

“It doesn’t belong to the internet”: copyright reform for user-generated content

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Introduction

Every day, millions of people create things and share them online. These creations are often shared via social media across range of formats: images, text, video, music. Similarly, every day, millions of people interact with these shared creations: reposting, downloading, screenshotting, or re-working them. The phenomenon of this user-generated content (UGC) is well-studied from the perspective of copyright law. Most often the focus of the scholarship has been on UGC as use of other commercial works protected by copyright, or of UGC’s links with remix and collaborative creativity as a challenge to the fundamental concept of authorship within the copyright system.¹

These are valuable discussions, but there has been less consideration of issues arising from the subsistence of copyright in UGC itself. What has been written on this largely focuses on the narrow question of whether copyright subsists in UGC.² This is an important issue considering the vast scale of UGC and the possible implications of copyright. For example, in 2020, the social media platform Reddit had 52 million daily active users, over 300 million posts and 2 billion comments.³ This article expands on the existing literature by interrogating the popular view among users that UGC exists beyond the regulation of copyright law - that it *belongs to the internet* – and by using this to underpin a critique of both the law and contribute to existing UGC-focused copyright reform discussions. It considers the legal and normative positions of UGC, the causes and implications of widespread misunderstanding in this area, and how reform proposals risk entrenching this issue. The article supports its argument in part through original qualitative research findings.

It is important to acknowledge that there is no one agreed definition of UGC. While some definitions focus on the status of the creator as non-professional,⁴ this does not adequately reflect that the line between professional and non-professional is often no longer clear-cut and that to imply a hierarchy between them is flawed.⁵ As such, it is the preference of this paper to define UGC in relation to other

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¹ See for example: M. Chon, “New Wine Bursting from Old Bottles: Collaborative Internet Art, Joint Works, and Entrepreneurship” (1996) 75 Oregon L.Rev. 257; L. Lessig, *Free Culture: The Nature and Future of Creativity* (New York: Penguin Books, 2005); R. Tushnet, “User-Generated Discontent: Transformation in Practice” (2007) 31 Colum. J.L. & Arts 497; J. Boyle, *The Public Domain: Enclosing the Commons of the Mind* (Yale University Press 2008); L. Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (New York: Bloomsbury Academic, 2008); D. Gervais, “The Tangled Web of UGC: Making Copyright Sense of User-Generated Content” (2009) 11 Vand. J. Ent. & Tech. L. 841.

² See for example: S. Hetcher, “User-Generated Content and the Future of Copyright: Part One-Investiture of Ownership” (2007) 10 Vand. J. Ent. & Tech. L. 863; J. Meese, “User Production and Law Reform: A Socio-Legal Critique of User Creativity” (2015) 37 Media, Culture & Society 753; M. Iljadica, “User Generated Content and Its Authors” in T. Aplin (ed.), *Research Handbook on Intellectual Property and Digital Technologies* (Cheltenham: Edward Elgar Publishing, 2020), p.163.

³ “Reddit’s 2020 Year in Review” (2020) <<https://redditblog.com/2020/12/08/reddits-2020-year-in-review/>>

⁴ For example, as “regular people” in J. Krumm, N. Davies and C. Narayanaswami, “User-Generated Content” (2008) 7 IEEE Pervasive Computing 10, 10.

⁵ Hetcher, “User-Generated Content and the Future of Copyright: Part One-Investiture of Ownership”, 871; D. Halbert, “Mass Culture and the Culture of the Masses: A Manifesto for User-Generated Rights” (2009) 11 Vand. J. Ent. & Tech. L. 921, 929; Iljadica “User Generated Content and Its Authors”, p.164.

characteristics that are commonly identified in definitions of UGC: firstly, that it involves participation and sharing;⁶ and secondly, that it is distributed in ways that contrast with the “commercial paradigm”⁷ of traditional cultural dissemination, “outside traditional profit-oriented chains of copyright production”,⁸ such as through online platforms.⁹

There are numerous types of content that fall within this definition, including mass collaborative projects like Wikipedia, or creations within virtual worlds,¹⁰ but this paper focuses specifically on “creative content”¹¹ or “sole authored”¹² content. This is content posted on social media platforms by individuals (as opposed to large collaborative groups). The reason for this focus is that this type of UGC is mainstream, particularly open to use by others since social media platforms and their content are widely accessible, and social media content is widely copied, re-shared, and otherwise interacted with by design. While the qualitative findings are based on communities on the popular websites Reddit and 4chan, the article also considers scholarship on other UGC communities to provide a broader insight into the issue.

Firstly, the methodological approach used in the qualitative project is outlined. The second part of the paper explains the significance of the phrase “it belongs to the internet” and demonstrates that this is a fallacy as it reflects neither the legal position nor creator expectations about how UGC may be used by others. The third part of the paper outlines the factors contributing to the existence of this fallacy, arguing a combination of a lack of copyright knowledge and access, the inadequacies of a system of social norms in large communities with open borders, and pervasive anonymity online are all significant. The final part of the paper highlights that the fallacy creates or exacerbates certain problems for creators and users and that this raises questions about copyright law itself. It also considers how this argument aligns with UGC copyright reform suggestions. It is specifically argued that while the copyright critique underlying existing reform proposals mirrors that set out in this paper, many suggestions risk entrenching the clarity issues underpinning the fallacy. Therefore, to be effective, copyright reform must ensure it reflects the needs of the UGC landscape not just as it interacts with the commercial copyright industries but also as it produces copyright-protected works of its own. Without this dual approach copyright reform for UGC cannot coherently achieve its objectives.

The Study

This paper draws from the findings of a qualitative project exploring the relationship between copyright law, creativity and anonymity in online communities. The project conducted a thematic analysis of 356 discussion threads posted on several creative communities on Reddit and 4chan, and of 12 online interviews with creators from both platforms. Creative content was limited to either (static, two-dimensional) art, photography, or literary or dramatic writing. The research design was based on netnographic methods and principles which are designed to guide in-depth research into social media and online communities, specifically “where a significant amount of the data collected and participant observational research conducted originates in and manifests through the data shared freely on the Internet.”¹³

⁶ Gervais, “The Tangled Web of UGC: Making Copyright Sense of User-Generated Content”, 842–43; Halbert, “Mass Culture and the Culture of the Masses: A Manifesto for User-Generated Rights”, 292-30; Iljadica, “User Generated Content and Its Authors”, p.167.

⁷ Halbert, “Mass Culture and the Culture of the Masses: A Manifesto for User-Generated Rights”, 924.

⁸ G. Lastowka, “Digital Attribution: Copyright And The Right To Credit” (2007) 87 B.U.L.Rev. 41, 47.

⁹ P.J. McKenzie et al., “User-Generated Online Content 1: Overview, Current State and Context” (2012) 17 First Monday <<http://www.uic.edu/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/3912>>; Iljadica, “User Generated Content and Its Authors”, p.164.

¹⁰ McKenzie et al., “User-Generated Online Content 1: Overview, Current State and Context”; Iljadica, “User Generated Content and Its Authors”, pp. 175-78.

¹¹ McKenzie et al., “User-Generated Online Content 1: Overview, Current State and Context”.

¹² Iljadica, “User Generated Content and Its Authors”, pp.169–75.

¹³ R. Kozinets, *Netnography: Redefined* (London: SAGE Publications, 2015), pp.67, 79.

Data collection began in October 2017. Interviews were conducted between December 2017 and April 2018 and the observational work began in January 2018, concluding in August 2018.¹⁴ However, because a search tool was being used, data was collected from threads posted between 1 September 2016 and 31 August 2018. A reflexive thematic analysis of the data was undertaken, using NVIVO software to facilitate the coding process and theme development.

Field site selection

Reddit and 4chan were chosen as field sites from a longlist of websites and platforms based on five selection criteria: widespread sharing of creative UGC; relevant types of creativity; sufficient levels of regular interaction with shared creative works within a community, and discussions about creative topics; significantly-sized; and strong normative attitudes towards the use of pseudonyms or anonymity.

Specific subcommunities on 4chan and Reddit were also selected to draw the observational data from. Within 4chan, the key creative boards are *oekaki* (drawing), known as /i/, *artwork/critique*, known as /ic/ and *photography*, known as /p/.¹⁵ Ultimately, most of the data came from /ic/ and /p/. On Reddit, the number of potential subreddits¹⁶ is much greater so selections were made based on data on the most popular subreddits from *redditlist.com*,¹⁷ as well as taking a snowball approach: this included subreddits the author identified through personal exploration of the platform, those suggested by community members, and those suggested by other subreddits within their community wikis. When considering their suitability, the decision-making was guided by the same criteria for choosing the platforms.¹⁸

Observation:

The online observation focused on collecting discussion threads where issues relevant to the research questions were discussed. To do this, regular overviews of live community discussions were conducted, alongside key word searches¹⁹ on tools built for Reddit and 4chan²⁰ to find relevant threads. This approach meant that the data is not necessarily a random sample. However, this approach was preferred over a more structured process using a web scraping tool as it would have alienated the author from an important part of the netnographic approach: getting to know and understand the community and culture by spending time there. Kozinets et al. explain that such tools “overshadow real-time engagement with the cultural context” and undermine understanding.²¹

¹⁴ Ethics approval for this project was granted by Queen Mary Ethics of Research Committee (approval reference number: QMERC2017/54). This gave permission to undertake the interviews. All interview participants provided written informed consent before participation and this included consent to inclusion in future publications of anonymised data they provided. No ethics approval nor informed consent from the study population was necessary for the observational element of the study as it used data from publicly available online discussion threads. Nonetheless, the project took steps to ensure that there was an ethical and considerate approach to the element of the study by minimising intrusion and avoiding the use of direct, searchable quotations within write-ups. As such the quotations used in this paper come from the interviews (where express consent was given), rather than from online discussion threads.

¹⁵ 4chan boards each have a shortened codename of letters or numbers between forward slashes. These names correspond to the URL extension to access that specific board. For example /p/ for photography, accessed at 4chan.org/p/. 4chan boards are set up by those running the website, not users, and so are limited in number.

¹⁶ Reddit is comprised of subcommunities known as ‘subreddits’. These are created by users and so there are millions of different subreddits on a wide variety of topics.

¹⁷ “Tracking the Top 5000 Subreddits” (*redditlist*) <<http://www.redditlist.com>>

¹⁸ See Table 1 in Appendix A for the final list of subreddits.

¹⁹ The keywords selected for this can be seen in Table 2 of Appendix A.

²⁰ *Pushshift.io* for Reddit and *archived.moe* for 4chan.

²¹ R. Kozinets, P-Y. Dolbec and A. Earley, “Netnographic Analysis: Understanding Culture Through Social Media Data” in U. Flick, *The SAGE Handbook of Qualitative Data Analysis* (London: SAGE Publications, 2014), p. 262, p.267.

Discussion threads arising from this process were assessed as to whether there was sufficient interaction with the research issue for it to be deemed as rich data²² and whether saturation had been achieved²³ to decide whether they were to be included in the dataset. In total, the dataset comprised 356 discussion threads: 217 from Reddit and 139 from 4chan.

Interviews

Convenience sampling was used to select participants for interviews, recruiting volunteers by posting requests on relevant communities on Reddit and 4chan. This approach has limitations in that it cannot be confirmed to be a representative sample, and because it is possible that those who volunteered did so due to having particularly strong opinions about copyright. These limitations were mitigated by combining the interview data with the observational data to ensure validity.

12 interviews with creators from 4chan and reddit were conducted in total.²⁴ Due to the research topic, the research design specifically sought to embed respect for anonymity and identity practices, and so very little specific personal information was requested from participants. Some provided their real name, others only their Reddit usernames or no name at all. While some participants revealed their geographic location or their ‘offline’ status as a creator, they were not asked for information such as age (beyond requiring participants to be over the age of 18) or gender. This could raise questions of authenticity: how could the veracity or reliability of their answers be verified without knowing about their ‘real’ offline lives? However, Hine rejects the idea that this is problematic, highlighting that the aim is to “experience Internet interactions on their own terms” rather than to define people’s offline identities.²⁵ This also aligns with netnographic principles, which reject the view that internet data is partial, not ‘real’ or merely part of the wider ‘offline’ world.²⁶

A semi-structured interview approach was used based on six key areas of interest, of which the following were relevant to the discussion in this paper: acceptable and unacceptable uses of creative works; views and understanding of originality; approach to communicating and enforcing expectations; and copyright law both in relation to their general views of the law as well as its specific role in the participants’ creative practices.

The interviews were held online through synchronous channels: 11 via instant message chat services and one via Skype voice call. Participants were able to suggest the platform they would feel most comfortable using, and the most popular platform for interviews was Discord, but Skype and Facebook were also used. While IM chat services have some limitations for interviews, such as a lack of additional social cues and increased mediacy when responses are typed and processed,²⁷ in the context of this research, it seemed acceptable and appropriate to offer a range of formats and platforms for the interviews. Firstly, members of online communities operate in a similar environment, one that lacks visual cues and where the majority of interactions are conducted through text rather than speech. This therefore offered a way to conduct research in a natural setting, and where they would feel at ease.²⁸ Secondly, in the context of the project’s focus on anonymity and identity, it enabled participants to retain control over their anonymity and online identity practices where they wished to. Lastly, it also provided practical benefits of attracting participants and enabling interviews with participants from all over the world, which is beneficial when researching communities with global membership.

²² This was assessed in terms of quantity (i.e. how many people joined the discussion), or of quality (i.e. whether points were made in detail).

²³ S.L. Faulkner and S.P. Trotter, “Data Saturation”, *The International Encyclopedia of Communication Research Methods* (Hoboken: John Wiley & Sons, 2017), p.1.

