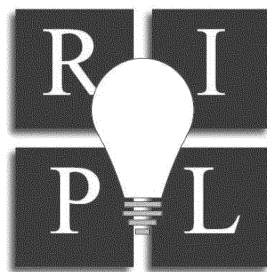


THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW



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

WARREN B. CHIK

ABSTRACT

This article examines user-generated content (“UGC”) 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.

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INTRODUCTION

“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”)² and UGC-related technological services, applications, and web-based 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. This paper proposes 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.

I. BACKGROUND AND OVERVIEW

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 UGC. These internet-based applications and World Wide Web (“WWW”) platforms supply the tools and the forum for the devolvement of creativity to the masses for mass consumption.³ Much of the

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¹ *Person of the Year*, TIME, Dec. 25, 2006, at cover page. Time Magazine was referring to internet users and the contributors of UGC and indirectly, the WWW and UGC platforms that nurture and support such content). It was thus no coincidence that the Time Magazine Person of the Year for 2010 was the founder of Facebook, just such a UGC platform. See Lev Grossman, *Person of the Year 2010: Mark Zuckerberg*, TIME, Dec. 27, 2010, available at http://www.time.com/time/specials/packages/article/0,28804,2036683_2037183,00.html.

² See, e.g., ORG. FOR ECON. CO-OP & DEV., WORKING PARTY IN THE INFORMATION ECONOMY 4 (Apr. 12, 2007) [hereinafter OECD REPORT], available at <http://www.oecd.org/dataoecd/57/14/38393115.pdf>.

³ *Id.*

UGC can be original such as those materials generated through citizen reporting,⁴ but much UGC involves varying degrees of borrowed materials, which are the subject matter of concern and the main focus of this paper.

It is important to establish a clear policy and legal outcome on the status of UGC and the legitimacy of the players in the creation and dissemination chain for UGC. The rise of powerful internet giants like Facebook for social networking,⁵ YouTube for video-sharing,⁶ Wikipedia for collaborative learning,⁷ and online blogs and news sites for citizen-journalism are the engines that power the creation of UGC. On one hand, the proliferation of UGC is in turn redefining human relationships and the way society interacts. On the other hand, there are various impediments to UGC, which restrict interaction. These impediments are a result of restrictive and monopolistic copyright laws, digital rights management (“DRM”), technological protection measures (“TPM”), anti-circumvention laws (“ACL”), and restrictive licensing requirements.

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 paper also examines and explains the significance of UGC that will justify legal accommodation under the copyright regime and the reason for choosing statutory limitation as the ideal solution.

Part II explains UGC and the backdrop of Web 2.0 technology. The role and functions of the user-creator and the assortment of UGC, categorized by social function and type of content are also analyzed in this section. Part III examines how the fair use doctrine, in the United States (“U.S.”) has been applied in order to protect the downstream user-creator from copyright liability. This examination highlights the inadequacies of fair use as the sole instrument of protection for UGC. The discussion also addresses 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 and an increasingly hostile and non-conducive online environment.

Part IV of the paper visits and reviews copyright objectives in the context of the digital age with both a utilitarian outlook and a view to justify reform for statutory UGC. Then a proposed reform will be offered by way of a 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 will be assessed. In the process, policy reasons for the type of UGC and the technological platforms identified for legislative protection are provided.

Inter-disciplinary scholastic studies, the Canadian draft UGC limitation provision, and the various stakeholder principles and guidelines are examined to help identify internet customs relating to UGC and serve also as precedents and authorities for identifying a fair balance of rights between UGC and copyright

⁴ *Id.* at 15.

⁵ *About Facebook*, FACEBOOK, <http://www.facebook.com/facebook?sk=info> (last visited Jan. 30, 2012).

⁶ *About Youtube*, YOUTUBE, http://www.youtube.com/t/about_youtube (last visited Jan. 30, 2012).

⁷ WIKIPEDIA, http://en.wikipedia.org/wiki/Main_Page (last visited Jan. 30, 2012).

ownership. 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. Finally, this paper explores the potential legal and technical hurdles to such proposed approaches and the incidental effects of the proposal on the UGC supply chain.

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. The aim is also to provide an environment conducive for UGC 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 purposes 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. References to a statutory limitation (and other synonyms such as carve out, exclusion, and protection) covers any form of statutory protection from infringement liability unless otherwise specified.

II. USER-GENERATED CONTENT

A. Web 2.0 and the Rise of User-Generated Content

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. This in turn can encourage more active user interaction, involvement and participation in generating content and in creating a less generic interface.⁸ These characteristics are multifaceted and involve: (1) the development of internet-based applications that are more user-centric in design; (2) increasing engagement in user collaboration; and the encouragement of both original and derivative UGC.⁹ Even the non-

⁸ See generally, Tim O'Reilly, *What is Web 2.0: Design Patterns and Business Models for the Next Generation of Software*, 65 COMM. & STRATEGIES, 1, 22 (2007) (coining the term "Web 2.0" and describing it as the "architecture of participation" that produces "rich user experiences").

⁹ See SAMUEL E. TROSOW ET AL., MOBILIZING USER-GENERATED CONTENT FOR CANADA'S DIGITAL ADVANTAGE 5 (Univ. of Ontario, 2010), available at <http://ir.lib.uwo.ca/fimspub/21/> (providing an overview and examples of the complicated overlap between "three major domains" of UGC, small-scale tools and collaborative UGC).

technologically sophisticated internet user can now actively participate and contribute to the information shared on the WWW and interact online with relative ease.¹⁰

The main feature of Web 2.0 is this focus on the decentralization of power, individual engagement, developing a 'digital society,' and 'grassroots culture building' in the internet environment.¹¹ 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 mash-ups, and other user-centric activities involving the user as a creator.¹² 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.¹³ These intermediaries inevitably influence user behavior and thereby shape the development of the WWW, even as they react to user demands.¹⁴

2. User-Centric Trends in Many Jurisdictions

Concomitant with the development of Web 2.0 technology is the increasing awareness of the need for stronger user rights under the copyright regime.¹⁵ One way that the courts have recognized this trend is through more expansive interpretation and application of the fair use exception in the U.S. copyright law.¹⁶ Statutory limitations exist in the copyright laws of other legal systems and countries too. The national legislatures in many countries have reacted in a similar fashion to that of the U.S. by increasing the scope of the statutory limitations.¹⁷ This has been

¹⁰ See, e.g., OECD REPORT, *supra* note 2, at 57–58 (indicating that one of the key factors in in the growth of UGC was the ease of use in creating and publishing).

¹¹ *Id.* at 6, 9.

¹² *Id.* at 15.

¹³ See, e.g., *id.* at 12 (indicating that there are more than 200 million pieces of content on the internet that are under various licenses, indicating the involvement of intermediaries).

¹⁴ See, e.g., Ian Paul, *Grading Facebook's Privacy Changes*, PC WORLD (May 27, 2010), http://www.pcworld.com/article/197339/grading_facebooks_privacy_changes.html (discussing changes Facebook has made to its privacy platform and public responses to the changes).

¹⁵ See OECD REPORT, *supra* note 2, at 7.

¹⁶ See *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1156 (N.D. Cal. 2008) (quoting S. REP. No. 105-190, at 2 (1998)) ("Requiring owners to consider fair use will help 'ensure[] that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will expand' without compromising 'the movies, music, software and literary works that are the fruit of American creative genius.'") (alteration in original).

¹⁷ See, e.g., *CCH Canadian Ltd. v. Law Soc'y of Upper Canada*, [2004] 1 S.C.R. 339, para. 48–60 (Can.) (illustrating limitation on Canadian copyright law as it applies to what is considered "fair dealing"). To those unfamiliar with "fair dealing", it is a narrower limitation to the exclusive rights in copyright law than "fair use" that is more commonly adopted in many common law countries that is purpose-specific (e.g. the use has to be in relation to study or research only) as well as requiring a fairness assessment.

accomplished through liberal judicial interpretations and legislative amendments that incorporate purpose-specific statutory exemptions into the existing provisions.¹⁸

In Canada, for instance, the Canadian Supreme Court judges in the seminal case of *CCH Canadian Ltd. v. Law Soc’y of Upper Canada*¹⁹ enhanced the users’ copyright protection in their oft quoted statement that “[t]he fair dealing exception, like other exceptions in the [Canadian] Copyright Act, is a user’s right.”²⁰ The case involved an internet intermediary and its service that benefitted its patrons.²¹ The Court also effectively extended the protection of the Canadian fair dealing exclusion to the intermediary servicing the user so the user could achieve the benefits of the service.²²

The trend in the U.S. and many other jurisdictions indicates a stronger protection for user interests in the digital age and recognizes the benefits that new forms of technology accords to users.²³ In the U.S., the flexible fair use exception has been used by the courts to cover many new types of uses and purposes.²⁴ The list of fair use factors has been supplemented by newer and more applicable tests over the years, many of which were formulated to deal with technology-related services and functions.²⁵ The exception has also been utilized for the protection against indirect as well as direct infringement claims.²⁶ Moreover, the U.S. has exported the essence of its fair use provision to other jurisdictions, such as Singapore, Israel, and the

¹⁸ See, e.g., Singapore Copyright Act (Act No. 2/1987) Cap. 63, Part IV, div. 6, s. 35, 109 (regulating fair dealing for the purposes of research and study); Jeremy de Beer & Christopher D. Clemmer, *Global Trends in Online Copyright Enforcement: A Non-Neutral Role For Network Intermediaries?*, 49 JURIMETRICS J. 375, 388 (2009) (examining a worldwide shift in laws, policies, and practices pertaining to intermediaries’ role in online copyright enforcement, with emphasis on Australia, Belgium, Canada, China, the European Union, France, Germany, Japan, New Zealand, Singapore, South Korea, the United Kingdom, and the United States).

¹⁹ *CCH Canadian*, 1 S.C.R. 339.

²⁰ *Id.* at para. 48 (“In order to maintain the proper balance between the rights of a copyright owner and users’ interests, it must not be interpreted restrictively.”).

²¹ *Id.* at para. 1.

²² *Id.* at para. 6. 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. *Id.* at paras. 48–60; see also Parveen Esmail, *CCH Canadian Ltd. v. Law Society of Upper Canada: Case Comment on a Landmark Copyright Case*, 10 APPEAL 13, 19 (2005) (noting that the Law Society of Upper Canada decision expanded the scope of the fair dealing exception dramatically).

²³ See, e.g., *Rossi v. Motion Picture Ass’n of Am., Inc.*, 391 F.3d 1000, 1003 (9th Cir. 2004) (requiring a copyright owner to make a fair use consideration before issuing a take down notice); see also 17 U.S.C. § 512 (2006) (adding provision to protect internet users from abusive copyright owners).

²⁴ See, e.g., Notice of Final Rule, 75 Fed. Reg. 43825 (July 27, 2010) (codified at 37 C.F.R. § 201) (classifying some uses of digital media as non-infringing). In July 2010, the Librarian of Congress made the determination that certain uses of copyrighted DVDs were no longer considered a violation of copyright. *Id.*

²⁵ *Id.*

²⁶ See, e.g., *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 489 (1984) (indicating that causation can be shown both directly and indirectly, and explaining the analysis for each approach).

Philippines, where the trend in technology-related cases also appears to favor users and technology creators.²⁷

The increased creation and use of purpose-specific statutory exemptions is also a global trend.²⁸ 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.²⁹ Some examples of recent exemptions that have been popular include the backing up of computer programs, caching, personal use, educational use, and parody or satire.³⁰

Finally, even the Digital Millennium Copyright Act (“DMCA”) safe harbor provisions that protect various fundamental internet technological functions have the effect of protecting the intermediary that is an integral part of the chain for the storage and distribution of UGC in the U.S.³¹

B. UGC Defined and Categorized

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. A growing appetite for the diversity of views and the ease of interaction offered by the internet, mobile devices, and modern digital media have also driven the expansion of UGC.³² 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.³³ The monetization of UGC, and lucrative businesses that

²⁷ See, e.g., *RecordTV Pte Ltd. v. MediaCorp TV Singapore Pte Ltd.*, [2011] 1 S.L.R. 830 (Sing.) (holding that there was no copyright liability or infringement on the part of the internet intermediary, an online digital video recorder).

²⁸ See, e.g., GOWERS REVIEW, *infra* note 218, at 119 (recommending an incremental approach for the U.K.). Countries, including the U.K., Australia and Canada, for example, that do not have or have rejected the U.S. fair use system, often prefer an incremental approach through the expansion of purpose-specific exemptions.

²⁹ See, e.g., Notice of Final Rule, *supra* note 24, at 43825 (providing an example of a statutory amendment in the U.S.).

³⁰ *Id.* at 43826.

³¹ 17 U.S.C. § 512 (2006) (establishing limitations on liability relating to material online).

³² See OECD REPORT, *supra* note 2, at 9–12. Initial empirical studies and surveys have shown, in various contexts, the phenomenal growth rate of UGC and its socio-cultural popularity. *Id.* However, measuring UGC is difficult given the various variables and the fluid, intangible and transient nature of online transactions. *Id.* at 9.

³³ See EUROPEAN COMMISSION, A SINGLE MARKET FOR INTELLECTUAL PROPERTY RIGHTS BOOSTING CREATIVITY AND INNOVATION TO PROVIDE ECONOMIC GROWTH, HIGH QUALITY JOBS AND FIRST CLASS PRODUCTS AND SERVICES IN EUROPE 12 (May 24, 2011), *available at* http://ec.europa.eu/internal_market/copyright/docs/ipr_strategy/COM_2011_287_en.pdf. 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. *Id.*

emerge from it, are main contributors to the Web 2.0 bubble.³⁴ 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.³⁵ The UGC value and publishing chain is also simplified and more accessible to users than traditional mediums.³⁶ Moreover, the buzz is already developing on Web 3.0, involving web-based “clouds” taking over traditional desktop-based applications, which will continue this trend of shifting control from organizations to individuals.³⁷

There is no single widely accepted definition of UGC.³⁸ In the 2006 Organisation of Economic and Co-operation and Development (“OECD”) Report on the subject, user-created content (“UCC”), the equivalent of UGC, was defined as: “(i) content made publicly available over the [i]nternet, (ii) which reflects a “certain amount of creative effort”, and (iii) which is “created outside of professional routines and practices.”³⁹ The public, creative, and non-commercial natures of UGC are relevant in defining the boundaries of rights, duties, and liabilities that can reasonably be placed on UGC creators and platforms. From this general definition, classification of the categories of UCC or UGC—based on the type of content, host, distribution and purpose—can be drawn up. These classifications encompass a wide range of content, technology and services.⁴⁰

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.

