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# The Tangled Web of UGC: Making Copyright Sense of User-Generated Content

*Daniel Gervais\**

## ABSTRACT

*Even as a mere conceptual cloud, the term “user-generated content” is useful to discuss the societal shifts in content creation brought about by the participative web and perhaps best epitomized by the remix phenomenon. This Article considers the copyright aspects of UGC. On the one hand, the production of UGC may involve both the right of reproduction and the right of adaptation—the right to prepare derivative works. On the other hand, defenses against claims of infringement of these rights typically rely on (transformative) fair use or the fact that an insubstantial amount (such as a quote) of the preexisting work was used. One might also rely on another type of fair use defense—for example, that the second work was used in news reporting, or, although the case law on this point is still controversial, that the reproduction was fair use because it made the work more accessible. While it is clear that creating original content by reusing preexisting content is nothing new, the focus here is on amateur creation and reuse and the Article discusses whether the amateur nature of the content constitutes a new normative vector. The Article suggests that the first step to find adequate answers is a proper taxonomy of UGC.*

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“If I have seen further it is by reading the blogs of giants.”<sup>1</sup>

Let me be perfectly clear: there is no such thing as “user-generated content.”

Or is there? If user-generated content (UGC) is defined as content that is created in whole or in part using tools specific to the online environment and/or disseminated using such tools, then the real focus is indeed on content “generated” by Internet users. Even as a mere “conceptual cloud,” the label may be useful to discuss the societal shifts in content creation brought about by the Internet and perhaps best epitomized by the remix phenomenon.<sup>2</sup> The shift from a one-to-many entertainment and information infrastructure to a many-

1. The original quote (“If I have seen further it is only by standing on the shoulders of giants”) is usually attributed to Sir Isaac Newton in a letter to Robert Hooke dated Feb. 5, 1676. It is cited, *inter alia*, in Suzanne Scotchmer, *Standing on the Shoulders of Giants: Cumulative Research and the Patent Law*, 5 J. ECON. PERSP. 29, 29 (1991), though one author traced the aphorism to Bernard de Chartres in the twelfth century. See ROBERT K. MERTON, *ON THE SHOULDERS OF GIANTS: THE POST-ITALIANATE EDITION*. (Univ. of Chicago Press 1993).

2. See LAWRENCE LESSIG, *REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY* 28 (Penguin Press 2008) Lessig compares the “Read/Write Culture” and the increasing tendency to make works available as “Read-Only,” and notes that citizens “add to the culture they read by creating and re-creating the culture around them . . . . Culture in this world is flat; it is shared person to person.” *Id.* (internal citations omitted). Using the Internet and other digital tools, “users” of digital content can thus create and recreate using preexisting content, giving life to the “remix” culture. See *id.*

to-many infrastructure has deep consequences on many levels. It has made possible on a massive scale content such as fan fiction, mashups, music remixes, cloud computing, and collages; blogs have transformed access to, and arguably the nature of, information.

Against this backdrop, I will take an existentialist view of UGC, rather than hypothesize its essence: it exists because people say that it does<sup>3</sup>—even though the constellation of different types of content that it covers seriously challenges any attempt at definitional rigor. From that perspective, it is now widely accepted that there is such a thing as the “participative web,” or Web 2.0 (soon to be 3.0).<sup>4</sup> These terms refer to an Internet-based network of content and services that use increasingly intelligent software capable of empowering Internet users to develop, rate, collaborate on, and distribute content, as well as to customize Internet applications. As the Internet becomes more embedded in peoples’ lives, they draw on new Internet applications to express themselves through content that they upload or make available. Life stories are written on Facebook as they happen.

This short contribution focuses on one facet of this complex phenomenon, namely copyright. This Article’s aim is admittedly modest, yet by no means simple: to examine the source of tension within the copyright system. This will require an appropriate taxonomy and a look at some rather vague notions of copyright law.

The production of UGC may involve both the right of reproduction and the right of adaptation—for example, the right to prepare derivative works contained in 17 U.S.C. § 106(2). Defenses against claims of infringement of these rights typically rely on one of the following fact patterns.<sup>5</sup> First, if the junior, or second, work is a fixed, original work based on one or more preexisting, copyright-protected works (such as a typical derivative work), one could argue, from the *Campbell v. Acuff-Rose* perspective,<sup>6</sup> that the second work is

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3. I thus use “existentialist” somewhat loosely to signify that UGC exists in the eyes of the Other.

4. See John Markoff, *Entrepreneurs See a Web Guided by Common Sense*, N.Y. TIMES, Nov. 12, 2006, available at <http://www.nytimes.com/2006/11/12/business/12web.html?pagewanted=1&ei=5088&en=254d697964cedc62&ex=1320987600> (“Their goal is to add a layer of meaning on top of the existing web that would make it less of a catalog and more of a guide—and even provide the foundation for systems that can reason in a human fashion. That level of artificial intelligence, with machines doing the thinking instead of simply following commands, has eluded researchers for more than half a century. Referred to as Web 3.0, the effort is in its infancy . . .”).

5. I am assuming, of course, that the allegedly infringed work is still copyright-protected.

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

a (transformative) fair use. Alternatively, depending on the facts of the case, one could argue that it is a fair use or otherwise does not infringe the right of reproduction because only an insubstantial amount (such as a quote) of the senior, or preexisting, work was used.<sup>7</sup> One might also rely on another type of fair use defense—for example, that the second work was used in news reporting,<sup>8</sup> or, although the case law on this point is still controversial, that the reproduction was fair use because it made the work more accessible.<sup>9</sup>

Most commentaries about UGC, including some of those contained in this issue of the *Vanderbilt Journal of Entertainment and Technology Law*,<sup>10</sup> focus on amateur creation and reuse. At first glance, this does not, in itself, warrant extensive new prescriptive analyses. It is abundantly clear that creating original content by reusing preexisting content is nothing new. Many Walt Disney productions are based on medieval fairy tales, and countless screenplays are adaptations of novels and plays.<sup>11</sup> Nor should commercial works based upon works of others be a fundamental problem for theories that have traditionally undergirded copyright. Is the fact that UGC is *amateur* content a new normative vector to consider?

After all, reuse should not be a major source of doctrinal tension. Most copyright theories support reuse. If I may be allowed a few analytical shortcuts, one could even say that natural rights theory supports reuse. After all, John Locke based his theory of property on transformative labor.<sup>12</sup> Locke was referring to what one takes from

7. See, e.g., *New Era Publ'ns, Int'l v. Carol Publ'g Group*, 904 F.2d 152, 155, 158-59 (2d Cir. 1990).

8. See, e.g., *Nunez v. Caribbean Int'l News Corp.*, 235 F.3d 18, 21-23 (1st Cir. 2000).

9. See, e.g., *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701 (9th Cir. 2007); see *infra* Part III.

10. See, e.g., Debora Halbert, *Mass Culture and the Culture of the Masses: A Manifesto for User-Generated Rights*, 11 VAND. J. ENT. & TECH. L. 921 (2009); Steven A. Hetcher, *Hume's Penguin, or, Yochai Benkler and the Nature of Peer Production*, 11 VAND. J. ENT. & TECH. L. 963 (2009); Mary W. S. Wong, "Transformative" User-Generated Content in Copyright Law: *Infringing Derivative Works or Fair Use?*, 11 VAND. J. ENT. & TECH. L. 1075 (2009).

11. For example, the Disney movies *Cinderella*, *Sleeping Beauty*, and *Snow White* are based on fairy tales by the Brothers Grimm. See JACOB GRIMM & WILHELM GRIMM, *THE COMPLETE FAIRY TALES OF THE BROTHERS GRIMM* (3rd ed., 2003). The film version of *Gone With the Wind* is based on the book by Margaret Mitchell. See Internet Movie Database, <http://www.imdb.com/title/tt0031381/> (last visited Apr. 30, 2009). And the movie *My Fair Lady* is based on George Bernard Shaw's play *Pygmalion*. See Internet Movie Database, <http://www.imdb.com/title/tt0058385/> (last visited Apr. 30, 2009).

12. See JOHN LOCKE, *Of Civil Government*, in TWO TREATISES OF GOVERNMENT. 269-78 (Peter Laslett ed., Cambridge Univ. Press 1967) (1689); WENDY J. GORDON, A

"nature," of course, and not from other authors. Still, the analogy between transforming nature and creating literary or artistic works holds, though only up to a point, due to the investment of skilled labor. Most authors do not "take from nature"; rather, authors take from each other and all those who created before them and made their work available for others to enjoy. Humanity, as Blaise Pascal once said, is but one person who continually grows.<sup>13</sup> Utilitarianism also supports reuse, once a proper return has been made possible by a limited exclusive right: looking at UGC through an instrumentalist lens, should one not seek the optimal point between protecting the creation and dissemination of new works and allowing the creativity of others?

In spite of apparent theoretical support and familiarity with reuse, copyright law is undeniably struggling to cope with UGC. In Part I, this Article will examine the reasons for this struggle. In Part II, it will offer a new and simple taxonomy of UGC that better reflects the types of content in question and may facilitate the application of copyright principles and norms to such content. Finally, Part III will look at fair use and the extent to which the doctrine applies to UGC.

