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User-Generated Content and the Future of Copyright: Part One-- Investiture of Ownership

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User-Generated Content and the Future of Copyright: Part One—Investiture of Ownership

Steven Hetcher*

ABSTRACT

While user-generated content (UGC) has been around for quite some time, the digital age has led to an explosion of new forms of UGC. Current UGC mega-sites, such as YouTube, Facebook, and MySpace, have given UGC a new level of significance, due to their ability to bring together large numbers of users to interact in new ways. The “user” in UGC generally refers to amateurs, but also includes professionals and amateurs aspiring to become professionals. “Generated” is synonymous with created, reflecting the inclusion of some minimal amount of creativity in the user’s work. Finally, “content” refers to digital content, or that generated by users online.

Because discussion of the legal aspects of UGC is in its infancy, and new UGC is distinguishable from old UGC, the initial focus must be on the copyrightability of UGC—whether UGC falls in the core of copyrightable subject matter. In this article, the first part in a three-part discussion of the key copyright issues surrounding UGC, the author lays the foundation in a discussion of whether UGC is original, whether it is a work of authorship, and whether it is fixed in a tangible medium of expression. The answer to these questions, especially the one identifying the author of UGC, are imperative to the second part of this three-part discussion, which argues that courts should deem Facebook’s Terms of Service (and similarly drafted terms of service for the other UGC mega-sites) unconscionable.

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One important aspect of Copyright law's future will be dealing, to a growing extent, with user-generated content (UGC). UGC is exploding online. The topic of UGC has been capturing the popular imagination for the past few years, but it has only recently begun to receive attention from legal scholars. For example, in 2005, *Wired* magazine had a cover story entitled, "Remix Now! The Rise of Cut & Paste Culture."¹ This was on the heels of the Apple Corporation's advertising campaign a few years earlier that famously (or infamously, depending on who you talk to) encouraged consumers to "Rip, Mix, and Burn."² The 2006 *Time* magazine "Person of the Year" was "You," as in "us," the new online creators.³ There is perhaps a sad irony in this coming on the cover of a magazine, given the fact that, like other areas of the print media, magazine publishing is on the decline, undoubtedly due in significant part to the rise of online media.⁴ But then this irony has always been present, eponymously so, with *Wired* magazine, technology's equivalent to *Time*.⁵

1. WIRED, July 2005, available at <http://www.wired.com/wired/coverbrowser/2005>.

2. For an example from Apple's advertising campaign, see Apple Movies—Rip Mix Burn 144, http://www.theapplecollection.com/Collection/AppleMovies/mov/concert_144a.html (last visited April 4, 2008). An Apple lawyer might correctly note that the invitation to rip, mix, and burn does not entail the fact that an infringement is contemplated, as one might exclusively rip, mix, and burn public domain materials. Nevertheless, Apple users are de facto major infringers and Apple is a beneficiary to the extent that demand for its products is increased by dint of their illegal use. According to Steve Jobs, only three percent of music on a given iPod is from the iTunes store. Steve Jobs, *Thoughts on Music*, APPLE.COM, Feb. 6, 2007, <http://www.apple.com/hotnews/thoughtsonmusic/>.

3. Lev Grossman, *Person of the Year: You*, TIME, Dec. 25, 2006, at 38 ("[F]or seizing the reins of the global media, for founding and framing the new digital democracy, for working for nothing and beating the pros at their own game, TIME's Person of the Year for 2006 is you.").

4. ANDREW KEEN, THE CULT OF THE AMATEUR: HOW TODAY'S INTERNET IS KILLING OUR CULTURE 54 (2007) ("[P]rofessional newspapers are losing readership to a

User-generated content can be fairly seen as a bona fide major social phenomenon. While predicting the future is always treacherous, it is probably a good bet that the UGC trend will continue to accelerate.⁶ The phenomenon is so new from a historical perspective, however, that it is prudent to ask whether there is some element of fashion and newness that will pass.⁷ Another possibility is that, although UGC is here to stay, it nevertheless presents no new problems or issues for copyright, and thus is not worth discussing apart from other copyright concerns. The obvious reply to this, however, is that we will not know about the connections between UGC and other types of content in terms of their relationships with copyright law until we explore them.

User-generated content, per se, has been around for a long time. After all, e-mail is user-generated content. What is different today, however, is the newfound importance and volume UGC is taking on. Policy issues concerning UGC have been percolating for a few years. For example, Cass Sunstein's book *Republic.com*, which was published in 2002, discusses the political significance of blogs,⁸ which are a form of UGC. It is only in the past few years, however, with the emergence of UGC mega-sites such as YouTube, MySpace, Facebook, Digg, and Revver, that UGC has taken on a new level of social significance, due to the sheer number of participants and the new ways in which they are interacting.⁹

seemingly endless stream of blogs and opinion-based sites.”). However, there is a notable exception of magazines for the rich. David Carr, *For the Rich, Magazines Fat on Ads*, N.Y. TIMES, Oct. 1, 2007, at C1 (“[L]uxury also represents one part of the business that will not succumb to the Web anytime soon.”).

5. In what could fairly be seen as digital NIMBY, *Wired* magazine and, presumably, its editor, Chris Anderson, have constantly supported a strident “copyleft” stance in print, favoring Napster, Grokster, and the like, and yet neither the magazine nor Anderson's recent book, *The Long Tail*, were or are now available pursuant to a creative commons license or, for that matter, posted for free copying. See CHRIS ANDERSON, *THE LONG TAIL: WHY THE FUTURE OF BUSINESS IS SELLING LESS OF MORE* (2006). In their defense, this arguably just demonstrates that the potential for hypocrisy is built into the mandate to maximize profits, as espousing copyleftism and practicing copyrightism may do just that.

6. See SPENCER WANG ET AL., *ENTERTAINMENT INDUSTRY: A LONGER LOOK AT THE LONG TAIL* 14-15 (Bear, Stearns & Co. Inc. June 2007), <http://www.bearstearns.com/bear/bsportal/emdnld.do?w=rmdx76gn7&v=vPPsxOIE> (predicting that UGC is not just a passing fad and that demand for it will continue to rise).

7. This question is posed by Yochai Benkler in the broader context of his book. See YOCHAI BENKLER, *THE WEALTH OF NETWORKS* 5-6 (2006).

8. CASS SUNSTEIN, *REPUBLIC.COM* (2002).

9. See YouTube, <http://www.youtube.com/> (last visited Mar. 31, 2008); MySpace, <http://www.myspace.com/> (last visited Mar. 31, 2008); Welcome to Facebook!, <http://www.facebook.com/> (last visited Mar. 31, 2008); Digg, <http://digg.com/> (last visited

This current cadre of mega-sites displays some similarities to Napster circa 1999-2000. In particular, each involves a social phenomenon that exploded onto the cultural scene so big and fast that it immediately captured the attention and imagination of mainstream culture. The aspect that captured the most attention with Napster was its vast number of users. Internet use across the board had, of course, grown over the previous decade, but the growth was slow compared to Napster's explosive growth.¹⁰ There are not that many things that come along that capture an audience of many millions in such a brief time. Like Napster, the new breed of mega-sites has also grown explosively. Facebook has been in existence only a few years; yet, its membership is huge and growing at a recent rate of one million people each week.¹¹ Facebook is currently the most visited Web site in Canada.¹² Another feature these sites share is that they were created by young people for next to nothing, rather than by the titans of online commerce, such as Ebay, Amazon.com, Google, Yahoo!, or Microsoft.¹³

One important difference between Napster and the new UGC sites is that the reaction of mainstream commentators, the media, and other opinion-shapers has been more nuanced regarding the latter. Napster was instantly assailed by the major copyright industries, which saw themselves as threatened because, for instance, it did not take much imagination for the film industry to see that the only thing preventing itself from the perils of so-called "Napsterization" was the exceedingly long time it took to download movies. Broadband penetration was growing fast and so the writing was on the wall. Not surprisingly, Jack Valenti, a powerful lobbyist for the film industry, came out swinging.¹⁴ At first, the media was captivated by the sheer magnitude of the phenomenon and vacillated on the legality issue.¹⁵

Mar. 31, 2008); Revver Video Sharing Network, <http://www.revver.com/> (last visited Mar. 31, 2008).

10. Gwendolyn Mariano, *Napster Fans Seen as Music Browsers, Not Buyers*, CNET NEWS.COM, Oct. 31, 2000, <http://www.news.com/2100-1023-247893.html> (citing the number of Napster users at the time of publication as 18.7 million, having doubled over six months, and representing one-fifth of the total online population).