²⁴ Interview participant details can be found in Table 3 of Appendix A.

²⁵ C. Hine, *Virtual Ethnography* (London: SAGE Publications, 2000), p.144.

²⁶ Kozinets, *Netnography: Redefined*, p.81.

²⁷ R. Opdenakker, “Advantages and Disadvantages of Four Interview Techniques in Qualitative Research” (2006) 7 Forum: Qualitative Social Research; N. King and C. Horrocks, *Interviews in Qualitative Research* (London: SAGE, 2010), paras. 19-28.

²⁸ King and Horrocks, *Interviews in Qualitative Research*, pp.42–43, 80.

Limitations and validity

The findings from the research are, like all qualitative findings, limited to the specific time, context, field sites and participants of the data they are drawn from and so cannot be used as the basis of generalisations beyond this. The argument in this paper acknowledges this and draws on findings from a range of other studies to support wider claims.

As previously outlined, there are some limitations in the research in relation to the approach to sampling and potential concerns about the authenticity of interview data. These have been mitigated by two accepted strategies for determining validity: the use of multiple types of data and prolonged engagement and persistent observation in order to produce thick, rich data.²⁹ Data was collected and analysed covering a period of two years, several months of observational work was undertaken and the quantity of data collected was significant, allowing a sufficient sample size to reach saturation. Furthermore, the findings across both types of data (observation and interviews) were consistent, indicating their validity.

Does it belong to the internet?

Perceived meaning

It belongs to the internet is a relatively common phrase heard in relation to UGC, with Meese describing it as “pervasive online rhetoric”.³⁰ The phrase represents the belief that once you post something online you waive the right to control what then happens to it. One element of control of UGC would be copyright law, and so we can understand this phrase as meaning that the content is in the public domain and other people can use it in ways that could otherwise be considered as infringement.

This idea that UGC is in the public domain was reflected in some of the interviews conducted with creators. Some creators mentioned the idea explicitly: “As far as I’m concerned, as soon as I post my stuff online it belongs to the internet...”³¹ Some creators were also clear that they intended and desired their content to be considered to belong to the internet, viewing this as positive: “Once I put it out there, it’s out there... the world works better when ideas are shared”.³² However, some creators, while acknowledging that sharing UGC online often equates to loss of control, discussed this in more neutral terms: “But really, once it’s on the internet, you kind of lose control of it.”³³

As we will see, however, the viewpoint that works posted online are in the public domain is fallacious, firstly because copyright subsists in much of this content and secondly because, while some creators are happy for works to be used in any way, many creators desire some form of ongoing control over their works.

The fallacy

That UGC belongs to the internet is a fallacy can be demonstrated through two, interlinked, discussions: the legal position of UGC and creator expectations about how such content can be used. These are explored in turn.

Law

Despite widespread views to the contrary, UGC is in many cases regulated by copyright law; as will be shown, copyright both subsists in many types of UGC as original works and the types of interactions others make with UGC are the type of uses that copyright usually restricts. This part of the paper

²⁹ J.M. Morse, “Critical Analysis of Strategies for Determining Rigor in Qualitative Inquiry” (2015) 25 *Qualitative Health Research* 1212, 1214-16.

³⁰ J. Meese, “‘It Belongs to the Internet’: Animal Images, Attribution Norms and the Politics of Amateur Media Production” (2014) 17 *M/C Journal* <<http://journal.media-culture.org.au/index.php/mcjournal/article/view/782>>.

³¹ p2

³² p7

³³ p3

demonstrates that, while of course not all, a significant amount of UGC is regulated by copyright law.

Examining issues of law relating to UGC requires questions of applicable law to be addressed. While the qualitative research underpinning the discussions of creator and community expectations in this paper can transcend national borders without difficulty, this legal discussion cannot. Which legal system then, is the most relevant in a discussion of law relating to content created by individuals from all over the world, posted on websites run from different countries (most often the US),³⁴ and with a global audience? The answer to this is not straightforward and different countries have taken different approaches to decisions of applicable law in copyright cases with international elements.³⁵ Private international law scholarship has given this issue much consideration, with various sets of guidelines and principles being produced, including the ALI Principles, the CLIP Principles and the Kyoto Guidelines,³⁶ although this has not always provided more clarity.³⁷ Fortunately this has little impact on the substance of the argument made here. This discussion considers the law from three jurisdictions to provide an analysis of the copyright status of UGC: the UK, the US and Germany. These choices are appropriate in relation to the field-sites for the qualitative research as the demographic data for Reddit and 4chan showed that they were in the top five contributing countries at the time the project was designed.⁴⁰

The criteria for copyright subsistence generally relate to subject matter, fixation and originality. While most scholarship on copyright law and UGC has been framed around potential infringement of protected works created by traditional creative industries,⁴¹ there is some that addresses whether UGC meets subsistence criteria. Some of these studies base their discussions on the assumption that copyright subsists in at least some forms of UGC. For example, Meese and Hagedorn's qualitative exploration of everyday social media users' relationships with ownership and use of UGC does not directly address the subsistence question, instead making only brief reference to the fact that the use of much UGC will be regulated by copyright law.⁴² From this it can be inferred that copyright must subsist in that content otherwise its use would not be regulated by it, but the paper puts forward no comprehensive legal analysis. This could indicate that the subsistence question is one that has already been resolved, but the

³⁴ Reddit's majority shareholder is a US media company, Advance Publications, and its headquarters is in San Francisco. 4chan is owned by Hiroyuki Nishimura, a Japanese citizen. Most of the other large platforms, including YouTube, TikTok, Instagram and Facebook, are headquartered in the US.

³⁵ A. Metzger, "Applicable Law under the CLIP Principles: A Pragmatic Reevaluation of Territoriality" in J. Basedow, T. Kono and A. Metzger (eds.) *Intellectual Property in the Global Arena* (Germany: Mohr Siebeck 2010), p.157, pp.160, 171.

³⁶ The American Law Institute, *Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes*, (Philadelphia: ALI 2008); European Max Planck Group on Conflict of Laws in Intellectual Property (CLIP), *Principles for Conflict of Laws in Intellectual Property*, Final Text (1 December 2011); M-E. Ancel, N. Binctin, J. Drexel et al., "Kyoto Guidelines: Applicable Law" (2021) 12 JIPITEC 44.

³⁷ While they agree that applicable law in relation to the existence and infringement of copyright should be guided by the principle of *lex loci protectionis* (CLIP Principles, Arts 3:102 and 3:601; ALI Principles, §§301-302; 311-313; Kyoto Guidelines 19 and 25), there is some divergence on the issue of first ownership. Both the ALI Principles and the Kyoto Guidelines propose this be governed by the law of the state in which the creator of the work was habitually resident at the time of creation (CLIP Principles, §313; Kyoto Guideline 20(2)), while CLIP advances *lex loci protectionis* (CLIP Principles, Art 3:201). On issues of authorship and first ownership see also P. Torremans, "Authorship. Ownership of right and works created by employees: which law applies?" (2005) 27 EIPR 220, 220-21.

⁴⁰ For 4chan, the top 5 countries were 1. USA, 2. Germany, 3. Hong Kong, 4. UK, 5. Australia: Alexa, "4chan.Com Traffic, Demographics and Competitors" <<https://web.archive.org/web/20180417214612/https://www.alexa.com/siteinfo/4chan.com>>; For Reddit, the top 5 countries were 1. USA, 2. UK, 3. Canada, 4. Australia, 5. Germany: Alexa, "Reddit.Com Traffic, Demographics and Competitors" <<https://web.archive.org/web/20171018155018/https://www.alexa.com/siteinfo/reddit.com>>.

⁴¹ See fn 1 for examples.

⁴² J. Meese and J. Hagedorn, "Mundane Content on Social Media: Creation, Circulation, and the Copyright Problem" (2019) 5 *Social Media + Society* 1, 3-4.

relatively limited consideration of this in the scholarship so far does not make this a convincing position. More compelling are discussions where scholars have undertaken a direct analysis of copyright subsistence. With a focus on US law, both Hetcher and Schuler identify that UGC will often meet the criteria for copyright protection.⁴³ Tan reaches the same conclusion in relation to US, UK and Australian laws.⁴⁴ Iljadica's 2020 paper focuses on UK (as then harmonised with EU law) and US provisions, providing a nuanced overview of the complexities of answering this question, but nonetheless highlighting that while copyright will not subsist in all UGC, it will subsist in some.⁴⁵ All of these scholars highlight that UGC is capable of meeting the possible requirements for copyright subsistence: subject matter, fixation and originality. However, they also identify some aspects of this analysis that raise issues or where there is less clarity. This paper now explores each of the subsistence requirements, considering relevant issues raised by previous analyses, in more detail.

The type of UGC being discussed here will meet any subject matter requirements for copyright subsistence without controversy: typical forms of UGC include photographs, drawings, paintings (all artistic subject matter), and stories (literary works). Some scholars have raised the issue of whether Tweets would constitute a literary work, with suggestions that the limited length would preclude this.⁴⁷ However, since copyright was found to subsist in an 11-word headline in *Infopaq* this is less likely to be a problem in the UK and Germany.⁴⁸ The decision in *Meltwater* in the UK further supports this,⁴⁹ but tweets may fail to meet subject matter requirements in other jurisdictions such as the US.⁵⁰ While some UGC may therefore not fall within a relevant subject matter category, it is clear that plenty will.

UGC would also be able to meet the fixation requirement found in some jurisdictions.⁵² In both the UK and the US, fixation is broadly construed, is not limited to physical fixation such as being printed on paper, and can extend to digital formats.⁵³ There are therefore various ways that UGC could meet such a requirement. Most easily, posting UGC on a platform could itself be considered fixation; Hetcher highlights that "much UGC is fixed to the extent it exists in digital form, such that it can be perceived with the naked senses or reproduced or communicated by means of everyday digital technologies."⁵⁴ UGC will also often be fixed somewhere other than the platforms themselves, for example, a digital artwork file will likely be stored on the creator's computer hard drive and a photograph may be stored as a file on the creator's mobile phone photo reel or on the memory card in their digital camera. UGC may also be fixed in analogue form, for example where the UGC is a digital image of a non-digital artwork such as a pencil sketch. In many cases then, fixation is therefore unlikely to be contentious.⁵⁵

⁴³ Hetcher, "User-Generated Content and the Future of Copyright: Part One-Investiture of Ownership"; A.G. Schuler, "Insta-Appropriation: Finding Boundaries for the Second Circuit's Fair Use Doctrine after Campbell" (2016) 85 Fordham L.Rev. 367.

⁴⁴ C. Tan, *Regulating Content on Social Media: Copyright, Terms of Service and Technological Features* (London:UCL Press, 2018), Ch. 2.

⁴⁵ Iljadica, "User Generated Content and Its Authors".

⁴⁷ Schuler, "Insta-Appropriation: Finding Boundaries for the Second Circuit's Fair Use Doctrine after Campbell", 370; Iljadica, "User Generated Content and Its Authors", p. 171.

⁴⁸ Case C-5/08, *Infopaq Int'l A/S v Danske Dagblades Forening* [2009] ECR I-6569.

⁴⁹ *NLA v Meltwater* [2011] EWCA Civ 890

⁵⁰ Iljadica, "User Generated Content and Its Authors", p.171.

⁵² Berne Convention, Art 2(2) states that countries may specify a requirement for fixation. Under the UK's Copyright, Designs and Patents Act 1986 (CDPA), s.3(2), copyright does not subsist in literary, dramatic or musical works until they are "recorded in writing or otherwise". In the US, fixation is required for all works under 17 U.S.C., §102(a). Germany does not have a fixation requirement. Under EU law, it is generally understood that no fixation requirement is required; the CJEU in *Levola* (Case C-31/17, *Levola Hengelo BV v Smilde Foods BV* [2018] EU:C:2018:899) made clear in para 40 that no permanent form is required. This has led to questions about whether fixation requirements in the UK are compatible with the ruling (as retained EU law post-Brexit).

⁵³ CDPA, s.178; 17 U.S.C. §101; US H.R.REP. No. 1476, 94th Cong., 2d Sess. 47, 52 (1976). a

⁵⁴ Hetcher, "User-Generated Content and the Future of Copyright: Part One-Investiture of Ownership", 886.

⁵⁵ Schuler agrees, stating "[thus] all social media postings most likely would meet this requirement": Schuler, "Insta-Appropriation: Finding Boundaries for the Second Circuit's Fair Use Doctrine after Campbell", 371.

Iljadica argues, however, that there are questions about whether some ephemeral or transient forms of UGC can meet fixation requirements, giving the example of Snapchat posts which are automatically deleted after a short period of time. She argues that this transience would be problematic under US law with its express requirements for fixation. She also highlights that, although an express fixation requirement is lacking for artistic works under the CDPA, some view cases such as *Harpbond*⁵⁶ as demonstrating an implied requirement for fixation, and if this is the case, that ephemeral Snapchat posts could struggle to meet it.⁵⁷ In terms of the qualitative field sites, 4chan also functions on a model of ephemerality; space on 4chan is limited and so threads are deleted regularly to make room for new ones.⁵⁸ However, this discussion argues there is little concern about fixation for 4chan, and even for Snapchat.

Firstly, while fixation is required in the US, this only requires a work to be “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”⁵⁹ Donat frames this as being “prevented from vanishing into thin air upon its completion”, giving improvisational performances as an example of creative work unable to meet the requirement as there is “nothing tangible” left at the end of a performance.⁶⁰ This does not align with Snapchats and 4chan posts, which exist for at least some material time after the creative act. Secondly, as Iljadica touches on,⁶¹ the view that fixation is an implied requirement for artistic works in the UK has been refuted. Derclaye argues that the UK fixation requirement does not impliedly extend to artistic works, and furthermore rejects the notion that fixation requires permanence in UK law.⁶² Instead she argues fixation is better understood as requiring that works take a *material* rather than *permanent* form. Based on this, Snapchat and 4chan’s time-limited models would pose no problem to copyright subsistence.

