



The Canadian UGC Exception: An Attempt to Revolutionise Fair Use Defence for User Generated Content

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Part I of the research paper attempts to introduce the conceptual understanding of user generated content and the copyright issues related to UGC, following which Part II will present a critical analysis of the problems contained in the Fair use defence as enshrined in the United States legislation. Part III of the research paper will try to argue as to why the non-commercial UGC exception as enshrined in Section 29.21 of the Canadian Copyright acts till remains the much-needed answer which UGC has been looking for so long now, along with a few concluding thoughts. Throughout the paper, the author tries to argue that the new exception, namely the non-commercial user generated exception is the much-needed UGC protection with respect to the commercial aspect of any user created content on online platforms.

Keywords: Intellectual Property, Fair use Defence, User Generated Content, Copyright Law

User generated content is practically all around us. In today's age of ever evolving technology, expressing oneself through content on the internet has become a norm that nobody can escape from. Since anyone can post content anonymously on the internet and there isn't usually a way to check the source or the identity of the person posting content, this makes it possible for content fans to find a larger market.

As such if history is looked at, creation through the act of borrowing is not a recent problem or issue as authors have been facing the dilemma as to where to draw the line from the very beginning. Samuelson¹ even suggested that iterative copying should be allowed for useful information-access tools or as Professor Jane² puts – “copying from one source is copying but from multiple sources is research.” A long trajectory of borrowing practices is well documented in music, literature, and the visual arts. But what is new about the practice of borrowing is an increased tension between copying and content owners. On the one hand, more and more individuals are now creatively engaging with cultural objects in an increasingly connected and networked environment. At the same time, content owners have become increasingly protective of their property rights as they resort to the use of technological protection measures, the issue of take-down notices, and the threat of litigation.³

This is where the digital age comes in and makes things more complicated. The digital economy has changed the way works are made and used in a big way. There are now many new ways to make creative content and access, share, store, and use copyrighted content.⁴ These new ways have flooded the internet.

User Generated Content

Although User generated content (hereinafter, referred to as ‘UGC’) is a term that has been used to describe a wide range of Internet activities, from blogging to file-sharing, this research paper attempts to define UGC from the lens of the “type of UGC on which the Bill C-11 amendments to the Canadian Copyright Act are focused, which is content that is created by users and that incorporates, to a greater or lesser extent, copyright-protected works by others.”⁵

UGC is content created in various forms ranging from texts, videos, audios or images on online platforms by consumers or customers. The brand per se does not create it. It's usually content that an individual or group makes on their own time and shares through an online platform. It includes things like simple text, reviews or surveys, wikis, social networking, classified ads, link exchanges, collaborative content creation, submission contests, “online worlds,” and file exchanges. More and more businesses, both online and offline, are looking for UGC through contests and other ways to “crowd source” creative content that can be used in

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advertising and other commercial content like music, videos, and games.⁶

UGC flows from the twin phenomena of de-professionalization and disintermediation. Today, more advanced, user-friendly, and increasingly portable technologies and software are readily available, allowing non-professionals (without any specialised training or soft skills) to engage in a variety of activities that were once the exclusive domain of professionals, such as filmmaking, recording or remixing music, and information compilation. Moreover, digitization, the Internet, and the emergence of social media have made it possible to distribute user-created works to a global audience without the need for traditional intermediaries in content publication and distribution.⁷ The result is a profoundly different environment for the creation and dissemination of “works” of all kinds within a rapidly transforming normative environment.

UGC and the Growing Concerns over Copyright Protection

Due to the fact that UGC involves more than two parties and applies to various stakeholders such as website owners, copyright owners, employers, and employees, etc., issues such as ownership and licence matters, personal privacy and copyright, revenue generation, hate speech or harassment, inaccurate statements, and campaign hijacking are particularly pertinent to legislate.⁸ Furthermore, the gradual but significant transformation in how people create and interact with intellectual property has sparked a debate regarding the necessity of reforming certain areas of copyright law. One issue has to do with figuring out when copyright material should be made freely available for uses that help society as long as it doesn't hurt the copyright holder's business. For innovation to happen, we need a copyright system that is not tied to any one technology and is flexible enough to adapt to new and unanticipated business and consumer practises.⁴