11. Steven Levy, *Facebook Grows Up*, NEWSWEEK, Aug. 20, 2007, at 41.

12. *Id.*

13. For example, Facebook was created by Mark Zuckerberg, a Harvard sophomore. See Levy, *supra* note 11, at 41.

14. Lev Grossman, *It's All Free!*, TIME, May 5, 2003, at 60 (quoting Jack Valenti as saying: "If we let this stand, you're going to see the undoing of this society. I didn't preside over this movie industry to see it disintegrate like the music industry.")

15. See, e.g., Mike Snider, *Napster's Siren Song Entices Loyalty but Even Some Fans See Site as Scene of Crime*, USA TODAY, July 26, 2000, at 3D (quoting various different perspectives on the legality of Napster: from users—"I don't think it is stealing from the recording industry, because they have been stealing from us all this time by

Over time, as the illegality of file sharing of unauthorized commercial works became more established, most mainstream commentary turned in the copyright owners' direction.¹⁶

With the UGC sites, the reaction has been more complex, which reflects the increased functionality of these sites apart from their ability to serve as a venue for pirated works. One function that parallels that of Napster and Grokster is that unauthorized commercial content is uploaded by some users and downloaded by other users. There are differences (e.g., Napster was music only), whereas now most of these sites contain video. Thus, now it is not just the record labels attacking this activity as criminal infringement; rather, the TV studios, film studios, and other owners of video are also claiming infringement.

But there are important differences between sites like Napster and Grokster, on the one hand, and MySpace and YouTube, on the other hand. One is the proportion of infringing as compared to non-infringing content to be found on the sites. The famous *Sony* standard in copyright law relies on the test of actual or potential non-infringing uses.¹⁷ Napster and Grokster were big on actual infringing uses with only a potential for non-infringing uses.¹⁸ The examples cited by Napster and Grokster as non-infringing uses of their services were, for

charging way too much for compact discs"—to law professors—"I think Napster has a good argument that what it is doing is not infringing copyright. I think it is more difficult to make the claim that what the individual Napster users are doing is not infringement"—and also to peer-to-peer developers—"Surely, 20 million Napster users can't be wrong").

16. See, e.g., Kevin Maney, *Download Biz Has To Change, or Digital Sales Will Be Playing a Swan Song*, USA TODAY, Feb. 14, 2007, at 3B (noting that part of the online digital music market is not doing well because people are still getting music that is "illegitimately downloaded for free off file-sharing sites such as Kazaa or eDonkey"); see also, e.g., Jefferson Graham, *RIAA Chief Says Illegal Song-Sharing 'Contained': Double-Digit Piracy Growth Hits Hollywood, Though*, USA TODAY, June 13, 2006, at 1B (noting that, since the court rulings against file-sharing networks, "[t]he wide availability of legitimate alternatives to file-sharing services has helped wean computer users away").

17. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984).

18. Content owners are unlikely to concede without a fight the implicit claim that the *Sony* doctrine applies to Napster, Grokster, or the UGC mega-sites. See *id.* They will argue that these cases do not involve "staple articles of commerce." As a matter of black-letter law, their point has merit. Nevertheless, litigators are pressing the extension of the *Sony* doctrine and courts are following. See, e.g., *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154, 1162 (9th Cir. 2004), *vacated and remanded by Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) (finding that the defendants "established that their products were capable of substantial or commercially significant noninfringing uses," thus meeting *Sony's* "staple article of commerce" standard). The Supreme Court stated that the "Ninth Circuit's judgment rested on an erroneous understanding of *Sony* and [left] further consideration of the *Sony* rule for a day when that may be required." *Grokster, Ltd.*, 545 U.S. at 934.

the most part, dubious.¹⁹ By contrast, regarding MySpace and YouTube, the proportion of infringing to at least arguably non-infringing uses is fundamentally different. The new breed of mega-sites offers a genuinely large variety of content, much of which is original, at least in significant part. The “potential” for significant non-infringing uses of Napster and Grokster have become *actual* non-infringing uses of a significant amount and type. The importance of this fundamental difference for copyright law has yet to be adequately explored.

There will be disagreement, of course, in a variety of situations over where to draw the line between infringing and non-infringing uses. The Motion Picture Association of America (MPAA), Recording Industry Association of America (RIAA), and American Association of Publishers (AAP), on the one hand, and the Electronic Frontier Foundation (EFF), on the other hand, rarely agree generally, and so it will be no surprise if they do not agree on the gray area in which UGC works contain some element of unauthorized content. However, this very fact goes to highlight the importance of UGC as a category of interest to copyright law, as the more “user” there is in some particular UGC work, so to speak, the less potential there is for there to be a disagreement about infringement. Because of an obviously high level of creativity and less borrowing from unauthorized sources, the mainstream reaction to the UGC mega-sites was, from the start, much more favorable than the reactions to Napster and Grokster.²⁰ In a nice turn of phrase, Andrew Keen refers to this generally favorable reaction as in part constitutive of “Web 2.0 euphoria.”²¹

19. *Grokster, Ltd.*, 545 U.S. at 933 (noting that Grokster introduced evidence that “their software can be used to reproduce public domain works”); *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154, 1161 (9th Cir. 2004) (noting, as an example of Grokster’s potential for noninfringing use, the fact that rock band Wilco released an album online and allowed it to be shared for free before later releasing the album commercially).

20. See, e.g., Joel Selvin, *On YouTube, Musicians on Video as You Remember Them and the Way You Never Knew They Could Be*, S.F. CHRON., May 30, 2006, at D1 (comparing YouTube to a community for music lovers like Napster, but noting YouTube’s methods of dealing with copyright infringement).

21. See Kurt Anderson, *The Way We Boom Now*, N.Y. MAG., May 1, 2006, at 34 (discussing “Internet euphoria”); see also KEEN, *supra* note 4, at 13-16; Andrew Keen, Keynote Address at the Vanderbilt Journal of Entertainment and Technology Law Symposium: User-Generated Confusion: The Legal and Business Implications of Web 2.0 (Nov. 2, 2007), available at <http://law.vanderbilt.edu/publications/journal-entertainment-technology-law/index.aspx> (discussing “Web 2.0 Euphoria”) [hereinafter Keen, Keynote Address]. The phrase “Web 2.0” is credited to Tim O’Reilly. See Brad Stone & Matt Richtel, *Silicon Valley Start-Ups Awash in Dollars, Again*, N.Y. TIMES, Oct. 17, 2007, at A1. It has been characterized positively in the media. See, e.g., *id.* (referring to the “nexus [of] optimism around the latest set of society-changing online tools”).

While the prospect of Napsterization may be less problematic for some of the leading UGC mega-sites, other legal issues regarding UGC have emerged. For instance, online predators have used UGC mega-sites as a means to gain access to information about minors.²² Another issue that received attention in the past year is the possible negative implications that posting one's information online may have, for example, due to the fact that prospective employers may check for such information.²³ In a broad sense, this should be expected. A lot of UGC is found on sites that are fairly labeled as social networking sites or communities, and any community will develop negative features as well as positive ones. Utopia has never existed offline, and it would be naïve to expect a significantly different outcome online. While these problems are not insignificant, they are not copyright problems, and so are discussed here only in passing.

In the realm of copyright, one fundamental difference between the offline world and the online world is that much of what gets created online may be copyright protected in a way that is not true for offline creations. For example, if you and I have a conversation in real space, it is not copyrightable, unless perhaps one of us is a Hemingway.²⁴ However, if your avatar²⁵ and my avatar have the same discussion online, it may be subject to copyright protection because such works are fixed.²⁶ Thus, the explosion of UGC is apparently of direct importance to copyright because much UGC

22. See, e.g., John Cassidy, *ME MEDIA: How Hanging Out on the Internet Became Big Business*, NEW YORKER, May 15, 2006, at 50 (noting how the online phenomenon of UGC has led to, among other things, online predators using sites such as Facebook and MySpace to find minors).

23. See, e.g., Lucy Kellaway, *Google Will Make Recruits Less Frugal with the Truth*, FIN. TIMES, June 18, 2007, at 14 (“[T]he teenagers who are blogging in their millions about their drunken exploits will join the job market and companies refusing to take them will find it hard to find any recruits at all.”); see also, e.g., Ian Byrnside, Note, *Six Clicks of Separation: The Legal Ramifications of Employers Using Social Networking Sites To Research Applicants*, 10 VAND. J. ENT & TECH. LAW 445, 447 (2008) (“As social networking sites [like Myspace and Facebook] become more and more commonplace in today’s society, there is increasing attention being given to reports of employers rejecting applicants or firing employees based on information discovered on these sites.”).

24. Estate of Hemingway v. Random House, Inc., 244 N.E.2d 250, 256 (N.Y. 1968) (suggesting that the spoken word, under certain circumstances, may be copyrightable).