## I. COPYRIGHT'S STRUGGLE WITH UGC

Copyright is struggling with UGC for many reasons. Some are qualitative (for example, amateur versus professional users),<sup>14</sup> but another one is simply quantitative. Hundreds of millions of Internet users are downloading, altering, mixing, uploading, and/or making available audio, video, and text content on personal web pages, social

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*Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1540 (1993) ("In 1984 the Supreme Court cited Locke when it held that intangible 'products of an individual's labor and invention' can be 'property' subject to the protection of the Takings Clause. Similarly, other courts have extended common law protection to intangibles on the Locke-like ground that no entity should 'reap where it has not sown.' Locke's labor theory of property and allied approaches have been used so frequently as a justification for creators' ownership rights that Locke's *Two Treatises* have been erroneously credited with having developed an explicit defense of intellectual property. . . . Lockean theory deserves a closer examination than the intellectual property courts have given it so far. Such an examination will show that Locke's theory has much to reveal about when property in intangibles should *not* be granted.") (emphasis in original).

13. "[T]oute la suite des hommes, pendant le cours de tant de siècles, doit être considérée comme un même homme qui subsiste toujours et qui apprend continuellement." BLAISE PASCAL, PREFACE POUR LE TRAITE DU VIDE (1651), available at [http://www.paris4.sorbonne.fr/e-cursus/texte/CEC/glelievre/histoire-philo/preface\\_pour\\_le\\_traite\\_du\\_vide.pdf](http://www.paris4.sorbonne.fr/e-cursus/texte/CEC/glelievre/histoire-philo/preface_pour_le_traite_du_vide.pdf). Translated, this reads, "So that the whole succession of men, during the course of many ages, should be considered as a single man who subsists forever and learns continually." BLAISE PASCAL, PREFACE TO THE TREATISE ON VACUUM (The Harvard Classics 1909), available at <http://www.bartleby.com/48/3/10.html>.

14. See *infra* Part I.B.

sites, or using peer-to-peer technology to allow others to access content on their computer.<sup>15</sup> The enormity of the task of regulating this relatively new yet exponentially increasing activity has hit law and policy like a Category 5 storm. Like a levee, copyright law was designed to fight identifiable threats, such as commercial pirates, and allow the marketplace for copyrighted content to organize itself. Will it hold or is the amount of UGC activity simply too much for copyright? Looking back at the history of copyright does not provide a clear answer. Past may not be prologue here because of the magnitude and depth of the changes at hand,

### *A. The Rise of the Nonprofessional User*

The English Statute of Anne of 1710,<sup>16</sup> often described as the first copyright statute,<sup>17</sup> emerged after the Stationers' Company's<sup>18</sup> licensing monopoly had expired<sup>19</sup> and stationers, or publishers, were unable to politically justify a renewal of their publishing monopoly, which many saw as a form of censorship.<sup>20</sup> The stationers joined authors in a petition to Parliament in demanding a "copyright" to be

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15. It is difficult to determine how many Internet users are using the Internet and which type of content they are trying access, but Internetworldstats.com reported 1,463,632,361 Internet users as of late 2008. World Internet Usage Statistics News and World Population Stats, <http://internetworldstats.com/stats.htm> (last visited Apr. 2, 2009).

16. Statute of Anne, 1710, 8 Ann. c. 19 (Eng.), available at [http://avalon.law.yale.edu/18th\\_century/anne\\_1710.asp](http://avalon.law.yale.edu/18th_century/anne_1710.asp).

17. There is still a debate as to whether the Statute of Anne was in fact a "copyright" law. See Brad SHERMAN & LIONEL BENTLY, *THE MAKING OF MODERN INTELLECTUAL PROPERTY LAW: THE BRITISH EXPERIENCE, 1760-1911*, 207-08 (Cambridge Univ. Press 1999); see also Michael W. Carroll, *Whose Music Is It Anyway? How We Came to View Musical Expression As a Form of Property*, 72 U. CIN. L. REV. 1405 (2004); Dan Rosen, *Artists' Moral Rights: A European Evolution, An American Revolution*, 2 CARDOZO ARTS & ENT. L.J. 155 (1983); H. C. Streibich, *The Moral Right of Ownership to Intellectual Property: Part I - From the Beginning to the Age of Printing*, 6 MEMPHIS ST. L. REV. 1 (1975); Cheryl Swack, *Safeguarding Artistic Creation and the Cultural Heritage: A Comparison of Droit Moral Between France and the United States*, 22 COLUM. J. L. & ARTS 361 (1998).

18. The Stationers were the equivalent of modern-day publishers. The "Company" functioned as a guild. They thus licensed publishers who applied to become Members. Operating under a royal charter, publishers who were not members were not allowed to publish books in the United Kingdom. See generally MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* (Harvard Univ. Press 1993).

19. As a result, the Company no longer had the power to control who could publish books. See *Id.*

20. The Company was considered a form of censorship because people who might want to publish certain types of content may not be admitted as members, and members of the Company self-regulated what they could publish, but kept fairly close contact with the political elite. See *Id.*



vested initially in authors but then typically assigned to publishers.<sup>21</sup> This led to Parliament adopting the statute, which granted a fully assignable fourteen-year copyright monopoly to authors.<sup>22</sup>

On the European Continent, after the 1789 French Revolution and sometime before that in Germany, it became clear that the purpose of the *droit d'auteur* or *Urheberrecht*,<sup>23</sup> in spite of its roots as a child of the Enlightenment and its progeny of individual human rights, was to govern use by and between professionals, including authors, publishers, and other commercial “exploiters” of copyrighted content.

For approximately 290 of its nearly 300-year history, the “copyright” was thus traded by way of licenses or assignments among professionals, including authors, publishers, producers, and broadcasters. It was occasionally enforced against professional infringers. Only during the past ten years has it routinely been applied to individual consumers and end-users.<sup>24</sup> This shift is the source of much of the current tension in the copyright system, and also that it has greatly increased the level of attention paid to copyright law and policy.

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21. *Id.*

22. As a transitional measure, the statute renewed, for a limited period of time, the Stationers monopoly. To be complete, in addition to this statutory “copy-right,” British authors also had common law rights to prevent first publication and false attribution. After a long debate before British courts, it was determined in *Donaldson v. Beckett*, 98 Eng. Rep. 257(1774), that there was no residual common law right in *published* works that could be used to prevent copying of books after the expiration of the statutory monopoly. British “copyright” was thus born by merging two quite different approaches: on the one hand, there was the economically motivated desire of publishers to prevent copying of their books, and, on the other, the demands of authors to “own” their works, anchored in a natural rights perspective and based on the Lockean principle that every person should own the fruits of his or her labor. *See id.*

23. These terms, which translate as “authors rights,” are the author-centric, sometimes also referred to as the Romantic version of copyright. The underlying view, according to which authors invest their personality or their soul on their creative and intellectual works, was defended by philosophers such as Kant and later Hegel. *See* Thierry Joffrain, *Deriving A (Moral) Right For Creators*, 36 TEX. INT’L L.J. 735, 738-9 (2001).

24. Even though in January 2008 the recording industry announced it would no longer be filing massive amounts of lawsuits against individual end-users, other lawsuits and legal uncertainty continues. *See* Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J., Dec. 29, 2008, available at <http://online.wsj.com/article/SB122966038836021137.html>; Maria Lillà Montagnani, *A New Interface Between Copyright Law And Technology: How User-Generated Content Will Shape The Future Of Online Distribution*, 26 CARDOZO ARTS & ENT. L.J. 719, 769 (2009) (“[T]he nature of the Internet and the ease with which content on the Internet can be reproduced and distributed makes all online content, including UGC, particularly susceptible to copyright infringement.”).

Put differently, while the law has not changed, its target and purpose seemingly have.<sup>25</sup> This was possible because formally copyright is designed in terms of restricted acts, that is, acts that can only be performed with authorization of the right holder such as reproduction, public performance, and so on; there is little, if any, focus in copyright legislation on the nature or category of users, with a few targeted exceptions.<sup>26</sup>

The transition from a right traded by and enforced against professionals to a right targeted at individual consumers was not an easy one. Trading copyright between professionals, or enforcing it against those same professionals (or professional "pirates"), assumes that the users were identifiable (i.e., known quantities) and that normal licensing transactions were possible. In other words, the market functions because copyright owners contractually grant authorizations to professional users. In cases where a large number of professionals use a large repertory of works owned by a plurality of owners, collective systems exist to allow licensing to hundreds, sometimes thousands, of users.<sup>27</sup> Compulsory licenses sometimes support such systems.<sup>28</sup>

Typically, however, collective licenses are for non-altering uses and/or integral copying, such as reproduction of sound recordings or public performance.<sup>29</sup> Collectives do not routinely license the right to prepare derivative works, at least not on the basis of preexisting

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25. This also explains the emergence of para-copyright norms such as anti-circumvention of technological protection measures. See, e.g., 17 U.S.C. §1201-1204 (2000); World Intellectual Property Organization Treaty, Apr. 12, 1997, S. TREATY DOC. NO. 105-17, 2186 U.N.T.S. 152.

26. See, 17 U.S.C. § 108 (2000), which provides an exception for libraries.

27. See Daniel Gervais. *The Changing Role of Copyright Collectives*, in COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS 1 (2006) [hereinafter Gervais, *The Changing Role*].

28. See, e.g., 17 U.S.C. § 115 (2000) (allowing for the compulsory license for making and distributing phonorecords).

29. U.S. copyright law is different from other national copyright laws in many respects. One of them is the distinction drawn in 17 U.S.C. § 101 between sounds recordings and phonorecords. See 17 U.S.C. § 101 (2000). The former are copyrighted *works* "that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied," *id.*, while phonorecords are the *material objects* in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed. *Id.*; see also Daniel J. Gervais, *Transmission of Music on the Internet: An Analysis of the Copyright Laws of Canada, France, Germany, Japan, the United Kingdom, and the United States*, 34 VAND. J. TRANSNAT'L L. 1363, 1363-1416 (2001).

tariffs.<sup>30</sup> Nor have they licensed individual end-users, other than exceptionally.<sup>31</sup>

But now individual Internet users have become “content providers,” even though they are not professionals. Consequently, rights holders have analogized them to (professional) content providers and other intermediaries, and have not hesitated to enforce copyright, a hitherto purely professional right, against those individual users. However, licensing mechanisms have thus far been unable to follow. In fact, one potential reason why end-users were traditionally left out of the copyright equation was the system’s inability to license or integrate those end-users. Digital technology may be changing this,<sup>32</sup> and could remove the obstacle. However, as discussed below, there are other reasons, including privacy, to leave out end-users.