Lastly, the question of ephemerality becomes even less pertinent, however, in the context of the focus of this paper - the use of UGC once it is shared; without fixation many common uses, such as reposting or remixing, become impossible. In Iljadica’s Snapchat example, the most likely means of achieving such uses would be to take a screenshot before the post expired. In itself, this could satisfy fixation requirements. While some uses of UGC may not require copies of the original version, for example written words could be replicated from memory, this does not undermine the argument made here: even if not all UGC will meet the copyright subsistence criteria, a significant amount will do so.

The final requirement for copyright subsistence is that the work must be original. There are longstanding jurisdictional differences in definitions of originality. The US asks that “the creative spark is [not] utterly lacking or so trivial as to be virtually non-existing”,⁶³ while Germany seeks the author’s “personal intellectual creation”⁶⁴ as understood through the CJEU lens of “the author’s own intellectual creation”⁶⁵ and its interpretation in relation to creative choices.⁶⁶ The UK’s traditional definition is of

⁵⁶ *Merchandising Corporation of America v Harpbond* [1981] WLUK 161

⁵⁷ Iljadica, “User Generated Content and Its Authors”, pp.171–72.

⁵⁸ This is not a particularly widespread approach for social media platforms. For example, Reddit does not have ephemerality of that type built into the platform and in fact, there are Reddit archives.

⁵⁹ 17 U.S.C. §101

⁶⁰ G. Donat, “Fixing Fixation: A Copyright with Teeth for Improvisational Performers” (1997) 97 Colum.L.R. 1363, 1364.

⁶¹ Iljadica, “User Generated Content and Its Authors”, p.172.

⁶² E. Derclaye, “Debunking some of UK Copyright Law’s Longstanding Myths and Misunderstanding” (2013) 1 I.P.Q. 1, 12.

⁶³ *Feist Publications, Incorporated v Rural Telephone Service Company, Incorporated* 499 US 340 (1991), p. 359.

⁶⁴ German Copyright Law/Urheberrechtsgesetz (UrhG), §2(2).

⁶⁵ Case C-5/08, *Infopaq Int’l A/S v Danske Dagblades Forening* [2009] ECR I-6569 at [37].

⁶⁶ Case 145/10, *Painer v Standard Verlags GmbH* [2012] ECDR 6 at [89]. Joined Cases C-403/08 and C-429/08 *Football Association Premier League et al. v QC Leisure et al. and Karen Murphy v Media Protection Services Ltd* [2011] EU:C:2011:631 at [98].

labour, skill and/or effort,⁶⁷ albeit with some convergence with the CJEU definition.⁶⁸ The jurisdictional differences have, however, been significantly reduced in recent years and there are numerous overlaps:⁶⁹ “constellations”, not “silos”.⁷⁰

How originality works in practice depends on the type of UGC. Gervais categorises UGC as either “user-copied”, “user-derived”, or “user-authored”.⁷¹ In the first category we find content that merely replicates other content, authored by someone other than the person sharing it. For example, a post sharing a famous photograph would fall into this category.⁷² As it involves no originality on the part of the person sharing it, he or she will hold no copyright in that work.

There may, however, be sufficient originality for copyright to subsist in the other two categories of UGC. User-authored content does not incorporate other copyright-protected works. Such UGC, for example a still life painting or a written story created by the author without using other content, will often comfortably meet the relatively low bar for originality for copyright subsistence.⁷³ Photographic works have sometimes faced more problems in terms of originality, particularly in relation to snapshots. Schuler highlights that some common types of photographs shared on social media, such as pictures of food or famous monuments, may not be original enough for copyright protection.⁷⁴ This is less likely to be an issue under EU law. Photographs are protected if they are original in the sense of being the author’s own intellectual creation,⁷⁵ but in *Painer* the CJEU was clear that creative choices for originality included choices as to framing, angles, atmosphere, developing and editing.⁷⁶ The UK courts followed similar reasoning on the value of composition in questions of originality in *Temple Island Collections v New English Teas*,⁷⁷ where a photograph of a red bus crossing Westminster Bridge in front of the Houses of Parliament was held to have copyright. All three jurisdictions provide copyright protection for photographs under a relatively low bar of originality⁷⁸ and so it is likely that copyright could subsist in much photographic UGC, where user-authored.

⁶⁷ *University of London Press v University Tutorial Press* [1916] 2 Ch 601; *Ladbroke (Football) v William Hill (Football)* [1964] 1 WLR 2 73

⁶⁸ A. Ramalho and M.C. Gomez Garcia, “Copyright after Brexit” (2017) 12 JIPLP 669. UK courts have applied the *Infopaq* standard, either on its own (for example: *Shazam Productions Limited v Only Fools The Dining Experience Limited and Others* [2022] EWHC 1379 (IPEC) at [125]) or positioned as equivalent to the UK’s traditional test (for example: *Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2011] EWCA Civ 890 at [20]; *Mei Fields Designs Ltd v Saffron Cards and Gifts Ltd* [2018] EWHC 1332 (IPEC) at [100]).

⁶⁹ W. Fisher, “Recalibrating Originality” (2016) 54 Hous. L.R. 437, 447.

⁷⁰ E.F. Judge and D.J. Gervais, “Of Silos and Constellations: Comparing Notions of Originality in Copyright Law” (2009) 27 *Cardozo Arts & Ent.L.J.* 375, 403.

⁷¹ D.J. Gervais, *(Re)Structuring Copyright: A Comprehensive Path to International Copyright Reform* (Cheltenham: Edward Elgar Publishing, 2017), pp.131–36.

⁷² Although for some this would not be considered to be UGC at all. Hetcher frames this instead as “user-uploaded content”: “User-Generated Content and the Future of Copyright: Part One-Investiture of Ownership”, 871.

⁷³ Hetcher, “User-Generated Content and the Future of Copyright: Part One-Investiture of Ownership”, 868; Schuler, “Insta-Appropriation: Finding Boundaries for the Second Circuit’s Fair Use Doctrine after Campbell”, 371; Iljadica, “User Generated Content and Its Authors”, p.170.

⁷⁴ Schuler, “Insta-Appropriation: Finding Boundaries for the Second Circuit’s Fair Use Doctrine after Campbell”, 371.

⁷⁵ Directive 2006/116/EC on the term of protection on copyright and certain related rights (Term Directive), Art 6.

⁷⁶ Case 145/10, *Painer v Standard Verlags GmbH* [2012] ECDR 6 at [90]-[92].

⁷⁷ [2012] EWPC 1

⁷⁸ Germany takes advantage of Art 6 of the Term Directive, which allows Member States to provide for the protection of photographs that do not meet the standard of the author’s own intellectual creation: UrhG, §§72(1) and (2). In the UK, see for example *Antiquesportfolio.com Plc v Rodney Fitch & Co Ltd* [2000] 7 WLUK 214 and *Temple Island v New English Teas*. In the US, photographs have been recognised as being capable of being original since *Burrow-Giles Lithographic Co v Sarony*, 111 U.S. 53 (1884). Dispute over whether simple photographs are sufficiently original is largely in discussion of highly mechanical photographs or exact replications of an existing artwork. See for example: *Jeweler’s Circular Publishing v Keystone Publishing*, 281 F. 83 (2d Cir 1922) and *Bridgeman Art Library v Corel Corp.*, 36 F. Supp. 2d 191 (S.D.N.Y. 1999).

Like user-copied content, user-derived content also relies on content authored by someone else, but it is not an identical copy. Instead, the UGC creator uses some or all the other work to create something new, such as where a digital fan artwork may have integrated elements from the pre-existing work. In the UK derivative works may meet the threshold of originality. The requirements for this pre-Infopaq were that the derivative work was not slavishly copied and was materially different from the work from which they are derived,⁷⁹ but derivative works are likely to now need to meet the ‘author’s own intellectual creation’ standard instead, as is the case in German law. In the US, derivative works must meet Feist originality criteria, but copyright will not extend to derivative elements of a work that infringes copyright in pre-existing material.⁸⁰ Whether copyright subsists in user-derived content therefore needs to be assessed on a case-by-case basis.

Iljadica highlights several examples where such UGC could struggle to be considered original, including memes and continually edited mass collaborative projects such as Wikipedia.⁸¹ But it is clear that plenty of user-derived UGC *can* meet the originality requirement, with Hetcher correctly explaining that “much UGC ... is creative and some of it wildly so.”⁸² For example, a digital artwork that is based on a popular animated series may copy some visual elements, for example by incorporating characters. But inasmuch as it did not produce a close replica of a still of that series, perhaps situating those characters within a new context, then it is possible that those new elements could be original enough. So while Iljadica is correct to highlight that there are gaps in copyright protection for UGC, there are also substantial amounts of UGC in which copyright will subsist.

That UGC does not belong to the internet is further supported by the fact that the ways UGC is used by others are also the types of uses that copyright law restricts. There are various ways others can interact with UGC: commenting (posting a comment on the shared content), remixing (creating new user-derived content from the shared content), distributing (sharing the content or part of the content with others in some way, such as reposting on social media) or utilizing (using the content without altering it, for example setting an image as a screensaver on a mobile phone). With the exception of commenting, these types of interactions are the sorts of uses restricted by copyright law, namely copying or reproducing in whole or in part; distributing; issuing, communicating or making available to the public (including via the internet).⁸³ There are also relevant moral rights that a UGC creator could hold over their work, in particular the right to paternity or attribution⁸⁴ and the right to integrity,⁸⁵ although in the UK needing to assert the right to attribution in advance makes relying on the right more difficult and in the US moral rights are limited to quite narrow circumstances.⁸⁶ Nevertheless, these moral rights could restrict uses that failed to give credit or that took credit for the UGC creators’s work, as well as some remixing uses.

In some instances, such uses without permission would not be infringing where they fell within a permitted use, limitation or exception. If all uses of UGC are permitted within the law without authorization from the copyright holder then it would be understandable to view UGC as belonging to the internet. Relevant provisions are found in the law of the UK, US and Germany,⁸⁷ such as those permitting uses relating to education and disability. However, the most relevant to the UGC context

⁷⁹ *Interlego AG v Tyco Industries Inc* [1989] A.C. 217

⁸⁰ 17 U.S.C. §103(a).

⁸¹ Iljadica, “User Generated Content and Its Authors”, pp.173-74, 178-180..

⁸² Hetcher, “User-Generated Content and the Future of Copyright: Part One-Investiture of Ownership”, 885.

⁸³ CDPA, ss.16(1) and 20(2)(b); UrhG, §15 and §19a; 17 U.S.C. §106(1)-(3)

⁸⁴ CDPA, s.77(1); UrhG, §13; 17 U.S.C. 106(a)(1)(A) (in relation to visual art only).

⁸⁵ CDPA, s. 80(1); UrhG, §14; 17 U.S.C. 106(a)(3)(A).

⁸⁶ P. Goldstein, *International Copyright: Principles, Law and Practice* (Oxford: OUP, 2001) p.162; N.C. Suhl, “Moral Rights Protection in the United States under the Berne Convention: A Fictional Work” (2001) 12 *Fordham Intell.Prop.Media & Ent.L.J.* 1203, 1227; C.P. Rigamonti, “Deconstructing Moral Rights” (2006) 47 *Harv.Int’l L.J.* 353, 406.

⁸⁷ CDPA, ss.28-89; UrhG, §§44A-53A; 17 U.S.C. §107

would be the UK and Germany's permitted uses⁸⁸ for caricature, parody or pastiche,⁸⁹ reporting on current events⁹⁰ and quotation,⁹¹ and fair use provisions in the US.⁹²

Reliance on the UK and German provisions is limited by the narrow framing of the exceptions. While some types of uses would be permitted, for example a parody of UGC, in many cases the exceptions are not applicable. Senftleben gives the example of a mash up that merely combines a pre-existing copyrighted work with the user's new creation, such as the use of copyright protected music over the user's own video.⁹³ This would not be considered to be caricature, parody or pastiche, nor is it reporting on current events. Furthermore, it does not enter into the requisite dialogue with the included work for quotation exceptions to apply.⁹⁴ US fair use provisions are more flexible. However, transformation is an essential element of fair use. The work must "[alter] the original with new expression, meaning, or message,"⁹⁵ so remixing the original UGC could be sufficient, but simple non-transformative sharing will be unlikely to. As such, even where there are exceptions available within national laws, this cannot mean that the UGC "belongs to the internet" and so *all* uses of *all* UGC are acceptable; this does not reflect the complex case-by-case consideration required for copyright exceptions.

Therefore, although the question of originality is less clear cut for user-derived content, copyright will subsist in much user-authored and at least some of the user-derived UGC and where it does, it will regulate many of the interactions with that content by others. As such, the idea that UGC is in the public domain is legally inaccurate unless there has been a specific waiver or abandonment of rights,⁹⁶ which, as will be seen in the subsequent discussion, is generally not the case.

Creator expectations

Despite the quotations on 'belonging to the internet' earlier in this discussion, the qualitative findings indicated that creator expectations about control and uses of their UGC often did not align either with the belief that their content belonged to the internet or with a possible waiver of rights. Some creators⁹⁸

⁸⁸ As enacting Article 5 of Directive 2001/29/EC on copyright in the information society.

⁸⁹ CDPA, s.30A; UrhG §51(a)

⁹⁰ CDPA, s.30(2); UrhG §50

⁹¹ CDPA, s.30(1ZA); UrhG §51

⁹² 17 U.S.C. §107.