25. An “avatar” refers to a virtual world participant’s online persona. See Merriam-Webster’s Online Dictionary, <http://www.merriam-webster.com/dictionary/avatar> (last visited Apr. 7, 2008) (defining an avatar as “an electronic image that represents and is manipulated by a computer user (as in a computer game)”); see also Create an Avatar, <http://secondlife.com/whatis/avatar.php> (last visited Mar. 28, 2008).

26. This point is missed by Facebook as its privacy policy fails to recognize that archives of online conversations have copyright implications as well as privacy implications. See Facebook’s Privacy Policy, <http://www.facebook.com/policy.php> (last visited Mar. 31, 2008).

dissemination occurs in virtual space, where, for better or worse, copyright has a more encompassing grant of jurisdiction given the fixation of works.²⁷ If mere online social interaction is copyright protected, we can arguably draw the conclusion that, other things equal, UGC is positively connected to copyright in the sense that copyright protection is conventionally thought to be justified to the extent that it serves to incentivize production of copyrightable content. Thus, the emergence of the set of technologies that facilitate UGC are doing copyright's work for it by incentivizing the production of creative content by lowering its cost.

Since relatively little has been written about the conceptual foundations of UGC, it will be useful to first provide some of its basic characteristics. Taking a philosophical approach of the ordinary language variety, it is worthwhile to begin the first section of Part I with the core definitional question: what is UGC? The second section of Part I will then examine the macro-economic structure of user-generated content. With these basic considerations as a primer, Part II will commence an examination of the importance of UGC to copyright law, beginning with core issues regarding ownership of UGC.

I. THE DEFINITION AND MACRO-ECONOMIC STRUCTURE OF UGC

A. What Is User-Generated Content?

What is meant by the terms “user,” “generated,” and “content”? People have always been involved in producing creative works; what makes them users involved in the generation of content is the fact that digital technologies and the Internet are involved. The term “user” in user-generated content is short for “computer user.” Other than the context of computer users, the term “user” is most commonly employed in the salacious context of drug users. Drawing this linguistic parallel may be increasingly appropriate given that new studies suggest some online activities may indeed be addictive—not just in a metaphorical sense, but in a physiological sense (i.e., dopamine levels are heightened, as is the case with the use of certain addictive drugs).²⁸

27. See *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518 (9th Cir. 1993) (explaining that the loading of computer software onto a computer causes a copy to be made and, therefore, absent a valid copyright license, the copier has infringed).

28. See Judy Siegel, *Always Online?*, *JERUSALEM POST*, Aug. 10, 2007, at 6.

Social-networking sites such as *Second Life* also appear to be potentially psychologically addictive.²⁹

Another definitional feature is that the term “user” refers to content created by amateurs.³⁰ The media has excoriated professionals who have attempted to pawn off their works as amateur UGC. An early instance of this attempt to capture public attention occurred with regard to a supposed amateur with the online name “lonelygirl15.”³¹ Her quirky, intimate postings, which depicted her speaking to her webcam from what seemed to be the privacy of her bedroom, gained a wide audience. Many viewers felt duped when she was exposed as an aspiring actress and it was discovered that her remarks were scripted and filmed by aspiring filmmakers.³² This example illustrates that the publication of UGC will make it increasingly difficult to draw bright lines between amateurs, professionals, and amateurs seeking to be professionals.

Now consider the word, “generated.” As used by non-lawyers in the general media, the term “generated” is roughly synonymous with “created.” Thus, one might as well refer to user-created content, and, indeed, some commentators have done so.³³ At least for lawyers, however, this option may be suboptimal, as the relevant abbreviation would be UCC, which has the potential to cause confusion with the Uniform Commercial Code, and might also have the tendency to unnecessarily invoke unpleasant memories of 1L Contracts class.

Content that is merely copied and uploaded would tend not to be referred to as user-generated content. In ordinary language terms, this would simply be user-uploaded content. To create user-generated content, a user must do more than simply generate a copy of pre-existing content. What appears to be missing is any element of creativity. Thus, the sense in which some work is user-generated is one in which the user is not merely a causal part of a new copy of some

29. Alexandra Alter, *Is This Man Cheating on His Wife?*, WALL ST. J., Aug. 10, 2007, at W1 (quoting a woman whose husband plays *Second Life*: “Basically, the other person is widowed,’ she says. ‘This other life is so wonderful; it’s better than real life. Nobody gets fat, nobody gets gray. The person that’s left can’t compete with that.’”).

30. See KEEN, *supra* note 4, at 35-37; SACHA WUNSCH-VINCENT & GRAHAM VICKERY, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, PARTICIPATIVE WEB: USER-CREATED CONTENT 5 (2007), <http://www.oecd.org/dataoecd/57/14/38393115.pdf> [hereinafter PARTICIPATIVE WEB]; User-Generated Content, http://en.wikipedia.org/wiki/User-generated_content (last visited Mar. 31, 2008).

31. See Joshua Davis, *The Secret World of Lonelygirl*, WIRED, Dec. 2006, available at <http://www.wired.com/wired/archive/14.12/lonelygirl.html>; lonelygirl15’s Channel, <http://www.youtube.com/user/lonelygirl15> (last visited Mar. 31, 2008) (providing a number of lonelygirl15’s videos).

32. Davis, *supra* note 31.

33. See PARTICIPATIVE WEB, *supra* note 30, at 5.

preexisting content being reproduced. Rather, the user must add something new, something creative.

This, of course, raises the question of what is the minimum amount of creativity needed for some piece of content to count as user-generated. Consider the sort of situation that may provide a minimal threshold of creativity. A common situation would involve the unauthorized use of a piece of video or audio (or both) as part of some larger work. One can go on YouTube and see videos in which someone has laid a piece of music over a piece of video. For example, one can find an audiovisual work that lays the *Dark Side of the Moon* album over the *Wizard of Oz* movie with the film's original soundtrack turned off.³⁴ It is likely that, in ordinary language and as defined in this article, this would count as UGC, albeit perhaps just barely. It appears, then, that little creativity is needed to qualify as user-generated content by the relevant linguistic community.³⁵

Having said that the creativity threshold for UGC is low, we will nevertheless see in detail below that one of the most important distinguishing features of UGC is that some of it is of very high quality, despite, or perhaps due to, its amateur status. While copyright doctrine has tended to avoid the issue of quality for reasons discussed in Part II of this article, the fact that some UGC is of high quality is of great practical significance. In short, this high quality is the core fact around which business models, and hence the monetization of UGC, are likely to be built.

Finally, consider the word "content." This word is used often in a copyright context as in "content providers" or the "creative content industries." Yet, the "content" in user-generated content is not synonymous with the "creative content" term of art in copyright law.

34. See S. Wayne Clemons, Jr., Note, *The Fair Use Doctrine and Trackjacking: Beautiful Animal or Destroyer of Worlds?*, 10 VAND. J. ENT. & TECH. LAW 479, 485-86 (2008) (discussing the combination of *The Dark Side of the Moon* and *The Wizard of Oz*, combined to create the *Dark Side of the Rainbow*, a "music video experience that replaces the optimistic themes of the original film with the dark pessimism of the album").

35. According to Wikipedia, a site whose entries are primarily written by amateur computer users:

Mere copy & paste or a link could also be seen as user generated self-expression. The action of linking to a work or copying a work could in itself motivate the creator, express the taste of the person linking or copying. Digg.com, Stumbleupon.com, leaptag.com is a good example where such linkage to work happens. The culmination of such linkages could very well identify the tastes of a person in the community and make that person unique through statistical probabilities.

User-generated Content, http://en.wikipedia.org/wiki/User-generated_content (last visited Mar. 31, 2008).

There can be UGC that is neither creative nor copyrightable. In the UGC sense, then, content means digital content.

UGC is typically available online, although this availability may be limited to particular groups. For example, on Facebook, one may choose to share certain content only with one's "friends." Online availability appears not to be part of the definition of UGC, however. As the Internet has become more usable for audio clips and video clips, in addition to text clips, so-called "cutting and pasting" has naturally come to involve uploading cut-and-paste creative works. There is nothing intrinsically Internet-dependent about the creation of UGC, however, as a computer user could generate a cut-and-paste work on her computer and never post it online or make it part of an online social network; and yet, this work would seem to count as user-generated content.³⁶ Thus, perhaps it is digitization rather than online availability that is one of the core characteristics of UGC as content, to the extent that it is computer-user generated and will be fixed in a digital form. Thus, for purposes of this definition, online availability may be non-essential yet characteristically present in the future of UGC.