In sum, the inability and/or unwillingness to license end-users, along with uncertainties about the scope of fair use, are two main sources of tension in the copyright system. One potential response is that individual end-users have always been a part of the copyright equation, or that they have used works on the basis of implied licenses. After all, the system could not ignore them: is not most content designed to be viewed, read, or listened to by these users? The answer is yes, of course, but this does not end the discussion—far from it.

First, the verbs themselves (view, read, and listen) describe a passive approach to content and fail to reflect the user empowerment that digital tools have generated. Second, major copyright holders did

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30. A tariff may be defined for these purposes as a set of licensing conditions, including a price which may be set on various bases (units produced, user revenue, and so on), that any qualified user (normally, any person to whom the tariff applies) may invoke and use a work contained in the repertory of works covered by the tariff according to the conditions contained therein. Competition (antitrust) law often prevents collectives from refusing to issue a license based on such a tariff to a qualified user. For example, if a tariff allows a broadcaster to broadcast a repertory of musical works for a given period of time in exchange for the payment of a percentage of the broadcaster’s advertising revenues, then any broadcaster who qualifies—this may be determined under other (e.g., broadcasting) statutes—would be entitled to the license. In the United States, this is “regulated” by consent decrees negotiated between ASCAP and BMI, on the one hand, and the Department of Justice on the other. See Glynn Lunney, Copyright Collectives and Collecting Societies: The United States Experience, in DANIEL GERVAIS, *COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS* 311, 314-321 (2005).

31. Copyright Clearance Center, Inc. (CCC) will grant individual users reproduction licenses. See Copyright.com: The Rights Licensing Experts, [www.copyright.com](http://www.copyright.com) (last visited Apr. 2, 2009). However, collectives have not been in the business of granting micro-licenses. See Lunney, *supra* note 30, at 339-340.

32. One should not belittle the scope of the challenge ahead: millions of users who do not fit existing user profiles, using systems not equipped to grant them licenses.

not much care about the impact of copyright on end-users, provided that they remained just that: end-users. The notion of implied license was not necessary; most passive uses did not require a license until the Internet made reproduction a simple process. Rights holders took notice by trying to keep end-users at the end of the distribution chain so that they could continue to ignore their copyright footprints, that is, their impact on the exploitation of copyrighted material.<sup>33</sup> Third, it is true that pre-Internet end-users occasionally adapted preexisting content, but never on the scale of their passive content consumption. Interactive uses were a small minority, and those responsible for these individual uses and transformations could not produce multiple generations of perfect copies.<sup>34</sup> From a policy standpoint, this was arguably *de minimis* use.<sup>35</sup> One impact of the UGC phenomenon is the exponential rise in the number of individual uses and transformations of content, and the ability to share and disseminate content.

### *B. Private Use or Amateur Use?*

The Internet has radically transformed the possibilities of creation, reproduction, and distribution. Individual users naturally

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33. I am not making an empirical claim, merely a modest anecdotal one. The dozens of end-user license agreements (EULAs) I have read tend to limit reuse by end-users and ensure that end-users remain just that: at the end of the distribution chain. One example is the prohibition to create derivative works, such as in the RealNetworks EULA, which reads in part as follows: "You may not . . . modify, translate, reverse engineer, decompile, disassemble (except to the extent that this restriction is expressly prohibited by law) or create derivative works based upon the Software or Documentation." (on file with author).

34. An example would be music tracks copied on cassette tapes. These "private compilations" were not authorized by rights holders, even though they may have been fair use. The website of the Recording Industry Association of America (RIAA) states: "It's okay to copy music onto an analog cassette, but not for commercial purposes. It's also okay to copy music onto special Audio CD-R's, mini-discs, and digital tapes (because royalties have been paid on them) – but, again, not for commercial purposes." RIAA, *The Law*, [http://www.riaa.com/physicalpiracy.php?content\\_selector=piracy\\_online\\_the\\_law](http://www.riaa.com/physicalpiracy.php?content_selector=piracy_online_the_law) (last visited Apr. 30, 2009). But few right holders tried to prevent the copying because an analog tape could not produce generations of good-quality copies, as the lack of lawsuits indicates. When (short-lived) digital audio tapes were introduced, the music industry reacted by getting Congress to mandate technological locks to prevent second generation copying and imposing a levy of blank tapes. See Audio Home Recording Act of 1992, 17 U.S.C. §§ 1001-1010 (2000).

35. See, e.g., *Gordon v. Nextel Commc'ns*, 345 F.3d 922, 924 (6th Cir. 2003) ("To establish that a copyright infringement is *de minimis*, the alleged infringer must demonstrate that the copying of the protected material is so trivial 'as to fall below the quantitative threshold of substantial similarity, which is always a required element of actionable copying.'" (quoting *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 74 (2d Cir. 1997)).

want to harness the enormous capabilities of the Internet to access, use, and disseminate information and content. The demand is huge and ever increasing.<sup>36</sup> Technology has responded to this huge pull by providing the powerful technological means to meet user expectations.

Copyright was not initially designed for routine individual use, evidenced by the fact that exceptions and limitations in the Copyright Act were written with the professional user in mind.<sup>37</sup> This explains why, in several nations' laws, the main copyright exceptions can be grouped into two categories: first, private use, which governments previously regarded as "unregulatable" as a practical matter,<sup>38</sup> and where copyright law thus abdicated its authority; and second, specific uses by professional intermediaries such as libraries, schools, courts, and sometimes the government itself.<sup>39</sup> Regarding the former category, today there are still several very broad exceptions for "private use" (for example, in Italy and Japan).<sup>40</sup> End-users have

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36. Richard Stallman wrote a perceptive piece in 1996:

The Internet is relevant because it facilitates copying and sharing of writings by ordinary readers. The easier it is to copy and share, the more useful it becomes, and the more copyright as it stands now becomes a bad deal. This analysis also explains why it makes sense for the Grateful Dead to insist on copyright for CD manufacturing but not for individual copying. CD production works like the printing press; it is not feasible today for ordinary people, even computer owners, to copy a CD into another CD. Thus copyright for publishing CDs of music remains painless for music listeners, just as all copyright was painless in the age of the printing press. To restrict copying the same music onto a digital audio tape does hurt the listeners, however, and they are entitled to reject this restriction.

We can also see why the abstractness of intellectual property is not the crucial factor. Other forms of abstract property represent shares of something. Copying any kind of share is intrinsically a zero-sum activity; the person who copies benefits only by taking wealth away from everyone else. Copying a dollar bill in a color copier is effectively equivalent to shaving a small fraction off of every other dollar and adding these fractions together to make one dollar. Naturally, we consider this wrong. By contrast, copying useful, enlightening or entertaining information for a friend makes the world happier and better off; it benefits the friend and inherently hurts no one. It is a constructive activity that strengthens social bonds.

Richard Stallman, *Reevaluating Copyright: The Public Must Prevail*, 75 OR. L. REV. 291, 294 (1996).

37. For example, see section 108, which deals with libraries, and the compulsory license in section 115 for phonorecords. 17 U.S.C. §§ 108, 115 (2000).

38. Professor Alain Strowel considers the defense of the private sphere as one of the three main justifications for exceptions to copyright, the other two being circulation of information and cultural and scientific development. See Alain Strowel, *Droit d'auteur et accès à l'information: de quelques malentendus et vrais problèmes à travers l'histoire et les développements récents*, 12 CAHIERS DE PROPRIÉTÉ INTELLECTUELLE 185, 198 (1999).

39. See, e.g., 17 U.S.C. § 108 (2000).

40. The result of those exceptions is expressed as a combination of chattel rights of the owner of the copy and the related first-sale doctrine, and statutory exceptions to copyright—in particular, fair use.

always enjoyed "room to move," thanks to exceptions such as fair use and rights stemming from ownership of a physical copy of the protected work.<sup>41</sup>

Entering the private sphere also means that copyright has to fight a new, formidable opponent: the right to privacy, which is anchored, among other places, in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>42</sup> and in Articles 17 and 19 of the International Covenant on Civil and Political Rights, of December 16, 1966.<sup>43</sup> The right to make private use of copyrighted material is considered fundamental in several European copyright statutes,<sup>44</sup> and may have a constitutional basis in a number of other legal systems.<sup>45</sup> The fight over the right to privacy may be episodic or systematic, with the means of content distribution chosen by rights holders as the principal determinant. If privacy-invasive tools are used to monitor the actions of end-users,<sup>46</sup> privacy will become a major issue. If, however, systems are in place to decouple usage data from individual identities early on, then the issue may vanish from major policy radars.

Rights holders really only need to know what content is used, and how much, in order to distribute monies collected for mass uses.<sup>47</sup>

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41. See, e.g., *Doan v. American Book Co.*, 105 F. 772, 777 (7th Cir. 1901) ("A right of ownership in the book carries with it and includes the right to maintain the book as nearly as possible in its original condition, so far, at least, as the cover and the binding of the book is concerned." (citing *Harrison v. Maynard, Merrill & Co.*, 61 F. 689 (2d Cir. 1894))).

