPS & PRS)	CMO with 100,000 composer, author and publisher members	Guy Fletcher President
Publishers Licensing Society (PLS)	CMO with 2,325 publisher members	Mark Bide Chairman
The Publishers Association	200 publishing companies	Nick Fowler, Elsevier, President
The Royal Photographic Society	11,000 photographers	Roy Robertson Hon FRPS, President
The Society of Authors	9,000 authors	Philip Pullman, President
The Writers' Guild of Great Britain	2,100 authors	Olivia Hetreed, President

FAIR DEALING/FAIR USE

The purpose of this note is to summarise the information which we have been able to gather relating to: the number of UK Fair Dealing cases and the number of US Fair Use cases since 1 January 1978; and the cost of copyright litigation in the UK and in the US.

As will be seen, the information is far from complete. However, it does shed some light on these issues.

Number of UK Fair Dealing Cases

This was the most straightforward area to research. In our research, we have looked at decisions made on or after 1 January 1978, which is the date on which the US Copyright Act 1976 came into force and introduced for the first time in the US a statutory Fair Use regime.

On 1 January 1978, the Copyright Act 1956 (“the 1956 Act”) was still in force in the UK and it remained in force until 31 July 1989. On 1 August 1989, the Copyright, Designs and Patents Act 1988 (“the 1988 Act”) came into force in the UK and it is still in force, although it has been amended on several occasions since 1989.

Under both the 1956 Act and the 1988 Act there were/are a number of exceptions to copyright. In researching the cases, we have drawn a distinction between cases decided which involved the Fair Dealing provisions and those which involve other exceptions. Under the 1988 Act, there are 64 sections which set out the “act permitted in relation to copyright works”. However, only two of these (Section 29 and 30) deal with Fair Dealing as such. Under these sections, Fair Dealing is permitted for the purposes of private study (which must not be directly or indirectly for a commercial purpose) or non-commercial research, criticism or review or the reporting of current events.

The remaining exceptions (Sections 28 and 31 to 76) cover a wide range of activities such as, for example, recording for purposes of time shifting, incidental recording for purposes of broadcast etc. There was a similar regime in the 1956 Act, only with fewer exceptions. The reason that we have included the other exceptions is that some of them would be covered in the US by the US Fair Use legislation.

The number of reported decisions in the UK since 1 January 1978 is as follows:

- (i) Number of Fair Dealing cases decided under the 1956 Act: 4
- (ii) Number of Fair Dealing cases decided under the 1988 Act: 17
- (iii) Number of other exceptions cases decided under the 1956 Act: 13
- (iv) Number of other exceptions cases decided under the 1988 Act: 40⁸⁹

The total number of cases decided¹⁰ during the period is 67 or approximately two per year. We can provide lists of these cases (together with short summaries) if this would be of use.

⁸ Five of these cases also dealt with fair dealing so are included in that total as well. To that extent, there is duplication between the two totals. Those five cases are: *Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2010] EWHC 3099 (Ch); *SAS Institute Inc v World Programming Ltd* [2010] EWHC 1829 (Ch); *HM Stationery Office v Green Amps Ltd* [2007] EWHC 2755 (Ch); *Universities U.K. Ltd v Copyright Licensing Agency Ltd* [2002] E.M.L.R. 35; *Newspaper Licensing Agency Ltd v Marks & Spencer Plc* [2001] Ch. 257

⁹ Two of these cases also considered the 1956 Act so are included in that total as well. To that extent, there is duplication between the two totals. Those two cases are: *Jules Rimet Cup Ltd v Football Association Ltd* [2007] EWHC 2376; and *Lucasfilm Ltd v Ainsworth* [2009] EWCA Civ 1328.

Number of Fair Use Cases in the US

It has proved much more difficult to obtain details of the number of reported decisions in Fair Use cases in the US.

We have been able to establish that there were not less than the following numbers of such decisions during the years ended June as set out below:

June 2010	- 8
June 2009	- 8
June 2008	- 7
June 2007	- 8

In an article entitled “An Empirical Study of U.S. Copyright Fair Use Opinions, 1978 – 2005”, published in the University of Pennsylvania Law Review – January 2008 Vol. 156 No. 3 Barton Beebe identified 306 reported opinions from 215 cases. This means that during the 28 years from 1 January 1978 to 31 December 2005 there was an average of just under 11 reported opinions per year.