Consider the example of mash-ups.³⁷ The term "mash-up" has probably been most used as a term and most undertaken as an activity in the context of music. Mash-ups of music have been going on for a number of years and have been an explosive new element in contemporary music. Mash-ups have typically been created and performed outside of the context of mainstream commercial music.³⁸ This is because creators of the mash-ups do not typically clear the rights to the works that are drawn upon in the process of creating the mash-up.³⁹ An important part of mash-up culture in the music world is that the mash-ups are often created live by a DJ on stage. Tapes of

36. See LAWRENCE LESSIG, *FREE CULTURE* 105-06 (2004) (describing our "'cut and paste' culture").

37. Mashup (music), [http://en.wikipedia.org/wiki/Mashup_\(music\)](http://en.wikipedia.org/wiki/Mashup_(music)) (last visited Mar. 31, 2008) ("A mashup or bootleg is a song or composition created from the combination of the music from one song with the a cappella from another (also mash up and mash-up)."). "Remix" is a roughly synonymous term. See Negativland, *Two Relationships to a Cultural Public Domain*, 66 *LAW & CONTEMP. PROBS.* 239, 254 (2003) (discussing how digital sampling devices and computer controlled music sequencing software had the unintended consequence of "allow[ing] musicians to capture and then play back bits of any pre-recorded music or found sound and add it to their own music").

38. David Ressel, *Scrambled Songs: Musical Mash-ups, Once Fought by Record Labels, Are Going Mainstream*, *ST. LOUIS POST-DISPATCH*, Jan. 2, 2007, at E1.

39. See *id.* (discussing the music industry's initial reaction to mash-ups).

these performers are sometimes made available by their creators. This availability need not be online.⁴⁰

B. The Macro-Economic Structure of User-Generated Content

Before the most important economic features of UGC can be explored, the misconception that there is a necessary connection between UGC and public goods must be dispelled.⁴¹ Such a misconception might arise due to the fact that some discussion of significant group activity online has concerned what are arguably public goods. This is true, for instance, of some of the important examples discussed by Yochai Benkler.⁴² Benkler's study goes beyond copyright concerns to include a whole range of participatory phenomena, such as SETI,⁴³ in which distributed computer users from all over the world donate their spare computer processing power to the joint effort of searching for alien life.⁴⁴ Benkler also discusses the open source software movement.⁴⁵ Each appears to be a type of behavior on which there would be a temptation to free ride. Applying the free-rider framework to UGC, arguably, it would be rational to consume the UGC of others while not bothering to expend the effort of producing it on one's own, at least in those circumstances in which it would cost someone more to produce the incremental amount of UGC than one would personally benefit from one's own share of this incremental amount.⁴⁶ As has been said, only a blockhead writes for

40. Ricardo Baca, *Mixing It Up with Mash-Ups: Several Songs into One*, DENVER POST, May 25, 2007, at FF-01.

41. Paul M. Johnson, *Public Goods: A Glossary of Political Economy Terms*, http://www.auburn.edu/~johnspm/gloss/public_goods (last visited Mar. 31, 2008) (defining public goods as "a very special class of goods which cannot practically be withheld from one individual consumer without withholding them from all (the 'nonexcludability criterion') and for which the marginal cost of an additional person consuming them, once they have been produced, is zero (the 'nonrivalrous consumption' criterion)").

42. See BENKLER, *supra* note 7, at 1-2 (listing software development, investigative reporting, avant-garde video, and multiplayer online games as areas where the development of new opportunities to make and exchange information, knowledge, and culture have been seen). The scope of his discussion is beyond copyright law, as Benkler's topic is digital networks.

43. "SETI" stands for searching for extra-terrestrial intelligence. See ANDERSON, *supra* note 5, at 61.

44. See BENKLER, *supra* note 7, at 81-83.

45. See *id.* at 63-67.

46. See generally RUSSELL HARDIN, *COLLECTIVE ACTION* (1982) (studying and analyzing the problem of "collective action" in social contexts). A parallel point was raised with regard to peer-to-peer file sharing. Rational actors should be downloaders and not uploaders, because there is no personal benefit in uploading music files—better to free ride on the uploading of others. Lior Jacob Strahilevitz, *Charismatic Code, Social Norms, and*

free, but this seems to be precisely what creators of UGC are doing, at least in the examples provided by Benkler, such as that of open-source software.⁴⁷

While a public goods framework may accurately characterize some examples of UGC, analyzing UGC across the board as a free-rider problem fails to appreciate important features of the context in which much of the content is created. In particular, people often do personally benefit from generating content. However, the payoff may be in non-pecuniary terms, such as career promotion or reputation enhancement.⁴⁸ In addition, some people intrinsically benefit from generating such content in the sense that they enjoy the activity. These actors would appear not to need an economic incentive to engage in the creation of UGC.⁴⁹ Unlike other problematic activities for the public goods issue, such as voting or uploading,⁵⁰ it is plausible to suppose that creating content for UGC sites would be intrinsically enjoyable for a significant number of individuals. The credo of modern art is art for art's sake; this is UGC for UGC's sake. There may be important implications of this fact for core issues of copyright as

the Emergence of Cooperation on the File-Swapping Networks, 89 VA. L. REV. 505, 523-28 (2003). This incentive to free ride was exacerbated by the fact that, at least in the early peer-to-peer lawsuits brought by the RIAA, uploaders, but not downloaders, were targeted. Jefferson Graham, *Who's Liable for Actions of People Who Share?*, USA TODAY, Mar. 28, 2005, at 3B ("RIAA has sued more than 9,000 swappers for 'uploading'—sharing collections online for others to download. Uploaders are easy to catch: Their Internet computer address is posted within share programs such as Grokster and Morpheus."). Some Web sites responded by requiring uploaders—those having their files available for others to copy—to share files as a condition of being able to download. See, e.g., Lime Wire, Frequently Asked Questions, http://www.limewire.org/static_copy/FAQ.html (last visited Mar. 31, 2008).

47. *Johnson, Samuel*, in *THE COLUMBIA WORLD OF CITATIONS* (Robert Andrews et al. eds., 1996), available at <http://www.bartleby.com/66/98/31298.html> (attributing to Samuel Johnson the quote: "No man but a blockhead ever wrote, except for money"); see BENKLER, *supra* note 7, at 63-67.

48. See ANDERSON, *supra* note 5, at 73-75 (noting that reputation is one driving force behind UGC creation, especially because "reputation can be converted into other things of value: jobs, tenure, audience, and lucrative offers of all sorts").

49. One of the venerable, albeit highly suspect, moves in rational actor theory is to make seemingly irrational actions, such as voting, rational by means of the convenient and tautological move of ascribing a preference for such behaviors. This move, venerable though it may be, does not solve any problems, but rather assumes them away. The only rational actor theory worth exploring is one that is not true by definition but instead is built on a conception of rational behavior that has some teeth to it and, more importantly, is falsifiable. In the present context, a non-tautological account would resist the temptation to explain the rationality of uploading behavior by means of an assumption that the relevant users have a raw preference for uploading.

50. See Aaron-Andrew P. Bruhl, *Public Reason as a Public Good*, 4 J.L. SOC'Y 217 (2003) (discussing "public reason" as a "public good," and addressing moderation in political discourse).

copyright assumes that people create due to the incentive provided by legal protections afforded by copyright law.⁵¹ Ergo, if no incentive is needed because people are motivated for art's sake—so to speak, to create UGC—then the protections afforded by copyright law may be unnecessary, at least for some subset of creative UGC works, which may have important policy implications.

The next step is to identify those features that are propelling UGC to a level of greater social and legal importance. The one feature that perhaps naturally comes to mind is that the future of UGC is bright because it relies on technologies that increasingly are becoming more prevalent and less expensive. Indeed, the emergence of a number of related technologies together makes it dramatically easier for everyday computer users to create such content. It is basic supply and demand: assuming a downward sloping demand curve, if the cost to generate this form of content drops, the supply will rise as marginal producers enter the market.

There is a set of related technologies that have all come together in the past few years to reduce the cost of creating UGC dramatically. Perhaps most important is the fact that broadband penetration has skyrocketed. While those coming of age now may take video on the Internet for granted, it was not so long ago that Internet video was choppy and the image often froze. If we consider MySpace as perhaps the first UGC mega-site, we see the importance of high quality video, because this site quickly gained prominence as it became a venue for thousands of bands to upload their music and videos. The significance of this shift can be understood by comparison to the difference between music before Music Television (MTV) and after MTV.

MTV, in the late 1980s and early 1990s, was a dominant cultural force. It was not uncommon for commentators to speak extravagantly in terms of the MTV generation. YouTube and other sites on which amateur music videos can be found are best understood against the backdrop of MTV. What MTV proved was that people, in large numbers, have a desire to watch musicians perform their music even in non-live settings, indeed even when lip-syncing.⁵² What YouTube presented was a way for amateur musicians to, in effect,

51. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”).