42. Convention for the Protection of Human Rights and Fundamental Freedoms, § I, art. 8, *opened for signature* Nov. 4, 1950, C.E.T.S. Doc. No. 005, *amended by* Protocol No. 11, *opened for signature* May 11, 1994, C.E.T.S. Doc. No. 155, *available at* <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm>.

43. International Covenant on Civil and Political Rights, Part III, arts. 17, 19, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171, *available at* [http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm).

44. See Lucie M. C. R. Guibault, *Contracts and Copyright Exemptions*, in COPYRIGHT AND ELECTRONIC COMMERCE: LEGAL ASPECTS OF ELECTRONIC COPYRIGHT MANAGEMENT 125 (P. Hugenholtz ed., 2000).

45. For a description of the constitutional basis in the United States, see Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace*, 28 CONN. L. REV. 981 (1996); see also Julie E. Cohen, *DRM & Privacy*, 18 BERKELEY TECH L.J. 575, 576-77 (2003) ("Properly understood, an individual's interest in intellectual privacy has both spatial and informational aspects. At its core, this interest concerns the extent of breathing space, both metaphorical and physical, available for intellectual activity. [Digital rights management] technologies may threaten breathing space by collecting information about intellectual consumption (and therefore exploration) or by imposing direct constraints on these activities.").

46. See Nicola Lucchi, *Countering the Unfair Play of DRM Technologies*, 16 TEX. INTELL. PROP. L.J. 91, 94-102 (2007).

47. As a concrete example, if a client is monitoring which songs are transferred between users online (in a hypothetical licensed "sharing" model), then collectives or equivalent entities administering the funds would need to know how often each song is

Presumably they do not need to know precisely *who* is listening to what. Performing rights organizations<sup>48</sup> need to know not just which song was used and how many times, but also by whom and when, because they might attribute higher value to a prime-time use by a major user than a 4:00 a.m. use by a minor user.<sup>49</sup> By contrast, use by millions of individual people should have a standard value and, therefore, usage data linked to individuals would be unnecessary. Consequently, privacy-compliant systems are possible, though marketing data may be a different issue. While capturing only aggregated demographic data on users for marketing purposes is a viable option, the move from micro- to “nano-marketing” targeted to individual preferences is likely to grow and pose privacy challenges that will not be copyright-specific.<sup>50</sup>

An additional problem related to the shift to individual users is that, while copyright professionals tend to follow copyright rules as a business decision and as a matter of basic risk assessment, individual end-users must internalize the norm. Otherwise, huge, and sometimes futile, enforcement efforts are required.<sup>51</sup>

Owing to this perceived inadequacy of copyright licensing, normative concerns about privacy, and ownership of copies, social norms have emerged by which some uses or reuses of digital content are acceptable. These norms, often ostensibly fueled by the confusion over fair use, have not responded well to traditional prohibitions against reproduction, preparation of derivative works, and communicating or publicly performing protected content. In fact, combined with ineffective enforcement,<sup>52</sup> copyright has barely made a dent in the massive reuse of protected content.<sup>53</sup> The rather vague

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transferred, not by whom. Privacy of users is a key consideration. See Laurence Helfer, *Collective management of Copyright and Human Rights*, in DANIEL GERVAIS, *COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS* 73 (2005). Demographic or geographic data could likely be captured for marketing purposes.

48. A “performing rights society” is an association, corporation, or other entity that licenses the public performance of nondramatic musical works on behalf of copyright owners of such works, such as the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC, Inc. 17 U.S.C. §101 (2000).

49. See MIHÁLY FICSOR, *COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS* 44-48 (World Intellectual Property Organization 2002).

50. The term “nano-marketing” has emerged in this context to reference marketing efforts directed at a very small, targeted audience. See The Mattis Group, <http://www.mattisgroup.com/how.htm> (last visited Apr. 30, 2009).

51. See McBride & Smith, *supra* note 24.

52. When measured in terms of overall decrease in unauthorized use, enforcement has been ineffective.

53. See Brett Luncford & Shane Luncford, *Meh, The Irrelevance of Copyright in the Public Mind*, 7 NW. J. TECH. & INTELL. PROP. 33, 33 (2008).

notions of fair use, and of de minimis use,<sup>54</sup> arguably support these social norms, buttressed by the perceived social value in letting users create freely and making content more available.<sup>55</sup> Whether those norms and practices can be imbued with legal status and affect how courts apply copyright to UGC remains unclear.<sup>56</sup> Still, there is undeniably a meme, with a strong built-in feedback loop, that many forms of UGC are “acceptable” within undefined parameters. This may explain model codes and similar efforts to define those parameters and “tweak the meme.”<sup>57</sup>

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54. The lack of enforcement is a key consideration. In patent law, it has been argued that, while most forms of experimental use are illegal, *see* *Madey v. Duke Univ.*, 307 F.3d 1351, 1362 (Fed. Cir. 2002), it is nonetheless routinely practiced because the cost of enforcement is high and the damages typically low, *see Intellectual Property: American Exceptionalism or International Harmonization?*, 3 N.Y.U. J. L. & LIBERTY 448, 464 (2008). One can analogize it to efficient breach. Whether the same argument can be made in the field of copyright, with high statutory damages—\$150,000 for wilful infringement, *see* 17 U.S.C. § 504(c)(2) (2000). An interesting view of the conflict between those damages and the status of individual end-user was expressed by Chief Judge Davis who, in granting the motion for a new trial presented by a Minnesota woman ordered to pay \$220,000 in damages for file-sharing, wrote:

All of the cited cases involve corporate or business defendants and seek to deter future illegal commercial conduct. The parties point to no case in which large statutory damages were applied to a party who did not infringe in search of commercial gain . . . Part of the justification for large statutory damages awards in copyright cases is to deter actors by ensuring that the possible penalty for infringing substantially outweighs the potential gain from infringing. In the case of commercial actors, the potential gain in revenues is enormous and enticing to potential infringers. In the case of individuals who infringe by using peer-to-peer networks, the potential gain from infringement is access to free music, not the possibility of hundreds of thousands—or even millions—of dollars in profits. This fact means that statutory damages awards of hundreds of thousands of dollars is certainly far greater than necessary to accomplish Congress's goal of deterrence. Her status as a consumer who was not seeking to harm her competitors or make a profit does not excuse her behavior. But it does make the award of hundreds of thousands of dollars in damages unprecedented and oppressive.

*Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1227-28 (D.Minn. 2008). More controversial was her finding that “by using Kazaa, Thomas acted like countless other Internet users. Her alleged acts were illegal, but common.” *Id.* at 1227. Whether that can stand as a defense is a most interesting question, but one I will have to leave aside for now.

55. *See* Julie E. Cohen, *WIPO Copyright Treaty Implementation in the United States: Will Fair Use Survive?*, 21 EUR. INTELL. PROP. REV. 236, 244-45 (1999); Peter Jaszi, *Copyright, Fair Use And Motion Pictures*, 2007 UTAH L. REV. 715, 729 (2007). Who would have been able to say with any certainty that making available thumbnail pictures was fair use? *See* *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007).

56. *See* Edward Lee, *Warming Up to User Generated Content*, 2008 U. ILL. L. REV. 1459, 1466-68.

57. For two different efforts on that front, compare *Fair Use Principles for User Generated Video Content*, ELECTRONIC FRONTIER FOUNDATION, <http://www.eff.org/issues/ip-and-free-speech/fair-use-principles-usergen>, with *User Generated Content Principles*, <http://www.ugcprinciples.com> (last visited Apr. 2, 2009) (listing the principles made available by leading commercial copyright owners).



Again, copyright's ineffectual response to the social norms that underpin UGC has multiple factors: application of a regulatory system not designed for mass consumptive use rather than mass reuse; inability or unwillingness to license both types of use because of either the type of use or the type of user; normative battles regarding the rights of end-users;<sup>58</sup> and a marked lack of understanding, at least until very recently, of network effects and the use of the Internet to create virtual groups of friends who want to "share" the pictures, shows, books, or music they like but in most cases have not authored.<sup>59</sup>

This poses the question: how far does the private sphere extend? Does it explode when a digital use inside it is made available to others online? The social norms at play do not seem to reflect the traditional distinction between private (i.e., tolerated) and public (i.e., unauthorized) use. These norms have existed for decades and are reflected in the traditional views expressed by large rights holders. For example, the Recording Industry Association of America condones limited copying for private use, but does not approve of making copyrighted content available online.<sup>60</sup> Technologically, however, the same copy that is legal to make for personal use becomes illegal if made available to others, again according to the traditional view.<sup>61</sup> On a technical level, making it available online would then be an infringement under one of several possible theories across various national legal systems: in Canada, it could be considered the authorization of communication to the public,<sup>62</sup> and in the United States it could be deemed an inducement to download and therefore copy without authorization, or to publicly perform.<sup>63</sup> Put differently,

58. See Jeremy Stanley *Managing Digital Rights Management: Effectively Protecting Intellectual Property And Consumer Rights In The Wake Of The Sony CD Copy Protection Scandal*, J. L. & POL'Y FOR INFO. SOC'Y 157, 168-75 (2008).

59. See Daniel J. Gervais, *The Price of Social Norms: Towards a Liability Regime for File-Sharing*, 12 J. INTELL. PROP. L. 39, 40-43 (2004).