Legal Costs and Expenses of UK Fair Dealing Case

It is difficult to generalise. The costs of any particular case will depend on a number of different factors, such as the amount of evidence, whether it is disputed, the complexity of the case, prospects of preliminary references to the ECJ and so on. However, the costs of bringing or defending a copyright case which goes to a full trial and a reported decision is likely to be somewhere between £250,000 and £500,000 (excluding any appeals). The newly reinvigorated Patents County Court (which has a cap on recoverable costs of £50,000 and is intended to provide a more streamlined judicial process) may mean that this figure may drop for the smaller and less complicated cases.

Legal Costs and Expenses of US Fair Use Case

A report by the American Intellectual Property Law Association estimates that the average cost to defend a copyright case is just under \$1 million. [Cited at page 42 in an article by Giuseppina D’Agostino entitled “Healing Fair Dealing? A Comparative Copyright Analysis of Canadian Fair Dealing to UK Fair Dealing and US Fair Use – published in Comparative Research in Law & Political Economy 2007 (Vol: 03 No. 04)].

This is clearly an average figure and some cases will be more expensive and some less. For example, in the Google Books litigation, the latest draft of the Amended Settlement Agreement provides that Google will pay \$30 million towards the Plaintiffs’ attorneys fees and costs. The Google Books case was a class action, involved a large number of parties and was extremely complex. Nevertheless, it was a Fair Use case and does demonstrate how difficult, complex and expensive US litigation involving Fair Use can be.

Dated: 22 February 2011

¹⁰ Excluding the duplication referred to above.

APPENDIX III

Consumer adaptation of creative content**Paper for BCC–IPO Joint Consultative Meeting
on 17 September 2013****Summary and key recommendations**

- Consumer adaptation of creative content is a rapidly developing, complex area. Licensing user-generated content (UGC) is an important and growing source of revenue for UK creators and businesses.
- Any regulatory intervention in these markets should be preceded by thorough impartial well-evidenced research.
- Areas in which research could valuably be carried out:
 1. Consumer understanding of copyright and licensing and to consider whether improvement of information is required.
 2. Whether there are gaps in licensing, weaknesses in website data provision to collecting societies or website takedown procedures and whether improvements should be sought.
 3. Whether the rights of consumers in their own creative content are adequately protected.

Purpose and scope of paper

- Consumer sharing of creative content has reached new proportions as technology allows users to create, copy and upload works to public platforms. The web has enabled a many-to-many information and entertainment infrastructure. Consequently new legal issues have arisen of widespread relevance. Some governments are studying the issues. An EU ‘Licences for Europe’ working group is currently exploring problems and solutions related to UGC. The Lisbon Council, a think tank sponsored by Google, has called for an exception in any EU copyright review.
- This paper explores copyright and moral rights issues relating to adaptation of creative content, including a practical look at licensing arrangements. Although adaptation of copyright content may take place offline, the paper focuses on the internet, where the explosion of activity is taking place.

Definition of ‘UGC’ and characteristics of the UGC world

- ‘UGC’ refers to many types of diverse content on the internet generated by users. The concept of ‘UGC’ is imprecise, a ‘conceptual cloud’ (Gervais, ‘Tangled Web of UGC’, 2009). The concept of ‘UGC’ potentially includes content uploaded by users that is 100% their own creation, or 100% someone else’s creation or a mix of the two – this paper focuses on the latter type. A recent Ofcom report indicates that the dominant and growing area of UGC is ‘social curation’ (i.e. aggregating and commenting on other’s content); the creation of mash-ups, by contrast, is a minority activity, of more interest to commentators on digital media than the general populace, its importance overstated because it makes for good copy (‘The Value of User-Generated Content’, Turner Hopkins, 2013, p. 54).
- UGC – whether transformative or not – involves a wide range of original creative content, including photographs, music, the written word (ranging from newspaper articles, to books, to TV scripts) and film.