⁹³ M. Senftleben, "User Generated Content: Towards a New Use Privilege in EU Copyright Law" in T. Aplin, *Research Handbook on Intellectual Property and Digital Technologies* (Cheltenham: Edward Elgar Publishing, 2020) p.136, p.156.

⁹⁴ M. Senftleben, "User Generated Content: Towards a New Use Privilege in EU Copyright Law", p.156; J. Pila and P. Torremans, *European Intellectual Property Law* (2e) (Oxford: OUP 2019), p.335, based on CJEU rulings: Case C-476/17 *Pelham GmbH v. Hütter* EU:C:2019:624 at [71]; Case C-516/17 *Spiegel Online GmbH v. Volker Beck* EU:C:2019:625 at [78].

⁹⁵ *Campbell v Acuff-Rose Music, Inc.*, 510 US 569 (1994).

⁹⁶ There is some discussion over whether this is possible within copyright law. Johnson argues that, while legal routes to dedicate works to the public domain exist in the US, it is not technically possible to waive copyright in the UK. In the UK, if creators wish to surrender copyright, a dedication to the public domain could act as a bare license for others to use the work, but this comes with the possibility of future revocation. (P. Johnson, "Dedicating Copyright to the Public Domain" (2008) 71 MLR 587, 599, 601, 604-607). Hudson and Burrell argue, however, that it is possible to abandon copyright works and that works can be dedicated to the public domain without risk of revocation (E. Hudson and R. Burrell, "Abandonment, Copyright and Orphaned Works: What Does It Mean to Take the Proprietary Nature of Intellectual Property Rights Seriously?" (2011) 35 MULR 972, 1003). Resolving this debate is not necessary for the argument made here, as the findings show there is neither a waiver of copyright nor a licence. It should also be noted that copyright is inalienable under German law (UrhG §29).

⁹⁸ The assumption in this article is that the creator of the work is the copyright holder. In Germany, protection vests in authors and is inalienable under UrhG, §§ 1 and 29(1). In the UK and the US, the owner may assign rights to others (CDPA, s.90; 17 U.S.C. 201(d)) but first ownership will vest in the author (CDPA, s.11(1); 17 U.S.C. §201(a)) unless the work is created in the course of employment (CDPA,s.11(2); 17 U.S.C. §201(b)). As UGC is

were clear that they saw themselves as retaining control over the content they post: “I’d still consider it my own”.⁹⁹ Others also understood their relationship to their content as one of property and ownership: “My work being exposed to the world doesn’t make it anyone else’s property”.¹⁰⁰

Interestingly, in some instances, creators expressed conflicting expectations:

“As far as I’m concerned, as soon as I post my stuff online it belongs to the internet. **Although I’d probably get upset if someone tried to claim the work as their own.**”¹⁰¹
[Emphasis added].

Here we can see that in some cases, while creators may be generally permissive about how their content is used, that does not equate to a desire to lose complete control over it. This is further supported by the fact that often *it belongs to the internet* is a statement of futility rather than one of desire. In an earlier quotation, a creator talks of losing control of their content rather than framing it as a positive setting free or granting of permission: “But really, once it’s on the internet, you kind of lose control of it”¹⁰²

Instead, it must be acknowledged that while some creators do see posting online as waiving their rights, often creators want to retain control over some aspects of the work. While in communities of this scale there can be no unanimously agreed position, it is possible to identify types of use that, generally, creators are happy to occur without their permission, and those they want to retain a say over. Most creators were happy with non-commercial personal use such as setting a visual artwork as a wallpaper on a phone or computer: “[A] new background? ... a tattoo? Sure.”¹⁰³ Most were also happy for others to repost their work, usually conditional on appropriate credit being given: “of course they’re free to share it as well I just hope they give me credit LOL”.¹⁰⁴ It was also generally acceptable for others to use UGC as part of non-commercial remix activity: “others could modify and repost it”.¹⁰⁵

Despite this permissive approach to non-commercial interactions with UGC, some creators expressed a desire to retain control over some types of usage, for example, some creators mentioned concerns about losing the ability to restrict certain political uses:

“I feel like people can post other’s creative work or alter it if they give the original creator credit and not disrespect his or her work and ethics ... sometimes people would want to use that content to use it to push for a political agenda or an ideology that clashes with the morals or the principles of the creator.”¹⁰⁶

In all but the most extreme positions, creators were not happy with people falsely claiming credit for their work: “The worst thing you can do is claim someone’s work as your own.”¹⁰⁷ Similarly, using the work commercially or profiting from it without permission was considered unacceptable: “without permission, improper; without permission or credit, actionable.”¹⁰⁸

These creator expectations are not limited to the 4chan and Reddit communities; studies into other online amateur creative communities outline similar findings. A study into online video creators found that 74% of those surveyed agreed that they felt owning copyright was important, and several highlighted that someone else making money from their videos would be upsetting, even if they did not

non-commercial, it is unlikely that it has been created in the course of employment or that the rights have been assigned to another person.

⁹⁹ P11

¹⁰⁰ P9

¹⁰¹ P2

¹⁰² P3

¹⁰³ P1

¹⁰⁴ P3

¹⁰⁵ P9

¹⁰⁶ P8

¹⁰⁷ P1

¹⁰⁸ P5

view their own work as commercial.¹⁰⁹ Fiesler et al.’s content analysis of several remix and fandom communities found “frustration” from creators that they were limited in how much they could restrict how their work was used, implying a desire to retain control over it. They also found strong norms against plagiarism, in the sense of others claiming work as their own.¹¹⁰ In a later work, Fiesler and Bruckman conducted interviews with fan creators, identifying “highly consistent copyright-related norms” linked to attribution, plagiarism and commerciality, similar to those found in this paper’s Reddit and 4chan study.¹¹¹ An ethnography into the online art community, DeviantArt, identified similar themes in relation to requiring permission, expecting credit and making a profit, with even very permissive users having issues with the latter.¹¹² Meese and Hagedorn’s exploration of norms in relation to UGC outside of specifically creative communities identified different expectations about circulation and sharing depending on platform, but respondents were consistent in their view that commercial exploitation of UGC was unacceptable, and there were positive views about attribution.¹¹³

What this shows us is that even if creator expectations are generally more permissive than copyright, particularly in relation to non-commercial uses, there is consistent evidence across a range of UGC contexts that shows there is no widespread waiving of copyright. As such, *it belongs to the internet* is a fallacy.

Causes of the fallacy

For such a fallacy to take root, there needs to be both insufficient clarity about what the actual rules are and sufficient reasons for believing the fallacious viewpoint could be true. Both of these are present in relation to UGC copyright protection. Firstly, it is evident that there is some confusion about which uses of UGC are and are not permitted:

Q: “So how do people know what they are allowed to do with works that are posted?”

P2: “The short answer is nobody really knows.”

Furthermore, because uses of UGC that conflict with creator expectations will often go unsanctioned, then it is easier to believe that such uses are permitted. This section sets out three factors that contribute to these conditions: a lack of knowledge about and access to copyright law, the inadequacy of a system of social norms to replace legal rules, and online anonymity.

Copyright knowledge and access

Online community members, including UGC creators themselves, often lack an accurate understanding copyright law and this is one factor that contributes to the lack of clarity in this area. This helps the fallacy that UGC belongs to the internet to flourish. The lack of accurate understanding about copyright law takes two main forms. Firstly, there is often a lack of knowledge about copyright law’s potential relevance to their creative activity as ‘amateurs’. Creators and community members often viewed copyright law narrowly as something linked to commercial creativity that offered them very little as non-commercial creators. These views often highlighted that copyright law was there only to protect financial interests.

Q: “Do you feel that copyright offers you any benefits as a creator?”

P10: “I can’t think of very many, can you?”

¹⁰⁹ P. Aufderheide and P. Jaszi, *Reclaiming Fair Use: How to Put Balance Back in Copyright*, 2nd edn (Chicago: University of Chicago Press, 2018), p.7.

¹¹⁰ C. Fiesler, J.L. Feuston and A.S. Bruckman, “Understanding Copyright Law in Online Creative Communities”, *Proceedings of the 18th ACM Conference on Computer Supported Cooperative Work and Social Computing* (New York: ACM Press, 2015) 116, 122–3.

¹¹¹ Casey Fiesler and Amy S Bruckman, “Creativity, Copyright, and Close-Knit Communities: A Case Study of Social Norm Formation and Enforcement” (2019) 3 *Proceedings of the ACM on Human-Computer Interaction* Article 241:1, 2.

¹¹² Dan Perkel, “Share Wars: Sharing, Theft, and the Everyday Production of Web 2.0 on DeviantArt” [2016] *First Monday* <<https://firstmonday.org/ojs/index.php/fm/article/view/6795>>

¹¹³ Meese and Hagedorn, “Mundane Content on Social Media: Creation, Circulation, and the Copyright Problem”, 4-7.

Q: “How do you feel copyright relates to you?”

P11: “Copyright is a pretty important concept for any artist. We tend to get used pretty often. However, it’s a much bigger issue for a well-known artist, or someone who makes their living from art than it is for someone like me who has very little influence or reliance on my work to make ends meet. For the moment I’m not too worried about it. It’ll be a much bigger concern for me if creative work ever becomes a full-time career for me.”

P7: “I personally don’t care about ownership, because I’m an amateur I don’t need the money I do it for fun.”

The understanding that copyright law is about commercial creativity was also visible in some of the comments which interpreted the questions about copyright law’s relevance to their creative activity in terms of the use of existing works owned by the traditional copyright industries:

“Copyright law is being abused by the very big fish and I think that’s not right cos that’s not what copyright was made for, it was made so that so that you can regain your financial investment that you made to create something but not so you could stifle creativity, you know. Copyright was made to promote creativity and not to stifle it and right now it’s definitely being stifled”¹¹⁴

The same participant explained: “I wish there were clearer methods of cooperation, between artists who want to use a certain intellectual property and those who hold said IPs.”¹¹⁵

In this interpretation of copyright law there is a noticeable gap: moral rights. UGC creators often lack knowledge of the broader rights and benefits copyright law could offer them, for example in terms of attribution and integrity rights. This is perhaps to be explained by the fact that these particular creative communities have a large proportion of US-based members, there is often an assumption that US law applies, and the US has weak moral rights provisions comparative to other jurisdictions such as those within the European intellectual property tradition.¹¹⁶

However, this default focus on US law among UGC creators and community members, while understandable, is problematic. A large percentage of community members are US-based, but plenty are not. Around 53% of both Reddit and 4chan users are based outside of the US¹¹⁷ so it is possible that the legal rights these creators have over their UGC differs from that of a creator based in the US, particularly in terms of moral rights. In this way, we can see there are often significant gaps in knowledge in relation to what copyright law can offer UGC creators, because it is seen, through the lens of US law, as a commercial right.

Secondly, in discussions of how copyright law functions in practice there are often inaccuracies and misunderstandings. This is something that has also been identified in other studies of online creative

¹¹⁴ P12

¹¹⁵ P12

¹¹⁶ For example, in the UK CDPA, s.77 provides the right to be identified as the author of a work (the attribution right) and s.80 provides the right to object to derogatory treatment of a work (the integrity right). Germany offers similar, but inalienable, rights under UrhG §§13 and 14. In the US, some moral rights protection is available, albeit through a patchwork of provisions, including 17 U.S.C. §106(2) which grants the exclusive right to create and authorise derivative works to the author and the Visual Artists Rights Act 1990 which grants some moral rights to authors of visual art works. However, US moral rights protection has been criticised as being limited in practical application (see for example, Suhl, “Moral Rights Protection in the United States under the Berne Convention: A Fictional Work”).

¹¹⁷ Statista, “Regional distribution of desktop traffic to Reddit.com as of February 2022 by country” <[https://www.statista.com/statistics/325144/reddit-global-active-user-distribution/#:~:text=Reddit%20use%20in%20the%20United,platform%20strongly%20declines%20with%20age.](https://www.statista.com/statistics/325144/reddit-global-active-user-distribution/#:~:text=Reddit%20use%20in%20the%20United,platform%20strongly%20declines%20with%20age.;)>; 4chan, “Advertise” <<https://www.4chan.org/advertise>>

communities. A study on remix communities found evidence of a lack of accurate copyright knowledge, either with “simplistic”¹¹⁸ understanding or “fundamental misunderstandings”.¹¹⁹ In online knitting communities, there are often confident but incorrect pronouncements on what copyright law means, with claims made about the protection offered to knitting patterns that would likely not be successful if tested in court.¹²⁰ This confusion has been identified in numerous other studies too.¹²¹

Similar issues were found on 4chan and Reddit. In particular, issues in this regard were in relation to exceptions, with the US-as-default position of these communities leading to a focus on fair use. Even if these discussions portrayed an accurate outline of the US legal position, which was certainly not consistently the case, this is likely not the legal position for those based in other jurisdictions such as the UK, where the copyright exceptions are more narrowly construed.¹²² Humphreys identifies discussions demonstrating the difficulties of sharing accurate copyright knowledge in a cross-jurisdictional context in the online knitting community, Ravelry.¹²³ However, even within studies with a singular jurisdictional focus, confusions remained: Jaszi and Aufderheide report that none of their interview participants could describe the fair use doctrine accurately.¹²⁴

As Fiesler et al. highlight, community discussions are therefore “potentially spreading misinformation”¹²⁵ about how copyright law works. This inaccurate knowledge is facilitated also by the fact that UGC creators are often less able or likely to access the formal copyright law system. Firstly, because, as noted, they often do not know that they have rights over their works, but also, even if they are aware of rights, it is less financially viable to pay for legal advice to ensure that they have accurate knowledge when the work is created and shared for non-commercial purposes.