³⁴ See *Top Sites*, ALEXA, <http://www.alexa.com/topsites> (last visited Jan. 30, 2012). According to Alexa, a website offering internet traffic data, UGC platforms currently occupy fifty percent of the top 500 sites on the WWW. *Id.* Facebook is ranked second, YouTube is ranked third, Blogger.com is fifth, Wikipedia is seventh and Twitter is ninth. *Id.* The others are major search engines and service providers. *Id.* See also OECD REPORT, *supra* note 2, at 23 (indicating that monetization of new business models and investments made on UGC platforms amounts to billions of dollars).

³⁵ See OECD REPORT, *supra* note 2, at 13–14.

³⁶ *Id.* at 15–20 (resulting from 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).

³⁷ See NICHOLAS CARR, *THE BIG SWITCH: REWIRING THE WORLD, FROM EDISON TO GOOGLE* 21–23 (W.W. Norton, 2008).

³⁸ See OECD REPORT, *supra* note 2, at 4.

³⁹ *Id.*; see also Daniel J. Gervais, *User-Generated Content and Music File-Sharing: A Look at Some of the More Interesting Aspects of Bill C-32*, in MICHAEL GEIST, FROM “RADICAL EXTREMISM” TO “BALANCED COPYRIGHT”: CANADIAN COPYRIGHT AND THE DIGITAL AGENDA 465 (Irwin Law, 2010) (making reference to the electronic medium in a definition of UGC as “content that is created using tools specific to the online environment and/or disseminated using such tools.”).

⁴⁰ OECD REPORT, *supra* note 2, at 15–16.

2. *Categorizations and Comparisons*

UGC comes in many forms and can give rise to various types of comparison.⁴¹ 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, too.⁴² UGC can also be categorized according to the type of platform or according to the wider social objectives and functions.⁴³

Under current fair use and fair dealing regimes, the purpose and character of the UGC, rather than the type of platform or the general social purpose, is the primary factor relevant in determining the protectability of the underlying content.⁴⁴

C. Copyright Issues Relating to User-Generated Content

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

The current disputes between copyright owners and UGC creators revolves around derivative or copied works without authorization.⁴⁵ The mere copying of content without more is generally not protectable under the fair use provision, unless the copy falls under a specific statutory exemption.⁴⁶ Thus, there should be little confusion over the permissibility of such practices.⁴⁷ It is the derivative use of existing works that is the main subject matter of copyright liability disputes.⁴⁸

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.⁴⁹ The practice of re-inventing or re-creating digitized works, using one or more existing copyrighted work, forms a penumbra of digital user creations.⁵⁰ The re-creation of third party content can involve a portion or full versions of existing works in any combination.⁵¹ “Vidding”⁵² and “mash-ups”⁵³ are just some terms that

⁴¹ See, e.g., *id.* (charting out comparisons of the various types of UCC).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 44–46.

⁴⁵ See, e.g., *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1154 (N.D. Cal. 2008) (discussing how a mother posted a video of her children online with a sample of a Prince song in the background).

⁴⁶ See, e.g., 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05 (2011) [hereinafter NIMMER] (“In determining whether given conduct constitutes copyright infringement, the courts have long recognized that certain acts of copying are defensible as ‘fair use.’”).

⁴⁷ *Id.* at § 13.05[A][1][b] (discussing the 9th Circuit’s labeling the doctrine of “productive use,” holding that ‘mere reproduction of a work in order to use it for its intrinsic purpose’ may not be considered fair use).

⁴⁸ *Id.* (“Unless there is a ‘productive use’ in the sense that the copier himself is engaged in creating a work of authorship whereby he adds his own original contribution to that which is copied, the [9th Circuit] Court of Appeals held that the defense of fair use may not be invoked.”).

⁴⁹ See OECD REPORT, *supra* note 2, at 8.

⁵⁰ *Id.*

⁵¹ See, e.g., Rob Walker, *Mash-Up Model*, N.Y. TIMES (July 20, 2008), <http://www.nytimes.com/2008/07/20/magazine/20wwln-consumed-t.html?partner=rssnyt&emc=rss>

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.⁵⁴

2. An Uncertain Legal Environment for UGC Creators

Although the most prominent disputes are between the economic goliaths, namely the media industry and technology companies,⁵⁵ the threat of litigation and the prohibitory effects of current copyright provisions are also felt by the UGC creators themselves.

For the downstream creator who re-uses existing works, there is a lack of any guidance or a clear legal right to re-create copyrighted works.⁵⁶ The legal environment is not only murky, it is also hostile. Laws now criminalize individuals for copyright infringement for downloading infringing UGC and prematurely preempt potential fair uses through DRM, TPM, and ACL provisions.⁵⁷ Emboldened by these laws, copyright owners have also developed practices and processes that increasingly discourage UGC creators from uploading material onto the WWW, some of which are heavy-handed and without proper legal foundation.⁵⁸

The most prominent example of this is the case of *Lenz v. Universal Music Corp.*,⁵⁹ which is illustrative of the endemic problem of a protectionist copyright regime. This case was brought by a UGC creator against a copyright owner and makes a statement about the latter’s role and responsibility in the statutory “notice-and-take-down” process.⁶⁰ Its implications on internet intermediaries like YouTube

(discussing the potential for an infringement lawsuit for musical artist “Girl Talk” who creates albums by sampling sections of popular songs and mixing them together to form new tracks).

⁵² See Sarah Trombley, *Visions and Revisions: Fanvids and Fair Use*, 25 CARDOZO ARTS & ENT. L.J. 647, 649 (2007) (explaining the 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).

⁵³ *Id.* at 658; Zachary Lazar, *The 373-Hit Wonder*, N.Y. TIMES, Jan. 6, 2011, at MM38 (explaining that a ‘mash-up’ is a remix or sample created by combining parts or components of more than one piece of music, for example lyrics and melody).

⁵⁴ See, e.g., Walker, *supra* note 51 (labeling Girl Talk as a “lawsuit waiting to happen.”).

⁵⁵ See, e.g., *Viacom Int’l Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 516 (S.D.N.Y. 2010) (claiming that “tens of thousands of videos on YouTube, resulting in hundreds of millions of views, were taken unlawfully from Viacom’s copyrighted works without authorization).

⁵⁶ See 1 NIMMER, *supra* note 46, § 3.01 (discussing the confusion and subjective nature of what constitutes a derivative work).

⁵⁷ See, e.g., 17 U.S.C. § 1201 (2006) (prohibiting circumvention of technological measures).

⁵⁸ See, e.g., Emma Carmichael, *We Need Youth Baseball Teams to Reenact MLB Highlights for us Because MLB Hates its Fans (and Probably Children, too)*, DEADSPIN (Apr. 18, 2011, 1:40 PM), <http://deadspin.com/#!/5793065/we-need-youth-baseball-teams-to-reenact-mlb-highlights-for-us-because-mlb-hates-its-fans-and-probably-children-too> (explaining how the sports blog has attempted to post videos of MLB games and they have continually received takedown notices).

⁵⁹ *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150 (N.D. Cal. 2008).

⁶⁰ *Id.* at 1151–53. See also 17 U.S.C. § 512 (2006). Under Title II of the Digital Millennium Copyright Act (“DMCA”), 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. *Id.* Under the process, if the intermediary receives a notification claiming

are incidental but still of particular interest. Mainly, this case 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 thirteen-month-old son dancing to Prince's song "Let's Go Crazy" but only posted a twenty-nine second clip of the video on YouTube.⁶¹ The defendant, Universal Music, the owner of the copyright to the song, sent a notice to YouTube demanding that the video be taken down in accordance with the DMCA.⁶² YouTube complied with the request and notified Lenz, who in turn sent a counter-notice to have the video reposted citing fair use, which YouTube also complied with.⁶³ Lenz, then sued Universal claiming misrepresentation under the DMCA, seeking a court declaration that her use was non-infringing.⁶⁴

On August 20, 2008, a U.S. federal district court ruled 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 whether the posting constituted fair use of the copyrighted material contained therein.⁶⁵ The court's decision is a significant statement on the operation and status of the U.S. 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 defense in any given case.⁶⁶ If the copyright owner uses a mechanical procedure or automatically gives notice without considering fair use, then bad faith claims can be made.⁶⁷ This should be reflected in the notice.⁶⁸

infringement from a copyright holder, or its 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". *Id.*

⁶¹ Stephanie Lenz, "Let's Go Crazy" #1, YOUTUBE (Feb. 7, 2007), <http://www.youtube.com/watch?v=N1KfJHFWhQ> (exemplifying 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, 47 (2009).

⁶² See *Lenz*, 572 F. Supp. 2d at 1152.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 1154, 1156 (holding 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'").

⁶⁶ *Id.* at 1156 (explaining that a "full investigation" is not required, pursuant to precedent from the Ninth Circuit Court of Appeals in *Rossi v. Motion Picture Ass'n of Am., Inc.*, 391 F.3d 1000, 1004 (9th Cir. 2004)). The subjective "good faith" evaluation is assessed from the copyright holder's perspective, pursuant to 17 U.S.C. § 512(c)(3)(A)(v) (2006). *Id.*

⁶⁷ *Lenz*, 572 F. Supp. 2d at 1153 (accusing Universal of misrepresentation under § 512(f), among other allegations); see also 17 U.S.C. § 512(f) (providing that "any person who knowingly materially represents . . . that material or activity is infringing . . . shall be liable for any damages, including cost and attorneys' fees, incurred by [anyone] injured by such misrepresentation."). Section 512(f) is designed to prevent abuse of DMCA take-down notices. *Id.* § 512(c)(3)(A)(v).

⁶⁸ *Lenz*, 572 F. Supp. 2d at 1154–55. 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. *Id.*; see also 17 U.S.C. § 512(c)(3)(A)(v) (specifying that such notice must include "[a] statement that the complaining party has a good faith

The case 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 subjective policing of UGC platforms. 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.

III. CONSTRAINTS OF FAIR USE

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

1. *The Three Phases of Fair Use Development*

The first phase in the legal development of the U.S. fair use doctrine dates back to its inception as a counterweight to copyright protection.⁶⁹ Its earliest incarnation was as a legitimate action-based form of protection for “fair abridgment.”⁷⁰ It has since evolved to encompass many forms of uses including, and in particular, derivative works.⁷¹ This carve out of otherwise exclusive rights for the derivative use of existing works without authorization continues to be relevant, especially with the growing emphasis on re-creativity and re-invention.⁷²

The second significant phase in the development of fair use relates to the advent of technology with the social utility and benefits of mechanical and electronic duplication. This milestone was defined by the Supreme Court in *Sony Corp. of Am. v. Universal City Studios*.⁷³ In that case, the Court found that fair use was a defense for the technological inventors and intermediaries who provided facilitative devices to their customers, who in turn could use those devices for infringing purposes.⁷⁴

The invention of the internet, WWW, and increasingly efficient wireless electronic communications, storage and transfer of technology heralds a whole host of new media technology that has given rise to the third phase for fair use development.⁷⁵ It has also given rise to other significant forms of statutory carve-

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*, 572 F. Supp. 2d at 1155.

⁶⁹ See 4 NIMMER, *supra* note 46, § 13.05.

⁷⁰ See *Gyles v. Wilcox*, (1740) 26 Eng. Rep. 489, 490.

⁷¹ See 4 NIMMER, *supra* note 46, § 13.05[A][1][b].

⁷² See, e.g., *What is Creative Commons?*, CREATIVE COMMONS ORG., http://wiki.creativecommons.org/images/3/35/Creativecommons-what-is-creative-commons_eng.pdf (last visited Jan. 30, 2012). 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. *Id.*

⁷³ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

⁷⁴ *Id.* at 498–99 (explaining that a manufacturer of a product is not liable for contributory infringement as long as the product is “capable of substantial noninfringing uses”).

⁷⁵ Matthew Sag, *God in the Machine: A New Structural Analysis of Copyright’s Fair Use Doctrine*, 11 MICH. TELECOMM. & TECH. L. REV. 381, 404 (2005).

outs such as safe harbor protections and purpose-specific statutory exemptions, which were necessary to cope with societal changes and needs.⁷⁶ This third phase of development also covers the UGC phenomena and the devolvement of creativity, especially follow-on creations to the masses.

It is this third stage that this paper is concerned with and proposes that the legislature play an increased role in the development of limitations to rights in creative works. These changes should even extend beyond the confines of fair use, however flexible the doctrine has proven to be and despite its continued importance and relevance as a defense.

2. *The Basic Tenets of Fair Use*

The U.S. Supreme Court has noted that copyright law serves two primary objectives: “to 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.”⁷⁷ The public benefit consideration encapsulates the overarching public interest and social utility concerns.⁷⁸ Fair use as a defense is an “equitable rule of reason” to serve as a salve to the strict copyright regime.⁷⁹ 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.⁸⁰ It remains a flexible and evolving standard, and as such is versatile while unpredictable.⁸¹

The fair use defense has seen its fair share of judicial activism. For instance, the types of factors considered in analyzing fair use in the U.S. have expanded, and its protections have extended to protect the development of new technologies and practices that have become acceptable in society.⁸²

⁷⁶ See, e.g., 17 U.S.C. § 512 (2006) (creating a safe harbor for online service providers against copyright liability if they adhere to and qualify for certain prescribed guidelines like the notice-and-takedown provision).

⁷⁷ Harper & Row, Publishers, Inc. v. Nation Enter., 471 U.S. 539, 546 (1985).

⁷⁸ *Id.* at 559.

⁷⁹ H.R. REP. NO. 94-1476, at 65 (1976); see Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 448 (1984).

⁸⁰ See Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994) (recognizing 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.”); Fisher v. Dees, 794 F.2d 432, 435 (9th Cir. 1986) (noting that 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”).

⁸¹ See MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW 299 (LexisNexis, 4th ed. 2005) (“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.”); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1110–11 (1990).

⁸² See generally Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1586–1614 (2004) (explaining the trend of fair use in cases after *Sony Betamax* attests).

3. Problems with Fair Use

One problem with the fair use doctrine is the fact that the enumerated list of fairness factors constitutes considerations that were more relevant in a non-digital context and the pre-internet society, thus less relevant in the UGC context.⁸³ Although fair use does extend as a defense to alleged indirect, contributory or secondary infringers,⁸⁴ the doctrine faces several inadequacies in application. The enumerated fair use factors are currently focused on primary infringement and from the perspective of the copyright owners' interests.⁸⁵ Hence, the recent judicial developments of additional and novel tests to supplement these factors have primarily emerged from U.S. jurisprudence and many of which were in direct response to technological progress.⁸⁶

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 the relevant factors and tests in favor of the service provider.⁸⁷ Potential user-creators can also be deterred

⁸³ See L. Ray Patterson, *Folsom v. Marsh and Its Legacy*, 5 INTELL. PROP. L. 431, 446–51 (1998) (explaining that the four factors of analysis for fair use derive from the opinion of Joseph Story in *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841), in which the defendant had copied 353 pages from the plaintiff's twelve volume biography of George Washington in order to produce a separate two-volume work of his own).