The copyright issues with UGC are not that it is authored from already published works and hence infringement. That has been happening from the very beginning (as stated above) following which it has either been tolerated⁹ or it has been next to impossible to detect infringement in personal spaces. In the context of UGC, Lee discusses the ‘phenomenon of ‘warming,’ in which — unlike ‘chilling’ — users are emboldened to make unauthorized uses of copyright-protected works based on seeing what appears to be an increasingly accepted practice.¹⁰ What is new is the

scale of this activity, along with its social, political and economic consequences.¹¹ Copyright law expects that people seek prior permission for uses of copyright-protected works outside unless a limitation or exception applies.¹⁰ However, in modern practise, this condition is generally impractical, as the transaction costs nearly always outweigh any potential financial advantage from exploiting the content. In addition, many users create content for non-commercial purposes as a form of self-expression.

Consumptive v Transformative UGC

With respect to how the current copyrighted work is utilised, Tushnet argues that as opposed to consuming a work for its entertainment value, it is transformative to use a work as a building block for an argument or as an expression of the author's imagination.¹² Tushnet's distinction between consumptive and transformative uses is crucial, and it is reflected in the language of Section 29.21 itself.³ Transformative UGC plays an important role in the discussion further. This is majorly because of the due importance given to transformative factor (first factor) in the fair use defence over commercialisation aspect (fourth factor; as is explained in detail in Part II).¹³ But the developing link between art and commercialism renders invalid the argument that art exists solely for commercial gain. As commercialism in artistic works increases, this boundary between commercial and non-commercial uses blurs, making it harder to determine the primary purpose in creating the work.¹⁴

The Fair Use Defence

Fair Use as a Questionable Defence

Various countries like Singapore, Israel, and South Korea adopted the fair use approach after the United States. Instead of authorising specific uses of copyrighted material, fair use evaluates the nature of each usage against a set of standards.⁴ Under general myths with respect to fair use defence, YouTube also points out that “Similarly, ‘non-profit’ uses are favoured in the fair use analysis, but it's not an automatic defence by itself.”¹⁴

That being said, it is essential to understand fair use from a YouTube perspective. According to YouTube, “fair use is a legal doctrine that says you can reuse copyright-protected material under certain circumstances without getting permission from the copyright owner.”¹⁴ YouTube also notes that

“commercial uses are less likely to be considered fair, though it’s possible to monetize a video and still take advantage of the fair use defence.”¹⁴

First Statutory Factor: Relevant Factor as well as the Relevant Problem

Fair use is an exception to the law about copyright that lets someone use someone else's work without getting permission from the owner of the copyright. When deciding if a certain use of a work is fair use, a court will look at and weigh four factors, such as:

- (i) The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes
- (ii) The nature of the copyrighted work
- (iii) The amount and substantiality of the portion used in relation to the copyrighted work as a whole
- (iv) The effect of the use upon the potential market for or value of the copyrighted work

United States Fair use jurisprudence rests due importance on the transformative nature of the work which is enshrined in the first statutory factor of fair use titled ‘purpose & character of the use’. Essentially, a transformative work is one that imbues the original “with a further purpose or different character, altering the first with new expression, meaning or message.” According to the Supreme Court in *Campbell v Acuff-Rose Music Inc*¹⁵, “transformative factor not only occupies the core of the fair use doctrine” but also reduces the importance of all other factors such that “the more transformative the new work, the less will be the significance of other factors, like commercialization, that may weigh against a finding of fair use”¹⁶. The defence, which requires “an examination of non-exhaustive but a compulsory list of five factors, is applicable to all uses except for criticism or review¹⁷ and reporting of current events.”¹⁶

One of the biggest problems with the fair use doctrine is that it limits how much you can use. It is difficult to precisely calculate the economic impact of a transition from fair dealing to fair usage. Due to the varying interpretations of fair use, it is difficult to compare copyright laws between nations and to rate the level of flexibility allowed in each country. This makes it difficult to test whether fair use has a statistically significant impact on economic growth. Copyright is only one of several factors that influence economic progress. Ultimately, market demand, not

legislation, defines the estimated worth of a work. Second, economic measures such as the effect of fair use on education, training, or consumer surplus are not captured by standard economic measures, and there are numerous potential non-market benefits and results of fair use that are best addressed qualitatively because they are not captured by standard economic measures.⁴