Secondly, this also means that online creators are less likely to have access to the means to enforce their rights. Where works are created for non-commercial purposes, the cost of lawyers to protect them will in most cases be disproportionate to any possible harm. While UGC creators have access to some formal copyright processes, such as notice and takedown reporting on some platforms, this is not a comprehensive solution as it does not provide redress for possible infringements taking place outside of platforms that offer such reporting tools. One example of such an infringement that came up during the research included photographs being turned into t-shirt designs by a well-known brand.

Where UGC creators (and others, such as other community members) have an incomplete or an inaccurate understanding of copyright law, it creates grey areas where the fallacy that *it belongs to the internet* can take hold. A reduced ability to access legal representation also means that potential infringements are more likely to go unchallenged, which can lead to reinforcing inaccurate understandings of how creative work can be used.

Inadequacy of a system of social norms

¹¹⁸ Fiesler, Feuston and Bruckman, “Understanding Copyright Law in Online Creative Communities”, 124.

¹¹⁹ Fiesler, Feuston and Bruckman, “Understanding Copyright Law in Online Creative Communities”, 122.

¹²⁰ K. Robertson, “No One Would Murder for a Pattern: Crafting IP in Online Knitting Communities” in L.J. Murray, S.T. Piper and K. Robertson (eds), *Putting Intellectual Property in its Place: Rights Discourses, Creative Labor, and the Everyday* (Oxford: OUP, 2013), p.41, p.43.

¹²¹ See for example: S. Kheria, “Copyright and Digital Art Practice: The ‘Schizophrenic’ Position of the Digital Artist” (2013) 19 *Leonardo Electronic Almanac* 114, 118; Aufderheide and Jaszi, *Reclaiming Fair Use: How to Put Balance Back in Copyright*, pp.6–7; Fiesler and Bruckman, “Creativity, Copyright, and Close-Knit Communities: A Case Study of Social Norm Formation and Enforcement”, 8.

¹²² CDPA, ss.28-89 detail specific permitted uses.

¹²³ S. Humphreys, “The Challenges of Intellectual Property for Users of Social Networking Sites: A Case Study of Ravelry”, *Proceedings of the 12th International Conference on Entertainment and Media in the Ubiquitous Era - MindTrek '08* (New York: ACM Press 2008), 125, 128.

¹²⁴ Aufderheide and Jaszi, *Reclaiming Fair Use: How to Put Balance Back in Copyright*, p.7.

¹²⁵ Fiesler, Feuston and Bruckman, “Understanding Copyright Law in Online Creative Communities”, 125.

Often in communities, social norms can provide an alternative, preferred system of regulation to law.¹²⁶ A significant body of scholarship has explored this in the context of intellectual property law and specific creative communities or industries, for example the fashion industry,¹²⁸ roller derby,¹²⁹ magic¹³⁰ and stand-up comedy¹³¹ to name a few. These studies demonstrate that, in some circumstances, creativity can not only survive but also thrive when intellectual property systems are unavailable, and many of these communities and industries rely on normative systems to regulate expectations around issues usually dealt with by intellectual property law. For example, Broussard highlights that while recipes are not eligible for copyright protection, a norms-based intellectual property system supports a formal self-regulatory system (via a professional code of ethics) to provide protection for the original menu items created by chefs.¹³² This can also be the case where intellectual property rights are available; Perzanowski identifies core norms within the tattoo industry that regulate the use of tattoo designs (which are eligible for copyright protection), and that these are relied on more heavily than the legal system as they are better able to reflect the culture of the specific industry.¹³³ This reflects the common critique of copyright law found in much of this scholarship: the law takes an (inappropriate) one-size-fits-all approach to incentivising creativity and that because norms are flexible, they offer an effective way for regulation to respond to creativity in various forms.¹³⁴

If an effective system of norms existed for UGC, then it would not matter that there are issues about knowledge of and access to copyright; a normative system should be able to fill the gaps that uncertainty about the law leaves. There are certainly some relevant normative values that exist within online creative communities, not least those creator expectations identified and discussed earlier in this discussion. However, existing norms scholarship is also clear about the limitations of normative systems. For example, enforcement of normative systems can risk being heavy-handed and veer into mob justice, while the norms themselves can be overly restrictive by failing to recognise permitted uses.¹³⁵ In the context of UGC specifically, the size and accessibility of online communities negatively impacts how effective norms can be. For a norm to be established, there needs to be sufficient knowledge of the rules and people must know that their transgressions may be detected and sanctioned effectively.¹³⁶ As will be shown, UGC faces significant challenges in meeting these requirements.

¹²⁶ See, for example, the use of informal norms instead of legal rules to maintain order and address disputes in a rural cattle ranching community: R.C. Ellickson, *Order Without Law: How Neighbours Settle Disputes* (Cambridge MA: Harvard University Press, 1991), chs. 3-5.

¹²⁸ K. Raustiala and C.J. Sprigman, "The Piracy Paradox Revisited" (2009) 61 *Stan.L.Rev.* 1201.

¹²⁹ D. Fagundes, "Talk Derby to Me: Intellectual Property Norms Governing Roller Derby Pseudonyms" (2011) 90 *Tex.L.Rev.* 1093.

¹³⁰ J. Loshin, "Secrets Revealed: How Magicians Protect Intellectual Property without Law" in C.A. Corcos (ed), *Law and Magic: A Collection of Essays* (Durham NC: Carolina Academic Press, 2010), p.123.

¹³¹ D. Oliar and C. Sprigman, "There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy" (2008) 94 *Va.L.Rev.* 1787; H. Pham, "Standing Up for Stand-Up Comedy: Joke Theft and the Relevance of Copyright Law and Social Norms in the Social Media Age" (2019) 30 *Fordham Intell.Prop.Media & Ent.L.J.* 55.

¹³² J.A. Broussard, "An Intellectual Property Food Fight: Why Copyright Law Should Embrace Culinary Innovation" (2007) 10 *Vand.J.Ent. & Tech.L.* 691, 708-711.

¹³³ A. Perzanowski, "Intellectual Property Norms in the Tattoo Industry" (2013) 98 *Minn.L.Rev.* 511, 532-67, 569.

¹³⁴ Oliar and Sprigman, "There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy", 1795, 1841; Kate Darling, "IP without IP: A Study of the Online Adult Entertainment Industry" (2013) 17 *Stanford Technology L.Rev.* 709, 760-61; Perzanowski, "Intellectual Property Norms in the Tattoo Industry", p. 584; Iljadica, "User Generated Content and Its Authors", p. 184.

¹³⁵ Oliar and Sprigman, "There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy", 1866-67; T.M. Gates, "Providing Adequate Protection for Comedians' Intellectual Creations: Examining Intellectual Property Norms and Negative Spaces" (2014) 93 *Or.L.Rev.* 801, 817; Fiesler and Bruckman, "Creativity, Copyright, and Close-Knit Communities: A Case Study of Social Norm Formation and Enforcement", 241:17.

¹³⁶ R.H. McAdams, "The Origin, Development, and Regulation of Norms" (1997) 96 *Mich.L.Rev.* 338.

Systems of norms are reliant on people knowing what the rules are. The first problem that UGC faces here stems from the large size of these communities. Discussions of normative systems stress that they are most effective in small, close-knit communities, for example the drag scene in Israel.¹³⁷ Online creative communities, however, are often very large. As such, clear communication of normative rules is easily undermined. Creative communities such as those found on Reddit or 4chan often have many members, attract many posts and comments and are widely accessed.¹³⁸

The significance of the large scale of communities is that reaching unanimity on what normative rules should be is not possible. This does not mean that norms cannot be established as consensus (“the majority of those who hold an opinion share the same opinion”) is sufficient.¹³⁹ Consensus, rather than unanimity, means that there will be a minority of people who do not agree with the norms. In large communities this minority will equate to large numbers of people in absolute terms. This causes problems for a normative system as dissenting views on a platform can dilute or confuse the communication of community norms. This was seen in the data collected in the 4chan and reddit project. For example, there were numerous discussion threads about the acceptability of certain creative practices, such as relying heavily on references in art, and these often included strong opinions arguing against the general consensus.

This is particularly problematic due to the way that community members learn about norms, which are rarely expressly articulated within communities. Instead, they are learnt through an inductive process of witnessing and being involved in ongoing dialogues. 4chan communities, for example, place great significance on ‘lurking’, essentially observing the community for long enough to learn the rules before participating.¹⁴⁰

“We have no big expectancies within the community, but also some degree of understanding of its unspoken rules.

Which I and others try desperately to turn into very outspoken rules whenever someone new shows up and asks questions that imply they don’t really understand ...

It’s this cycle of learning and sharing information, even if in the form of memes and rude remarks that allows us to maintain the overall shape of a community that while anonymous and composed of people all around the world, moderates and teaches itself its own values. Not by one person deciding anything, but arguing endlessly until what is obvious stands out from any preposterous proposals.”¹⁴¹

This process of communicating norms means that new community members need time to learn,¹⁴² a process that will take longer where there is vocal dissent. In the interim, they risk transgressing norms.¹⁴³

¹³⁷ Oliar and Sprigman, “There’s No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy”, 1795; E. Sarid, “Don’t Be a Drag, Just Be a Queen—How Drag Queens Protect Their Intellectual Property Without Law” (2014) 10 FIU L.Rev. 133, 173-74; Gates, “Providing Adequate Protection for Comedians’ Intellectual Creations: Examining Intellectual Property Norms and Negative Spaces”, 817.

¹³⁸ For example, the r/Art subreddit currently has over 20 million members: Reddit, “R/Art” <<https://www.reddit.com/r/Art/>>; “Subreddit Stats - Statistics for Every Subreddit” <<https://subredditstats.com/>>; 4chan, “Press”, <<https://www.4chan.org/press>>; Statista, “Reddit – Statistics & Facts”, <<https://www.statista.com/topics/5672/reddit/>>

¹³⁹ McAdams, “The Origin, Development, and Regulation of Norms”, 358.

¹⁴⁰ M. Trammell, “User Investment and Behavior Policing on 4chan” (2014) 19 First Monday <<https://firstmonday.org/article/view/4819/3839>>

¹⁴¹ p9

¹⁴² A. Roundtree, “Graffiti Artists Get Up in Intellectual Property’s Negative Space” (2012) 31 Cardozo Arts & Ent.L.J. 959, 982; Robertson, “No One Would Murder for a Pattern: Crafting IP in Online Knitting Communities”, p.47.

¹⁴³ Fiesler and Bruckman, “Creativity, Copyright, and Close-Knit Communities: A Case Study of Social Norm Formation and Enforcement”, 10–11.

The second, related, but more significant issue with people knowing the normative rules is that the borders to these communities are open. Rather than the close-knit communities described in many studies, people that we would not consider to be members of the community and have no interest in becoming members can easily access UGC through social media platforms. The potential for such widespread transient access intensifies the issue of communication of norms. Meese and Hagedorn's study highlighted that there are different vernaculars about circulation and sharing on different platforms; for example, reposting UGC on Twitter is more acceptable than on Instagram.¹⁴⁴ It also found that their participants did not feel confident discussing the rules of platforms they were unfamiliar with.¹⁴⁵ This demonstrates the lack of knowledge about norms new and non-members have to navigating communities. When non-members can transiently access these communities, they are unlikely to spend long enough within the communities to induct the relevant norms.

Furthermore, beyond learning the rules, for norms to be effective people must be aware that there is a risk that their transgression will be detected and sanctioned. Detection is difficult in the context of UGC because it is impossible to oversee every corner of the internet. In many cases, it is unlikely that a use of UGC that transgresses the rules would come to the attention of the original creator or of the community more generally. If it did, the possibility of an effective sanction is also reduced. In normative systems, including within the online creative communities studied, sanctions most often take the form of social shaming and ostracism.¹⁴⁶ In the study, it was found that publicly calling out someone for behaviour that transgressed community norms was a common approach. For example, on 4chan, community members would often comment on posts that featured unacceptable uses of existing works, labelling the person a "hack".

However, social shaming only works firstly when the shaming is heard by the person being shamed,¹⁴⁷ and secondly when they care about being shamed.¹⁴⁸ Within the community, the shaming is likely to be heard, but that does not necessarily equate to caring about the shaming. Perzanowski explains that the different approaches to adherence to norms between custom tattoo artists and street shop tattooists stem from a difference in values: professional respect in contrast to commercial interests.¹⁴⁹ Relatedly, in the graffiti community, there was less conformity with norms from those who had the least to fear from censure: those with very high status and those with very low status.¹⁵⁰ More specifically linked to UGC, Fiesler and Bruckman are sceptical of the ability of a normative system to work across UGC platforms as users are unlikely to internalise norms due to the lack of community identity.¹⁵¹ If there is insufficient community identity, then the effect of shaming will be ineffective.

Those outside of the community, whose access is by its very nature transient, are unlikely to find out about any shaming that occurs. If they did, the impact of being shamed would likely be low where they did not have community bonds with those doing the shaming. As identified above, those with different values and those for whom reputational sanctions are less significant are less likely to conform with

¹⁴⁴ Meese and Hagedorn, "Mundane Content on Social Media: Creation, Circulation, and the Copyright Problem", 4-5.

¹⁴⁵ Meese and Hagedorn, "Mundane Content on Social Media: Creation, Circulation, and the Copyright Problem", 5.

¹⁴⁶ C. Reed, *Making Laws for Cyberspace* (Oxford: OUP, 2012), p.121; Gates, "Providing Adequate Protection for Comedians' Intellectual Creations: Examining Intellectual Property Norms and Negative Spaces"; Sarid, "Don't Be a Drag, Just Be a Queen—How Drag Queens Protect Their Intellectual Property Without Law"; Fiesler and Bruckman, "Creativity, Copyright, and Close-Knit Communities: A Case Study of Social Norm Formation and Enforcement", 18-20.