⁸⁴ See *Ellison v. Robertson*, 357 F.3d 1072, 1077 (9th Cir. 2004) (explaining that secondary liability (i.e., contributory and vicarious copyright infringement) requires proof of direct infringement). 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. *Id.*

⁸⁵ See, e.g., Edward Lee, *Technological Fair Use*, 83 S. CAL. L. REV. 797, 818–20, 834 (2010) (providing examples of proposals for analyzing “technological fair use”, which is a re-working of the fair use factors that take into account the special characteristics and considerations relevant to “speech technologies”, but are still within the context of the fair use exception).

⁸⁶ See, e.g., *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 419 (1984) (weighing the fair use argument concerning the Betamax home video recorder); *A.V. ex rel. Vanderhye v. iParadigms, L.L.C.*, 562 F.3d 630, 634 (4th Cir. 2009) (considering an internet service which stores digital copies of student research papers); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 815–816 (9th Cir. 2003) (examining a web search system which returned search inquiries with thumbnail pictures); *Field v. Google Inc.*, 412 F. Supp. 2d 1106, 1111 (D. Nev. 2006) (performing a fair use analysis on a search engine's “cache” function, which stored versions of websites accessed by the search engine algorithm); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1155–1156 (9th Cir. 2007) (discussing a search engine which could display images in thumbnail and full size formats in response to user's queries).

⁸⁷ See, e.g., *Sony*, 464 U.S. at 442–48 (illustrating that the substantial “non-infringing uses” test takes 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); *Campbell v. Acuff-Rose*, 510 U.S. at 579 (illustrating that although the nature of the usage is 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 *Kelly*, 336 F.3d at 818–19 (noting the difficulty copyright law has with cases in which the alleged infringement involves retransmission of the underlying work through a different technological medium); *Perfect 10, Inc. v. Google, Inc.*, 487 F.3d 701, 722 (9th Cir. 2007) (weighing the value of the alleged infringing service to the public); *CCH Canadian Ltd. v. Law Soc'y of Upper Canada*, [2004] 1 S.C.R. 339, para 64 (Can.) (stating 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, where the fair dealing defense 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

from creating UGC even if it could fall within the scope of fair use, because of threats of legal action, including long drawn out disputes and high legal fees.⁸⁸ The greater uncertainty and unpredictability of the fair use approach is, the greater the problem.

4. Looking Beyond Fair Use—Proposed Statutory Limitation Provision

Fair use is the foremost, but by no means the only, statutory carve-out to restrict liability for copyright infringement.⁸⁹ Today, there are also purpose-based statutory exemptions that protect against primary liability⁹⁰ and safe harbor laws to protect intermediaries from secondary infringement.⁹¹ The emerging importance of supplementary statutory protections and exemptions to the fair use exception serve several purposes. First, 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.⁹² Next, they obviate the need to resort to the slower evolution of the law through judicial law making in the common law system.⁹³ Statutory protections, exceptions, and exemptions also have the advantage of predictability and automatic applicability. This offers an almost instantaneous solution to the problems and conflicts posed by developments in the digital age and technological advances that often provide the impetus for significant amendments to copyright legislation to accommodate these changes.⁹⁴

Many academics have rightfully criticized the preemptively chilling and prohibitive effects of “digital locks,” namely, DRM, TPM, and ACLs.⁹⁵ Although internet users are becoming more sophisticated, they still generally lack the technical

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.

⁸⁸ See, e.g., *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1152 (N.D. Cal. 2008) (threatening to sue several internet service providers).

⁸⁹ See 4 NIMMER, *supra* note 46, § 13.05.

⁹⁰ See, e.g., 17 U.S.C. § 108 (2006) (detailing purpose-based copyright exemption for libraries and archives).

⁹¹ See, e.g., *id.* § 512(c) (providing immunization to online service providers that might inadvertently host infringing material uploaded by users).

⁹² See, e.g., *id.* § 512(f) (creating liability for copyright owners who improperly issue a take down notice for infringement).

⁹³ Henry N. Butler, *A Defense of Common Law Environmentalism*, 58 CASE W. RES. L. REV. 705, 724, 727 (2008).

⁹⁴ See, e.g. CONG. BUDGET OFF., COPYRIGHT ISSUES IN DIGITAL MEDIA 14 (2004), available at <http://www.cba.gov/ftpdocs/57xx/doc5736/08-09Copyright.pdf> (noting that the growth of technology is “outpacing” U.S. copyright law, despite Congress’s attempts to pass legislation addressing the changes).

⁹⁵ Jacqueline D. Lipton, *Solving the Digital Piracy Puzzle: Disaggregating Fair Use from the Dmca’s Anti-Device Provisions*, 19 HARV. J.L. & TECH. 111, 147–48 (2005). 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. Digital rights management (“DRM”) techniques 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.

know-how and technological skills to get around these measures even if it is to perform a fair usage.⁹⁶ Also, despite the *Lenz* case, 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.⁹⁷

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.⁹⁸ This is also done to ensure that statutory safe harbor protections extend to them by *subsequently* blocking or removing what may actually be legitimately posted UGC.⁹⁹ 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 ACL.¹⁰⁰

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.¹⁰¹ To be fair, as fair use is a judgment and merit-based assessment and involves a case-by-case analysis, it would be quite burdensome for the copyright owners to make this

⁹⁶ See Rebecca Tushnet, *I Put You There: User-Generated Content and Anti-Circumvention*, 12 VAND. J. ENT. & TECH. L. 889, 905 (2010); 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. L.J. 173, 176 (2007); JESSICA LITMAN, DIGITAL COPYRIGHT: PROTECTING INTELLECTUAL PROPERTY ON THE INTERNET 125–26, 135–36, 144–45 (Prometheus, 2d ed. 2006); 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, 1035 (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); Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised*, 14 BERKELEY TECH. L.J. 519, 551 (1999).

⁹⁷ See FEDERAL JUDICIAL CENTER, NATIONAL, CASEBASED CIVIL RULES SURVEY 2 (Oct. 2009), available at [http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/\\$file/dissurv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf) (stating that after excluding certain cases, such as ones that do not involve discovery and prisoner rights cases, the median litigation costs for the defense of a federal civil dispute was \$20,000); see also CARMEN DENAVAS-WALT ET AL., INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2010 5 (Sept. 2010) (estimating median household income in the United States to be below \$50,000 per year).

⁹⁸ See Michael S. Sawyer, *Filters, Fair Use & Feedback: User Generated Content Principles and the DMCA*, 24 Berkeley Tech. L.J. 363, 366 (2009).

⁹⁹ See 17 U.S.C. § 512(c).

¹⁰⁰ See In the Matter of Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, No. RM 2008-08, Comment on the Electronic Frontier Foundation, 2–12 (Dec. 2, 2008), available at <http://www.copyright.gov/1201/2008/comments/lohmann-fred.pdf>.

¹⁰¹ 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*, 1 INT’L J. OF PRIVATE L. 157, 175 (2008). 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. *Id.* Another possible reform is to statutorily provide a procedure for users to seek a declaration of fair use. *Id.*

assessment.¹⁰² This was a point made by the defendant in the *Lenz* case.¹⁰³ Thus, a more specific and explicit statutory limitation provision should help alleviate this burden by clarifying what types of UGC related activity are allowed.¹⁰⁴ This limitation provision would also lend greater weight, legitimacy and authority to these UGC activities. Moreover, the existing DRM, TPM, and ACLs along with the notice-and-take-down process should also be amended to accommodate UGC following the enactment of a statutory UGC limitation provision.¹⁰⁵

The follow-on effect of legally permitted UGC and an explicit statutory UGC limitation are also very important because complaints are currently brought against UGC platforms that cultivate and promote UGC. As indirect 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 legal action and provide an environment conducive for the development of such technology and services.¹⁰⁶

IV. CRAFTING A STATUTORY UGC LIMITATION

“You don’t pay love back; you pay it forward.”

In the Garden of Delight, 1916¹⁰⁷

A. Justifications for a Statutory Carve-Out

This section explains the justification for statutory protections for UGC and proposes a model that meets a certain set of conditions or pre-requisites. The objective of the recommended model of statutory limitation or copyright ‘carve-out’ is to recognize UGC and re-use as a legal and legitimate form of utility. It aims to provide at least a legal presumption in favor of certain categories or types of use emerging from user customs on the internet, provided that other necessary requirements and safeguards are met. Non-statutory precedents such as proposed draft legislation, private undertakings and best practices are canvassed for

¹⁰² *Lenz*, 572 F. Supp. 2d at 1155–56.

¹⁰³ *Id.*

¹⁰⁴ *See, e.g., id.* (providing an example of a sanction for groundless threats of legal action based on copyright infringement for acts that fall within clear and specific statutory exceptions or exemptions). A fine or an injunction from using the DRM or TPM are two examples of such sanctions.

¹⁰⁵ 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* note 141).

¹⁰⁶ *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 437–42 (1984).

¹⁰⁷ LILY H. HAMMOND, IN THE GARDEN OF DELIGHT 209 (Thomas Y. Crowell ed., 1916).

inspiration. Similarly, common UGC practices are examined in the proposed limitation.

1. Public Interest Justifications

Conducting an analysis based on a utilitarian model, 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 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.

Other legal theories can also be interpreted as largely supporting re-use,¹⁰⁸ especially when viewed in the context of society as a whole.¹⁰⁹ The concept of marginal utility in economics also supports the idea of utility gaining from an increase in consumption, 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.¹¹⁰

Given the socio-economic utility of UGC and its contributions to human interaction, re-invention, and the dissemination of knowledge, both the technology behind it and the source of such content should be given value and offered some protection. Due to the nature and subject of UGC, however, it is difficult for creators to seek the permission currently required from copyright owners before lawful use of

¹⁰⁸ *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., 1967) (explaining the theory of transformative labor); Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1556 (1993).

¹⁰⁹ See Blaise Pascal, *Preface to the Treatise on Vacuum*, in THE HARVARD CLASSICS (Charles W. Elliot ed., O. W. Wright trans., 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 multiplied altogether without limit and without interruption . . .” *Id.* at ¶ 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.” *Id.* at ¶ 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 . . .” *Id.* at ¶ 21.

¹¹⁰ John Tehranian, *All Rights Reserved? Reassessing Copyright and Patent Enforcement in the Digital Age*, 72 U. CIN. L. REV. 45, 51 (2003).

their work. Moreover, the difficulties of copyright licensing as a feasible or reasonable alternative for users requires a fundamental shift in the rights protection regime if UGC is to be allowed to perpetuate.

The public interest goals of UGC are multifaceted and encompass existing public and social interest considerations.¹¹¹ One goal is the maximization of social wealth in knowledge and information as well as the promotion of social interactivity.¹¹² 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.¹¹³

The next public interest goal involves human rights interests, particularly free speech and self-expression, political and artistic truth, and free press.¹¹⁴ Through the efficiency of peer production,¹¹⁵ 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.¹¹⁶ For example, UGC websites that allow forms of commentary or promote discussion can help achieve these goals.

UGC also acts as a ‘social leveler’ as anyone with a computer and internet access has the same powers of spreading and obtaining information.¹¹⁷ Greater access to and sharing of information and knowledge on UGC platforms also has an educational and archival role. By extending the life of information through the evolving and recycling of materials, this can prolong the lifespan and enjoyment of all types of content.¹¹⁸

Another goal includes the other intangible and tangible benefits, which include the creation of new forms of social ordering and interaction for social life enrichment. This includes the development of business and social relationships beyond the confines of physical proximity such as through social networking websites like

¹¹¹ See OECD REPORT, *supra* note 2, at 28–39 (explaining the economic and social impact of UGC, which is overwhelmingly positive).

¹¹² *Id.*

¹¹³ 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.

¹¹⁴ See *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (stating that copyright law “contains built-in First Amendment accommodations.”); see also Sonia Katyal et al., *Fair Use: Its Application, Limitations and Future*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1017, 1022 (2007).

¹¹⁵ See Yochai Benkler, *Coase’s Penguin, or, Linux and The Nature of the Firm*, 112 YALE L.J. 369, 381 (2002) (defining the term “peer production” as the “production by peers who interact and collaborate without being organized on either a market-based or a managerial/hierarchical model”).

¹¹⁶ *Id.* at 440–41.

¹¹⁷ 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.

¹¹⁸ See Damien O’Brien & Brian Fitzgerald, *Mashups, Remixes and Copyright Law*, 9 INTERNET L. BULLETIN 1, 17–19 (2006) (creating an understanding of the impact that Australian Copyright Act on various forms of online creativity, specifically mash-ups and remixes).

Facebook and Google+.¹¹⁹ Moreover, creators can also build their reputation, autonomously or independently develop a career and hone their skills through UGC by using video and music sharing platforms like YouTube and MySpace, for example.

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

2. *Private Interest Justifications*

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.¹²⁰ 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.¹²¹ This involves redrawing the boundary between proprietary copyrights and the digital commons. For this reason, a relatively moderate and incremental approach will still be preferred, and the proposed exclusion should not apply to *all* UGC but only to those that fulfill 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 into the public interest analysis.¹²² As explained, the tangible and intangible benefits of derivative works, whether sole adaptations or a collective combination or mash-ups of several works apply to and go beyond individual interests.¹²³

¹¹⁹ See Mark Millan, *Google Says Social Network has 90M Users* (Jan. 19, 2012), http://articles.cnn.com/2012-01-19/tech/tech_social-media_google-plus-users_1_search-engine-social-network-results-pages?_s=PM:TECH.

¹²⁰ See *Sayre v. Moore*, (1785) 102 Eng. Rep. 139, 140 (“[W]e must take care to guard against two' extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of . . . their just merits, and the reward of their ingenuity and labor; the other that the world may not be deprived of improvements, nor the progress of the arts be retarded.”); see also Samuelson, *infra* note 236.

¹²¹ 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*, 26 *COMPUTER L. & SEC. REV.* 1, 3–22 (2010); 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*, 26 *COMPUTER L. & SEC. REV.* 185, 185–202 (2010) (demonstrating that “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’).

¹²² 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.

¹²³ See, e.g., Walker, *supra* note 51 (discussing the mash-ups by the group, “Girl Talk”).

B. Non-Statutory Precedent Considerations

As mentioned, non-statutory precedents such as proposed draft legislation, private undertakings, and best practices provide the inspiration for the UGC provision proposed in this paper. Each of these considerations is discussed in the following sections.

1. UGC Principles, Guidelines, and Studies

While copyright owners deserve reward and recognition for their works and as incentives for creativity, it is not always 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.¹²⁴ 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, and to identify some general guidelines on the rights and responsibilities of the former in its practices, are the Principles for User Generated Content Services (“UGC Principles”)¹²⁵ that were issued on October 18, 2007 by several of the world’s leading internet and media companies.¹²⁶ Notable among the UGC Principles are self-regulatory guidelines, which place a duty on the UGC services to include intellectual property 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).¹²⁷

In return for these undertakings, the participating copyright owners undertake not to bring an infringement action against services that practice “good faith” adherence to these responsibilities.¹²⁸ Also, fair use has been recognized as an

¹²⁴ See Shubha Ghosh, *The Fable of the Commons: Exclusivity and the Construction of Intellectual Property Markets*, 40 U.C. DAVIS L. REV. 855, 871–72 (2007).