Fair Use Defence

A discussion of commercial aspect invites the mention of the landmark judgment *Harper & Row*.¹⁸ Justice O’Connor defined ‘commercial’ as a ‘form of exploitation where the user profits without paying the customary price’. The entire purpose of the fair use doctrine is to allow the use of others’ works without the requirement of a payment of fee. Therefore, legislative inclusion of a failure to pay the customary price as part of the definition is circular. Second, Justice O’Connor definition of ‘commercial’ is based on the underlying flawed assumption that very few activities in the area of copyright are undertaken with no intention of earning a profit. Copyright law was enacted to give people the incentive to create, and a large part of that incentive is monetary. Therefore, in practical reality, important components like the ‘profit’ and ‘customary price’ do not seem to be important in Justice O’Connor’s test and are ineffective in defining a commercial use.¹⁹

Further, the phrase ‘the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes’ suggests that such changes should be considered in the light of the commerciality of the secondary infringing work. Although, this examination overlaps with the fourth factor on market impact and whether the secondary infringing works serves a commercial or non-profit purpose is a separate consideration from ‘purpose and character of the use’.¹⁶ Courts have been repeatedly reported to not impose a strict distinction between ‘purpose’ and ‘character’, preferring to assess whether the secondary work was sufficiently transformative according to the guidelines laid down by the Supreme Court in *Campbell*.¹⁶

It is also interesting to note that a tension exists between the copyright holder's property rights and the requirement for unrestricted access to works for the development of new works. Although the evaluation of fairness is fact-dependent, judicial patterns indicate that the utilitarian goals of copyright law frequently

transcend the financial interests of the defence.²⁰ An example can be given in the form of artworks which generate huge revenue via public auctions and commercial advertising, yet they escape liability.²¹ It is argued that at the face of it, such an interpretation of not giving due importance to transformative factor rather than monetization potential enables Courts to protect, as non-commercial uses, expressive works that use a work to generate commercial profit because their purpose is not “purely commercial”²¹ which is taken care of in a more balanced manner by the Canadian UGC exception (as explained in detail in Part III).

Canadian UGC Exception: The Way Forward

Section 29.21: The Canadian Non-Commercial UGC Exception

With the growing concerns over UGC protection, Canada introduced a relatively dramatic exception, which went significantly further than many other jurisdictions in regard to user rights: the UGC exception, also known as the ‘YouTube’ exception.²² The clause establishes a legal safe harbour for makers of non-commercial UGC such as remixed music, mash up films, and home movies with commercial music playing in the background.²³ This kind of an exception can be said to be oriented towards the second category in Gervais’ taxonomy, content that is created by users and that incorporates to a greater or lesser extent, copyright works by others.²⁴ The non-commercial user-generated content exception to copyright infringement is the widest of the four new user provisions in terms of the variety of permissible acts that may be performed in relation to pre-existing copyright works.²⁵

The non-commercial provision enacted in the Copyright Modernization Act strongly resembles the UGC clause in Bill C-11’s immediate predecessor, Bill C-32, An Act to amend the Copyright Act, which died on the Order Paper.¹⁶ During parliamentary debates, this provision has been referred to as the “YouTube” or “mashup exception”,²⁷ and has also been suggested to be actually helpful for the copyright owner.²⁸

User Generated Content & Commercialisation

Instagram is one of the most relevant online platforms when it comes to UGC. Instagram alone had an estimated 2 billion monthly users in 2021²⁹ which speaks volumes about the potential financial benefits in terms of UGC. According to Halbert,³⁰

UGC is much more than just creative works. It is work that “generally disrupts the commercial paradigm.” She observes that the user-generated world can and does play with the commodified products of the culture industry by appropriating common cultural symbols and remaking them as personally meaningful connections³¹; consequently, an examination of the commercial aspect and monetization potentials of UGC becomes even more crucial.