¹⁴⁷ E.L. Rosenblatt, "Fear and Loathing: Shame, Shaming, and Intellectual Property" (2013) 63 DePaul L.Rev. 1, 34.

¹⁴⁸ Pham, "Standing Up for Stand-Up Comedy: Joke Theft and the Relevance of Copyright Law and Social Norms in the Social Media Age", 64-65.

¹⁴⁹ Perzanowski, "Intellectual Property Norms in the Tattoo Industry", 553-54.

¹⁵⁰ Roundtree, "Graffiti Artists Get Up in Intellectual Property's Negative Space", 983.

¹⁵¹ Fiesler and Bruckman, "Creativity, Copyright, and Close-Knit Communities: A Case Study of Social Norm Formation and Enforcement", 20.

norms. Those outside of the community are more likely to have diverse values and care less about what the community thinks of them. For example, Roundtree highlights that “custom-based recourse” has less impact on those outside the graffiti community.¹⁵² A similar problem is highlighted in the comedy community:

“If an extra-community player is not part of a group of members adhering to a pattern of behaviour arising from social pressures and expectations, social sanctions such as loss of esteem and expulsion from the community have little effect.”¹⁵³

Pham makes a direct link between social media and “underperforming” norms.¹⁵⁴ She highlights that despite strong norms about joke theft underpinned by the value placed on professional respect within the comedy industry, on social media it is exposure that is more highly valued and therefore norms are not effective.

As such, while within the communities there may be some scope that social norms could fill the gap that is left by lack of knowledge about and access to copyright systems, there are still concerns about this, and it is clear that a normative system cannot provide an adequate replacement where those norms can be easily transgressed by those with no ties to the community, and where widespread access to those communities obscures the communication of norms. Furthermore, the inability of a norms-based system to fully supersede the legal system also adds an additional layer of confusion as UGC creators and users have to navigate two separate, and often conflicting, systems.

Online anonymity

The final reason the fallacy is able to flourish is because often such content is posted in online spaces where anonymity is pervasive. This means firstly that asking permission to use UGC becomes more unreliable, and secondly that enforcing rights (or social norms) becomes more difficult.

Before exploring each of these reasons in more detail, it is first essential to explain what is meant here by anonymity. Despite its etymology, anonymity encompasses more than just namelessness. Such a traditional understanding of the term fails to reflect what anonymity actually conceals; it is not simply our names, but our broader identities.¹⁵⁵ Consequently, anonymity has been more accurately defined through the connected ideas of unreachability,¹⁵⁶ “untraceability”,¹⁵⁷ unidentifiability,¹⁵⁸ or unavailability of information¹⁵⁹ or of identity knowledge.¹⁶⁰

Traceability is essential for copyright as where interactions with works are legally restricted by copyright, or where lack of clarity about the law and norms means there is uncertainty as we have seen is the case here, a solution is to ask the creator for permission.¹⁶¹ Traceability is also important for

¹⁵² Roundtree, “Graffiti Artists Get Up in Intellectual Property’s Negative Space”, 28.

¹⁵³ Pham, “Standing Up for Stand-Up Comedy: Joke Theft and the Relevance of Copyright Law and Social Norms in the Social Media Age”, 64–65; For similar arguments see also: Gates, “Providing Adequate Protection for Comedians’ Intellectual Creations: Examining Intellectual Property Norms and Negative Spaces”, 817.

¹⁵⁴ Pham, “Standing Up for Stand-Up Comedy: Joke Theft and the Relevance of Copyright Law and Social Norms in the Social Media Age”, 64–66.

¹⁵⁵ H. Nissenbaum, “The Meaning of Anonymity in an Information Age” (1999) 15 *The Information Society* 141, 141–2.

¹⁵⁶ Nissenbaum, “The Meaning of Anonymity in an Information Age”, 142.

¹⁵⁷ Nissenbaum, “The Meaning of Anonymity in an Information Age”, 142.

¹⁵⁸ G.T. Marx, “What’s in a Name? Some Reflections on the Sociology of Anonymity” (1999) 15 *The Information Society* 99, 100.

¹⁵⁹ G. Bachmann, M. Knecht and A. Wittel, “The Social Productivity of Anonymity” (2017) 17 *ephemera: theory and politics in organization* 241, 247.

¹⁶⁰ G. Marx, “Internet Anonymity as a Reflection of Broader Issues Involving Technology and Society” (2004) 11 *Asia-Pacific Rev.* 142, 143.

¹⁶¹ Where a rights holder cannot be traced such works are considered to be orphan works. These are seen as a problem within copyright law as they increase transaction costs of getting permission, meaning users must either risk liability for infringement, or simply not use the work. While some legal measures exist to address to the orphan works problem, such as licensing schemes and statutory provisions, these are unlikely to provide a solution in the context of UGC. For example, in the UK, Schedule ZA1 CDPA outlines specific permitted uses of orphan works but its applicability is limited to ‘relevant bodies’ such as heritage institutions, libraries and

locating and contacting infringers to enforce rights and seek remedies where they are infringed. Where clarity could be sought direct from creators and infringements could be sanctioned, then there would be less space for the misunderstanding that UGC belongs to the internet. For this solution to be successful, however, there needs to be a way to locate and contact the creator.

There are several characteristics of the online environment that reduce the ability to trace the real-life identity of someone to be able to successfully seek that permission or to sanction misuse. Firstly, there is a widespread culture of anonymity practices on some platforms, and that is particularly the case on 4chan, where the majority of users post as ‘Anonymous’, and on Reddit, where most users post under a pseudonymic user-name. Without a real-life name, it becomes difficult, although not always impossible, to link online actions to an offline person. Secondly, even if a real name is available, that does not mean that a person can be traced offline. For example, a common name such as ‘James Brown’ without any further information is as untraceable as ‘anonymous’ when the scale of the environment is taken into account.

Thirdly, the speed of interactions and the ephemerality of online participation creates problems even when you do have the ability to contact someone. For example, Reddit has a direct messaging function that would facilitate direct contact to a creator without the need for knowledge about their offline identity and contact details. However, often those interacting with works are doing so over minutes, hours or days¹⁶² and so a prompt response is required. While the user can request permission, that does not mean that the creator will reply. They may be asleep on the other side of the world. They may be an infrequent user of the platform, or an infrequent email checker. They may have created a ‘throwaway’ account¹⁶³ for a particular purpose and never log in with those details again.

This leads us to a position where asking permission isn’t easy, and infringements avoid sanction. When creators want to restrict uses of their UGC but attempts are futile, they go along with the idea that it belongs to the internet. When people have to use works without permission, and do so on a large scale without consequence, this easily blurs into the erroneous idea that permission isn’t required.

Implications

So far, this article has explored both why the idea that UGC belongs to the internet is a fallacy and how this fallacy comes to exist. This section considers whether the fact of its existence is a problem, arguing that the fallacy leads to undesirable outcomes and is also indicative of wider issues for copyright law as it has not adapted to online conditions. It then considers what this means for copyright reform, highlighting that current suggestions overlook the issues identified here and in doing so risk exacerbating problems for UGC and undermining their own objectives.

Implications of the fallacy

Where there is a widespread but wrongly-held belief that UGC is in the public domain, this leads to undesirable outcomes for both users and creators. First, if creators believe it, infringements are facilitated because creators will not seek redress, even if they would like to restrict such uses and have the legal right to do so. This includes bad faith infringements, where users know they need permission and nonetheless choose to use the work without seeking such permission. Creators may decide to limit what they share online to avoid these issues, and the comments in the discussion threads on 4chan and Reddit revealed that such defensive measures are common:

museums. German orphan works provisions under §61 UrhG are restricted to similar bodies, as well as to works printed in books, journals, newspapers and magazines and do not permit any alteration to the work.

¹⁶² For example, looking at the top 20 posts on r/Art at a particular point in time showed that none of them had been posted longer than 23 hours ago: <<https://www.reddit.com/r/Art/>> (this was based on the webpage being accessed 20 November 2021).

¹⁶³ An account created for one-off use. This will often be to post something the user feels to be embarrassing, or ‘off-brand’ for their usual account.

“If I spent real time and effort on something intended to have a long life, then I’d be more attached. For example: I have spent (I think) hundreds of hours creating a font, and haven’t shared it online.”¹⁶⁴

Secondly, where users believe it, there is the increased risk of good faith infringements where UGC is used without permission thinking that they are behaving within the legal (or normative) rules. This is obviously bad for the creators whose copyright in UGC is infringed, but also has the potential to be bad for users who risk social (and perhaps legal) sanction for transgressing creator expectations. While this paper has explained that such sanctions were not a comprehensive and reliable form of enforcing norms beyond community boundaries, for those who identify with community values they can be. Within this it must also be considered that the line between effective shaming and harassment, vigilantism or mob justice is easily breached, especially online,¹⁶⁵ and the psychological impact of shaming on an individual can be significant.¹⁶⁶ Therefore, being socially shamed or ostracized for behaviour they did not know to be transgressive could be highly undesirable for users. This could lead to a chilling effect on users where they become more reluctant to participate within the community.

These are undesirable outcomes in their own right, but they also indicate a broader issue for copyright: a weakness in its link to creativity. Creativity plays an important role in discourses about copyright law¹⁶⁷ and the concept weaves through the various theories that are used to justify the law. In Anglo-American contexts, the most often cited justification of copyright law is that copyright is a utilitarian incentive to maximise the creation of future works for social benefit.¹⁶⁸ The personality-based justifications more prevalent in European civil law countries also have creativity at their core, in that the inherent rights of the creator as author are key.¹⁶⁹ This is reflected in creativity rhetoric found in policy debates, which is often found in arguments for expanding or strengthening the law, and positions creators and creativity as the beneficiaries of copyright.¹⁷⁰

The power of creativity rhetoric to play such a role in underpinning copyright law is founded on the everyday understanding of creativity that leads creators and creativity to be held in high esteem in society. It is coherent that we create and develop law in line with the things that society values. However, the confusion around uses of UGC highlights the fact that in practice copyright law has not fully adapted to the UGC environment, which, as will be argued below, is valuable for creativity. This paper has highlighted that some hardwired aspects of the online space contribute to the fallacy, including its size, accessibility and anonymity. As these causes would be difficult and likely undesirable to change, a more achievable and appropriate solution to the issues discussed in this paper would be for copyright to better accommodate the UGC environment. Doing so would also be coherent with the creativity narratives that permeate copyright.¹⁷¹ Instead, we have seen that copyright struggles to be effective in the context of UGC and could lead to hesitancy from both users and creators to share and participate. This is an issue that copyright policy should want to address because UGC communities are

¹⁶⁴ P2

¹⁶⁵ Oliar and Sprigman, “There’s No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy”, 1836–38; K. Klonick, “Re-Shaming the Debate: Social Norms, Shame, and Regulation in an Internet Age” (2016) 75 Md.L.Rev. 1029, 1045; Fiesler and Bruckman, “Creativity, Copyright, and Close-Knit Communities: A Case Study of Social Norm Formation and Enforcement”, 17-18.

¹⁶⁶ Rosenblatt, “Fear and Loathing: Shame, Shaming, and Intellectual Property”, 34.

¹⁶⁷ J.C. Ginsburg, “The Concept of Authorship in Comparative Copyright Law” (2002) 52 DePaul L.Rev. 1063, 1092; J.E. Cohen, “Creativity and Culture in Copyright Theory” (2007) 40 U.C.Davis L.Rev. 1151, 1192; M.J. Madison, “Beyond Creativity: Copyright as Knowledge Law” (2009) 12 Vand.J.Ent. & Tech.L. 817, 820.

¹⁶⁸ W.M. Landes and R.A. Posner, “An Economic Analysis of Copyright Law” (1989) 18 The JLS 325; W. Fisher, “Theories of Intellectual Property” in Stephen R Munzer (ed), *New Essays in the Legal and Political Theory of Property* (Cambridge: Cambridge University Press, 2001), p.168.

¹⁶⁹ Fisher, “Theories of Intellectual Property”, p.171-72, 174.

¹⁷⁰ P. Jaszi, “Toward a Theory of Copyright: The Metamorphoses of ‘Authorship’” (1991) 1991 Duke L.J. 455, 480; A. Barron, “Copyright Law and the Claims of Art” (2002) 4 I.P.Q. 368, 368; R. Towse, “Creativity, Copyright and the Creative Industries Paradigm” (2010) 63 Kyklos 461, 463–64.

¹⁷¹ There are also wider arguments for UGC copyright reform, and these are discussed in the section that follows.

rich environments that provide creative opportunity in several ways.

Firstly, UGC communities are seen by many members as an important and accessible element of their creative training by providing them with the opportunity to get feedback, edits and suggestions from others:

“I did art school for two years and I dropped out halfway through my second year because I was no longer making progress through school and I realized that ... I could just improve through self learning because ... I had all the resources I could possibly want on [4chan board] as well as feedback from people on there to kind of help me guide myself. ... I didn't need art school anymore ... [the board] was there and had an unimaginable pool of resources you could just use to learn.”¹⁷²

This provides an insight into why these spaces are important and should be a consideration in copyright policy. Merges argues that it is acceptable for policy to prioritise the needs of commercial entities over, for example, UGC creators because commercial entities are the ones who pay, employ and train creators, allowing individual creators to make a living from their creative work.¹⁷³ When considering the evidence that online communities also play a role in the development of creators, with fewer barriers to access, it can be seen that ensuring copyright law also works for UGC is valuable to support creativity.