- Technologically, UGC is diverse: users may contribute to wikis, upload a mash-up video, link in various ways to other content, create content in virtual worlds etc. Typically UGC is considered to be content created on an amateur basis, though it is difficult to draw a sharp line between amateur and professional activities.
- In many cases, even where copyright content is mixed, UGC does not involve transforming the original content – merely using part of it, or juxtaposing it or synchronizing it with other content.
- Typically, consumers (i.e. members of the public) upload content to a hosting website maintained by another party (though this is not necessarily the case).
- Some UGC sites are licensed; others are not. UGC on YouTube is licensed by rightholders, who also share advertising revenues from UGC content. Amazon's fan-fiction platform Kindle Worlds is also licensed. Business models and licensing opportunities are varied and fast-moving. However, some other sites are reluctant to take licences on the grounds that they have no liability for user content under the Hosting Defence of the E-Commerce Directive or DMCA Safe Harbor.
- As well as B2B licences, consumers license other consumers to adapt their own creative content via Creative Commons licences or via the terms of sites. It is estimated that more than 400 million works are licensed under Creative Commons. Some Creative Commons licences permit derivative works and others do not, so members of the public can (and do) exercise control over whether they are permitting transformative uses of their works or not. A hundred hours of video are uploaded to YouTube every minute subject to a licence that gives other users the right to prepare derivative works – the original uploader can terminate this licence by removing his video.
- UGC web services are extremely popular in the UK. For example, there are 33 million active Facebook web users in the UK.

Legal framework

- Copyright law gives authors exclusive rights in their creative works ('restricted acts') and also moral rights. Restricted acts involved in UGC include adaptation, reproduction and communication to the public rights. Where UGC is created or shared without the relevant copyright owner's permission or a relevant copyright exception, the consumer and possibly the website infringe copyright. The ways in which content may use pre-existing content is varied, so gives rise to a variety of legal analyses: UGC may creatively rework the original work, use part of a work or integrate a work with another work.
- The Berne Convention includes a right of adaptation. The Copyright Directive does not include an express adaptation right. The UK's Copyright, Designs and Patents Act 1988 includes an adaptation right. Typically, transformative uses are deemed use of a 'substantial part' of the original work in UK law.
- Sometimes works are created collaboratively online, resulting in works of joint authorship (e.g. www.indabamusic.com/sessions).
- UGC may raise moral rights issues, these rights under UK law being the author's right of identity and the right to prevent degradation of the work. Where moral rights have been waived or not asserted they provide no protection to authors in UK law. However, in some countries moral rights cannot be waived. In the UK, for example, film and TV scripts are adapted on video sites but film and TV screenwriters are invariably obliged in their contracts to waive their moral rights.
- Websites may or may not be liable for user content that infringes copyright. Both the EU Hosting Defence and the US DMCA Safe Harbor provide a defence if the site does not have actual knowledge of the infringement though the defence is lost in the US if the site receives a financial benefit from the infringing content.
- Copyright exceptions may apply to some UGC – e.g. news reporting or criticism. In the US, Fair Use can apply to some UGC (but does not automatically apply). Fair Use rules are complex and rapidly evolving and their application to UGC is contested in the courts.

- The rules on UGC are different in different jurisdictions, which have various copyright exceptions and defences. Canada has recently introduced a non-commercial UGC exception. Internet users communicate globally, so the differences between these rules may not always be appreciated by consumers.

Principles

- The opportunity for consumers to create and share derivative content on the internet is valuable and should be supported.
- The development of consumers' creativity is not in opposition to authors' exclusive rights. It is not a question of 'either or'. Consumer adaptations are not prevented by the exercise of exclusive rights. Rather the original author can license the derivative work.
- Consumers who upload derivative content to websites, while using others' copyright content, are creating new copyright content. In that respect, it is important that their rights are also protected.
- The right of authors to object to derivative works on moral rights grounds (or other grounds) should be respected.