As per Merriam-Webster’s dictionary, the definition of “commercial” includes work intended for commerce.³² It is possible to interpret this to mean that the person who creates a work must have an obvious intention to profit and make money from it. The Canadian Copyright Act defines ‘commercially available’ but never a ‘commercial use’. It highlights that ‘a commercially available’ work must be:

- a) available in the concerned and relevant market within a reasonable time for a reasonable price without putting in much efforts to locate; or
- b) for which a license to reproduce, perform in public or communicate to the public by telecommunication is available from a collective society within a reasonable time and or a reasonable price and may be located with reasonable effort.³³

This does not recognise that commercially available works are intended to generate revenue; a suitable price is never established and could be zero. Frequently, works of UGC that are defined as non-commercial UGC under Section 29.21 have the potential for future commercial value, but may not have been created with commercial intent. Rosen explains this through ‘Stereotronic’,³⁴ which is an interesting case wherein Kevin becomes capable of making a living producing original music through bootleg mixing. Commercial benefits in terms of ‘selling his original productions and receiving live show booking requests’ poses a concern here. Additionally, the question of ‘substantial adverse effect on the exploitation or potential exploitation of the original work and recording’ comes into picture.

Section 29.21 (1)(a) clearly states that “*non-commercial UGC requires that the use of, or authorization to disseminate, the new work or other subject-matter must be done solely for non-commercial purposes.*” From the dictionary definition of ‘commercial’ point of view (as explained above), it is argued that there should be no ‘intent to profit’

which is considered by the Canadian approach. The argument that listeners will not purchase the original track using the bootleg remix as a substitute, having an adverse effect on its exploitation as specified in subsection (d), is difficult to prove (as explained further in detail). There must be a clear correlation between the bootleg remix's popularity and a drop in sales, licencing, or other potential revenue sources. Even Nevertheless, bootleg remixes can generate visibility for the artist who created the original material, which may result in a greater exploitation potential. It is suggested that a combined reading of Sections 29.21(1)(a) and 29.21(1)(d) includes a fair dealing analysis and a degree-based concept of a commercial purpose.⁵

Second Condition Read with the fifth Condition; Parliament's Intention

The shortcoming in Paragraph 29.21(1)(a) “the use of, or the authorization to disseminate, the new work or other subject-matter is done solely for non-commercial purposes” purports to create a bright-line distinction between commercial and non-commercial purpose.”³³ As Daniel Gervais³⁵ suggests that a restrictive interpretation of the exclusion restricting it to non-commercial uses would afford only minimal protection because sites like YouTube and many blogs contain commercial components.³⁶ But the term “YouTube exception” was widely utilized during the discussions on Bills C-32 and C-11. It is stated that Parliament did not intend for YouTube postings to be commercial and therefore ineligible. In its Backgrounder on Bill C-31, the government summarized the provisions as follows:

“Canadians will also be able to incorporate existing copyrighted material in the creation of new works, such as Internet mash-ups, as long as:

- i. It is done for non-commercial purposes*
- ii. The existing materials was legitimately acquired; and*
- iii. The work they create is not a substitute for the original material or does not have a substantial negative impact on the markets for the original material, or on the creator's reputation.”³⁶*

Direct references to “YouTube” were made by the government prior to the passage of Bill C-11 with respect to the proposed exception. A memorandum for use by ministers in responding to questions for legislative committees titled “Questions and Answers — Bill C-32: For Ministers' Appearance before the

Legislative Committee” contains a heading entitled “Copyright Owner Concerns around the UGC Exception.”³⁷ It asks the question: “The YouTube/mash-up exception opens another door to piracy. Why did the government create such a broad and undefined exception?” In a separate document providing a clause-by-clause analysis, the government explicitly indicates posting a video to YouTube as an example of activity that could fall under the exception. In explaining the rationale for the new section, the analysis stated: “The individual who creates this ‘user-generated content’ can also authorize its dissemination by an intermediary (e.g., YouTube).”³⁸ These documents provide compelling evidence that a posting to YouTube or similar commercial website should not necessarily be a disqualifying act under Section 29.21(a).³

Desire for Monetary Gain

Often, it is assumed that content is generated primarily for monetization basis, but commercial purposes do not always drive the creation of such works, and thus providing proper incentives and protection for them requires treating them as non-commercial, distinct from the platform on which they reside.³⁹ Moreover, Trosow argues that in situations where “scholars might argue that the exception would not apply if the UGC begins as a wholly non-commercial project, such as a school project or a hobby-related activity, and later enjoys a measure of commercial success, the exception would still remain intact because it is unusual to suggest that what was a non-infringing act at the time of creation has somehow become an infringing act.”³ Similarly, finding your work as a reference in somebody else's work only invites attention to your own work and not deviate your audience.