Secondly, there is much to suggest that regardless of the brilliance of an individual mind, it needs to be able to interact serendipitously with a “fertile” external network of sources, information and influences to make the necessary connections for creativity.¹⁷⁴ It is clear that on a macro level we can consider this network in broad terms relating to access and exposure to creative ideas and works. On a micro level, however, we should also consider that these online communities in themselves act as such a network:

“Well, scrolling through large numbers of pictures I'll get an idea for a composition, then sketch based on that and either continue from there and finish or set it aside, that's the visual part anyway. I'll also sometimes be inspired by a poem in r/ocpoetry or a writing challenge. It's... well, it's filled with more thoughts, pictures and ideas than anyone could possibly see or reflect on individually – but as an amalgamation it can help create a basis for creative thought.”¹⁷⁵

Where UGC platforms and communities provide a rich environment that facilitates and generates creativity, it would seem coherent for copyright law to promote that environment by encouraging participation and sharing of UGC. This is supported by arguments based in psychology that participation and sharing are valuable to the creative process.¹⁷⁶ Indeed, Johnson argues that the rewarding feeling of sharing can act as a motivator for creativity, and in some cases be more effective than economic incentives that copyright law provides.¹⁷⁷ This was reflected in the qualitative study, where creators described diverse and complex motivations to create, including those related to sharing:

“It's satisfying knowing they get something they enjoy.”¹⁷⁸

¹⁷² p12

¹⁷³ R.P. Merges, “The Concept of Property in the Digital Era” (2008) 45 Hous.L.R. 1239, 1250-51.

¹⁷⁴ J.E. Cohen, *Configuring the Networked Self: Law, Code and the Play of Everyday Practice* (New Haven: Yale University Press, 2012), pp.93–94; E. Reuveni, “Copyright, Neuroscience and Creativity” (2013) 64 Ala.L.Rev. 735, 752–53.

¹⁷⁵ p4

¹⁷⁶ G. Mandel, “To Promote the Creative Process: Intellectual Property Law and the Psychology of Creativity” (2011) 86 Notre Dame L.Rev. 1999, 2000-01; E. Johnson, “The Economics and Sociality of Sharing Intellectual Property Rights” (2014) 94 BUL.Rev. 1935, 1945-60.

¹⁷⁷ Johnson, “The Economics and Sociality of Sharing Intellectual Property Rights”, 1945-46.

¹⁷⁸ p7

“Just the thought that something I did gave a little bit of entertainment to someone thousands of miles away makes me very happy.”¹⁷⁹

Economic and professional motivators were also ranked highly as motivators in the study, but notably these were largely aspirational, for example those who created UGC as skills development to become professional in the future. Furthermore, where economic motivators were cited, this was frequently alongside others, particularly happiness, fun and enjoyment, indicating that an economic incentive is not necessarily required.¹⁸⁰ Incentive based arguments for copyright focus on finding an efficient balance between access to works and incentive to create, and considering these findings, it seems that a more effective approach to creativity in UGC contexts is to encourage the sharing of UGC and, therefore, the development of the UGC environment as a fertile network of inspiration.

Therefore, the fallacy that UGC belongs to the internet and the damage that it can cause have important implications for copyright law itself. As copyright law regulates this space in theory, but fails to do so effectively in practice, this allows an inaccurate understanding of the law to flourish, chilling UGC practices and weakening copyright’s justificatory relationship to creativity.

Reforming copyright for UGC

A UGC-based critique of copyright law is nothing new and as a result there is a significant body of existing scholarship exploring how copyright law could or should be reformed in response to the UGC phenomenon. This paper now argues that, while the reform arguments in this scholarship often align with the points made in this discussion, many of the existing suggestions overlook UGC creators as copyright holder, risk exacerbating the problems of clarity and therefore would entrench some of the problems they seek to remedy. This section first makes explicit the thematic similarities in copyright critique. It then gives a short illustrative overview of UGC-focused reform proposals. Lastly, it demonstrates how these proposals fail to address the key issues and critiques in this paper, arguing ultimately that UGC reform therefore also needs to address the fallacy in order to be effective.

Critique

The findings and argument made here mirror many of those found in existing copyright law scholarship - including other analyses of UGC - in that they all ultimately raise concerns about copyright law’s relationship with creativity. First, there are criticisms that the law has failed to respond to new technological challenges in the creativity landscape.¹⁸³ For example, Gervais identifies the disconnect between the analogue cultural environment when copyright was created and the digital one in existence now, and argues that we cannot expect the same laws to work in both.¹⁸⁴ This paper has highlighted the importance of the technologically-facilitated UGC sphere for creativity and has demonstrated several ways that the law as currently construed does not work in this context: it is inaccessible and misunderstood by those within the UGC landscape, it is more restrictive than widespread social practice, and it’s inability to effectively regulate use of UGC has possible negative implications for creativity.

There is also critique of the reliance on ideology rather than empirical evidence in copyright law and policy-making,¹⁸⁵ and it is argued that one of the outcomes of this is that law does not reflect the reality

¹⁷⁹ p2

¹⁸⁰ This mirrors other scholarship that highlights diverse creative motivators and the narrowness of copyright’s incentive narrative. See for example: P. Ganley, “The Internet, Creativity and Copyright Incentives” (2005) 10 *J.Intel.Prop.Rights* 188, 197; R. Tushnet, “Economies of Desire: Fair Use and Marketplace Assumption” (2009) 51 *Wm.& Mary L.Rev.* 513, 522-27; L.J. Murray, “Cultural Labor in a Small City: Motivations, Rewards, and Social Dynamics” in L.J. Murray et al., *Putting Intellectual Property in its Place: Rights Discourses, Creative Labor, and the Everyday*, p.132, p.140.

¹⁸³ M.A. Pallante, “The Next Great Copyright Act” (2013) 36 *Colum.J.L. & Arts* 315, 320.

¹⁸⁴ Gervais, *(Re)Structuring Copyright: A Comprehensive Path to International Copyright Reform*.

¹⁸⁵ Towse, “Creativity, Copyright and the Creative Industries Paradigm”, 463-64; W. Patry, *How to Fix Copyright* (Oxford: OUP, 2011) p. 50.

of creativity in terms of its process or diversity of practices.¹⁸⁶ Much UGC-based copyright critique is based on a failure of the law to reflect the cumulative reality of much creativity by relying too heavily on narratives about the individual genius author,¹⁸⁷ which have been argued to stifle creativity,¹⁸⁸ and on how looking at the reality of creativity demonstrates the limitations of copyright law as a universal incentive to creativity.¹⁸⁹ Relatedly, scholars such as Lessig have long argued that the current copyright system is unfairly balanced in the favour of the copyright industries to the detriment of other creators.¹⁹⁰ Usually this is about the chilling effect of copyright on UGC creative practices based on remix, where copyright law restricts what source materials can be used. It has been argued, based on empirical findings, that creators feel that copyright is not relevant to them as creators, indicating incentives to create based on the rights the law provides are low. It also highlights a potential chilling effect resulting from the fallacy that UGC belongs to the internet, meaning that creators are less likely to share and users are less likely to use UGC. Based on this we can see that while this paper looks at the UGC landscape from a different angle, the core issues it raises reflect existing critiques of copyright law. This indicates that the findings here should supplement those already established in the literature.

This is particularly important in the context of reform proposals for UGC. So far, such proposals have largely focused on the issue of UGC as use of traditional copyright works and have overlooked the implications of UGC being copyright works in their own right. These two issues are aligned and intertwined – UGC creators are stakeholders in both perspectives and the aims/critiques of both issues overlap. As such, it is essential that copyright reform for UGC reflects the needs of both elements of the UGC landscape to coherently achieve its objectives to improve copyright's link to creativity. This paper argues that this is not currently the case for two key reasons: firstly, UGC-focused reform proposals largely overlook the broader issue of use of UGC and therefore do not adequately address non-transformative use; and secondly, there is an implicit framing of UGC as use of traditional copyright works (where the copyright industries hold the rights). This means the proposals in fact exacerbate issues of clarity, and thereby also undermine copyright law's relationship with creativity. Existing reform proposals

Before exploring these issues in more detail, it is first necessary to provide an indication of the types of reforms that have been suggested by scholars to enable copyright law to better reflect the needs of the UGC landscape. While this is not an exhaustive list, suggestions include a right to remix based on compulsory licensing of copyrighted content,¹⁹¹ reintroducing formalities to ensure access to works is only restricted when the creator wishes this to be the case,¹⁹² and opt-out systems creating clear, enforceable and flexible routes to waive copyright or to dedicate works to the public domain.¹⁹³ Some suggest making the law more accessible to amateurs and individuals outside of the traditional copyright industries either through rewriting and simplifying the law in order to make it more accessible,¹⁹⁴

¹⁸⁶ R. Tushnet, "Economies of Desire: Fair Use and Marketplace Assumption", 516; J. Silbey, *The Eureka Myth: Creators, Innovators, and Everyday Intellectual Property* (Stanford: Stanford University Press, 2015), pp.278-80.

¹⁸⁷ J. Boyle, *Shamans, Software, and Spleens: Law and the Construction of the Information Society*, (Cambridge, Mass.:Harvard University Press, 1997), p.119.

¹⁸⁸ Lessig, *Remix*.

¹⁸⁹ C. Sprigman, "Some Positive Thoughts about IP's Negative Space", in A. Perzanowski and K. Darling (eds.) *Creativity without Law: Challenging the Assumptions of Intellectual Property* (New York: New York Press 2017), p. 257; Darling, "IP without IP: A Study of the Online Adult Entertainment Industry", 762; M. Iljadica, *Copyright Beyond Law: Regulating Creativity in the Graffiti Subculture* (Oxford: Hart Publishing, 2016), p. 291.

¹⁹⁰ Lessig, *Free Culture*; Lessig, *Remix*; J. Litman, "Real Copyright Reform" (2010) 96 Iowa L.Rev. 1; Patry, *How to Fix Copyright*.

¹⁹¹ Y. Li, "The Age of Remix and Copyright Law Reform" (2020) 12 L.I.T. 113, 142.

¹⁹² S. van Gompel, "Copyright Formalities in the Internet Age: Filters of Protection or Facilitators of Licensing" (2013) 28 Berkeley Tech.L.J. 1425, 1433.

¹⁹³ Merges, "The Concept of Property in the Digital Era", 1272; C.S. Brown, "Copyleft, the Disguised Copyright: Why Legislative Copyright Reform Is Superior to Copyleft Licenses" (2010) 78 UMKC L.Rev. 749, 778-82.

¹⁹⁴ Litman, "Real Copyright Reform", 33–34; Pallante, "The Next Great Copyright Act", 323; R. Arnold, "The Need for a New Copyright Act: A Case Study in Law Reform" (2015) 5 QMJIP 110, 126; P. Samuelson,

removing some of the financial hurdles to pursuing a claim in the courts¹⁹⁵ or through increasing legal certainty through the use of databases or other searchable records so that users can assess whether a work is subject to copyright protection.¹⁹⁶

One of the most common suggestions, however, is to make copyright law less restrictive in relation to UGC practices by reforming exceptions and limitations to copyright law. It is this aspect of reform narratives that is the focus of the argument in this discussion. This specific focus is justified on two grounds: firstly, these proposals are more numerous than others; and secondly, it is arguably the type of reform most likely to be implemented. Evidence of this can be seen in the fact that several scholars set out how their suggestions fit within existing international copyright obligations, whereas suggestions such as reintroducing formalities would require a significant and controversial amendments to the Berne Convention. Furthermore, Canada actually introduced a specific exception for non-commercial UGC in 2012, demonstrating that these types of proposals are achievable in practice.¹⁹⁷

Some of these exception reforms are now described. Much of the discussion of UGC exceptions is focused on EU law, which is understandable given the much narrower range of exceptions and limitations available under Article 5 of the information Society Directive¹⁹⁸ in comparison to US fair use provisions.¹⁹⁹ However, there are those arguing for changes to US fair use provisions,²⁰⁰ such as including making attribution as a factor.²⁰¹ Outside of the US, suggested UGC reforms are mostly structured as the introduction of an exception or limitation to the copyright holder's exclusive rights over a work.²⁰² Discussion about a potential UGC exception is long running; the Gowers Review recommended an exception for "creative, transformative or derivative works" in 2006²⁰³ and the European Commission's *Copyright in the Knowledge Economy Green Paper* also raised the question of whether a UGC exception should be introduced in 2008.²⁰⁴

Gervais argues for a clearer system of exceptions and limitations in the EU to respond to the social and cultural reality of remix and similar practices, either through extensions to existing exceptions and limitations, or by introducing one similar to fair use in the US.²⁰⁵ Patry also suggests a more positive role for fair use provisions in the law, including opening up any closed list provisions.²⁰⁶ Geiger suggests merging wider limitations for creative uses with a system of remuneration, in an example of using

"Preliminary Thoughts on Copyright Reform" in B. Atkinson and B. Fitzgerald (eds), *Copyright Law* (London: Routledge, 2017) Vol.3, p.531.

¹⁹⁵ K.K. Olson, "The Copyright Claims Board and the Individual Creator: Is Real Reform Possible?" (2020) 25 Communication L.& Policy 1, 3.

¹⁹⁶ Brown, "Copyleft, the Disguised Copyright", 782-83.

¹⁹⁷ Copyright Act (Canada) s. 29.21. This exception would not apply where UGC creators are creating commercial content.

¹⁹⁸ Directive 2001/29/EC on copyright in the information society.

¹⁹⁹ While of course post-Brexit the UK is now free to explore copyright reform on its own terms, the scholarship has not yet explored this, and the EU proposals outlined here were applicable to the UK when written and address issues with the narrow framing of permitted uses that still exist.

²⁰⁰ M.J. Madison, "Rewriting Fair Use and the Future of Copyright Reform" (2005) 23 Cardozo Arts & Ent.L.J. 391.