¹²⁵ *Principles for User Generated Content Services: Foster Innovation. Encourage Creativity. Thwart Infringement*, DISNEY ENTERS., INC., <http://www.ugcprinciples.com/> (last visited Jan. 30, 2012) [hereinafter UGC Principles]; see also Alan N. Braverman & Terri Southwick, *The User-Generated Content Principles: The Motivation, Process, Results and Lessons Learned*, 32 COLUM. J.L. & ARTS 471, 471–72 (2009) (explaining the motivation behind the UGC Principles); Anon, *The Principles for User Generated Content Services: A Middle-Ground Approach to Cyber-Governance*, 121 HARV. L. REV. 1387, 1287–88 (2008) (explaining the middle ground approach to governing cyber space, adopted by some of the leading commercial copyright owners).

¹²⁶ See generally *Press Release, UGC Principles, Internet and Media Industry Leaders Unveil Principles to Foster Online Innovation While Protecting Copyrights*, DISNEY ENTERS., INC., (Oct. 18, 2007), available 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.

¹²⁷ *Id.*

¹²⁸ See UGC Principles, *supra* note 125, at ¶¶ 3, 14.

important exception and it is an expressly stated exclusion to filtering technology and copyright enforcement.¹²⁹ The copyright owners undertake to “accommodate fair use” when sending notices and making infringement claims,¹³⁰ and when applying “identification technology” and exercising manual review.¹³¹ However, as an initial attempt at self-governance, the UGC Principles suffer from many flaws and fail to address the root cause of the UGC problem and the concerns of the UGC users.

There are many criticisms. The first main criticism is that the most important and influential UGC platforms and services, including YouTube and Facebook, were not involved in drawing up the UGC 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.¹³² Second, 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.¹³³ Third, 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.¹³⁴

As noted, the main intention and tenor of the UGC Principles is the protection of copyright ownership.¹³⁵ Because the burden of policing and identifying infringing content is on the UGC platforms, this presents yet another concern.¹³⁶ Additionally, although there is language on accommodating fair use, there is no real solution offered as to how this could be done through current technology.¹³⁷

¹²⁹ *Id.* at ¶ 3(d).

¹³⁰ *Id.* at ¶ 6.

¹³¹ *Id.* at ¶¶ 3(d)–(f). 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.,* Sawyer, *supra* note 98, at 366 (explaining that UGC sites appear to be implementing filters and erring on the side of caution).

¹³² *See Press Release, supra* note 126 (listing participating companies which does not include Facebook and YouTube).

¹³³ *See* UGC Principles, *supra* note 125 (stating the groups who *were* consulted in drafting the Principles - Private users and civil rights groups were not included in this group). 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.

¹³⁴ *Id.*

¹³⁵ *Id.* at ¶ 1.

¹³⁶ *Id.* at ¶ 3 (explaining procedures for using content identification technology, used to identify infringing material).

¹³⁷ 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. 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.

In response to the perceived bias towards copyright protection in the UGC Principles, the Electronic Frontier Foundation (“EFF”) among other public interest groups produced and proposed a set of “Fair Use Principles for User Generated Video Content” (“Fair Use Principles”).¹³⁸ 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 rather than to create technological filters that implement a stricter reading of what constitutes fair use.¹³⁹ 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.¹⁴⁰

While reliance on good faith and on the current fair use doctrine does not resolve the issues concerning UGC, the fact that these UGC and Fair Use Principles are even produced by the relevant stakeholders indicate that there is genuine concern that the current copyright law provisions are inadequate.

2. *The Statutory UGC Exception Proposal in Canada*

Draft legislation from other jurisdictions provides guidance for future proposals. One such precedent from Canada provides inspiration for the UGC provision this paper proposes.

A proposal to amend the Canadian Copyright Act was tabled on June 2, 2010 in the Canadian Parliament (“Bill C-32”).¹⁴¹ Among the proposed amendments that were a mixture of pro-copyright and pro-user provisions, Bill C-32 included proposed fair dealing limitations. It also included 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.¹⁴² The proposed provision that is of interest is the provision for a UGC exception. Although Bill C-32, like other proposed Canadian copyright amendment bills, did not crystallized into law, its proponents are still optimistic for a breakthrough in the future.¹⁴³

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

¹³⁸ See *Fair Use Principles for User Generated Video Content*, ELEC. FRONTIER FOUND. (Oct. 31, 2007), <http://www.eff.org/issues/ip-and-free-speech/fair-use-principles-usergen> [hereinafter Fair Use Principles].

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ An Act to amend the Copyright Act, R.S.C 2010, c. C-32 [hereinafter Bill C-32].

¹⁴² *Id.*

¹⁴³ See Ferne Downey, *Copyright Reform Vital to Artists*, TORONTO STAR, Aug. 6, 2009, at A19 (noting the failure of previous copyright amendments, namely Bills C-60 and C-61 in 2005 and 2008 respectively); see also Giuseppe D’Agostino, *There is No Two Without Three: Bill C-32 is Dead*, IP OSOODE, (Dec. 5, 2011, 12:21 PM), <http://www.iposgoode.ca/2011/03/there-is-no-two-without-three-bill-c-32-is-dead/> (noting that Bill C-32 failed to make it out of committee); Richard J. Brennan, *Copyright: Consumer Versus Artists*, TORONTO STAR, May 31, 2010, at A6 (“Clearly what we want to do is have a copyright law that makes sense for everyday consumers. It also has to make sense for creators. There is always a balance.”).

exception from copyright liability in section 29.21 of Bill C-32.¹⁴⁴ The benefit of a general provision, like section 29.21, is that all categories of UGC are potentially covered 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.

Bill C-32 also proposed fair dealing exemptions for parody and satire, which together with other relevant uses like commentary, could also fall under the scope of the UGC provision.¹⁴⁵ Hence, there may be some overlap in the exceptions.

The proposed amendment under Bill C-32 also included a different and more moderate approach to the copyright monitoring and complaint filing procedures.¹⁴⁶ Unlike the “notice-and-take-down” procedure that the U.S. utilizes, section 41.25 of Bill C-32 proposes a “notice-and-notice” approach.¹⁴⁷ Under this system, the copyright owner must notify the intermediary internet providers of possible piracy on the part of their customers.¹⁴⁸ The intermediary would in turn be required to notify the customer of the possible violation of the law.¹⁴⁹ 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.¹⁵⁰

The responses to the proposal have been mixed with the usual reactions from the various stakeholders.¹⁵¹ Predictably, copyright owners such as the Alliance of

¹⁴⁴ Bill C-32, § 29.21(1).

(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 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.

Id.

¹⁴⁵ See Bill C-32, § 29 (“Fair dealing for the purpose of research, private study, *education*, *parody* or *satire* does not infringe copyright.”) (emphasis added).

¹⁴⁶ *Id.* § 41.25.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* §§ 41.25–41.26; see also Gervais, *supra* note 39, at 448 (“As a normative matter, it makes sense to allow this aspect of the internet to flourish by using *ex post* controls (such as the proposed notice and notice) and providing safe harbors, rather than ban the activity completely.”) (citations omitted).

¹⁴⁹ Bill C-32, §§ 41.25–26.

¹⁵⁰ *Id.*

¹⁵¹ Compare Jordan Timm, *Germans Win through Sharing*, CANADIAN BUSINESS, Sept. 14, 2010, at 16 (noting that Bill C-32 has been “[c]alled by some a sellout to corporate interests and a

Canadian Cinema, Television and Radio Artists (“ACTRA”) were against the provision.¹⁵² They argued that it would take away economic and moral rights from creators. Alternatively, other stakeholders such as the Canadian Federation of Students (“CFS”) specifically supported the proposed provision to “legaliz[e] practices that are already commonplace.”¹⁵³

It remains to be seen if these recommended amendments will eventually be passed into law,¹⁵⁴ and if so, whether they will remain in this form. If these amendments had been passed into law, 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 in general under its fair use exception.¹⁵⁵

3. Customary Norms

Customary norms often influence many areas of law.¹⁵⁶ In some areas of law, particular customs, usages, and social practices are considered in developing

surrender to Washington”) with Kate Taylor, *The Middle-Class Copyright War*, GLOBE AND MAIL, Sept. 3, 2011, at F5 (noting that “for those who live off publisher’s advances, royalties or freelance fees, the alternative schemes that are presented sound mainly like fantasies driven by unlikely subscriptions, intrusive advertising, or worse yet, donations from an online audience.”).

¹⁵² See Press Release, Alliance of Can. Cinema, Television and Radio Artists, *Bill C-32 Update: Canadian Content—Free Today, Gone Tomorrow* (Nov. 5, 2010), <http://www.actra.ca/main/press-releases/2010/11/bill-c-32-update-canadian-content-free-today-gone-tomorrow>. Stating that:

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

Id.

¹⁵³ See *Maintaining the Balance*, CAN. FED’N OF STUDENTS SUBMISSION 5 (Jan. 2011), http://www.cfs-fcee.ca/html/english/campaigns/CFS-Submission_C-32_Copyright_Modernization.pdf. (recognizing the importance of existing practices and attitudes towards UGC and the increasing acceptance of its legitimacy irrespective of their legal status); *id.* at 3 (recommending also a non-exhaustive list of categories for the fair dealing provision in line with the U.S. fair use exception).

¹⁵⁴ See Jessica Murphy, *New Copyright Bill to Duplicate C-32: Tories*, TORONTO SUN (May 17, 2011), <http://www.torontosun.com/2011/05/17/new-copyright-bill-to-duplicate-c32-tories>; Karen Bliss, *Canadian C-32 Copyright-Reform Bill Dies (Again) with Election Call*, BILLBOARD.BIZ (Mar. 28 2011), <http://www.billboard.biz/bbbiz/industry/global/canadian-c-32-copyright-reform-bill-dies-1005097402.story> (showing how politicized the issue of copyright amendment is).

¹⁵⁵ See, e.g., Steven Hetcher, *User-Generated-Content and the Future of Copyright: Part-Two—Agreements between Users and Mega-Sites*, 24 SANTA CLARA COMPUTER & HIGH TECH. L.J. 829, 840 (2008) (“Certainly, in principle, if cases involving much of this UGC were litigated, there would likely be many instances in which the creators would prevail in a fair use argument.”); *but see* Trombley, *supra* note 52, at 684 (noting that some UGC would likely fail the four part fair use analysis, but that courts should still not find infringement in these cases).

¹⁵⁶ See, e.g., Statute of the International Court of Justice, art. 38(1)(B), *available at* <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0> (“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.”).

standards or tests that often evolve into common law.¹⁵⁷ It has a role to play in identifying “implied terms” under contract law,¹⁵⁸ the application of the “reasonable man test” in tort law¹⁵⁹ and determination of “common law marriage” in family law.¹⁶⁰ Thus, custom can have a central role to play in the development of the law and legal norms.

Some academics have argued for the greater utilization of common usage and practices in the development of IT law.¹⁶¹ User behavior and attitude in cyberspace is an interesting study since patterns of activities can be empirically derived and examined.¹⁶² Especially in the case of UGC where the users are the drivers of creation, 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.¹⁶³

There is already a groundswell of opinion from academics, practitioners, civil rights organizations, and even lawmakers that users should be given greater rights in the form of freedom of access to and use of creative works. As noted, the EFF has been one such watchdog for user rights. Similarly, the Creative Commons Movement driven by a leading academic in this field, Lawrence Lessig, has sought to promote a culture of sharing and re-use of copyrighted works within the existing copyright framework.¹⁶⁴ Meanwhile, the free software, free culture and open source movements have likewise preceded and paved the way for a culture of sharing.¹⁶⁵

¹⁵⁷ See, e.g., RESTATEMENT (SECOND) OF TORTS § 283 (1965) (“Unless the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances.”).

¹⁵⁸ See RESTATEMENT (SECOND) OF CONTRACTS § 4 (1981) (“[I]ntention to make a promise may be manifested in language or by implication from other circumstances, including course of dealing or usage of trade or course of performance.”).

¹⁵⁹ See, e.g., RESTATEMENT (SECOND) OF TORTS § 283 (providing standard of conduct).

¹⁶⁰ See, e.g., Rutkin, *Family Law and Practice*, Ch. 1-4B, § 207 (Matthew Bender) (providing that “[p]arties to a marriage prohibited under this section who cohabit after removal of the impediment are lawfully married as of the date of the removal of the impediment”).

¹⁶¹ See Chik, *Customary Part I*, *supra* note 121, at 13–15.

¹⁶² E.g., “web analytics” is the study through collection, measurement, analysis and reporting of Internet data in order to understand and optimize web usage. 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.

¹⁶³ *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd*, [2010] 2 SLR 152, para. 114 (Sing.) (“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”); see also John Tehranian, *Infringement Nation: Copyright Reform and the Law/Norm Gap*, 2007 UTAH L. REV. 537, 543 (2007) (noting that the emergence of new technologies has made the average American citizen a copyright infringer).

¹⁶⁴ See LAWRENCE LESSIG, *REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY* 254–73 (Penguin, 2008) (recommending the removal or deregulation of noncommercial amateur re-use from copyright law and the simplification copyright law for greater clarity for users, including easily understood exemptions to complement fair use); see also WARREN CHIK & GIORGOS CHELIOTIS, *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*, 35TH RES. CONF. ON COMM. INFO. AND INTERNET POL’Y 1, 33 (Sept. 29, 2007).

¹⁶⁵ See, e.g., OECD REPORT, *supra* note 2, at 12 (noting that there are probably 200 million pieces of content on the internet that are under various Creative Commons licenses). At the

The courts in various jurisdictions have also become more sympathetic to user rights. For example, the Supreme Court in Canada took a strong stance on user rights in the seminal case of *CCH Canadian Ltd. v. Law Soc’y of Upper Canada*.¹⁶⁶ Even the holding in *Lenz* considered the users’ fair use as more of a right than an exception.¹⁶⁷ Just like customary internet law stems from the attitudes and practices of online users,¹⁶⁸ the assessment of lawful user-generated activities should stem from the acceptance of common UGC practice.

Daniel Gervais has noted in one of his theses that there is an “[element of social behavior passed on through generations in a culture], with a strong built-in feedback loop, that many forms of UGC are ‘acceptable’ within undefined parameters.”¹⁶⁹ This ‘new morality’ or ‘global social consciousness’ of users towards UGC can be used to determine what is acceptable and should be legalized.¹⁷⁰ The parameters of acceptability should be defined by the established practices and attitudes of users.¹⁷¹ The development of principles and guidelines by the relevant stakeholders can also

extreme, certain socio-political organizations and websites like Pirate Parties International and Pirate Bay take things further by attempting to subvert copyright law by appealing to populist notions of internet and online freedom.

