

## Consumer adaptation of creative content

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### 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](http://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 rightowner 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 rightowners is not a prohibitive transaction cost: rightowners 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 rightholders. 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.

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