52. When performers lip-sync in live performances, they open themselves to merciless ridicule. For reasons that are not obvious, music videos do not present this problem.

have their videos shown in a forum akin to MTV—but, for considerably less money and without the necessary prerequisite of success. The technologies, the functionality provided by YouTube, and the creative expression of the artists captured in digital form, all combine to produce creative content of material economic value.⁵³ This is the true marvel of UGC: that, in fact, users are not simply creating content, but creating content that is often valuable as judged by the cold, invisible hand of the market. Unless there is content of economic value, there will be little practical reason for concern regarding a number of other potential copyright considerations, most obviously large-scale infringement, and defenses to it such as fair use. The world of UGC is new and it remains to be seen just how valuable this content can be made to be. What the future will bring will result from a combination of the efforts of creators and sites that bring creators together.

As mentioned in the Introduction to this article, UGC was not always so valuable. The best example of this is e-mail, the vast majority of which is presumably copyrightable by virtue of its being created, fixed, and displaying some modicum of originality or creativity. Yet, for all the billions of pieces of this type of content, little of it is of value to anyone other than the creator, the recipient, and perhaps a few others. There are, of course, exceptions, such as the smoking-gun e-mails between Microsoft employees that ended up being very valuable to their competitors and the DOJ when it came to establishing antitrust violations.⁵⁴ Most e-mail, however, is not even of value to its creator or recipient a short time after it is created and sent.⁵⁵

Other forms of UGC are of interest both to copyright and to society as well, but do not offer the feature of apparently huge potential for monetization that appears to be the case for the content

53. This economic value is the same rationale for News Corp's purchase of IGN Entertainment, a Web network of video game fans, for \$650 million. See Michelle Gershberg, *News Corp. Keeps Buying into On-line Ad Boom: Video Game Network IGN Entertainment Murdoch's Third Web Acquisition Since July*, GLOBE AND MAIL (Toronto), Sept. 9, 2005, at B10.

54. Benjamin Pimentel, *E-mails Can Haunt Executives: Unguarded Messages Can Show Up in Court*, S.F. CHRON., July 5, 2004, at E1 (noting the "federal antitrust case against Microsoft in which e-mails by company executives helped the government prove that the software giant sought to dominate the browser market").

55. This can be seen economically from the fact that many people do not save their e-mail but instead allow their e-mail providers to destroy it after some prescribed period of storage. For example, for years AOL sold its portal services to customers, which included e-mail. The e-mail would disappear in thirty days. One could pay for more or longer storage but most customers did not, which speaks to the worth of this copyrightable content to them.

found on UGC mega-sites. Perhaps the best example of this is blogs. The number of blogs has grown tremendously in the past few years.⁵⁶ In the last few elections, blogs have been an increasingly important element in shaping electoral outcomes, and thus are significant for democratic politics.⁵⁷ The content of blogs is by and large copyrightable UGC. Some blogs are simply sites for the UGC of the particular blogger running the site. Other blogs feature the content of a number of persons.⁵⁸ While blogs have an undeniable growing cultural importance, their economic import has been limited. Some blogs are advertiser-supported, but few, if any, appear to be truly significant revenue generators.⁵⁹

Wikis are a permutation of the blog.⁶⁰ Wikis are important with regard to the topic of UGC because they allow much greater functionality for random users to contribute to online conversations. This gives Wikis a particular significance, as their open structure creates the potential to give a political voice to groups or individuals of diverse backgrounds and perspectives. Such collaboration can create new ideas and material that might not have been created without the merging of these diverse backgrounds and perspectives in digital space.

Returning to the topic of the manner in which technological advances have fostered UGC, in addition to broadband, other technologies that already exist are becoming dramatically less expensive, such as video editing tools and video cameras, such that they are now available to many millions of people for their use in the creation of UGC. It is worth noting, however, that some of the most meaningful advances in UGC have resulted not from the creation of important new technologies, but instead from new creative uses of already existing technologies. For example, the new breed of social

56. Sifrey's Alerts, http://www.sifry.com/alerts/archives/2006_08.html (Aug. 7, 2006, 04:55) (presenting statistics on the growth of blogs between 2003 and 2006, including that the blogosphere was 100 times larger in 2006 than in 2003).

57. See, e.g., Jose Antonio Vargas, "*Net Roots*" Event Becomes Democrats' Other National Convention, Wash. Post, Aug. 3, 2007, at A04 (discussing the impact of blogs as "powerful backroom players in Democratic circles").

58. See, e.g., The Blog—The Huffington Post, <http://www.huffingtonpost.com/the-blog/> (last visited Mar. 31, 2008) (featuring blog postings by various individuals).

59. One blogging service found that a majority bloggers who participate in advertising programs earn less than twenty dollars per month. Posting of arianna to Qumana Blog, http://blog.qumana.com/blog/_archives/2005/10/5/1282559.html (Oct. 5, 2005, 18:56 PDT).

60. Wiki, <http://en.wikipedia.org/wiki/Wiki> (last visited Mar. 31, 2008) ("A wiki is software that allows users to collaboratively create, edit, link, and organize the content of a website, usually for reference material. Wikis are often used to create collaborative websites and to power community websites.").

networking mega-sites are the result of creative ideas about how to build sites that perform new functions that consumers find useful and desirable, all the while using existing technology and computer code. The computer code that allows these functions is simply the implementation in software of ideas about how to design sites that will perform creative new functions that people find desirable.⁶¹ The difference between YouTube, MySpace, and Facebook is not in the relative sophistication of the technologies each employs so much as a matter of how roughly the same set of technologies can be employed to perform different functions.

Lessig famously said (metaphorically, let us hope) that “code” is law.⁶² He is right, and importantly so, but this is nevertheless a lawyer-centric perspective, as there is more to regulation than law, and, indeed, more to human action than regulation. While computer code is indeed law-like, speaking more generally, code is functionality. Facebook, for instance, is currently experiencing an explosion in functionality due to its policy of allowing third-parties to write applications for other users to add to their profile pages.⁶³ The truly dramatic shift of late, then, is not in technology, per se, but in people coming up with better ways to use the technologies that already exist.

Complementing this creativity at the level of Web site development, amateurs have demonstrated a highly robust ability to create UGC works that others in large numbers find worth viewing. Particularly surprising, perhaps, is the extent to which this has been true for minors. The Mozarts of the world aside, the creative efforts of minors have been met in the past with little commercial success. No child Picasso comes to mind. And while we can now look back at the youthful efforts of a Picasso or a Dali and with hindsight (or bias) perhaps perceive embryonic genius, this in no way means that their youthful efforts did or could have garnered commercial success. Perhaps sad, but nevertheless true, is that, of the millions of offline works of visual art produced by minors in the past, their public display rarely, if ever, went beyond the front door or side of the family refrigerator.

By contrast, on sites such as YouTube, minors are now producing works that are sought out and viewed by thousands or even

61. See, e.g., Levy, *supra* note 11, at 41 (noting that Mark Zuckerberg, as a college sophomore, designed Facebook to mimic “the yearbook-style booklet of photos and vital statistics that incoming freshmen receive [each year] at Harvard”).

62. LAWRENCE LESSIG, CODE: VERSION 2.0 5-6 (2006).

63. Levy, *supra* note 11, at 41 (“Thousands of developers, from big companies to kids in dorm rooms, instantly began creating applications that piggybacked on Facebook’s infrastructure.”).

millions of viewers. Many of these works are valuable in the economic sense that others want to view and “consume” them. While these viewers do not pay money for the privilege of this consumption on UGC mega-sites, nevertheless, the interactions are meaningfully viewed as economic in the sense that viewers pay with their “eyeballs” or “attention.”⁶⁴ This viewing time opens up these consumers to the various sorts of advertisements that are emerging on UGC mega-sites. Thus, the potential for monetization of UGC is not due simply to the creative genius of individual posters of content. The mega-sites play an essential role in bringing together large quantities of UGC. This is an important function, as it dramatically reduces the transaction costs of consuming the content.

There is undoubtedly a great deal of valuable UGC out there somewhere on the Web, but, if it is exceedingly costly to locate, it may as well not exist. This was a fundamental problem with Web 1.0.⁶⁵ As the Internet became usable to the general public in the 1990s, due to the introduction of user-friendly browsers, Web sites sprung up like mushrooms. As noted, Keen refers to “Web 2.0 euphoria.”⁶⁶ While it seems like ancient history at this point, there was “Web 1.0 euphoria” as well. The explosion of Web sites of every variety was a cause of euphoria. It soon became apparent, however, that most sites went largely unvisited, causing their owners to lose interest. This led to an Internet chocked full of stale Web sites, last updated months or even years earlier. A main reason that these sites went unvisited was that there was no ready means to find the content of interest. The solution was obvious: what was needed were better “filters” to help users sift through the morass of stale or irrelevant content in order to find what they were looking for.