¹⁶⁶ *CCH Canadian Ltd. v. Law Soc’y of Upper Canada*, [2004] 1 S.C.R. 339.

¹⁶⁷ *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 150, 1154 (N.D. Cal. 2008). Concluding 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.’ Even if Universal is correct that fair use only excuses infringement, the fact remains that fair use is a lawful use of copyright.

Id. (internal citations omitted); see also *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 433 (1984) (“Anyone . . . who makes a fair use of the work is not an infringer of the copyright with respect to such use.”); Chik, *supra* note 101, at 169–79 (drawing a distinction between a right and a defense and issues pertaining thereto).

¹⁶⁸ See Chik *Customary Part I*, *supra* note 121, at 3–22 (detailing how empirical study of user attitudes and practices could be accomplished); Chik *Customary Part II*, *supra* note 121, at 185–202 (making recommendations about the rules and principles that could be adopted for lawmaking based on customary Internet law as a source of law).

¹⁶⁹ Daniel J. Gervais, *The Tangled Web of UGC: Making Copyright Sense of User-Generated Content*, 11 VAND. J. ENT. & TECH. L. 841, 853–54 (2009). Gervais also notes 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:

[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 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?

Id. at 855–56.

¹⁷⁰ See *id.*

¹⁷¹ 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, e.g., *supra* note 163 and accompanying text.

influence the direction and development of customs as well, insofar as it reflects the consensus of the majority.¹⁷² Gervais also noted that “[w]hether a court will . . . 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.”¹⁷³

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.¹⁷⁴ It may be an overstatement that internet users are taking control of technology, as it is the technology creators, UGC intermediaries and technological 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.¹⁷⁵

4. Identifying Customary UGC Practices

The expansion of a fair use-type of protection to non-commercial derivative works of third parties that involve more than mere copying has been proposed before. That type of a proposal was based on the same utilitarian arguments set forth above that the re-use of copyrighted works can benefit society and, even to some extent, the copyright owner. This benefit would be accomplished through continued or increased interest and exposure of their works, which can offset any detriment from such use.¹⁷⁶ The rise of the public interest in, and social benefits of, 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 Center for Social Media (“CSM”) in January 2008 where the main types of purpose relating to UGC

¹⁷² Compare UGC Principles, *supra* note 125 with Fair Use Principles, *supra* note 138 (arguing for improvements automated content filtering, “take-down” notices, and a procedure by which users may challenge the removal of their content).

¹⁷³ Gervais, *supra* note 169, at 868. 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 reinforces a practice as a custom (i.e. a valid exception/exemption), and if so, to what extent such objection can constitute a source of customary norm (e.g. “implied consent”).

¹⁷⁴ See Debora Halbert, *Mass Culture and the Culture of the Masses: A Manifesto for User-Generated Rights*, 11 VAND. J. ENT. & TECH. L. 921, 959 (2009).

¹⁷⁵ *Id.* at 960–61 (proposing a manifesto by users and the copyright critics to support what she describes as a UGC ‘movement,’ which can be expressed as a manifestation of the developing attitudes, 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).

¹⁷⁶ See, e.g., Jessica Litman, *Creative Reading*, 70 L. & CONTEMP. PROBS. 175, 175–76 (2007) (proffering the Star Wars and Star Trek franchises as examples of how fan-based creative works can enhance the popularity of the original works).

were identified.¹⁷⁷ The Program on Information Justice and Intellectual Property (“IIJIP”) and the CSM also produced a set of code of best practices in fair use specifically for creators of online video.¹⁷⁸

Some types of UGC are already widely recognized statutory exceptions under fair use or exemptions as stand-alone provisions. These types include commentary, parody and satire, albeit in a more generalized context.¹⁷⁹ Newer forms of UGC include, but are not limited to, home videos, tribute videos, fan fiction, music mash-ups, and remixes.¹⁸⁰ Whether there are already general limitations for such purposes, 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 a natural progression that recognizes the changing contexts of usage.

5. Fairness

Fairness remains a fundamental consideration under the proposed statutory UGC carve-out. It is not accurate to say that the Canadian Bill C-32 model or the model proposed in this paper permits UGC as legally defined “without reference to the tempering effect of ‘fairness.’”¹⁸¹ 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 can be carefully *built into* the very definition of the UGC provision, which must be fulfilled in order for the exception or exemption to apply.¹⁸² Thus, if the conditions are established, the use should be deemed fair. Also, the nature and effect of certain purposes can also constitute fair usage provided that the other statutory conditions are met as well.

¹⁷⁷ AM. UNIV. CTR. FOR SOCIAL MEDIA, RE CUT, REFRAME, RECYCLE: QUOTING COPYRIGHT MATERIAL IN USER-GENERATED VIDEO 5 (Jan. 2008), *available at* <http://www.centerforsocialmedia.org/fair-use/best-practices/online-video/recut-reframe-recycle> [hereinafter CSM Report] (listing nine main categories of uses of copyrighted works for UGC).

¹⁷⁸ See AM. UNIV. CTR. FOR SOCIAL MEDIA, CODE OF BEST PRACTICES IN FAIR USE FOR ONLINE VIDEO 5–8 (June 2008), *available at* <http://www.wcl.american.edu/pijip/go/bestpractices> (identifying 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).

¹⁷⁹ See Notice of Final Rule, *supra* note 24, at 43826.

¹⁸⁰ See, e.g., OECD REPORT, *supra* note 2, at 15 (listing various types of user generated content and providing examples of each).

¹⁸¹ Andrea Rush, *What Anna Karenina Might Have Said About Copyright Qualifications Under Canadian Law*, 57 J. COPYRIGHT SOC'Y 667, 669 (2010).

¹⁸² See, e.g., 17 U.S.C. §§ 108–112, 117, 119, 121–122 (2006) (listing purpose-specific statutory exemptions that are the counterpart to the fair use or fair dealing factors).

C. The Formulation of a Proposed Statutory UGC Defense

The legislature will have to consider what allocation of rights is fair before determining the appropriate solution. This is because the extent of the protection accorded is dependent on whether the limitation is in the form of a general exception or specific exemption. For that reason, this paper presents two options. Option one is a more ‘liberal’ open-listed general UGC *exception* while option two is a more ‘conservative’ closed-listed purpose-specific UGC *exemption*.

For the purpose of this paper, especially this section, “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 are hybrids that fall somewhere in between the sliding scale marked at both extremes by the current fair use exception on the one side and existing restrictive purpose-specific exemptions on the other side. 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 should be determined by three Ps: profile; process; and purpose. These three “Ps” should form the pre-requisites for the two options for a UGC limitation provision.

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

Option one is a moderate option in between the open concept of the U.S. fair use doctrine and an exhaustive list of purpose-specific exemptions. Thus, subsection (2)

provides for the conditions to be fulfilled before UGC can avoid direct liability for infringement. These conditions are based on a core set of common characteristics of UGC that provides a fair balance of interest between the stakeholders. Because of its specificity, however, it may not cover *every* type of UGC.

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.¹⁸³ Because the list under subsection (3) is non-exhaustive, the judges can incrementally and gradually expand the boundaries of this exception to include other purposes, which can expand to other categories of uses or purposes. This will involve a 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’ of use or purpose.

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

¹⁸³ See, e.g., CSM Report, *supra* note 177, at 5 (listing the following as typical types of UGC: parody and satire; negative or critical commentary; positive commentary; quoting to trigger discussion; illustration or example; incidental use; personal reportage or diaries; archiving of vulnerable or revealing materials; pastiche or collage’); OECD REPORT, *supra* note 2, at 15–16 (listing sixteen different types of UGC).

characteristics. The 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 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 legislative intent, the only way that the category of eligible purpose-based UGC can expand is through legislative amendment. This lengthy process will likely lead to a more gradual development than option one.

National legislative approach as well as international law-making platforms such as within the World Trade Organization (“WTO”) and World Intellectual Property Organization (“WIPO”) can incrementally allow for a greater combination of exclusive rights and carve-outs. These limitations can be amended from time to time, but their reaction time will often be slow and will require greater effort and political will.

3. *The Basic Requirements*

UGC can be the outcome of an individual endeavor or collaboration.¹⁸⁴ Collaborative works appear on platforms such as wikis and other text-based cooperative portals (e.g. Wikipedia), 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).¹⁸⁵ It is also common for audio-visual and video content that are commonly uploaded to multi-media sharing platforms.¹⁸⁶ 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 re-formatted for compatibility with the system support of a particular platform, but it should not be substantively or substantially edited by an intermediary or any other third party. Otherwise, it may become the work of another.¹⁸⁷

a. Combination of Works (“Process”)

The essence of UGC is that it can be a combination of several existing works, an original take of an existing work or both.¹⁸⁸ It can also incorporate original elements by the UGC creator.¹⁸⁹ This definition refers to the *derivative* forms of UGC and not merely copied works.¹⁹⁰ It would apply, for example, to mash-ups and remixes.¹⁹¹

¹⁸⁴ See, e.g., OECD REPORT, *supra* note 2, at 16 (listing examples of distribution platforms for UGC).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ See 4 NIMMER, *supra* note 46, § 13.01.

¹⁸⁸ See OECD REPORT, *supra* note 2, at 4, 12.

¹⁸⁹ See 4 NIMMER, *supra* note 46, § 13.01.

¹⁹⁰ *Id.*

Because of the conditions set out here that are particular to UGC, the remainder of derivative rights rests with the copyright owner, thus 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 and the profitability in syndication).¹⁹² 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.¹⁹³

Substantiality of the taking of existing works should generally not be an issue, especially where the UGC utilizes many changes, or the use is quantitatively or qualitatively less central to the UGC work as a whole. For example, a collective work or a compilation of works, such as a “best of” tribute or a megamix, could also constitute UGC, so long as the new work does not merely combine entire pieces of existing work.¹⁹⁴ Nonetheless, the “transformative use” requirement will also factor in and outweigh considerations of substantiality of taking.

b. Transformative Use (“Purpose”)

The transition from passive user-consumer to a top-down model of cultural production for creative works have undergone a swift radical evolution to an active user-consumer model. This includes peer sharing and information dissemination across platforms,¹⁹⁵ collaborative tagging, and social classification.¹⁹⁶ The ‘social engineering’ technologies generally fall under the umbrella of “social software” applications.¹⁹⁷ In short, re-creativity is not new,¹⁹⁸ but the context of UGC and the way it is “democratized” through the use of networked digital technologies is new.¹⁹⁹

¹⁹¹ See e.g., Walker, *supra* note 51 (demonstrating how Girl Talk created and marketed its latest mash-up made from the combination of existing works, without fear of a lawsuit).

¹⁹² See, e.g., Starbucks Corp. v. Wolfe Borough Coffee, Inc., 588 F.3d 97, 117–18 (2d Cir. 2009) (discussing dilution and how exploiting the works, in this case a similar trademark, of another can negatively effect the commercial value of the original).

¹⁹³ See CSM Report, *supra* note 177, at 6–10 (providing examples of how re-using content can add value). 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.

¹⁹⁴ 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.

¹⁹⁵ See, e.g., *Sharethis*, <http://sharethis.com/> (last visited Jan. 30, 2012) (providing example of social bookmarking method). Other more traditional methods of social bookmarking include hyperlinking, deeplinking and in-line linking.

¹⁹⁶ See Tal Z. Zarsky, *Assessing Alternative Compensation Models for Online Content Consumption*, 84 DEN. U.L. REV. 645, 709–10 (2006) (discussing “folksonomies,” a system of collective and collaborative classification or indexing by users through the creation and management of tags to annotate digital content).

¹⁹⁷ *Id.* at 711.

The most significant achievements and outcome of this socio-cultural renaissance in the WWW are in the form of secondary expression, peer sharing and information dissemination.²⁰⁰ The former relates more to a derivative work with a different and perhaps incidental purpose from the original work. Alternatively, the latter relates more to the methods of transmission, broadcast and dissemination.²⁰¹

Even the creative industry has not exactly been placid and some have jumped onto the UGC bandwagon through different avenues and techniques. For example, some uses are more directly related to online advertising, including uploading of trailers on YouTube, while others use more subtle methods such as viral marketing campaigns, mash-up, or remix competitions.²⁰²

i. 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.*,²⁰³ the U.S. Supreme Court established that even a blatant commercial parody could constitute fair use, as long as it is sufficiently transformative.²⁰⁴

The transformative use test has been used to protect fair uses by alleged primary infringers (i.e., users) for re-creations for purposes different than that of the existing work used.²⁰⁵ The fair use test has also been applied to protect fair uses by alleged secondary infringers (i.e., internet intermediaries) for purposes different from

¹⁹⁸ Graham Reynolds, *A Stroke of Genius or Copyright Infringement? Mashups and Copyright in Canada*, 6 SCRIPTED 534, 642 (2009) (noting that “early versions of mashups have existed for decades”).

¹⁹⁹ 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, 562 (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.

Id. at 562.

²⁰⁰ See HENRY JENKINS, *CONVERGENCE CULTURE: WHERE OLD AND NEW MEDIA COLLIDE* 2–4 (N.Y. Univ. Press, 2006); HENRY JENKINS, *FANS, BLOGGERS, AND GAMERS: MEDIA CONSUMERS IN A DIGITAL AGE* 134–36 (N.Y. Univ. Press, 2006).

²⁰¹ See generally OECD REPORT, *supra* note 2, at 44–47 (differentiating derivative works from original works on the context of UCC).

²⁰² *Id.* at 5, 12, 34.

²⁰³ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

²⁰⁴ *Id.* at 574. 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.

²⁰⁵ See *e.g.*, 4 NIMMER, *supra* note 46, § 13.05[A][1][b] (describing the history and evolution of the productive use, as it relates to the purpose and character of the use element in the fair use analysis).

that of the original work, for example to achieve an archiving function,²⁰⁶ and cataloguing function in the form of image search engine indexing.²⁰⁷

The test was formulated in the context of the fair use doctrine and as a supplementary consideration to the four explicitly listed factors.²⁰⁸ The most significant fair use factor is the first factor, where a new work is examined by how “transformative” it is in relation to the existing work upon which it is partially based.²⁰⁹ The creation of transformative works has been seen as “at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright.”²¹⁰ Transformative use is important to the survival of modern technologies as exemplified by the outcome in the Google images search cases.²¹¹ “[It] is central to the creation of many virtual objects through modification and collaboration.”²¹² 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.²¹³

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,²¹⁴ the use of a work as part of a biographical account,²¹⁵ 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.

ii. Transformative Use Under the UGC Limitation Provision

The very essence of transformative use in support of UGC does not fall far from the original meaning of transformative use as it appeared in earlier literature, and as

²⁰⁶ See, e.g., *Field v. Google Inc.*, 412 F. Supp. 2d 1106, 1118–19 (D. Nev. 2006) (finding that Google’s practice of caching webpages was a fair use).