²⁰¹ Lastowka, "Digital Attribution: Copyright And The Right To Credit".

²⁰² Much of the discussion of UGC exceptions is focused on EU law, which is understandable given the much narrower range of exceptions and limitations available under Article 5 of the Infosoc Directive in comparison to US fair use provisions.

²⁰³ HM Treasury, *Gowers Review of Intellectual Property* (2006), Recommendation 11, paras 4.85-4.88, pp.66-68.

²⁰⁴ European Commission, *Green Paper - Copyright in the Knowledge Economy* (Publications Office of the European Union, 2008) COM/2008/0466.

²⁰⁵ Gervais, *(Re)Structuring Copyright: A Comprehensive Path to International Copyright Reform*, pp.216-219.

²⁰⁶ Patry, *How to Fix Copyright*, pp.216-229.

compulsory licence schemes to move the right under copyright away from a right to prohibit use toward a right to remuneration.²⁰⁷

Senftleben identifies that some UGC content will already fall within existing parody and quotation exemptions, but that where it does not, a new exemption coupled with equitable remuneration is necessary. His suggestion permits uses for the purposes of “entertainment, illustration, or pastiche” subject to rightsholders receiving fair compensation (paid by platforms) and the requirement that the use is “in accordance with fair practice *when considering the creative effort made by the user.*”²⁰⁸

Frosio proposes the introduction of (preferably compulsory) licensing schemes to shift copyright away from exclusivity, alongside a UGC exception. This exception would permit “private non-commercial uses of lawfully made available content ... for the purpose of creating UGC content.”²⁰⁹ Such uses would only be permitted where it did not impair commercial use of the first work and where the copyright owner of the first work received equitable remuneration from platforms.²¹⁰ He also suggests a concurrent “open-clause exception” for fair use, opening up the current closed list of exceptions to allow the law to be more responsive to technological developments.²¹¹ Similarly, Lambrecht and Cabay argue that a “semi-open exception,” based on “template cases” is the best way for EU law to adapt to new cultural practices.²¹²

Angelopoulos and Quintais propose a mandatory exception for individual users of online content-sharing platforms alongside statutory licences. This exception would permit any non-commercial user activity, including transformative uses, and would provide the copyright holder of the first work fair compensation administrated by collective management schemes and funded by the commercial activity of the platforms.²¹³

Canada’s “user-generated content exception” permits the use of copyrighted work to create a new work as long as it is not for commercial purposes, the original source is credited, the remixer has reasonable grounds to believe the original source was not itself infringing copyright and the new work “does not have a substantial adverse effect” on the exploitation or market for the original source.²¹⁴

Reform proposals when UGC doesn’t belong to the internet

It is argued that these reform suggestions do not directly or fully address the UGC issue being explored here, as the provisions often overlook the needs of a landscape where UGC is copyright protected and interactions are infringing.

First, the reform proposals often focus on improving UGC creativity in relation to narrow types of uses, particularly in relation to remix practices. Remix is a significant part of UGC practice that requires some copyright reform, and these provisions would benefit UGC in the sense that it would bring the law in line with permissive creator expectations in relation to non-commercial remix of their copyright protected UGC. However, it overlooks the additional, important – and, as outlined in the discussion of creator expectations, widely accepted – aspect of re-sharing and utilising UGC. This is reflected in many of the suggestions related to exceptions and limitations, which permit use of works as long as it is non-commercial and demonstrates sufficient creativity, but do not permit re-posting or using without

²⁰⁷ C. Geiger, “Promoting Creativity through Copyright Limitations: Reflections on the Concept of Exclusivity in Copyright Law” (2009) 12 Vand. J. Ent. & Tech. L. 515, 532-33.

²⁰⁸ M. Senftleben, “User Generated Content: Towards a New Use Privilege in EU Copyright Law”, p.160.

²⁰⁹ G. Frosio, “Reforming the C-DSM Reform: A User-Based Copyright Theory for Commonplace Creativity” (2020) 51 IIC 709, 740.

²¹⁰ Frosio “Reforming the C-DSM Reform: A User-Based Copyright Theory for Commonplace Creativity”, 740.

²¹¹ Frosio “Reforming the C-DSM Reform: A User-Based Copyright Theory for Commonplace Creativity”, 740-41.

²¹² M. Lambrecht and J. Cabay, “Remix Allowed: Avenues for Copyright Reform Inspired by Canada” (2016) 11 JIPLP 21, 35.

²¹³ C. Angelopoulos and P. Quintais, “A Better Solution to Online Infringement” (2019) 10 JIPITEC 147.

²¹⁴ Copyright Act (Canada), s.29.21.

transformativity. For example, Senftleben’s proposed exemption places significant value on the creative effort the user expends,²¹⁵ Frosio’s proposal is about permitting use of works to create new UGC²¹⁶ and Canada’s exception only applies where the use of the copyrighted work leads to a new work, itself protected by copyright (and therefore requiring it meets certain originality requirements).²¹⁷ Within these reforms, creativity critiques of copyright in relation to UGC would not be fully addressed; they would not fully reflect the reality of UGC processes and practices and therefore, fail to understand the act of sharing UGC, even non-transformatively, to be an important contributor to creativity. It should also be noted that while discussion has focused on exceptions proposed for the EU context, these critiques could also be extended to the US with its transformativity-focused fair use provisions. Senftleben argues that the creative effort element of an exception is fundamental to it meeting the requirements of the three-step test, without which it would not comply with international obligations.²¹⁸ He argues that the added value of new expression allows a UGC exception to be considered applicable to “certain special cases” in that it provides a strong public policy justification based on freedom of expression: “Without an enhancement of pre-existing thoughts and expressions, the freedom of expression argument would lose its validity and the copyright limitation would lose the special character which is indispensable for satisfying the test of ‘certain special case’.”²¹⁹ Conversely, Angelopoulos and Quintais claim their proposal is capable of meeting the three-step test requirements - despite being broad enough to cover any non-commercial use - as it is underpinned by the inclusion of a system of statutory licensing and remuneration.²²⁰ It is possible, however, that a broader exception could meet this test using Senftleben’s own logic of public policy and freedom of expression; this paper has already highlighted the value of UGC spaces and sharing for creativity generally, and so an exception that also explicitly permits the non-commercial and non-transformative use and dissemination of UGC *specifically* (rather than of copyright works more generally), could be justified on that basis. This specific focus on use of UGC rather than works generally is important when when exploring the second issue with UGC reform narratives: many of these proposals implicitly frame the copyright owner as commercial, and UGC as use of commercial copyrighted work. As such, they fail to reflect the wider UGC picture, which extends beyond use of commercial works to include both use and creation/ownership of non-commercial, non-derivative creative content. This is linked in part to the criticism about the failure to address non-transformative use, as the law fails to represent their practices and therefore seems to be less relevant to them. However, the current proposals also frame copyright as commercial through the focus on fair compensation and/or equitable remuneration found in many of them.

The common inclusion of compensation/remuneration requirements shows UGC exceptions to be largely focused on commercial creators. Compensation and remuneration arguments attempt to reduce the ‘value gap’ between the profit UGC platforms make (in part from the widespread sharing of copyright works) and the (lack of) compensation provided to copyright holders. The compensation/remuneration systems suggested seek to address the value gap by placing the financial burden on platforms by requiring them to buy licenses. It is suggested that platforms could raise funds for this either through advertising revenue or through user subscriptions.²²¹ The latter suggestion demonstrates a fundamental failure to understand how UGC exists beyond use of commercial works. To try to fix the value gap by, in effect, taxing platform users fails to recognise that those platform users are often themselves copyright owners and are themselves on the disadvantaged side of the value gap;

²¹⁵ Senftleben “User Generated Content: Towards a New Use Privilege in EU Copyright Law”, p. 149.

²¹⁶ Frosio “Reforming the C-DSM Reform: A User-Based Copyright Theory for Commonplace Creativity”, 739.

²¹⁷ Copyright Act (Canada), s.29.21

²¹⁸ Berne Convention, art 9(2); TRIPS, art 13; WIPO Copyright Treaty (adopted 20 December 1996, entered into force 6 March 2002) 2186 UNTS 121, arts 10(1)-(2). Limitations or exceptions to exclusive rights are only permitted where they apply to certain special cases, do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

²¹⁹ Senftleben, “User Generated Content: Towards a New Use Privilege in EU Copyright Law”, p.149.

²²⁰ Angelopoulos and Quintais, “A Better Solution to Online Infringement”, 171.

²²¹ Angelopoulos and Quintais, “A Better Solution to Online Infringement”, 170.

platforms are reliant on the unpaid efforts of those users to populate their services with content that they create or curate.²²²

Considering the widespread but incorrect view that copyright protection is not relevant to UGC works, it seems undesirable to frame an exception in such a way that could reinforce that interpretation, as is the case in the existing suggestions. As such this paper argues that effective UGC reform needs to ensure that this is avoided. Failure to do so would merely further entrench the fallacy that UGC belongs to the internet, and in doing so would undermine the efforts of such reform to create law that reflects the UGC environment and supports creativity within it. It is suggested that by supplementing existing exception proposals with explicit provisions in relation to UGC that permit non-commercial use of any kind, subject to appropriate credit, it would provide some explicit clarity about what the rules are, mitigate the problems caused by the framing of a remix-focused exception and bring the law in line with creator expectations. There is undoubtedly less room for grey areas when there is a specific and direct provision setting out what is permitted and that copyright law applies to UGC. When the law reflects UGC creator wishes, this also creates a more coherent narrative between law and norms, thereby reinforcing communication about the rules and potentially reducing good-faith infringements. This approach would benefit creators, users and the law itself, while ensuring that UGC-focused reform was comprehensive and coherent.

Conclusion

This article has demonstrated that despite some misunderstandings amongst users, UGC is not in the public domain and does not belong to the internet. In many cases, copyright will subsist in UGC and its creators want to retain some aspects of control over how it is used, particularly in relation to moral rights and commercial uses.

We end up with a situation where the fallacy that UGC belongs to the internet can exist because this confusion is facilitated by a lack of understanding about the relevance and provisions of copyright law, the difficulty of communicating norms to large numbers of people including those outside of the community, the disconnect between norms and law, and pervasive online anonymity that makes it difficult to seek clarification from the creator themselves. The confusion is also facilitated when infringements go unsanctioned, either because creators do not know they have rights to enforce, because they cannot access appropriate legal support to pursue legal action, because social sanctions are ineffective beyond community borders or because online anonymity makes it too difficult to locate the infringer.

The fallacy leads to negative outcomes for creators and users in that it can stifle participation in online creative communities. This has wider implications for copyright because the law relies on narratives about supporting creativity but fails to adapt to this creative environment. This mirrors existing critique used to underpin copyright reform proposals relevant to UGC but to adequately address these critiques reform needs to also ensure that it does not simultaneously contribute to the fallacy that UGC belongs to the internet. To do that, this paper suggests supplementing existing proposals with direct and specific provisions permitting non-commercial use of, specifically and explicitly, UGC. This could mitigate some of the issues identified here by ensuring the law reflects the needs of the UGC landscape not just as it interacts with the commercial copyright industries but also as it produces copyright-protected works of its own. In this way, copyright law would better serve this important cultural and creative environment.

Appendix A

Table 1: Final subreddit selection for observational work

Art	Photography	Writing
r/Art	r/itookapicture	r/writing
r/ArtistLounge	r/photography	r/writingprompts

²²² K. Weatherall, “The Relationship between User-Generated Content and Commerce” in D. Hunter et al. (eds), *Amateur Media: Social, cultural and legal perspectives* (London: Routledge, 2012), p.59.

r/comics r/comicbookcollabs r/comiccrits r/photoshopbattles r/drawing r/painting r/illustration	r/photocritique r/pics	r/writers r/producemyscript r/screenwriting
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Table 2: Key word search terms

Research issue	Search terms
Creativity motivations	Motivate*; creat*
Anonymity practices	Anonym*; pseudonym*
Opinions on copyright	Copyright; intellectual property; IP; piracy/pirate; infring*
Understandings of originality	Original*; plagiaris*/plagiariz*; trace/tracing; steal/stole; hack; influence*; inspiration/inspire*; referenc*; copy/copied; transform*; author*
Ownership norms	Stole/steal; use/used/using; remix; permission; infring*; transform*; acceptable; theft/thief; credit
Enforcement of norms/rights	Stole/steal; use/used/using; theft/thief; enforce*

Table 3: Interview participant information

Participant	Platform	Relevant creativity type	Geographic location	Creator status ²²³
P1	Reddit	Art	Unknown	Professional
P2	Reddit	Art	Unknown	Hobbyist
P3	Reddit	Art	USA	Hobbyist
P4	Reddit	Art		Semi-professional
P5	Reddit	Art	Unknown	Unknown
P6	Reddit	Art	Algeria	Beginner hobbyist
P7	Reddit	Art	Unknown	Hobbyist and some commissioned work
P8	Reddit	Writing	Poland	Aspiring professional
P9	4chan	Art; Writing	Unknown	Professional in another creative field
P10	4chan	Art	Canada	Unknown
P11	4chan	Photography	USA	Hobbyist and some commissioned work
P12	4chan	Art	Unknown	Aspiring professional

²²³ Scholarship has acknowledged the blurring of lines between professional and amateur creator, especially in the online context, and so assigning individuals to specific categories is complex and may fail to reflect the nuanced practices of individual creators. This status information should be understood within this context. On the complexities of creator status see for example:

A. Bruns, "The Future Is User-Led: The Path towards Widespread Produsage" (2008) 11 *Fibreculture Journal* <<http://eleven.fibreculturejournal.org/fcj-066-the-future-is-user-led-the-path-towards-widespread-produsage/>>; Lessig, *Remix*.