60. See RIAA – Piracy: Online and On the Street, [http://www.riaa.com/physicalpiracy.php?content\\_selector=piracy\\_online\\_the\\_law](http://www.riaa.com/physicalpiracy.php?content_selector=piracy_online_the_law) (last visited Apr. 2, 2009) ("[B]urning a copy of CD onto a CD-R, or transferring a copy onto your computer hard drive or your portable music player, won't usually raise concerns so long as:

- The copy is made from an authorized original CD that you legitimately own
- The copy is just for your personal use.")

61. See *id.*

62. See Soc'y of Composers, Authors & Music Publishers of Can. v. Can. Ass'n of Internet Providers, [2004] 2 S.C.R. 427 (Can.); Daniel J. Gervais, *The Purpose of Copyright Law in Canada*, 2:2 U.O.L.T.J. 315, 323-25 (2006).

63. See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 919 (2005); Bennett Lincoff, *Common Sense, Accommodation and Sound Policy for the Digital Music Marketplace*, 2 J. INT'L MEDIA & ENT. L. 1, 8 (2008) ("Prior to the Internet, the reproduction and distribution rights, on the one hand, and the public performance right, on

the disconnect between social and legal norms lies in the blurring of the private/public distinction.

We can conclude from this analysis that traditionally there were two distinctions: one between private and public use, and another between professional and amateur use. The technological environment until approximately the year 2000 meant that the two different distinctions overlapped; amateur meant private and professional meant public.

The shift from one-to-many to many-to-many dissemination modes destabilized this system, and amateur no longer meant private. Normatively, the question is this: should amateur use prevail over public use when the two realms are separated? Some—most famously Professor Lawrence Lessig—have argued for an amateur “exemption” to allow remix.<sup>64</sup> Several normative arguments have been made to support this view, as well as some pragmatic arguments, such as the difficulty in licensing amateur uses.<sup>65</sup> If, however, the amateur leaves her private sphere,<sup>66</sup> then normatively the issue is no longer the confrontation between privacy and copyright, but one of amateur versus professional. While historically professional use was the sole focus of copyright law, if practical considerations rather than normative ones drove the absence of the amateur creator, then those amateurs should probably learn to use exemptions such as fair use or safe harbors. Then again, a valid case can be made that copyright need not consider “small” everyday uses, and instead should focus on “superusers.”<sup>67</sup> As a practical matter, this rings true if the goal is to transactionally license single uses, although blanket licenses for some uses may also be used. This Article will return to considering fair use

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the other, were separate and distinct, exploited in different ways, and subject to different business models and licensing regimes. Digital technology generally, and the Internet in particular, has rendered unenforceable certain of these pre-existing rights and blurred the distinctions between others. Through the Internet, the means of reproduction, distribution and public performance of songs and of the recordings that embody them have been merged into a single act of digital transmission that can be initiated and completed on a massive scale in a matter of moments at practically no cost by anyone and everyone in the world with network access. The industry's strategy to salvage the sales-based revenue model proceeded in opposition to these changed circumstances which it never could have overcome.”).

64. See LESSIG, *supra* note 2.

65. I will not develop this idea here but many forms of repertory or blanket licenses are possible. See Gervais, *supra* note 27.

66. Deciding in which cases this happens would require a different article, and the answer is likely to be different in each legal system.

67. See Paul Ohm, *The Myth of the Superuser: Fear, Risk, and Harm Online*, 41 U.C. DAVIS L. REV. 1327, 1398-99 (2008).

in the context of this issue after a brief attempt at a taxonomy of UGC in the next Part.

## II. A COPYRIGHT-RELATED TAXONOMY OF USER-GENERATED CONTENT

### *A. Proposed Taxonomy*

There have been some efforts to categorize UGC. For example, the Organisation for Economic Co-operation and Development's (OECD) report on user-created content (UCC)<sup>68</sup> distinguished UCC along two axes:<sup>69</sup> first, based on the type of content (text, novel, or poetry; photos, images, music, and audio; video; educational content; mobile content; or virtual content); and second, according to its distribution platform (blogs, text-based collaboration formats, sites allowing feedback on written works, group-based aggregation, podcasting, social network sites, virtual worlds, or content or file-sharing sites).<sup>70</sup> This effort is certainly a useful one, guiding us to draw certain distinctions, but it is unsatisfactory from a copyright perspective for a number of reasons. First of all, the distinctions between type and platform are not crystalline (for example, "virtual worlds" is used in both), and second, copyright has tried to be technologically neutral<sup>71</sup> and has not drawn distinctions between categories of content.<sup>72</sup> It is true, however, that some distinctions between types of use and types of users induce normative distinctions

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68. While the OECD uses this term, it may be deemed a synonym of user-generated content.

69. ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, PARTICIPATIVE WEB AND USER-CREATED CONTENT, 34-38 (Apr. 12, 2007), *available at* <http://213.253.134.43/oecd/pdfs/browseit/9307031E.PDF> [hereinafter OECD Report]. UCC is an unfortunate acronym for readers in the United States, who are more accustomed to associating it with the Uniform Commercial Code. See U.C.C. (2003).

70. ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, *supra* note 69, at 15-16.

71. See, e.g., H.R. Rep. No. 105-551, pt.2, at 25 (1998) ("[T]he digital environment poses a unique threat to the rights of copyright owners, and as such, necessitates protection against devices that undermine copyright interests. In contrast to the analog experience, digital technology enables pirates to reproduce and distribute perfect copies of works—at virtually no cost at all to the pirate. As technology advances, so must our laws. The Committee thus seeks to protect the interests of copyright owners in the digital environment, while ensuring that copyright law remain technology neutral.").

72. Apart from the limited performance right in sound recordings (which, in any event, are not copyrighted works in legal systems outside the United States, but rather objects of a "neighboring" or related right), § 106 rights apply to all categories of works. See, e.g., George H.C. Bodenhausen, *Protection of "Neighboring Rights,"* 19 LAW & CONTEMP. PROBS. 156 (1954).

about possible exceptions. Educational users, for example, may stake a public interest claim to free, spontaneous use of classroom material.<sup>73</sup>

To understand the application of copyright, I suggest that we should recognize only three categories of user-generated content: user-authored content, user-derived content, and user-copied content. The first two may be grouped under the umbrella concept of “user-created content,” although I find this notion mostly unhelpful for the purposes of this analysis.

### 1. User-Authored Content

Theoretically, this type of content is an easy question. It involves neither copying nor derivation nor adaptation. The author is free to copy, upload, perform, and/or make available her content on any basis, including allowing free and unrestricted use, imposing conditions for free use such as those found in Creative Commons licenses,<sup>74</sup> or licensing the content commercially.

One issue that may surface, however, is the interaction between the contracts employed by users of UGC-empowering sites and technologies, including social networking sites, which in some cases convey a license to the operator of the site.<sup>75</sup>

### 2. User-Derived Content

This second category of UGC is by far the most complicated in terms of copyright, because a satisfactory inquiry would require a

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73. See AGREEMENT ON GUIDELINES FOR CLASSROOM COPYING IN NOT-FOR-PROFIT EDUCATIONAL INSTITUTIONS WITH RESPECT TO BOOKS AND PERIODICALS, H.R. REP. NO. 94-1476, at 68 (1976).

74. See Licenses – Creative Commons, <http://creativecommons.org/about/licenses> (last visited Apr. 2, 2009).

75. See, e.g., Christina J. Hayes, Note, *Changing the Rules of the Game: How Video Game Publishers Are Embracing User-Generated Derivative Works*, 21 HARV. J.L. & TECH. 567, 569 (2008). Most websites require users to agree to a set of terms and conditions in which the user agrees to grant a license to the website owner to use the material the user posts. See Charles J. Biederman & Danny Andrews, *Applying Copyright Law To User-Generated Content*, L.A. LAW., May 2008, at 14 (“Many sites that utilize UGC include language in their terms and conditions and EULAs requiring users to warrant that their submitted content does not infringe on any third party’s intellectual property rights. These sites generally allow users to retain ownership of the content they create (to the extent that the content is noninfringing and otherwise permissible by law); require users to grant the ISP and its users very broad licenses to reproduce, transmit, or otherwise use the content; and provide dispute resolution procedures, which often include mandatory arbitration and other provisions required by the [Digital Millennium Copyright Act].”).

normative analysis of the underlying right.<sup>76</sup> However, if the derivation and possibly also the reproduction of the preexisting content is a fair use, then the matter is of less importance. This Article considers the application of the fair use doctrine in Part III.

### 3. User-Copied Content

The third category is not inordinately complicated. Copying is *prima facie* infringement, and this type of copying, where the user merely copies preexisting content, is thus generally illegal and illegitimate, though some might argue that it is understandable from the point of view of “gregarious” users.<sup>77</sup> Uploading a song, picture, or film will be infringement unless it is a fair use. However, a few questions do emerge.

First, the ratio issue might become relevant if only a short excerpt is used—this issue is not limited to the online environment.<sup>78</sup>

76. A task I will undertake in a different paper.

77. This could be discussed on many levels. At a philosophical level, imitation is a way of belonging. For a Rawlsian analysis, see Speranta Dumitru, *Are Rawlsians Entitled to Monopoly Rights*, in *INTELLECTUAL PROPERTY AND THEORIES OF JUSTICE* 57, 61 (Axel Grosser et al. eds., 2008) (“A ‘companion effect’, Rawls maintains, of the Aristotelian principle [according to which, all things being equal, human beings enjoy the exercise of their innate and trained abilities] is the general tendency to appreciate, learn and imitate products of human excellence: ‘as we witness the exercise of well-trained abilities by others, these displays are enjoyed by us and arouse a desire to do the same things ourselves.’”). Recoding is also a form of discourse. See David M. Morrison, *Bridgeport Redux: Digital Sampling And Audience Recoding*, 19 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 75, 79 (“[R]ecoding [may be defined] as ‘using the cultural object or recognizable elements of the object in a forum for third persons to achieve different effects than those generally achieved already by the object; the different results must affect the meaning of the original object in the social discourse.’”).