²⁰⁷ See, e.g., *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 822 (9th Cir. 2003) (holding that the reproduction of ‘thumbnail’ images for web search indexing was a fair use); *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 734–35 (9th Cir. 2007) (finding that Google’s use of thumbnail images was a fair use).

²⁰⁸ See *Campbell*, 510 U.S. at 581 (usurping the fair use factors in priority and weight as the Court considered the transformative factor as carrying more weight than the others).

²⁰⁹ *Id.* at 587–88.

²¹⁰ *Id.* at 579.

²¹¹ See *Kelly*, 336 F.3d at 822; *Perfect 10*, 487 F.3d at 734–35.

²¹² 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, 88 (2007) (noting 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”).

²¹³ See *Campbell* 510 U.S. at 581 n.14 (noting that less weight is accorded to other factors where significant transformativeness is found).

²¹⁴ See, e.g., *NXIVM Corp. v. The Ross Institute*, 364 F.3d 471, 480 (2d Cir. 2004) (taking the publication status of the underlying work into consideration in a fair use analysis).

²¹⁵ *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 609 (2d Cir. 2006) (finding the unauthorized use of copyrighted concert posters to be sufficiently transformative). See also, *Warren Publishing Co. v. Spurlock*, 2009 WL 2412542 (E.D.Pa. 2009).

it was adopted and applied by the U.S. Supreme Court in *Campbell v. Acuff-Rose*.²¹⁶ In that case, the 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.”²¹⁷ The users’ right to “rework [copyright-protected] material for a new purpose or with a new meaning” has been recommended in the 2006 Gowers Review of Intellectual Property in the United Kingdom (“U.K.”) on the subject as well.²¹⁸ Such a right of creation also includes the incidental right to disseminate such works.²¹⁹

Originality is a requirement for copyright protection and is also a factor in any transformative use assessment.²²⁰ The purpose of the use can give rise to a high likelihood of originality in a work.²²¹ The change in purpose or meaning of a work is a transformative use that usually requires a modification of the original copyrighted works.²²² For example, the changes made to an existing work or the extraction of the work in question for parody or for critical comment constitute transformative use.²²³ A mere repackaging or republication of a copyrighted work is unlikely to succeed,

²¹⁶ See Laura A. Heymann, *Everything Is Transformative: Fair Use and Reader Response*, 31 COLUM. J.L. & ARTS 445, 451–52 (2008) (noting that Judge Leval coined the term “transformative” in the fair use context); see also Leval, *supra* note 81, at 1111 (defining transformative use as requiring that “[t]he use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original”).

²¹⁷ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

²¹⁸ ANDREW GOWERS, GOWERS REVIEW OF INTELLECTUAL PROPERTY 66 (Nov. 2006), available at http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_755.pdf [hereinafter GOWERS REVIEW] (recommending that the U.K. government take steps to create a copyright exception for transformative use, because the so-called “rework material” can create “new meaning,” “new value,” and “new markets”).

²¹⁹ See 17 U.S.C. §106 (2006). The public nature of its sharing distinguishes UGC from personal use.

²²⁰ See Mary W. S. Wong, “Transformative” User-Generated Content in Copyright Law: *Infringing Derivative Works or Fair Use?*, 11 VAND. J. ENT. & TECH. L. 1075, 1087–88 (2009) (discussing issues regarding the level of originality that should be required for UGC). 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.

²²¹ See, e.g., Anthony Reese, *Transformativeness and the Derivative Work Right*, 31 COLUM. J.L. & ARTS 467, 488–89 (2008) (noting several cases in which creators changed nothing in the underlying work, yet the courts’ found no infringement due to the purpose of the defendant’s usage).

²²² See, e.g., *Brandir Int’l, Inc. v. Cascade Pac. Lumber Co.*, 834 F.2d 1142, 1144 (2d Cir. 1987) (discussing the requirement of conceptual separability when analyzing useful work that is re-created into a creative work).

²²³ Leval, *supra* note 81, at 1111.

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.

Id.

especially if it can be mechanically and automatically performed without human intervention or judgment.²²⁴

In summary, the re-working of different types of copyrighted works through various methods and in different degrees for a new purpose or meaning generally constitutes transformative use.²²⁵ Whatever the case, it must involve some modification or alteration of existing works, even if it may be contextual.²²⁶

There are good reasons 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. This is especially relevant if the scope of the protection is required to be restrictive, relative to the fair use doctrine, and in line with international legal obligations, like the Berne Convention.²²⁷ Additionally, they constitute value-added as they offer additional pleasure and different interests generated in the re-work.²²⁸ Because these user objectives are distinct from the original purpose of the work, the transformative use requirement is satisfied.²²⁹

iii. Transformative Use: Deemed or Presumed?

There are two additional choices for consideration under the two options previously proposed that relate to the transformative use requirement. One additional choice is that the listed purposes can, by their very nature, be considered transformative and as such they may be *deemed* transformative. This choice 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 intentions of the creator. Since transformative use here is intricately linked to the change of specific purpose, there is good reason for preferring a provision that deems transformativeness.

The other additional choice is to provide for a *presumption* of transformative use. The presumption option would transfer the burden of proof to the copyright owner to convince the court that the UGC in question is not transformative. This could be 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 purpose of its creation. However, there may be greater subjectivity in the analysis by the courts and the outcome could be more unpredictable. The safeguard accorded by a presumption,

²²⁴ *Id.* (“[I]n Justice Story’s words, it would merely “supersede the objects” of the original.”) (internal quotations omitted).

²²⁵ See GOWERS REVIEW, *supra* note 218, at 66 (noting that the purpose of the transformative works exception is to “enable creators to rework material for a new purpose or with a new meaning”).

²²⁶ Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578–81 (1994).

²²⁷ Berne Convention for the Protection of Literary and Artistic Works, art. 9(2) (Sept. 9, 1886) [hereinafter Berne Convention], available at http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html.

²²⁸ See CSM Report, *supra* note 177, at 8–10 (explaining how each type of purpose adds value to the content, thus making it transformative). The less of a direct substitute that the UGC is for the original, the more likely it fits into a categorical exception (especially for option one where other forms of usage or purpose can be eligible for its protection).

²²⁹ *Id.*

especially in relation to option one, is that UGC that is unoriginal or that serves a bad faith ulterior motive will not be able to obtain protection on the ostensible basis of a genuine change of purpose.

c. Creator (“Profile”)

Amateur and non-commercial users have different incentives to create, use, and share their works compared to the professional and commercially driven content owners.²³⁰ These incentives have strong social and cultural impacts.²³¹ The restrictive effects of the exclusive right 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.²³²

There are also many legitimate reasons for non-amateurs to create content outside of their professional practices and routines.²³³ One reason is that it provides an opportunity for non-amateurs to claim ownership of their work, as opposed to work created for an employer, which belongs to the employer.²³⁴ This category of creators should also be included, qualified by the non-commercial purpose condition and on condition that it is not work-related, so that the new work belongs to them and not to the employer.

d. Non-Commerciality (“Purpose”)

Commerciality is one of the fundamental considerations in the apportionment and balance of rights under the U.S. copyright regime.²³⁵ For example, in the U.S.,

²³⁰ See OECD REPORT, *supra* note 2, at 47. Other terms referring to UGC that have been used interchangeably to describe these types of works include “user created content” or UCC “consumer generated media” as well as “amateur digital content.” These terms reflects more clearly the central role of the amateur and non-commercial professional creator in UGC.

²³¹ *Id.*

²³² See generally LAWRENCE LESSIG, FREE CULTURE: THE NATURE AND FUTURE OF CREATIVITY 171–73 (Penguin, 2008) (arguing that Copyright law’s reach has extended too far, covering publishers and individuals alike in any form, which stifles creativity); LESSIG, REMIX, *supra* note 164, at 254–73 (listing five principle ways in which Copyright law should be reformed in order to accommodate the developments of modern technology); Lawrence Lessig, *Free(ing) Culture for Remix*, 2004 UTAH L. REV. 961, 970 (2004) (“A loss of control caused by a shifting technology has led policy makers and content owners to scramble to find alternatives for reinforcing control.”).

²³³ See, e.g., *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 732 (1989) (holding that a work created in the course and scope of employment is property of the employer not the employee).

²³⁴ *Id.*; 17 U.S.C. § 101 (providing definition for works for hire).

²³⁵ See 4 NIMMER, *supra* note 46, § 13.05[1][c]. In explaining why commercial use tends to cut against a fair use defense, Nimmer point out that:

even that ‘while commercial motivation and fair use can exist side by side, the court may consider whether the alleged infringing use was primarily for public benefit or for private commercial gain’ which inclines against fair use in a commercial context, but leaves wide latitude for the court to consider all the other factors that may outweigh this single fact under appropriate circumstances. Labeling a use as ‘commercial,’ in other words, should not end the analysis.

commercial use and profit-making are some of the key reasons behind the exclusive rights afforded to authors and are important components of fair use analysis.²³⁶ It is also the reason for the predominantly civil and equitable remedies for infringement and the awarding of monetary damages and sanctions.²³⁷

The nature of the use embodies the spirit, if not the form, of fairness.²³⁸ 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.²³⁹ In fact, in certain cases, it can even add value to the original work, by providing added exposure.²⁴⁰ 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 may also justify non-commercial usage as a fair compromise between the parties.²⁴¹ 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.

Id. (citations omitted).

²³⁶ Pamela Samuelson, *The Copyright Principles Project: Directions for Reform*, 25 BERKLEY TECH. L.J. 1175, 1176 (2010).

[C]opyright law carefully balances the interests of the public in access to expressive works and the sound advancement of knowledge and technology, on the one hand, with the interests of copyright owners in being compensated for uses of their works and deterring infringers from making market-harmful appropriations of their works, on the other.

Id. at 1176.

²³⁷ See *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) (“The sole interest of the United States and the primary objective in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.”); see also U.S. CONST. art. I, § 8, cl. 8 (“To promote the Progress of Science and the 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.

²³⁸ See *Harper & Row Publishers, Inc. v. Nation Enters., Inc.*, 471 U.S. 539, 562 (1985) (“The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.”).

²³⁹ See *e.g.*, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591 (1994) (“[W]hen . . . the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred . . . it is more likely that [a parody] will not affect the market for the original in a way cognizable under this factor, that is, by acting as a substitute for it.”). 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.

²⁴⁰ See, *e.g.*, Litman, *supra* note 176, at 175–76 (proffering the Star Wars and Star Trek franchises as examples of how fan-based creative works can enhance the popularity of the original works). Similarly, 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.

²⁴¹ *Cf.* U.S. CONST. art. I, § 8, cl. 8 (“To promote the Progress of Science and the useful Arts” infers that an important consideration in granting copyright protection is the public’s interest in creativity).

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 or her own host.²⁴² Celebrity bloggers have been known to derive *indirect* benefits including those from advertisement revenue merely based on the popularity of the website alone.²⁴³ In cases where the commercial benefits are incidental, the motives of the UGC creator and his or her profile should be irrelevant. However, motive is relevant if profit is generated *directly* from the UGC (i.e., through 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). Motive is relevant.

It is important to separate *indirect* benefits, from *direct* commercial usage and only allow protection for those UGC creators who get their benefits, if any, incidentally or indirectly.²⁴⁴ This also acknowledges that motivations of derivative users generating content are different from original creators.²⁴⁵

In summary, the test of commercial purpose is an objective-subjective one based on the purpose and context of the UGC rather than actual and *indirect* commercial gain. An objective test is thus formulated from the user’s subjective perspective and based on his or her *bona fide* motives and intentions.

e. General Observations Regarding the Proposed UGC Limitation

First, 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.²⁴⁶ The extent of overlap with statutory purpose-based exemptions will depend on the list of enumerated purposes to be included into the UGC exemption. However, overlapping defenses are not necessarily objectionable, especially when they make a political or policy statement, meet different objectives or cover areas that may not be fully within the scope of one or the other.²⁴⁷

²⁴² See e.g., Clay LePard, *Top YouTube Earners Share Their Strategy*, ABCNEWS.COM (Oct. 18, 2010), http://abcnews.go.com/Technology/top-youtube-earners-share-strategies/story?id=11894696#.TwHhRE_t4aQ (discussing how YouTube users have been able to create channels, host shows, and generate income from creating YouTube videos).

²⁴³ *Id.*

²⁴⁴ In the opinion of this author, this is a fair compromise especially after the subtle shift in the judicial opinion after *Campbell*. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994) (“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 § 107, including news reporting, comment, criticism, teaching, scholarship, and research, since these activities are generally conducted for profit in this country.”) (internal quotations omitted).

²⁴⁵ *Id.*

²⁴⁶ See 17 U.S.C. § 107 (2006).

²⁴⁷ For example, 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 one is preferred, given its potentially wider scope.

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 has been slow, especially in countries with only narrow fair dealing protections and other closed-list purpose specific exemptions.²⁴⁸ Also, 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. As discussed, Canada has come the closest to an enactment of such a limitation, as a clear recognition of the rising importance of UGC.

Third, the specified purposes will have special status in either option, as the proposal should be deemed, or at least presumed to be, transformative as to elevate the nature of the protection. The very re-purposing of original works into UGC renders such re-use transformative. Including an enumerated list of purposes is another way of recognizing user *rights* as opposed to user *defenses*.²⁴⁹ The focus is on a very specific type of protection for a specific, albeit 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 provide greater order in practices and clarity to the scope of protection.

4. Identification of Types of Commonly Accepted Purposes

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. It is important that these purposes are accepted both socially and culturally, not only in a cyberspace society, but also in the political climate of the jurisdiction considering such a provision. For purposes of this article, that jurisdiction is the U.S.

The purposes are categorized below according to the similarity of their function although they may differ in form and effect. Some of these purposes may also overlap as UGC can be created with several purposes in mind, hence they may not be mutually exclusive. The recommended purposes, substantially match the categories derived from the CSM Report.²⁵⁰ The six types of uses forming the core purposes are selected based on their widespread use and acceptance as UGC.

²⁴⁸ See P.B. HUGENHOLTZ & MARTIN SENFTLEBEN, FAIR USE IN EUROPE: IN SEARCH OF FLEXIBILITIES 4 (Nov. 2011).

²⁴⁹ See Chik, *supra* note 101, at 179.

²⁵⁰ See CSM Report, *supra* note 177, at 7–15.

a. Commentary

“Commentary” is a general form of expression that constitutes a series of notes or statements in one or more forms of expression.²⁵¹ The *purpose* of commentary is to provide a perspective that may or may not be meant to elicit debate or discussion.²⁵² It can address any topic, or it may relate to the ‘borrowed’ content itself, like when it serves as a critique of the existing work or works. Whatever the case, unlike personal reportage or diaries, it relates to the work of others.²⁵³

A commentary can take many forms and, and can be direct or indirect, although it is more likely to be the former.²⁵⁴ For example, a blog post can directly post subjective criticisms on a book or a piece of music. Additionally, a piece of music can be critiqued for being unoriginal by comparisons made using snippets of the song with other music. Similarly, 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.²⁵⁵

A commentary 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.²⁵⁶ *Motive* is irrelevant.²⁵⁷ It is not a market substitute for the original material utilized and may even bring added attention to the existing work. This attention can be a positive development for the copyright owner, as opposed to a negative development market substitution creates.²⁵⁸ When a commentary is used to generate discussion or debate, it can be conducted within the

²⁵¹ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580 (1994).