From a legislative lens, the Parliament was clearly bent towards ‘amateur UGC’ during creation of the provision. It is argued that considering the quality and reach of such amateur videos, it is safe to assume that it wouldn't create monetary problems for the original author.⁴⁰ Additionally, scholars have tried to deal with the lack of a proper definition of “non-commercial purposes” in the Copyright Act. Hayes and Jacobs suggest that this requirement is “likely to be analysed from the perspective of the intention of the individual creator in a manner similar to the analysis by the Supreme Court in its 2012 decision in *Alberta Education v Canadian Copyright Licensing Agency*.”⁴¹ This creates something of a “conundrum

since entities which host UGC will be able to profit from the dissemination of the works, while the individual creators” of those works are unable to have any commercial purposes for their use or dissemination.⁶

Second Generation Derivatives

Second generation creators are content providers who focus on undeveloped characters or aspects of first generation works like fan fiction. “Minor or background characters may fall on the “idea” side of the idea/expression continuum, while developed ones presumably fall within the “expression” category or side.”⁴

The final criterion listed out in Section 29.21 of the concerned legislation looks at the potential ‘substantial adverse effect [...] financial or otherwise’ on the “exploitation or potential exploitation of the existing work’. Effectively, the clause mandates that new user-generated works not undermine the markets or potential markets for the original works and not act as substitutes for the existing works. It is argued that second generation works typically do not have a substantial adverse effect on first generation works, as explained by Katz⁴² through the example of fan fiction (fan fiction stories do not serve as substitutes for the original franchises that spawn them). Even if second generation works is able to capture the same audience as that of first generation works, it is highly unlikely that it shall stop the audience from buying the first generation works. The well-known argument applicable in the context of personality rights ‘parody/satires only attract attention to the licensed works’⁴³ is relevant in the case of UGC as well. As Katz⁴² points out:

“The likely existence of Star Wars fan fiction exploring Anakin Skywalker’s youth does not seem to have prevented fan fiction readers and writers from watching the Star Wars “prequels”. Fans even read multiple fan fiction stories together with licensed tie-in media offering different perspectives on the same character and time period.”

Conclusion

UGC has proven to take the internet by storm, which also invites humongous attention to explicit policy attention. The Canadian non-commercial UGC exception portrays that while it may be closely related to fair dealing, is not exactly the same. The two defences exist concurrently, and a UGC claimant defending against an infringement lawsuit may assert

either the general fair use right or the UGC exception. But invoking the commercial aspect is satisfied by means of the Canadian approach.

Given its standard-like nature, it is argued that fair use is thought to be ‘vague and indeterminate’; creating a high risk of liability. This ambiguity regarding allowed uses may discourage otherwise valid usage or result in expensive transaction and legal expenses for users attempting to ascertain fairness in unexpected situations. Some have even labelled fair use as “the right to hire a lawyer”, disparaging fair use for its inability to protect amateur creators from large media companies.”⁴⁴ A better solution is to remove the fifth factor from the fair use test to afford adequate protection to UGC generated by private individuals and keep the protection limited to a case-by-case basis for celebrities and business users seeking to commercially exploit original copyrighted works. As of now, the lack of such provisions makes the Canadian UGC exception the right solution with respect to UGC and the commercial aspect.

However, various obstacles must yet be addressed before these benefits can be realised. Despite the revisions to the Copyright Act and the extremely good signals sent by the Supreme Court in the pentalogy, there is still a risk that users will be hesitant to fully embrace their rights.³ The fear of liability for infringement is still very strong. Creating an environment where UGC creators are enabled and encouraged to produce, distribute, and reuse new materials continues to present a challenge to policy-makers. Given the benefits of UGC, it is not enough that they be merely tolerated; they need to be actively encouraged. The addition of section 29.21 to the Copyright Act is a positive step forward.

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