78. The ratio is the amount used measured against the totality of the work from which it is taken. This may be *de minimis* (see *supra* notes 35 and 54 and accompanying text). However, the analysis is not limited to quantitative elements. See, e.g., *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 548-49 (1985) (holding that “generous verbatim excerpts” of a particularly quantitatively important part of a book did not constitute a fair use). The circumstances under which the copy of the book was secured may have influenced the outcome.; see also *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 613 (2d Cir. 2006) (finding that “copying the entirety of a work is sometimes necessary to make a fair use”); *Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, 166 F.3d 65, 71 (2d Cir. 1999) (holding that copying a paragraph of a news story was not infringing); *Publ’ns Int’l, Ltd. v. Meredith Corp.*, 88 F.3d 473, 480-81 (7th Cir. 1996) (holding that copying a recipe out of a collection of recipes was not infringing); *Alberto-Culver Co. v. Andrea Dumon, Inc.*, 466 F.2d 705, 710 n.2 (7th Cir. 1972) (holding that copying a paragraph from a label on a bottle of deodorant was not infringing). The ratio is applied much more on a qualitative than a quantitative basis, and its application is informed by the circumstances and purpose of the excerpt used. See Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549, 615 (2008).

That said, many works uploaded or made available online are integral copies of preexisting works. Secondly, what will be the scope of the "Google defense" (that making content available in a different form is fair use) going forward?<sup>79</sup> This Article discusses the case from which this defense arose in Part III.

#### 4. Peer-to-Peer as UGC

While unauthorized peer-to-peer (P2P) file-sharing is generally illegal,<sup>80</sup> it has been abundantly clear for years that it must eventually be monetized in order for the industry to equal in the online market the revenue it made selling physical copies.<sup>81</sup> I do not make a normative claim here; I make two empirical ones. First, if the recent past is a prologue, P2P cannot be stopped; second, the music industry loses money hand over fist in any scenario in which they try to stop P2P.<sup>82</sup> Put differently, even if P2P is ever brought down to a lower level, it will not significantly increase industry revenue, and it will raise broader public interest concerns if right holders force millions of people off of the web by shutting down Internet accounts, university servers, and other networks.<sup>83</sup>

Controlled monetizing is also the best possible outcome for composers, artists, producers, and the users who want to keep the music coming. A subscription service that anonymously tracks usage and allows legal users of that service to "share" music seems like an optimal outcome at this stage.<sup>84</sup>

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79. See *infra* note 87 and accompanying text.

80. It typically requires a reproduction on the server from which the copy is made and a copy on the computer on which it is received. The transmission itself may be a separate instance of infringement. See *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 919 (2005).

81. For a review of various P2P monetization proposals, see Salil K. Mehra, *The iPod Tax: Why the Digital Copyright System of American Law Professors' Dreams Failed in Japan*, 79 U. COLO. L. REV. 421 (2008).

82. See, e.g., Antionette D. Bishop, *Illegal P2P File Sharing on College Campuses – What's The Solution?*, 10 VAND. J. ENT. & TECH. L. 515, 520 (2008); Adam Liptak, *In the Heated Fight Over Music Piracy, a Rare Stand for Privacy*, N.Y. TIMES, Dec. 31, 2007, at A11.

83. Anonymous tracking was proposed in France for "repeat peer-to-peer offenders." See Jacqui Cheng, *"Three strikes" P2P rule inches closer to law in France*, ARS TECHNICA, Nov. 2, 2008, available at <http://arstechnica.com/news.ars/post/20081102-three-strikes-p2p-rule-inches-closer-to-law-in-france.html>.

84. See Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace*, 28 CONN. L. REV. 981, 981-83, 987 (1996).

### III. FAIR USE AND UGC

In any discussion of the fair use doctrine, especially one regarding the online environment, the tangled nature of web copyright becomes even more complicated, in part because of First Amendment issues.<sup>85</sup> That said, using the taxonomy proposed in Part II, some distinctions and conclusions may be easier to draw than others.

#### A. User-Copied Content

If the production of user-copied content is a fair use in a given fact pattern, it will be for reasons other than those applicable to user-authored or user-derived content. The production of such content will be a fair use if the user's act of providing access to it is fair use, which would typically rest on First Amendment grounds. Full analysis of how the First Amendment might be used as a defense to a copyright infringement claim is beyond the scope of this Article. However, as Professor Netanel has noted, "[First Amendment] challenges to copyright law 'as applied' would likely focus on whether the regulation leaves open 'ample alternative channels' for communication of the burdened speech."<sup>86</sup>

This doctrine may have been extended by the "Google defense."<sup>87</sup> Reversing in part a decision finding that making thumbnail versions of magazine *Perfect 10*'s "adult" images was not a fair use because it could hamper the market for such thumbnails,<sup>88</sup> the Ninth Circuit held that the thumbnails were a fair use.<sup>89</sup> Referencing *Campbell v. Acuff-Rose*,<sup>90</sup> the court noted that the first fair use factor<sup>91</sup> required a court to consider

the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes. The central purpose of this inquiry is to determine whether and to what extent the new work is

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85. See Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970); Neil W. Netanel, *Locating Copyright within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001).

86. Netanel, *supra* note 85, at 35 (discussing the test enunciated in *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 185 (1997)).

87. *Perfect 10, Inc. v. Google, Inc.*, 416 F. Supp. 2d 828, 836 (C.D. Cal. 2006).

88. *Id.* at 851. The original decision ignored the additional steps required to get the thumbnail image to a cellphone. See Britton Payne, Comment, *Imperfect 10: Digital Advances and Market Impact in Fair Use Analysis*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 279, 289-90 (2006).

89. *Perfect 10, Inc. v. Amazon, Inc.*, 487 F.3d 701, 725 (9th Cir. 2007), *amended on rehearing by* 508 F.3d 1146, 1168 (9th Cir. 2007).

90. 510 U.S. 569 (1994).

91. See 17 U.S.C. § 107(1) (2000).

'transformative.' A work is 'transformative' when the new work does not 'merely supersede the objects of the original creation' but rather 'adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.'<sup>92</sup>

This analysis seems correct, but may have been applied to the wrong fact pattern.<sup>93</sup> In *Campbell*, the allegedly infringing work, a hip-hop version of Roy Orbison's "Pretty Woman," was created content, whereas the *Perfect 10* court applied it to a new form of dissemination.<sup>94</sup> In other words, the court ignored the traditional difference between work-centered rights and dissemination-centered rights. Before that case, transformativeness focused on changes to the work, including a creative recontextualization, but not a mere modification in its mode of dissemination. Put differently, recontextualization (e.g. by Jeff Koons<sup>95</sup>) must involve a transformation (alteration) of the work itself, not to the mode of access.<sup>96</sup> Recontextualization involved creativity and one could hypothesize that transformativeness properly conceived requires Feistian originality, that is a modicum of (human-generated) creativity.<sup>97</sup> The automated grouping and/or reformatting of preexisting works copied by a search engine in response to a user search hardly fit this criterion. Ironically, the Ninth Circuit quoted its own *Wall Data* opinion which seems to support that distinction:<sup>98</sup> "A use is considered transformative only where a defendant changes a plaintiff's copyrighted work or uses the plaintiff's copyrighted work in

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92. *Amazon.com, Inc.*, 508 F.3d at 1164.

93. Paul Goldstein quipped that the decision was "a triumph of mindless sound bite over principled analysis," and added that "[p]arody is a fair use category; the mere transport of a work intact from one medium to another—without abridgment or other modification—is not. Is there any doubt that, faced with facts like these, Justice Story—or Justice Souter—would have placed them on the infringement side of the line? What principle has changed in the 167 years since Folsom to make a relevant difference?" Paul Goldstein, *Fair Use in Context*, 31 COLUM. J.L. & ARTS 433, 442 (2008).

94. *Compare Campbell*, 510 U.S. at 571-94, with *Perfect 10, Inc. v. Google, Inc.*, 416 F. Supp. 2d 828, 831-51 (C.D. Cal. 2006).

95. See *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006). See also *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006).

96. In *Castle Rock Entertainment v. Carol Publishing Group, Inc.*, 150 F.3d 132 (2d Cir. 1998), a case involving the creation of a test on well-known television series, found the copying non-transformative use, noting that the defendant had only "minimally alter[ed]" the Plaintiff's content.

97. See *Feist Publications v. Rural Telephone Service Company, Inc.*, 499 U.S. 340 (1991). For a comment suggesting that the test of a modicum of creativity is well-grounded normatively (independently of its ostensible constitutional origin in the case), see Daniel Gervais, *Feist Goes Global: A Comparative Analysis of the Notion of Originality in Copyright Law*, 49 J. COPYRIGHT SOC. OF THE USA 949, 973-980 (2002).

98. *Wall Data, Inc. v. L.A. County Sheriff's Dept.*, 447 F.3d 769, 778 (9th Cir. 2006).



a different context such that the plaintiff's work is transformed into a new creation."<sup>99</sup>

Transformativeness was historically and normatively linked to expression, not re-dissemination.<sup>100</sup> As mentioned above, dissemination may also be fair use, but on other grounds.<sup>101</sup> One may argue that there are public policy imperatives that would allow thumbnail access and, more generally, favor broad access to material on search engines such as Google.<sup>102</sup> It is unclear, however, that transformativeness is the appropriate vehicle to carry those concerns forward.