²⁵² See *id.*

²⁵³ *Id.*

²⁵⁴ See, e.g., *Rogers v. Koons*, 960 F.2d 301, 309 (2d Cir. 1992) (concerning the use of a copyrighted image for the purpose of social commentary); *id.* at 303 (explaining that Jeff Koons was an artist who was sued for allegedly infringing the copyright of the plaintiff’s commercial photographic image that appeared on a postcard); *id.* at 303–04 (noting that 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,” which commented ironically on the clichés that pervades mass media content); *Campbell*, 510 U.S. at 580 (illustrating that the direct usage of the underlying work 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.

²⁵⁵ *Rogers*, 960 F.2d at 309.

²⁵⁶ See Martha T. Moore, *Study: Rick Perry Nabs Most News Media Coverage*, USA TODAY (Oct. 17, 2011), <http://content.usatoday.com/communities/onpolitics/post/2011/10/rick-perry-news-coverage-pew-research-barack-obama-1> (noting that news commentary in a political context was polled in varying amounts of positive, negative, and neutral coverage); CARLA WILLIG, *INTRODUCING QUALITATIVE RESEARCH IN PSYCHOLOGY: ADVENTURES IN THEORY AND METHOD 6* (Open Univ. Press 2001) (stating that objective researchers strive to remain “detached . . . and impartial” when conducting research).

²⁵⁷ *Rosemont Enter., Inc. v. Random House, Inc.*, 366 F.2d 303, 307 (1966) (noting that commercial motive has no bearing on whether a commentary constitutes fair use).

²⁵⁸ See *Campbell*, 510 U.S. at 592 (“[T]he only harm to derivatives that need concern us . . . is the harm of market substitution. The fact that a parody may impair the market for derivative uses by the very effectiveness of its critical commentary is no more relevant under copyright than the like threat to the original market.”).

forum, like where the UGC platform provides the discussion threads, or outside of the forum.²⁵⁹

b. Parody and Satire

Parody is “work in which the style of an author or work is closely imitated for comic effect or in ridicule.”²⁶⁰ Alternatively, satire is “work holding up human vices and follies to ridicule or scorn.”²⁶¹ 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 nature generally.²⁶² Parodies can either flatter or cast a negative light on the existing work whereas satire is generally negative in nature.²⁶³

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.²⁶⁴ It may involve copying or changing the choreography, melody or lyrics, and also other things like lip-syncing, over exaggerations, or caricatures.²⁶⁵ Movies and television shows that depict the human condition can be spoofed such as in a “mockumentary” which is a

²⁵⁹ See, e.g., *Youtube Community Guidelines*, YOUTUBE, http://www.youtube.com/t/community_guidelines (last visited Jan. 30, 2012) (discussing the comment system within the YouTube community).

²⁶⁰ *Parody-Definition*, MERRIAM-WEBSTER'S ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/parody>.

²⁶¹ *Satire-Definition*, MERRIAM-WEBSTER'S ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/satire>. See CSM Report, *supra* note 177, at 7–8. In discussing the types and purposes of UGC, the CSM report explains that:

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.

Id.

²⁶² See 4 NIMMER, *supra* note 46, § 13.05[C][1]; see also *Suntrust v. Houghton Mifflin Co.*, 268 F. 3d 1257, 1265 (11th Cir. 2001). In distinguishing parody from satire, the court stated:

[p]arody, which is directed toward a particular literary or artistic work, is distinguishable from satire, which more broadly addresses the institutions and mores of a slice of society. Thus, parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim’s . . . imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing.

Id. (citations omitted).

²⁶³ See 4 NIMMER, *supra* note 46, § 13.05[C][1].

²⁶⁴ See, e.g., Jenna Wortha, *Banned From YouTube: Parody Guitar Videos*, WIRED (Feb. 8, 2008), <http://www.wired.com/underwire/2008/02/watch-the-parod/> (discussing a user who created parody videos on YouTube to which copyright owners claimed infringement).

²⁶⁵ *Id.*

type of film or television show in which fictitious events are presented in documentary format.²⁶⁶

Parodies and satires are increasingly important components of UGC as technology increasingly empowers and encourages the common user to express an opinion.²⁶⁷ However, parody and satire in general have increasingly been recognized as an important form of free speech and subsumed as a defense into the copyright legislation of many countries. For example, in 2005 the Australian Copyright Act incorporated the fair dealing exclusion for the purpose of parody or satire.²⁶⁸ Another example is the “parody, pastiche and caricature” provision in France.²⁶⁹ The provision states that once a work has been disclosed the author may not prohibit parody, pastiche and caricature; provided that even though the works must be similar, the public must be able to differentiate between them.²⁷⁰ Thus, there may be an overlap in those jurisdictions that already have such an exemption or that have an exception that can cover these forms of expression.

c. Pastiche or Collage

Pastiche refers to “work that imitates the style of previous work” and also “[a] composition made up of selections from different works.”²⁷¹ Similarly, a collage is “a creative work that resembles [a composition made of various materials] in incorporating various materials or elements.”²⁷² However, 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.²⁷³

²⁶⁶ See, e.g., Jill Serjeant, *Out with Old, in with New in Golden Globe TV Race*, REUTERS (Dec. 15, 2011) (discussing the popularity of the mockumentary “Modern Family”).

²⁶⁷ *Compare* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994) (using sampling for direct parody and determined to constitute fair use despite the commercial aspect of the venture) with Grand Upright Music Ltd. v. Warner Bros. Records Inc., 780 F. Supp. 182, 184–85 (1991) (indicating the importance of obtaining permission to use samples from an existing work to create new compositions).

²⁶⁸ See *Copyright Act 1968* (Cth) s 41A (Austl.); see also Maree Sainsbury, *Parody, Satire and Copyright Infringement: The Latest Addition to Australian Fair Dealing Law*, 12 MEDIA & ARTS L.R. 292, 292–319 (2007) (discussing the 2005 amendments in the Australian Copyright Act and the impact it has on various fair uses); Damien O’Brien & Brian Fitzgerald, *Digital Copyright Law in a YouTube World*, 9 INTERNET L. BULLETIN 1, 71–74 (2006); O’Brien & Fitzgerald, *Mashups*, *supra* note 118, at 17–19 (creating an understanding of the impact that the Australian Copyright Act has on various forms of online creativity, namely mash-ups and remixes).

²⁶⁹ *Compare* Law on the Intellectual Property Code No.92-597, L. 122-5(2) (1992) (Fr.), with Law on Copyright and Neighboring Rights (1993), art. 24 (Ger.) (“free use” provision allows use of an existing work belonging to another to be published and exploited without the consent of the author of the work used).

²⁷⁰ *Id.*

²⁷¹ *Pastiche-Definition*, MERRIAM-WEBSTER’S ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/pastiche>.

²⁷² *Collage-Definition*, MERRIAM-WEBSTER’S ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/collage>.

²⁷³ See KEMBREW MCLEOD & RUDOLF KUENZLI, CUTTING ACROSS MEDIA, APPROPRIATION ART, INTERVENTIONIST COLLAGE, AND COPYRIGHT LAW 1–2 (Kembrew McLeod & Rudolf Kuenzli, eds., 2011).

A pastiche or collage does not, however, include mere compilation of existing works such as a greatest hits album or an anthology.²⁷⁴ 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.²⁷⁵ Nonetheless, the provision may include a video montage or a music megamix.²⁷⁶

Similar to parody and satire, this category has also been increasingly recognized as a valid carve-out from copyright liability. For example, the 2006 Gowers Review that was commissioned by the U.K. government has suggested an amendment of applicable European Union (“EU”) copyright law to allow for an exception for creative, transformative or derivative work, within the parameters of the Berne Convention three-step test, which is discussed later in this paper.²⁷⁷ The Gowers Review also endorsed broadening the list of exclusions to include protections for works of caricature, parody, and pastiche.²⁷⁸

d. Personal Reportage or Diaries

“Personal reportage” or “diaries” refer to the production of news, personal views, and other information related to an individual, which in the UGC context is done publicly for sharing.²⁷⁹ Blogs are one of the most common manifestation of this practice.²⁸⁰ Because blogs have become wide-spread, UGC platforms have made it easier for non-technically savvy individuals to join in the movement, through websites including Tumblr, a blog hosting platform with customizable templates,²⁸¹ Flickr, used to manage and share photos,²⁸² YouTube, a video-sharing platform,²⁸³ Facebook, the preeminent social networking site,²⁸⁴ Twitter, a micro-blogging service,²⁸⁵ and MySpace, another social networking website but with a strong focus on amateur music.²⁸⁶ These various platforms indicate that the form can vary greatly. This category is the clearest manifestation of the ‘me’ generation with the focus on individualism.

²⁷⁴ See 4 NIMMER, *supra* note 46, § 13.05 (discussing “transformative” requirement).

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ GOWERS REVIEW, *supra* note 218, at 68. 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.

²⁷⁸ *Id.*

²⁷⁹ See CSM Report, *supra* note 177, at 12.

²⁸⁰ See OECD REPORT, *supra* note 2, at 11 (comparing the number of bloggers compared to the number of other types of UGC in the U.S. and in Japan).

²⁸¹ See *About Tumbler*, TUMBLR, <http://www.tumblr.com/about> (last visited Jan. 30, 2012).

²⁸² See *About Flickr*, FLICKR, <http://www.flickr.com/about/> (last visited Jan. 30, 2012).

²⁸³ See *About Youtube*, YOUTUBE, http://www.youtube.com/t/about_youtube (last visited Jan. 30, 2012).

²⁸⁴ See *About Facebook*, FACEBOOK, <http://www.facebook.com/facebook?sk=info> (last visited Jan. 30, 2012).

²⁸⁵ See *About Twitter*, TWITTER, <http://twitter.com/about> (last visited Jan. 30, 2012).

²⁸⁶ See *About Us—Myspace.com*, MYSPACE, http://www.myspace.com/Help/AboutUs?pm_cmp=ed_footer (last visited Jan. 30, 2012); see also *supra* Part IV.C.3.d (discussing amateur works).

e. Re-Interpretations

“Re-interpretation” refers to the re-invention or re-combination of copyrighted works to create new meaning or expression through the inclusion of other original works.²⁸⁷ “Fan laborers” form the biggest re-users for this category. While their motives vary greatly, their purpose is always for personal self-expression and appreciation.²⁸⁸

There are many examples of re-interpretations. For music, they can range from cover versions of songs to music mash-ups, and remixes.²⁸⁹ For vidding,²⁹⁰ they include video mash-ups, fanvids and music video re-enactments, which may include actual singing or lip-syncing, original or new choreography and new sets or actual background effects.²⁹¹ For literary works, a common example is 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. In the gaming community, fan-made machinima, which are films made within video games, are also common.²⁹²

Re-interpretation is most common in the music sharing community through the sampling of components of a song or parts of choreography.²⁹³ This is perhaps because of the length of songs and music videos, the availability of digital tools, the accessibility of existing works, the relative ease of use and 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.²⁹⁴ This may be achieved, for example, by the inclusion of new music, lyrics, subtitles, images, dialog, sound effects, or animation to existing works.²⁹⁵ There are many tools and applications available online that facilitates such forms of expression even amongst the most amateur of users.²⁹⁶

²⁸⁷ See Tushnet, *supra* note 96, at 895.

²⁸⁸ See generally Deborah Tussey, *From Fan Sites to Filesharing: Personal Use in Cyberspace*, 35 GA. L. REV. 1129, 1139, 1151–56 (2001) (discussing various forms of personal “fan” expression).

²⁸⁹ See Lessig, *supra* note 232, at 967–68. Mash-ups are songs made up of the combination of two or more different existing sound recordings while remixes are works that re-edit (and sometimes also 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).

²⁹⁰ See generally Tushnet, *supra* note 96, at 895–900 (examining 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).

²⁹¹ *Id.* at 895–96.

²⁹² See Brad King, *Machinima: Games Act Like Films*, WIRED (July 23, 2002), <http://www.wired.com/gaming/gamingreviews/news/2002/07/53929>.

²⁹³ See Tushnet, *supra* note 96, at 895–900.

²⁹⁴ *Id.* at 895.

²⁹⁵ See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (examining work which borrowed lyrics and certain musical composition); King, *supra* note 292 (utilizing existing art resources from video game in creating video compositions).

²⁹⁶ See, e.g., VIRTUALDJ, <http://www.virtualdj.com> (last visited Jan. 30, 2012) (sound mixing software with free version and robust community discussion).

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.

f. 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. An example of this is the accidental inclusion of background music in a home recording where the focus is on another subject matter.²⁹⁷ Incidental uses can also be intentional, such as the use of a work as an example to represent a genre or to illustrate a point of view.²⁹⁸ Such uses can, for instance, be education and research related.²⁹⁹ It is also common in videos uploaded into video sharing websites like YouTube and it can overlap with some of the above categories including personal diaries where the focus is on the UGC maker.³⁰⁰

g. Information and Knowledge Sharing (and Archiving)

Individual internet users often 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.³⁰¹ Group-based aggregation websites also perform a useful function and have a clear objective or purpose.³⁰² 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.

The statutory exceptions or exemptions for research, study and ‘librarying’ activities indicate that information and knowledge sharing is already an important factor relating to copyrights.³⁰³ Similarly, permissible exclusions for private copying and ‘librarying’ contribute to the archiving of human knowledge and materials.

²⁹⁷ *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1152 (N.D. Cal. 2008).

²⁹⁸ *E.g.*, *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 612–13 (2d Cir. 2006) (holding that, 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”).

²⁹⁹ 17 U.S.C. § 107 (2006) (detailing fair use exceptions which include research and education).

³⁰⁰ *See, e.g.*, *Lenz* 572 F. Supp. 2d at 1151–53 (mixing copyrighted music and personal tape of family).

³⁰¹ CITIZENDIUM, <http://en.citizendium.org/> (last visited Jan. 30, 2012); WIKIPEDIA, <http://www.wikipedia.org/> (last visited Jan. 30, 2012).

³⁰² *Purpose of Wikipedia*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Wikipedia:Purpose> (last visited Jan. 30, 2012).

³⁰³ *See* 17 U.S.C. §107; *see generally* *Sony Corp. of Am. v. Universal Studios, Inc.*, 464 U.S. 417, 451 (1984) (discussing the practice of “librarying”).