The first important breed of such filters was the search engine. During this Web 1.0 era, search engines were beginning to be developed. Search engines are an obvious means to locate hard to find content such as that created by amateurs and located on obscure Web sites. Search engines were not embraced by the leading portals, such as AOL and Yahoo!, however, as these search engines were viewed as a threat to the walled garden business model favored by Web 1.0

64. See Rebecca Tushnet, *Payment in Credit: Copyright Law and Subcultural Creativity*, 70 LAW & CONTEMP. PROBS. 135, 152 (2007) (analogizing attribution to the creator—as opposed to attribution to the copyright holder—to credit, in that the creator is only benefited by such attribution “when some third party sees the new use”).

65. See Brian Getting, *Basic Definitions: Web 1.0, Web 2.0, Web 3.0*, PRACTICAL ECOMMERCE, Apr. 18, 2007, <http://www.practicalecommerce.com/articles/464/basic-definitions-web-10-web-20-web-30/>.

66. See KEEN, *supra* note 4, at 13-16, Keen, Keynote Address, *supra* note 21.

mega-sites. In short, the walled garden approach depended on attracting visitors to one's site and then keeping them there as long as possible by providing content, such as news, weather, stock quotes, horoscope readings, etc., such that users would stick around the site and thus be further peppered by banner ads and pop-up ads, a site's main stream of income.

By contrast, search engines do the exact opposite: they provide reasons and means for users to leave the walled garden in search of content found on Web sites outside the garden. This was correctly perceived as a threat, as once the visitor left the walled garden via a hyperlink in order to search out content on some other site, what would prevent the user from continuing on her merry way, linking to yet another site, never to return to the walled garden? It was this fear that stopped Yahoo! from seeking to incorporate Google's state of the art search technology into its site.⁶⁷ Thus, the utilization of search engines as a means of filtering out the sea of dross in order to locate relevant UGC was impeded due to the threat it posed to the titans of Web 1.0.

Needless to say, search engines—Google in particular—overcame this handicap. Google quickly became the leading search engine, conducting more than half of all searches, thereby becoming a leading means to locating UGC. Still, this was not the technology that really made UGC take off. This is true for a few reasons. First, even search engines require the user to perform the search. By contrast, the new breed of UGC mega-sites makes things even easier by minimizing or even negating the need for a search—one need only go to such sites and the sites themselves perform filtering functions. For example, sites like YouTube list the “top video” in a manner that takes account of what, in current jargon, is referred to as the “wisdom of the crowd.”⁶⁸ A popular way to express this functionality is to say that these sites provide recommendation filters;⁶⁹ these sites aggregate information about the behavior of others in order to provide recommendations to new users. However, these sites do more than aggregate content, provide filtering, and make recommendations. They also provide a variety of functions for manipulating or managing the UGC on the site, such as allowing users to e-mail favorite videos to

67. DAVID A. VISE & MARK MALSEED, *THE GOOGLE STORY* 42 (2005).

68. Jessi Hempel, *Tapping the Wisdom of the Crowd*, *BUS. WK.*, Jan. 18, 2007, available at http://www.businessweek.com/innovate/content/jan2007/id20070118_768179.htm (providing five examples of what *Wired* contributing editor Jeff Howe has termed “crowdsourcing”).

69. See ANDERSON, *supra* note 5, at ch. 7 (discussing various uses of such filters).

friends.⁷⁰ Once such sites become popular, they exhibit what economists call positive externalities because users generally want to reach the greatest number of people; hence, a popular UGC site has the tendency to become even more popular as its sheer popularity alone becomes a draw to potential posters of content.

Second, a Google search is not a search of UGC, per se. Rather, it is a search that may turn up sites with UGC along with sites containing content from other sources that do not contain UGC. Depending on what one is searching for, one may well not want UGC. An individual who searches “Bay of Pigs” for research purposes, for example, may want only non-amateur professional sources of information. The UGC that the search engine provides might well constitute a jumble of conspiracy theories and polemic diatribes.

Thus, it has not been search engines, per se, that have been driving the UGC explosion. Rather, it is sites that have figured out a way to aggregate UGC and that also encourage a coordinated approach to UGC production. What is distinctive about the new mega-sites is that they not only aggregate content and filter it, but materially incentivize its creation.⁷¹ This is an important fact because it may play a role in an overall normative evaluation of the role of UGC. In particular, because Web sites like *Second Life* provide the venue for content creation, they apparently think it natural to claim some proprietary interest in the resulting content.⁷²

With the preceding definitional and macro-economic features as a preface, discussion can now turn to some of the core copyright issues raised by UGC. It might seem natural to begin with those aspects at the intersection of UGC and copyright that have garnered

70. Such features make these sites increasingly problematic for copyright law. For example, in its lawsuit against YouTube and Google, Viacom claims that these features not only facilitate copyright infringement, but make it more difficult for outsiders to police. Complaint at 8, 43-44, *Viacom Int'l, Inc. v. YouTube, Inc.*, No. 07-CV-2103 (S.D.N.Y. Mar. 13, 2007), available at http://www.viacom.com/news/News_Docs/Viacom%20YouTube%20Federal%20Complaint.pdf.

71. This incentivizing arguably may rise to the level of inducement in the sense in which the *Grokster* Court uses this term. See *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 936 (2005).

72. Indeed, the Web site's provision of facilities or tools for creation may have some purchase in copyright law as well, albeit probably not a dispositive one, or so I will argue. See *Cmty for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989) (noting that provision of tools may be relevant in the context of the multi-factored tests for works made for hire); see also *Clickable Culture*, <http://www.secretlair.com/index.php?clickableculture/> (last visited Apr. 4, 2008) (noting that, according to *Second Life's* Terms of Service, users do retain copyright in their created content, but not to the means to access it, since Linden retains ownership in user accounts and related data); *Second Life, Terms of Service*, <http://secondlife.com/corporate/tos.php> (last visited Mar. 31, 2008).

the most public attention. Not surprisingly, issues involving claims of copyright infringement have been the objects of public scrutiny, as these involve lawsuits that are covered in the press. Unlike more abstract copyright questions, lawsuits consist of events that happen at particular points in time and thus, are suitable for press coverage. The most attention thus far has gone to one pending lawsuit in which Viacom is suing Google, the owner of YouTube.⁷³ Indeed, this is an important lawsuit that is likely to be highly influential on the emerging law of copyright and UGC. For present purposes, however, it is more useful to start at the beginning and ask the most basic of copyright questions; specifically, issues of ownership must be addressed, as these logically come prior to issues of infringement and defenses to it.

Typically, issues of ownership do not create problems for copyright. While a potential litigant in an infringement suit must establish ownership as a prerequisite to an infringement claim, this will usually involve no more than producing evidence of a valid copyright certificate. Matters are arguably more complex in the context of UGC, for basic questions, such as who owns what, arise in novel ways, particularly in the context of UGC mega-sites.

II. CORE COPYRIGHT OWNERSHIP ISSUES ARISING FROM UGC

This Part will set out the most basic connections that exist between UGC and copyright law. Discussion is best begun by considering copyright's fundamental purpose, stated traditionally as the promotion of the arts and sciences,⁷⁴ and stated in more contemporary terms as the promotion of social welfare.⁷⁵ At first glance, UGC might seem obviously to serve the goals of copyright, as UGC has led to an explosion in the production of creative content. It has become clear, however, that, at least in the context of UGC, more is not always better. Before considering the manner in which UGC stacks up in terms of the overall goals of copyright, there is another set of questions that arise when UGC is held up to the statutory features of copyright law. Among the most central are: is all UGC content copyrightable content? If not, what features are shared between the two?

Next, basic ownership questions arise. Copyright is a form of property, and property must, by definition, be owned by someone.

73. See Complaint, *supra* note 70.

74. U.S. CONST. art. I., § 8, cl. 8.

75. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)

Some features of some types of UGC may raise ownership issues. For example, are UGC works that represent the combined efforts of a number of people best viewed as works made for hire, joint works, compilations, collective works, or something else? The more fundamental question is what causes copyright to vest, and with whom? It is no coincidence that many, if not all, copyright casebooks begin with questions as to what constitutes copyrightable subject matter and what counts as authorship. These are the basic issues, indeed constitutional issues, upon which the rest of copyright is built.⁷⁶ What is new here is the application of these questions in the context of user-generated content.