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99. *Amazon.com, Inc.*, 508 F.3d at 1165 (quoting *Wall Data*, 447 F.3d at 778).

100. Its source in U.S. copyright law may be Pierre Leval's 1990 article, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990), in which he wrote:

[T]he purpose and character of the use" raises the question of justification. Does the use fulfill the objective of copyright law to stimulate creativity for public illumination? This question is vitally important to the fair use inquiry, and lies at the heart of the fair user's case. Recent judicial opinions have not sufficiently recognized its importance.

In analyzing a fair use defense, it is not sufficient simply to conclude whether or not justification exists. The question remains how powerful, or persuasive, is the justification, because the court must weigh the strength of the secondary user's justification against factors favoring the copyright owner.

I believe the answer to the question of justification turns primarily on whether, and to what extent, the challenged use is transformative. The use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original. A quotation of copyrighted material that merely repackages or republishes the original is unlikely to pass the test; in Justice Story's words, it would merely "supersede the objects" of the original. If, on the other hand, the secondary use adds value to the original—if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.

Transformative uses may include criticizing the quoted work, exposing the character of the original author, proving a fact, or summarizing an idea argued in the original in order to defend or rebut it. They also may include parody, symbolism, aesthetic declarations, and innumerable other uses.

*Id.* at 1111 (notes omitted and emphasis added).

101. See *supra* notes 7-9 and accompanying text.

102. This concern was central in the U.S. Court of Appeals for the Ninth Circuit's previous decision in *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 816, 819 (9th Cir. 2003) ("Arriba's use of the images serve[d] a different function than Kelly's use—improving access to information on the internet versus artistic expression."). It was cited with approval by the court in *Amazon.com, Inc.*, 508 F.3d at 1165, which added that "search engine provides social benefit by incorporating an original work into a new work, namely, an electronic reference tool. Indeed, a search engine may be more transformative than a parody because a search engine provides an entirely new use for the original work, while a parody typically has the same entertainment purpose as the original work. . . . [E]ven making an exact copy of a work may be transformative so long as the copy serves a different function than the original work." *Id.*

One may counter, naturally, that no such distinction is made in the copyright statute.<sup>103</sup> Yet historical analysis shows that the 1976 Act should be read as a significant departure from the principles concerning derivative works and fair use in the case law concerning the 1909 Act.<sup>104</sup> The conclusion reached in *Perfect 10* may be correct on the basis of a “fresh” reading of the text of § 107 because it focused on the first factor of fair use, purpose, and the fourth factor, effect on the market—the two most important factors.<sup>105</sup> Whether or not that is the case, the court should not have relied on transformativeness. Now we must now distinguish transformative dissemination from transformative creation, which is hard to reconcile with *Campbell*.<sup>106</sup>

Professor Anthony Reese’s analysis of relevant fair use cases since *Campbell* makes a critical point:<sup>107</sup> the inquiry into whether the use of a work may be transformative from a teleological perspective is distinct from the question of whether copyright was infringed.<sup>108</sup> Theoretically, a “transformative use” may infringe the reproduction right, the right to make derivative works, or both. The fair use defense could successfully apply to both rights. Yet, not all derivative works are transformative, and some transformative uses do not involve the creation of a derivative work.<sup>109</sup> In fact, one court found that these were exclusive categories.<sup>110</sup>

103. See 17 U.S.C. § 107 (2000).

104. This is not what Congress intended apparently. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).

105. See P. Leval, *supra* note 100.

106. See *Campbell*, 510 U.S. at 578-79: “The enquiry into the purpose and character of the use ‘asks . . . whether and to what extent the new work is ‘transformative.’ Although such transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the *creation of transformative works*.” (emphasis added) (citations omitted).

107. R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 31 COLUM. J. L. & ARTS 467, 494 (2008).

108. *Id.* at 494 (“[A]ppellate courts also clearly do not view the preparation of a derivative work—or any transformation or alteration of a work’s content—as necessary to a finding that a defendant’s use is transformative. Instead, courts focus on whether the purpose of the defendant’s use is transformative.”).

109. For example, in *Warner Bros. Entm’t Inc. v. RDR Books* (perhaps better known as the *Harry Potter Lexicon* case), the court held that the lexicon was not a derivative work before continuing on to decide the issue of transformativeness for the purpose of its fair use analysis. 575 F. Supp. 2d 513, 538-39 (S.D.N.Y. 2008).

110. See *Castle Rock Entm’t, Inc. v. Carol Publ’g Group, Inc.*, 150 F.3d 132, 143 (2d Cir. 1998) (“Although derivative works that are subject to the author’s copyright transform an original work into a new mode of presentation, such works—unlike works of fair use—take expression for purposes that are not ‘transformative.’”).

It is possible to draw a distinction between the application of Google's defense<sup>111</sup> in *Perfect 10* to an alleged violation of the right of reproduction and its application to the right to prepare derivative works. Preparing derivatives is not necessarily copying. However, it is doubtful that Google's automated generation of search results and inline linking and framing functions<sup>112</sup> constitutes a derivative work, especially when looked at through a Feistian lens.<sup>113</sup>

### B. User-Authored Content

A fair use defense should not be required, because where no previous copyrighted content is reused, there should be no finding of infringement.

### C. User-Derived Content

The harder fair use question is that of user-derived content. Courts do not always make a clear distinction between infringement of the right to make copies and the right to prepare derivative works when applying fair use.<sup>114</sup> In *Campbell*, however, the Supreme Court did consider the effect on the market for "derivative uses" and focused on normal licensing transactions.<sup>115</sup>

While it may be difficult, and probably not desirable, to eschew equitable considerations entirely, I suggest that the purpose of the

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111. So called here because it is the making available of content in a different form through a search engine that the court considered transformative. If this type of "transformation" is indeed a fair use, then presumably it would apply to many categories of content that Google users may locate on the Internet using search engines such as Google's.

112. See *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1160 (9th Cir. 2007) (explaining that "Google does not, however, display a copy of full-size infringing photographic images for purposes of the Copyright Act when Google frames in-line linked images that appear on a user's computer screen"); see also Lee Burgunder & Barry Floyd, *The Future Of Inline Web Designing After Perfect 10*, 17 TEX. INTELL. PROP. L.J. 1, 2-3 (2008).

113. See *Feist Publ'ns v. Rural Tel. Co.*, 499 U.S. 340, 345-47 (1991). The *Feist* Court noted that originality emerged from a modicum of creativity in the form of choices made by the author that were not dictated by function or standards. *Id.* at 346-47. Where are the creative choices that generate the required originality here? See Daniel J. Gervais, *Feist Goes Global: A Comparative Analysis of the Notion of Originality in Copyright Law*, 49 J. COPYRIGHT. SOC.Y USA 949, 952-53, 975-81 (2002).

114. For a case where the court seemed to analyze the two separately, see *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965, 969 (9th Cir. 1992).

115. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592 (1994) ("The market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop. Yet the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market.").

right to prepare derivative works was to protect markets that an author may wish to exploit herself. The analysis is not subjective; it focuses on whether the market in question is normal for the type of work concerned.<sup>116</sup> The analysis should also reflect the nature and extent of what was taken from the first work. A parody is non-infringing because it does not cater to a market that the author should want to exploit and from which should be allowed to exclude others.<sup>117</sup>

As noted in Part I, noncommercial individual reuses are rarely licensed, even less so through collective systems.<sup>118</sup> The typical transaction would likely involve small amounts of money, and thus transaction costs would be a dominant consideration. Two different avenues are possible. First, automated systems may be a practicable solution, even though the cost of developing them is not inconsequential<sup>119</sup>—or second, repertory-based licenses.<sup>120</sup> Should either solution emerge as an available option, then the normalcy of that form of exploitation might trigger the application of the three-step test<sup>121</sup> and impact the analysis of the fourth fair use factor.<sup>122</sup>

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116. See Daniel J. Gervais, *Towards A New Core International Copyright Norm: The Reverse Three-Step Test*, 9 MARQ. INTELL. PROP. L. REV. 1, 1-37(2005) [hereinafter Gervais, *Towards A New Core International Copyright Norm*].

117. *Campbell*, 510 U.S. at 593 (“[T]he only harm to derivatives that need concern us . . . is the harm of market substitution. The fact that a parody may impair the market for derivative uses by the very effectiveness of its critical commentary is no more relevant under copyright than the like threat to the original market.”); see also *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1274-76 (11th Cir. 2001).

118. See *supra* note 31 and accompanying text.

119. For an analysis of technology and filters in particular, see Brette G. Meyers, Note, *Filtering Systems or Fair Use? A Comparative Analysis of Proposed Regulations For User-Generated Content*, 26 CARDOZO ARTS & ENT. L.J. 935 (2009).