5. Conclusion to Discussion on Types of Purposes

For the U.S., this proposed UGC limitation provision would supplement and overlap with the current fair use provision, by adding to the purpose-specific exemptions. Alternately, this would incrementally expand the exemptions from infringement and add to the list of purpose-specific exemptions for other countries that already have purpose-specific fair dealing provisions, such as Canada.³⁰⁴

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.³⁰⁵ 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. The fair use exception is wider in scope than the proposed exemption in either of the two permutation or options.³⁰⁶ 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.³⁰⁷ However, the UGC provision is not a subset of the fair use exception nor is it merely a “perfect substitute” for fair use.

In summation, option one has a general exception 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. Option two, on the other hand, the more limited option, is to make the exemption purpose specific according to an exhaustive list of purposes that can also be deemed or presumed transformative in effect. Option two would be more likely to comply with the Berne Convention three-step test, which is discussed in the following section.

D. Overcoming the Berne Three-Step Test

The copyright legislation in many countries contains limitations in the form of statutory exemptions for specific activities and purposes including personal use, teaching, research, comment, criticism, quotation, news reporting, and librarying.³⁰⁸

³⁰⁴ See, e.g., Canada Copyright Act, R.S.C. 1985, c. C-42, s. 29 (providing exceptions for fair dealing related to research, private study, criticism, review, and news reporting among others).

³⁰⁵ See, e.g., CCH Canadian Ltd. v. Law Society of Upper Canada, [2004] 1 S.C.R. 339, paras. 53–60 (Can.) (discussing application of a more general approach to fair use in light of statutory limitations).

³⁰⁶ See *id.* (demonstrating 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).

³⁰⁷ Rush, *supra* note 181, at 671 (“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 license even if the right/exception is not expressly tempered by ‘fairness.’”).

³⁰⁸ The type and extent of limitations vary from jurisdiction to jurisdiction. See e.g., Council Directive 2001/29/EC, 2001 O.J. (L 167) 10, art. 5 (providing a list of purpose-specific exemptions that were suitable to the legal traditions and the socio-cultural environment of the EU member states, which required the member states to adhere to the three-step test); 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. *Id.* at art. 5(5).

In recent years, it has become more common to make exemptions to protect the internet infrastructure and other innovative forms of technology.³⁰⁹ These exemptions include user caching, temporarily reproducing materials made in the course of communication, and back-up copying of computer programs.³¹⁰

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. Such conventions include the WTO and the Trade Related Aspects of Intellectual Property Rights (“TRIPS”),³¹¹ the Berne Convention,³¹² the World Intellectual Property Organization Copyright Treaty (“WIPO Copyright Treaty”),³¹³ and the World Intellectual Property Organization Performance and Phonograms Treaty Act (“WIPO Performance and Phonograms Treaty”).³¹⁴ 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 above-mentioned international legal instruments that relate to the copyright regime.

The three-step test was constructed to assess and limit the validity of limitations made to the exclusive rights of copyright owners.³¹⁵ 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.³¹⁶ 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.³¹⁷

³⁰⁹ See, e.g., Law on Copyright and Neighbouring Rights (1994), art. 23–35 (Pol.) (detailing copyright exceptions in Poland, for example an exception exists for dissemination of television broadcasts by a group cable network) available at <http://www.wipo.int/wipolex/en/details.jsp?id=3500> (English translation provided by WIPO) (last visited Jan. 30, 2012).

³¹⁰ See 17 U.S.C. § 512(a–d) (2006).

³¹¹ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125, 1869 U.N.T.S. 299, [hereinafter TRIPS], available at http://www.org/english/docs_e/legal_e/27-TRIPS.pdf.

³¹² Berne Convention, *supra* note 227, at art. 9(2).

³¹³ World Intellectual Property Organization Copyright Treaty, Dec. 20, 1996, 36 I.L.M. 65 (1997) [hereinafter WIPO Copyright Treaty], available at <http://www.wipo.int/treaties/en/ip/wct/index.html>.

³¹⁴ World Intellectual Property Organization Performances and Phonograms Treaty, Dec. 20, 1996, 36 I.L.M. 76 (1997) [hereinafter WIPO Phonograms Treaty], available at http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html.

³¹⁵ See generally Jane C. Ginsburg, *Toward Supranational Copyright Law? The WTO Panel Decision and the “Three-Step Test” for Copyright Exceptions 1–9* (Columbia Law Sch. Center for Law and Econ. Working Paper No. 181 2001), available at http://papers.ssrn.com/paper.taf?abstract_id=253867 (analyzing recent applications of the three-step test).

³¹⁶ *Id.* at 3; see MARTIN SENFTLEBEN, COPYRIGHT LIMITATIONS AND THE THREE-STEP TEST 283–93 (Kluwer Law Int’l, 2004); Daniel J. Gervais, *Towards A New Core International Copyright Norm: The Reverse Three-Step Test*, 9 MARQ. INTELL. PROP. L. REV. 1, 15–17 (2005).

³¹⁷ Berne Convention, *supra* note 227, at art. 9(2) (“It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, *provided*

The three-step test is contained in article 13 of the TRIPS Agreement.³¹⁸ That provision is based on provisions contained in earlier copyright related treaties, namely, article 9(2) of the Berne Convention, article 10 of the WIPO Copyright Treaty, and article 16 of the WIPO Performances and Phonograms Treaty.³¹⁹ Because its earliest appearance was in the Berne Convention, it is often referred to as the “Berne three-step test.”³²⁰

Although there are various applications of this test, that divergence should not be an impediment to the enactment of a UGC limitation for several reasons, both practical and academic.³²¹ Specific statutory exemptions are less likely to be contentious in the first place.³²² Thus, many purpose-specific exemptions such as for parody and satire as well as personal use activities have passed the three-step test.³²³ In particular, an exhaustive list of exemptions, such as that proposed in option two, should likewise be acceptable. In fact, limitations in the form of enumerated exemptions enjoy widespread acceptance. International instruments themselves even contain some such provisions.³²⁴

On the other hand, option one is likely to be more controversial as it functions in a more flexible and amorphous manner that is closer to the fair use model. As a result, option one 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 one proposal,³²⁵ it has successfully retained the provision for decades and its courts have applied it extensively.³²⁶ In fact, the U.S. government has even successfully exported this concept abroad to other countries including to Israel and Singapore.³²⁷ Many of its proponents have also made compelling and cogent arguments in defense of its scope

that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author” (emphasis added).

³¹⁸ TRIPS, *supra* note 311, at art. 13; See Ginsburg, *supra* note 315, at 1.

³¹⁹ Ginsburg, *supra* note 315, at 1.

³²⁰ See Gervais, *supra* note 316, at 28.

³²¹ See P. Bernt Hugenholtz & Martin R.F. Senftleben, *Fair Use in Europe. In Search of Flexibilities*, INSTITUTE FOR INFORMATION LAW (Nov. 2011) (indicating that national approaches to the determination of limitations vary).

³²² See 17 U.S.C. § 110(5) (2006) (providing limitations on exclusive rights as exemption on certain performances and displays); see DANIEL GERVAIS, *THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS* 237–48 (Sweet & Maxwell, 3d ed., 2008); Gervais, *supra* note 316, at 14–15.

³²³ William Patry, *Fair Use, the Three-Step Test, and the Counter-Reformation*, THE PATRY COPYRIGHT BLOG (Apr. 2, 2008, 2:44 PM), <http://williampatry.blogspot.com/2008/04/fair-use-three-step-test-and-european.html>.

³²⁴ See, e.g., Berne Convention, *supra* note 227, at art. 10, 10*bis* (providing an exemption for quotation, educational use, and attribution and for further possible free uses mainly for reportage).

³²⁵ See Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT'L L. 75, 113–16 (2000); Ginsburg, *supra* note 315, at 6–7.

³²⁶ See, e.g., Jay Dratler Jr., *Distilling the Witches' Brew of Fair Use in Copyright Law*, 43 U. MIAMI L. REV. 233, 234–36 (1988) (discussing the concept of “fair abridgement” that subsequently evolved into fair use); Gyles v. Wilcox, (1740) 26 Eng. Rep. 489, 490 (discussing the concept of “fair use” long before it became codified under section 107).

³²⁷ See e.g. Richard J. Peltz, *Global Warming Trend? The Creeping Indulgence of Fair Use in International Copyright Law*, 17 TEX. INTELL. PROP. L.J. 267, 285 (2009) (“U.S.-style fair use has plainly gained ground in at least one jurisdiction: Israel, where the Knesset in 2007 enacted a copyright law with a statutory fair use doctrine, effective May 2008.”).

and usefulness,³²⁸ 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.³²⁹

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.³³⁰ Thus, in all likelihood, such a wider provision should also survive the possible threat of any complaint based on the test. However, the development of these additional exemptions in an international fora like the WTO and WIPO will certainly help to ensure that it passes the test and the endorsement by such organizations and the incorporation into the relevant international copyright treaties and conventions will avoid disputes on this basis.

E. 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 and dissemination of UGC. Many of the most successful UGC platforms have pioneered new forms of social behavior of a traditionally physical form of activity with a primary focus on the amateur or non-professional user.³³¹ This includes wikis, social networking and video-sharing websites like Wikipedia, Facebook and YouTube respectively.³³² This excludes internet intermediaries that do not primarily deal with UGC content or have the creation of such content as its objective,³³³ which may only incidentally

³²⁸ See SENFTLEBEN, *supra* note 316, at 113; 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 153, 161–62 (Jonathan Griffiths & Uma Suthersanen eds., 2005).

³²⁹ Jo Oliver, *Copyright in the WTO: The Panel Decision on the Three-Step Test*, 25 COLUM. J.L. & ARTS 119, 158 (2002). A more flexible and holistic “dynamic view” is preferred over a strict “fixed view”. *Id.* 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, 328 (2009) (explaining the preferences for a more flexible interpretation of the test).

³³⁰ Dworkin, *supra* note 329, at 162–63; See Panel Report, United States – Section 110(5) Copyright Act, WT/DS160/R (June 15, 2000), available at http://www.wto.org/english/tratop_e/dispu_e/1234da.pdf. (indicating that there are not many actual international disputes that required an interpretation of the test in relation to certain statutory exemptions).

³³¹ See Antony Bruno, *YouTube: Growth in User-Generated Content is Outpacing Official Videos*, BILLBOARD (Apr. 14, 2011), <http://www.billboard.biz/bbbiz/industry/digital-and-mobile/youtube-growth-in-user-generated-content-1005135032.story>.

³³² *Id.*

³³³ *E.g.* 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*, 784 F. Supp. 2d 389, 412 (S.D.N.Y. 2011) (finding that a random sample of 1800 files available through LimeWire, ninety-three percent were protected or likely to be protected by copyrights, thus not authorized for free distribution);

involve and peripherally include UGC.³³⁴ Another distinguishing feature is the peer-to-public objective of UGC as opposed to the peer-to-peer nature of these other intermediaries.³³⁵

Copyright actions have mainly been brought against video-sharing websites with minimal success thus far.³³⁶ For example, YouTube has won copyright disputes brought against it based on the safe harbor provisions in the case of *Viacom Int'l Inc. v. YouTube Inc.*,³³⁷ and earlier in *Io Group Inc. v. Veoh Networks Inc.*³³⁸ These disputes, however, have yet to reach the apex of the U.S. legal system or obtained the endorsement of the U.S. Supreme Court.³³⁹

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.³⁴⁰ Hence, they are required to respond to notices, but not screen or police content.³⁴¹ In other words, only specific and not general knowledge is required and they are not to directly profit from unlawful activities. 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, as is the case Option one. This should remove the incentive for UGC intermediaries to err on the side of caution and to preemptively block or subsequently remove content that can and should be allowed. This was indeed what happened in *Lenz* and in many

Columbia Pictures Indus., Inc. v. Fung, 2:06-cv-05578, 2009 BL 287268, at *39 (C.D. Cal. Dec. 21, 2009)(finding that defendants are not entitled to statutory safe harbor under the DMCA) .

³³⁴ 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. *Compare Arista*, 784 F. Supp. 2d at 412, 431; *Columbia Pictures*, 2009 BL 287268, at *3–7 (involving peer-to-peer file sharing networks that did not fall within scope of the DMCA), *with Viacom Int'l Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 526–27 (S.D.N.Y. 2010) (finding that the defendants fall within the scope of the DMCA).

³³⁵ See Robert Colville, *Boldly Go Where No One Has Gone Before. Imagine Harry Potter in a Clinch with James Bond: Welcome to the World of Fan Fiction*, DAILY TELEGRAPH (London), Jan. 27, 2007, at 21.

³³⁶ See *Viacom*, 718 F. Supp. 2d at 526–27.

³³⁷ *Id.* at 514 (finding for YouTube and granting its motion for summary judgment to dismiss Viacom’s litigation).

³³⁸ *Io Grp. Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132 (N.D. Cal. 2008) (holding 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).

³³⁹ See Jane C. Ginsburg, *User-Generated Content Sites and Section 512 of the US Copyright Act*, in COPYRIGHT ENFORCEMENT AND THE INTERNET 183–98 (Kluwer Law Int'l 2010).

³⁴⁰ 17 U.S.C. § 512(k)(1)(b) (2006) (defining an online service provider as “a provider of online services or network access, or the operator of facilities therefor.”). This can be interpreted expansively to encompass services hosting or distributing third-party content.

³⁴¹ *Io Grp.*, 586 F. Supp. 2d at 1137; *Viacom*, 718 F. Supp. 2d 527.

other unreported cases or incidents and it was 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.³⁴² This should 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 should also contribute to the reduction of litigation relating to UGC.³⁴³

V. CONCLUSION

This paper highlights the significant impact that IT developments and the internet, particularly the rise of UGC on the WWW, have on the reality of modern life. A fair and just balance has to be achieved between both the relevant stakeholders 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 indicate that the protections extend largely to UGC on platforms including: social networking websites (e.g. Facebook, Twitter, MySpace);³⁴⁴ content-sharing websites mainly meant for individual expression or as re-creative space (e.g. YouTube, MySpace, FanFiction);³⁴⁵ user-based collaborative websites; (e.g. Wikipedia, Citizendium)³⁴⁶ and citizen journalism portals.³⁴⁷

³⁴² See *supra* Part II.

³⁴³ See William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249, 269–70 (positing that as outcomes become more uncertain parties are more willing to litigate).

³⁴⁴ See *supra* Part IV.C.4 and accompanying text (facilitating purposes such as commentary, parody and satire, collage and pastiche, among others).

³⁴⁵ *Id.* (supporting purposes like incidental uses and re-interpretations). Where it involves use of owned material, it can be viewed as an extension of personal use/rights (provided the sharing is limited). *Id.* There is competition but also inter-connectivity or cross-carriage of content between these websites and services (e.g. Facebook allows video sharing from YouTube and other sites).

³⁴⁶ *Id.* (mainly for the purposes of generating information and knowledge sharing among user-contributors).

³⁴⁷ *Id.* 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.

The definition of UGC for the purpose of the proposed statutory protection does not encompass all forms of UGC as generally understood by the layman. Instead, it should be defined by a set of conditions and identified purposes. The proposed legally permitted UGC 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. 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.