A. Basic Ownership Considerations

Before we can decide who owns what, we must ask what is owned. If not all UGC is creative in the sense crucial for copyright protection then we must ask what is the dividing line between copyrightable and non-copyrightable UGC. *Bleistein v. Donaldson Lithographing Co.* is the leading early case for the widely stated proposition that originality in the sense of artistic merit is not an appropriate standard for determining the copyrightability of a work.⁷⁷ Many modern courts have followed this rule.⁷⁸

The leading modern case is *Feist Publications, Inc. v. Rural Telephone Service Co.* Like *Bleistein*, the central lesson of *Feist* also pertains to a low threshold for copyrightability.⁷⁹ *Feist* says there must be a modicum, not a *de minimis* amount, of creativity, but does not define these terms.⁸⁰ The statute does not provide a test, nor does § 101 of the Copyright Act provide definitions of the terms “creative” or “original.” Courts and commentators have dealt with this lack of a definition by looking to the facts of *Feist* itself, in which the Court found that the white pages of a phone book do not contain the

76. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 345-46 (1991) (discussing originality and creativity as constitutional requirements of copyright protection).

77. 188 U.S. 239, 251-52 (1903).

78. See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 582-83 (1994) (citing *Bleistein* as support for the proposition that whether a parody is in good or bad taste should not be a consideration in fair use).

79. See *Feist Publ'ns.*, 499 U.S. at 345-46.

80. *Id.* at 363 (“As a constitutional matter, copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity. Rural’s white pages, limited to basic subscriber information and arranged alphabetically, fall short of the mark.”).

modicum of creativity needed for copyright.⁸¹ Nevertheless, through numerous comments, the court is clear that it contemplates a minimal standard.⁸²

Earlier, we saw that the *Dark Side of the Moon/Wizard of Oz* mash-up would count as an instance of UGC.⁸³ Consider whether this mash-up would exhibit a sufficient degree of originality so as to constitute an original derivative work.⁸⁴ In particular, consider this effort from the perspective of *Feist*. Since little creativity is involved in combining the two works in this manner—which is not to say the result is not of interest—a court would likely find that this does not constitute even the minimal degree of creativity needed for the existence of a new work under *Feist*.⁸⁵ As noted in Part I, there is nevertheless much UGC that is creative, and some of it wildly so.

81. *Id.*

82. While it is established doctrine that sweat of the brow is no longer accepted as relevant grounds for determining copyrightability, it is worth touching on briefly when the issue of copyrightability is discussed, as there is always the possibility that sweat of the brow equitable considerations are sub rosa playing a role in some legal outcome. *See, e.g., Nash v. CBS, Inc.*, 899 F.2d 1537, 1542 (7th Cir. 1990) (“The authors in *Hoehling* and *Toksvig* spent years tracking down leads. If all of their work, right down to their words, may be used without compensation, there will be too few original investigations, and facts will not be available on which to build.”). Due to the increasing powers of digital technologies, it continues to become easier to create works that will easily pass as copyrightable. All that is required is a new medium-priced PC, many of which now include built-in webcams, such that one can simply perform before the camera and broadcast to anyone anywhere in the world who has Internet access and the interest to tune in. Or, one may simply go to some blog site and enter some comments into the discussion. As long as one actually writes his own comments, they will count as copyrightable. Thus, to the extent that sweat of the brow normative intuitions ever play a role in the outcomes of courts, we should not expect them to be any more likely to do so in the context of UGC, and probably less likely to do so for the simple reason that new technologies are allowing for the creation of original works with less sweat than ever.

83. *See supra* text accompanying note 35.

84. A “derivative work” is defined as

a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a “derivative work.”

17 U.S.C. § 101 (2000). There remains a question, however, whether the standard for creativity of derivative works is different than that for non-derivative works. *See Gracen v. Bradford Exch.*, 698 F.2d 300, 302 (7th Cir. 1983).

85. A very pro-fair use court could conceivably find fair use in the “selection” and “arrangement” of this work—as is evidenced by the fact that full-length versions of the two works juxtaposed as such are actually shown in art house cinemas. On selection and arrangement, see *Feist Publ'ns*, 499 U.S. at 349 (“Where the compilation author adds no written expression but rather lets the facts speak for themselves, the expressive element is more elusive. The only conceivable expression is the manner in which the compiler has

Another requirement for copyrightable subject matter is that the UGC be “fixed [in a tangible medium of expression] by any method now known or later developed . . . from which [it] can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”⁸⁶ Clearly, much UGC would pass this test, as 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. As long as this digital expression exists for a period of more than transitory duration, the requirement for fixation will be satisfied.⁸⁷ Thus, the basic requirements for copyrightability—originality and fixation—appear to be easily satisfied, at least by substantial portions of UGC. But, when one digs deeper, questions emerge.

B. The Structure of UGC

User-generated content appears to present potentially difficult questions regarding what counts as an original work of authorship. This is best seen by considering some of the distinctive features of UGC. Two of the most important new trends are toward content found in social networking sites and content found in wiki sites, such as the eponymous Wikipedia.⁸⁸ Here, the product (in the economic sense of what has value) is the larger work. It is Wikipedia as a whole that has value—the encyclopedia has an overall value that is immeasurably greater than the sum of its parts. The first question, then, is what is the closest comparison to existing copyright law? As there are numerous creators all contributing to the project, the obvious comparisons in copyright law are with jointly authored works, compilations, collective works, and works made for hire.

In the case of motion pictures, for example, copyright allows for a simple solution by allowing for one owner, despite the fact that a large number of people collaborated in the project.⁸⁹ This is facilitated by the work for hire doctrine, whereby creators hire themselves out to work on the projects of others.⁹⁰ In the case of works made for hire,

selected and arranged the facts. Thus, if the selection and arrangement are original, these elements of the work are eligible for copyright protection.”)

86. 17 U.S.C. § 101 (defining “copies”).

87. *See id.* (defining “fixed”).

88. Wikipedia, <http://wikipedia.org/> (last visited Mar. 31, 2008).

89. *See* 17 U.S.C. § 101; *see also* *Aalmuhammed v. Lee*, 202 F.3d 1227 (9th Cir. 2000).

90. The Copyright Act defines a “work made for hire” as

(1) a work prepared by an employee within the scope of his or her employment;
or

the contributions of the various hirees never vest in them. It is not that ownership of some bit of creative copyrightable work vests in a hiree and then she licenses or sells it to the site; rather, it is because of an agreement or other relationship stipulating that the work is made for hire and thus vests originally in the hirers.⁹¹ The question, then, is to what extent does this description apply to UGC? The obvious and dispositive dis-analogy is that the typical user does not work for any of the UGC mega-sites. Users who contribute their content to sites such as Wikipedia, *Second Life*, MySpace, YouTube, or Facebook are not working for the owners of the sites. Thus, the conclusion seems inevitable that UGC works are not works for hire. Yet, the analysis may not be so straightforward. Courts have looked to other factors beyond a formal employment relationship when determining the issue of works for hire.

In the leading case regarding works for hire, the Supreme Court noted that no one factor is by itself determinative.⁹² A factor sometimes given strong weight in the determination is the exertion of control over the decision-making regarding what choices lead to the final product.⁹³ In *Community for Creative Non-Violence v. Reid*, the Supreme Court was dealing with a set of facts in which the plaintiff had exerted control over certain decisions that were integral in the production of the resulting work—a sculpture of a homeless family.⁹⁴ In the context of UGC sites, however, the owners of the sites provide the tools and facilities, but typically do not exert editorial control explicitly. Indeed, because it is in their interest not to do so, and not to be open to litigation for colorably being alleged to have done so, UGC Web sites often include in their Terms of Service the disclaimers that they do not edit, and disclaim all liability for the substance of, the content contributed by users.⁹⁵ Another factor courts have looked to is the extent to which the putative worker-for-hire, as it were, was a

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

Id.

91. *Id.*

92. *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989).

93. *See id.* at 738-39.

94. *See id.* at 733-36.

95. *See, e.g.*, Facebook, Terms of Use, <http://www.facebook.com/terms.php> (last visited Mar. 31, 2008); LiveJournal, Terms of Service, <http://www.livejournal.com/legal/tos.bml> (last visited Mar. 31, 2008); Wikipedia: General Disclaimer, http://en.wikipedia.org/wiki/Wikipedia:General_disclaimer (last visited Mar. 31, 2008).

contributor to some larger project to which she provided some portion of content.⁹⁶ On this factor, Web sites will differ. Clearly, Wikipedia counts as a larger project, while YouTube almost certainly does not; perhaps *Second Life* lies somewhere in between. Indeed, it would seem that virtual worlds themselves will differ in this regard depending on whether the world is a planned economy versus a “wild west” world.