120. Repertory-based licenses are sometimes referred to as “blanket licenses,” unless the system is supported by a compulsory license. The term seems incorrect unless one accepts that the blanket has only partial coverage. See Salil K. Mehra, *The Ipod Tax: Why the Digital Copyright System of American Law Professors' Dreams Failed in Japan*, 79 U. Colo. L. Rev. 421, 424 n.9 (2008). Any voluntary system based on contractual transfer to a central entity of the authority to license will be incomplete because not all rights holders will join, especially if a worldwide view is taken. A possible compromise, however, is the application by law of an extended repertoire system. See Daniel J. Gervais, *The Changing Role of Copyright Collectives*, *supra* note 27, at 28-34. Under such a system, once a substantial number of rights holders have voluntarily joined a collective system, the law may extend to the collective entity the authority to license on behalf of all other rights holders worldwide, except those who opt out. See *id.*

121. The three-step test is contained in Article 13 of the TRIPS Agreement—the WTO Agreement on trade-related aspects of intellectual property rights—and acts as a filter to determine the compatibility of exceptions and limitations contained in national copyright laws. See Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994). Section 110(5)(b) of the U.S. Copyright Act was found inconsistent with the test in 2000 by a World Trade Organization dispute-settlement panel. See D. GERVAIS, *THE TRIPS AGREEMENT:*

The availability of a technological licensing solution should not, in itself, be sufficient evidence that a market exists. It is a sign that a market is possible. Contrary to *Texaco*, a case in which the Second Circuit considered the existence of a viable licensing solution (namely Copyright Clearance Center, Inc.) as a valid consideration in determining market harm, no such system is in place and working and thus the emergence of a technology-based solution should have a smaller impact than it did in that case.<sup>123</sup>

In the same way that a transformativeness analysis should be, as suggested above, informed by the creation/dissemination distinction,<sup>124</sup> the fair use analysis applied to online derived content must include an adequate fairness test. A distinction must be made between use value gained by the user and lost exchange value by the right holder.<sup>125</sup> The proper test is one of commercial exploitation and seems to focus on the latter. Put in blunter terms: is the derivation parasitic or simply free-riding?<sup>126</sup> Parasitic behaviour imposes

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DRAFTING HISTORY AND ANALYSIS 237-48 (3d ed. 2008); Gervais, *Towards A New Core International Copyright Norm*, *supra* note 116, at 1-37.

122. See generally Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC'Y USA 209, 216, 232-33 (1983); Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1614-1619 (1982); Frank Pasquale, *Breaking the Vicious Circularity: Sony's Contribution to the Fair Use Doctrine*, 55 CASE WES. RES. L. REV. 777, 783-84 (2005).

123. See *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 929 (2d Cir. 1994) ("The District Court [...] pointed out that, if Texaco's unauthorized photocopying was not permitted as fair use, the publishers' revenues would increase significantly since Texaco would (1) obtain articles from document delivery services (which pay royalties to publishers for the right to photocopy articles), (2) negotiate photocopying licenses directly with individual publishers, and/or (3) acquire some form of photocopying license from the Copyright Clearance Center Inc. ("CCC")); See also Steven Hetcher, *Orphan Works And Google's Global Library Project*, 8 WAKE FOREST INTELL. PROP. L.J. 1, 35 (2007) ("Just as the CCC changed the factual situation vis-à-vis utility generation such that what was once a fair use was no longer a fair use, due to the emergence of an entity that promised to provide a better route to enhanced social welfare, so too for the shift in remedies promoted in the Orphan Works Report. Google will argue that there is an important difference, however, which is that in *Texaco* the CCC was already in place. By contrast, the Orphan Works Report's proffered shift in remedies is a proposal, not a reality.").

124. See *supra* note 100 and accompanying text.

125. In a more "extreme" version of this argument, Posner noted (in a variation of the theme of non-rivalry) that "[w]hile the theft of physical property deprives the property's owner of its use, the 'theft' of intellectual property does not. Indeed, if the software pirate, or those who purchase the pirated software from him, could not or would not pay the price charged by the owner of the patented or copyrighted software (this assumes that the owner's ability to price discriminate is limited, so that the owner cannot snag the poorest customers by reducing the price to them to just a shade above the owner's marginal cost), then piracy does not cost the owner any lost sales." Richard A. Posner, *Intellectual Property: The Law and Economics Approach*, 19:2 J. ECON. PERSP. 57, 64 (2005).

126. See generally DAVID GAUTHIER, *MORALS BY AGREEMENT* (1987).

negative externalities on the right holder; a free rider merely benefits from positive externalities. If due to license cost levels and/or transaction costs there are no demonstrable lost sales, user-derived content would seem to fit in the latter category and a court should consider this when deciding the fairness of the use. It fits within the first and fourth criteria.

#### *D. Enforcement Issues*

If the scope and extent of an infringement is severe enough, it may qualitatively affect the scope of the right. Interesting theoretical analyses have been suggested in this context, such as legal scholar Tim Wu's suggestion of "tolerated use":

Tolerated use is infringing usage of a copyrighted work of which the copyright owner may be aware, yet does nothing about. There may be a variety of reasons for tolerating use. Reasons can include simple laziness or enforcement costs, a desire to create goodwill, or a calculation that the infringement creates an economic complement to the copyrighted work—it actually benefits the owner . . . .

What is the difference between tolerated use and implicitly licensed use? The difference is legal. In the case of an implicit license you could, if brought to court, point to some conduct or writing that creates permission to engage in the activity in question. For example, many newspapers and magazines, such as the *New York Times*, provide a way for readers to email articles. Such emailing constitutes both a "reproduction" and a "distribution" of the articles under the copyright law. However, someone sued for such emailing would have a defense: that by clearly encouraging readers to email stories, the paper had implicitly created a contract—a non-exclusive license—permitting the reader to email the stories to friends.

By contrast, in a tolerated use scenario, there is no such contract. Instead, the defense, if any, is a fair use argument of some kind, an argument that the laches of the copyright owner should bar recovery (equity aids the vigilant), or possibly a statute of limitations defense. The main point is that that liability likely exists, but it is simply a matter of non-enforcement. The difference from an implied contract should be clear.<sup>127</sup>

It may indeed be time to reconsider the scope of implied licenses and laches. Whether a court will acknowledge that a customary practice has developed and give legal effect to such practice is unclear. It would make sense, however, to consider implied consent if the practice in question can be linked to the copyright holder or if it can be shown that it is commonplace within its industry. Professor Edward Lee has gone one step further in suggesting formal consideration of informal copyright practices as "gap fillers" in the

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127. Tim Wu, *Tolerated Use*, 31 COLUM. J.L. & ARTS 617, 619-20 (2008) (notes omitted).

law.<sup>128</sup> The difficulty inherent in any such approach is that the Copyright Act provides for high statutory damages<sup>129</sup>—so high that at least one court has expressed the view that they are disproportionate for cases of infringement by individual Internet users.<sup>130</sup> The presence of an informal practice might lead a court to at least be lenient on the willfulness criterion, which, when applicable, quintuples the maximum award.<sup>131</sup>

#### IV. CONCLUSION

Copyright has entered the sphere of “users.” Many of these have harnessed the power of digital technology and online dissemination to generate and make available copyrightable content.<sup>132</sup> When that content is authored entirely by the user, such as a photograph taken by the user, then he need not worry about copyright infringement claims. There are two other categories of “user-generated content” that are much more problematic, however. User-derived content uses preexisting content but adds to it substantially, in some cases to the point of producing a derivative work. In most cases, a substantial reproduction of one of more extant works is also involved. User-derived content may thus infringe both the reproduction right and the adaptation right; the user may

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128. See Edward Lee, *Warming Up to User Generated Content*, 2008 U. Ill. L. Rev. 1459, 1474-75 (“The primary reason we need gap fillers in copyright law is quite simple: formal copyright law is riddled with gray areas and gaps. At a systematic level, the Copyright Act is not constructed to address ex ante the welter of circumstances involving uses of copyrighted works. Besides a few very detailed, but mostly industry-based, exemptions, the Copyright Act is written at such a high level of generality that many of the key concepts are often too indefinite to inform the public as to whether an anticipated use is infringing, fair use, or otherwise permitted. To be sure, some cases of blatant infringement and commercial piracy are easy to tell. But, by the very way Congress has drafted the Copyright Act, many gray areas and gaps are necessarily created for the myriad of ways and settings in which copyrighted works can be used.”) (notes omitted).

129. See 17 U.S.C. § 504(c) (2000).

130. See *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1227 (D. Minn. 2008) (“While the Court does not discount Plaintiffs’ claim that, cumulatively, illegal downloading has far-reaching effects on their businesses, the damages awarded in this case are wholly disproportionate to the damages suffered by Plaintiffs. Thomas allegedly infringed on the copyrights of 24 songs—the equivalent of approximately three CDs, costing less than \$54, and yet the total damages awarded is \$222,000—more than five hundred times the cost of buying 24 separate CDs and more than four thousand times the cost of three CDs. While the Copyright Act was intended to permit statutory damages that are larger than the simple cost of the infringed works in order to make infringing a far less attractive alternative than legitimately purchasing the songs, surely damages that are more than one hundred times the cost of the works would serve as a sufficient deterrent.”).

131. See 17 U.S.C. § 504(c)(2) (2000).

132. Content is protected from its creation, although formalities are still useful. See 17 U.S.C. §§ 408, 410-11 (2000).

successfully assert fair use in cases of transformative use. User-copied content is content taken in its entirety from a source and made available online; peer-to-peer filesharing of music or films would fit this category. While *prima facie* infringement of the reproduction right takes place in such situations, fair use might also apply. Under one version of the doctrine, making content available in a different form may constitute fair use,<sup>133</sup> which is a somewhat different application of the concept of transformativeness than that previously associated with content creation.

The difficulties encountered in applying copyright to user-generated content stem in part from the quantity of online use, and from the problems with licensing on such a scale. There are also roots in the privacy rights of passive users, who historically have remained outside the reach of copyright. Before massive online reuse emerged, amateur reuse would generally fall in or close to this private sphere and be considered *de minimis*.<sup>134</sup> The ability to make user-derived or user-copied content available online has all but eliminated this superposition: the amateur is no longer private. Normatively, the question becomes whether the previous formal and informal exemptions which applied to the amateur sphere should survive. This in turn requires a reexamination of exceptions like fair use or safe harbors, as well as a deeper understanding of the interests that those exemptions are designed to protect.

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133. See *supra* note 112 and accompanying text.

134. See *supra* note 35 and accompanying text.