Commercial factors

- The main economic beneficiaries of UGC are currently manufacturers of devices and software, ISPs and UGC websites (Ofcom report).
- Use of works in ways that are different from the original publication is a common form of exploitation on which rightholders rely and may be the main commercial exploitation, e.g. film rights in a book, music synchronization rights and merchandising rights. In many cases, UGC can be, and is, licensed.
- Consumer content uploaded to websites may or may not be non-commercial from the perspective of the uploader, but it is often commercial from the perspective of the website. For example, the content may bring viewers to a site or into a service's network of related services, bringing it advertising revenue.
- The fact that content is used for a non-commercial purpose does not necessarily mean that the rightholder does not charge. Creative content is often enjoyed as part of a leisure activity that is 'non-commercial' from the consumer's perspective. Leisure is business for many sectors ranging from holidays to sport.
- Some individual pieces of UGC may be extremely popular and of considerable commercial value (some YouTube uploads have hundreds of millions of views). Others may have very low commercial value. Media businesses, ranging from photography to music, have proactively developed their practices to ensure that licensing is easily accessible and transaction costs are managed economically and proportionately in the changing digital environment.
- The fact that adaptive UGC may involve multiple rightholders is not a prohibitive transaction cost: rightholders have always handled complex right ownership situations and technology is making handling them ever easier.
- Is UGC substitutional for the original? Research carried out by Kris Erickson on parody argued that YouTube parodies are not substitutional. The research found that audiences for the 'parody' versions were much smaller than for the originals, so concluded that they cannot be having a negative effect on how often the original is viewed. This conclusion does not appear to be justified: even if the parody was relatively less viewed, it could still have been detracting from views of the original (or other original material) to that extent.

Possible problem areas relating to derivative content

- The starting point for problem identification must be a thorough evidence base. The policy debate about copyright law is often highly ideological and politicized, rather than based on actual needs and problems. Full research should be carried out before assumptions are made about the nature and scope of problems. Some possible issues for investigation are outlined below.
- Some websites do not accept that they need a licence to cover user content because of the Hosting Defence of the E-Commerce Directive and DMCA Safe Harbor. Therefore, consumers may wittingly or unwittingly be infringing copyright when they upload derivative content. Though these defences may in some cases shield sites from liability, consideration could be given to whether consumers can be better informed about which sites carry a licence and which do not, so consumers can make an informed choice about whether to make use of a site that allows them to upload content legally or one that would result in them infringing copyright.
- One problem may be that consumers do not know where to obtain a licence, even though there is a simple mechanism in existence.
- Members of the public who create UGC may not understand how copyright law applies to it. There is a widespread presumption that 'if it's on the web it's free'. Lawrence Lessig has noted on many occasions that Fair Use is impossibly complex and burdensome for amateurs to negotiate and is the preserve of multinational corporations.
- It is possible that there are certain uses for which licences are not currently easily obtainable. To what extent this is a real problem in practice should be tested by an extensive evidence base. Licensing complexity is sometimes overstated. The 2009 government strategy document © *the way ahead* took the example of clearing music in a wedding video to illustrate the complexity of rights clearance. However, MCPS offers a licence for this purpose covering millions of works, available online for £15.
- In order to distribute remuneration to the relevant rightholders, collective management organizations are dependent on the quality of the data that is provided by sites. Sometimes that information is inaccurate or incomplete.
- Where UGC is not licensed, the process of having it taken down from the site can be onerous, particularly if the content is reposted again after it has been taken down.
- Concerns have been expressed at how website terms may restrict the rights or profits of the consumer creator vis-à-vis the website. For example, the terms of Myspace, Facebook, Twitter and Instagram have all met with public protest.

Possible solutions

If evidence bears out the possible problems above, possible solutions that could be considered:

- A legal obligation for websites to state clearly whether they are or are not licensed for user content.
- Improving information about where to obtain licences for small-scale uses, e.g. via the Copyright Hub.
- Improving public understanding of copyright law, both understanding of the rules and of the value of intellectual property.
- If it is found that there are gaps in licensing of consumer UGC, consideration should be given as to how to license it in an efficient way.
- Clarify the obligation on websites to provide collective management organizations with good quality data to facilitate distribution to rightowners. Promote the adoption of state-of-the-art content-recognition technologies to help improve the accuracy of usage information.
- Improve efficiency of takedown procedures, in particular so that notice and takedown means 'notice and stay down'.
- Application of the Unfair Contract Terms Act 1977 to copyright consumer contracts.