Next, consider joint works.⁹⁷ The definition of a joint work may apply to some instances of UGC, but does not apply to the predominant type of situation in which an amateur posts her work on a site such as Facebook. The definition of a joint work is “a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.”⁹⁸ This definition might be reasonably interpreted as applying to a UGC site such as Wikipedia, since the virtual encyclopedia that results is a unitary whole. The individual contributions are not “inseparable,” however, because, while someone can come along and delete another’s contribution, Wikipedia will still exist. Nevertheless, an individual contribution to Wikipedia is fairly viewed as an “interdependent” part of the unitary whole, at least for the period of time that the contribution is present in Wikipedia. This definition would not, however, apply to the typical contribution to a site, such as MySpace or YouTube, in which there is presumably no “unitary whole.” Nevertheless, two or more people might together create a work that fell within the definition of a joint work and then post this work to MySpace or YouTube. But, the combined contents of either of these sites, considered in their totality, are not plausibly viewed as unitary wholes.

In the typical sort of UGC situation, the definition of a compilation seems inapplicable as well. “A ‘compilation’ is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.”⁹⁹ In dealing with most of the UGC mega-sites, it is not the case that pre-existing materials are selected, coordinated, and arranged in such a way so as to create an original work of authorship.

96. See *Aalmuhammed v. Lee*, 202 F.3d 1227, 1232-35 (9th Cir. 2000) (affirming the District Court’s grant of summary judgment to defendants, denying plaintiff’s motion for a declaratory judgment that his contribution to a movie entitled him to co-ownership because his contributions were those of a work made for hire).

97. See 17 U.S.C. § 101 (2000).

98. *Id.*

99. *Id.*

With sites such as YouTube and Facebook, there is no overall work; nor, for that matter, is there much by way of selection or arrangement. Not surprisingly, these mega-sites do not submit the totality of their content to the Copyright Office as an original work. What is distinctive about these sites is that their overall constitution at any given time is not coordinated and arranged, but rather is a sort of spontaneous emergence.

With a site such as Wikipedia, however, it may be plausible to view the outcome as one coherent work, albeit a work that is constantly being revised. It is not simply a selection and arrangement of “data,” but rather individual creative works—the individual entries that are written in expressive, creative ways. However, entries do not remain stable, but rather continue to emerge spontaneously through the largely uncoordinated editing of individual contributors.¹⁰⁰ Thus, there is selection and arrangement, as well as an overall work. Is Wikipedia then best characterized as a particular sub-genre of “compilations”?

The Copyright Act notes that compilations include collective works.¹⁰¹ A collective work is a work, “such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.”¹⁰² This description seems applicable to Wikipedia. Nevertheless, many entries will scarcely contain enough originality such that they could be separately copyrightable. Light edits by contributors to already present entries may not be copyrightable. Thus, a UGC site such as Wikipedia is perhaps best viewed as a collective work that collects both copyrightable and non-copyrightable elements into a larger whole.

It would be a stretch to conceive of *Second Life* as a collective work, however. It also seems too much of a stretch to conceive of the contents of YouTube or MySpace as collective works. While these sites are collections of separate and independent works, the result is not some new work, but simply a collection of individual works. These sites are no more of a collective work than the contents of a bookstore would constitute a collective work.

To the extent that some UGC sites such as Wikipedia are plausibly seen as collective works, they are governed under § 103 of the Copyright Act. Subsection 103(a) notes that “[t]he subject matter

100. However, Wikipedia does utilize editors to some extent. See Wikipedia: General Disclaimer, *supra* note 95.

101. 17 U.S.C. § 101.

102. *Id.*

of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.”¹⁰³ Thus, UGC sites must be careful not to make unauthorized use of the content contributed to the site as an element in any compilation or collective work it creates or in which it seeks to claim rights. Subsection 103(b) reads:

The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or substance of, any copyright protection in the preexisting material.¹⁰⁴

Note, in particular, that the language that any copyright in a compilation, such as a collective work, “does not imply any exclusive right in the preexisting material.”¹⁰⁵ In other words, even if a site like Wikipedia is a copyrightable collective work or compilation, and even if it legally obtains the right to include a particular UGC work, this does not mean that the owner, therefore, has an exclusive claim to the material contributed by those who add content to the site.

The presumption lies in the other direction. If creators are to alienate their rights, it must come through agreement.¹⁰⁶ These agreements are the Terms of Service that users arguably agree to in order to use the sites. Thus, the question as to which rights are held by whom when it comes to the creation of collective works or compilations will depend on the nature of the agreement, or lack thereof, between users and the sites.

III. CONCLUSION: SEGUE TO PART TWO

The sequels to this article will explore contract and tort issues regarding UGC.¹⁰⁷ It will be of interest to summarily note those aspects of these issues that follow directly from the foregoing exploration as a means of providing a segue between the present article and the sequel. This article has sought to ask a fundamental set of questions concerning the nature of UGC that arise prior to

103. 17 U.S.C. § 103(a) (2000).

104. *Id.* § 103(b).

105. *Id.*

106. *See* 17 U.S.C. § 204 (2000).

107. Steven Hetcher, 24 *SANTA CLARA COMPUTER & HIGH TECH. L.J.* 101 (forthcoming 2008).

infringement analysis. The remaining task will be to situate the discussion of UGC ownership within the broader context of the private law of UGC.

Understanding private law, in part, involves understanding the interconnections between the main legal categories of property, contract, and tort. As is indicated by the fact that the chapter on infringement is typically placed in the middle of copyright casebooks, before there can be infringement, there must first be ownership. For present purposes, there are two types of infringement cases: those in which ownership of the underlying creative work is not at issue, and those in which it is. The preceding analysis examined issues of ownership pertaining directly to the creation of UGC. In the simplest situation, a user-generated work is owned by the user who creates it. We saw that not only is much UGC copyrightable, and hence, capable of being owned in copyright, but that it may be economically valuable in the sense that viable business models may be created to monetize it.

Such monetization will necessarily involve exchange relationships for the obvious yet fundamental economic reason that UGC will not originally be under the proprietary control of the UGC mega-sites; however, it is these sites that are in the best position to squeeze the greatest economic value from the UGC. In the case of the UGC mega-sites considered in the above discussion, acts of infringement are likely to come in the context of these exchange relationships between the parties. Because UGC creators interact with the mega-sites online by uploading and downloading their content to these sites or by creating content while online at one of these sites, the agreement between the users and the sites are those that users click through in order to gain access to, and continued use of, these sites. These are typically called Terms of Use, Terms of Service, or, as they are sometimes generically referred to, End User License Agreements (EULAs).

These agreements determine property relationships in important ways. With UGC, it turns out that the form agreements between users and the UGC mega-sites are highly questionable. If these agreements turn out to be invalid and nullities, as I will argue, then the copying of the users' creative content by the mega-sites will be unauthorized and, thus, an infringement. In the sequel, I will argue that there are literally millions of these invalid agreements. For purposes of the present discussion, the connection to note is merely that this important type of infringement has its roots in a property dispute. This is in sharp contrast to the main category of purported infringements that have garnered the greatest attention in

the recent past—the file-sharing suits that have rocked the copyright world—in which ownership was not in dispute.

Property rights are only as good as the protection they are afforded. In the case of some of the EULAs of the mega-sites, there is little respect shown for the property rights of users. Sites such as Facebook use legal tricks in an attempt to pilfer rights away from users by means of unconscionable terms in the Term of Use.¹⁰⁸ Users are generally unaware of the rights they possess in the creative content they produce. It is no surprise, then, that users fail to appreciate when these rights are trampled on. A further problem is that more tangible harms, such as misuse of the archived copies of users' creative content kept by Facebook, may not occur until later, when the users might become well-known artists; in these circumstances, Facebook would retain possession of a copy of all their youthful creative expression. All of these factors combine to produce a situation in which Facebook's infringing actions have not drawn attention.

In my forthcoming article, I will argue that courts should deem Facebook's Terms of Service unconscionable with respect to the terms that purport to transfer ownership of interest in the archival copy, as well as the records of conversation between Facebook users, to Facebook. In other words, I will seek measures that give users a stronger right in their UGC—not a stronger formal right, but a stronger right in the sense that courts protect the property right by not allowing it to be infringed upon under circumstances that make a remedy unlikely. The larger point of UGC, in terms of the private law, is first to see how tortuous infringement of UGC paradigmatically reduces to a fight over property rights to the content. Additionally, we must recognize that these property rights are only meaningful in a context in which courts are willing to protect owners from unconscionable contracts pertaining to the content.

108. See *id.* at 114-128.