



User illusion: ideological construction of ‘user-generated content’ in the EC consultation on copyright

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Abstract: Recent policy consultations by the UK Intellectual Property Office, the US Patent and Trademark Office and the European Commission (EC) have highlighted the importance of user-generated content in debates to reform copyright. User-generated content (UGC) – often combining existing copyright material with transformative creativity – remains a contested terrain, with no clear or widely accepted definition. This paper examines how various stakeholders in the 2014 EC consultation on copyright attempted to shape the definition of UGC in order to suit their interests, sometimes aligning or conflicting with other stakeholder groups. Data from 203 written responses by registered stakeholders (authors, platform intermediaries and users) were subjected to a discourse analysis methodology. Key arguments and policy preferences from each stakeholder group are identified and discussed.

Keywords: User-generated content, Copyright, Online creativity

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THE STATUS OF USER-GENERATED CONTENT

The concept of ‘user-generated content’ has proven problematic for policy studies, for a variety of reasons. The notion of the ‘user’ presupposes a supplier-client relationship that, while descriptive of the arrangements prevalent on many commercial internet platforms, fails to accurately capture the range of activities that people undertake on those platforms besides simply ‘using’ them. Much of the scholarly interest in user-generated content (UGC) is focused on the extent to which amateurs, not traditionally endowed with the ability to widely publish

creative ideas, have been empowered through interactive media tools to take greater control in the ‘author-text-audience relationship’ (Cover, 2006; Burgess & Green, 2009; Green & Erickson, 2014). In particular, scholars in media studies and sociology have questioned whether this marks a fundamental shift in economic and social relations though such practices as video game modification (Mavridou & Sloan, 2013), fan fiction (Lipton, 2010), machinima video making (Haefliger et al. 2010), music parody (Erickson, 2013) and citizen science (Burgelman et al, 2010). Those who are enthusiastic about the political and subjective possibilities offered by widespread access to digital creative production have re-conceived mere users as ‘makers’ and theorised that they comprise the vanguard of a groundswell of participatory culture (Gauntlett, 2013; Jenkins, 2006). Authors more skeptical of the revolutionary potential of UGC have highlighted the potential for self-exploitation in practices which enrol the user in capitalist relations deemed ‘prosumptive’ (Zwick et al, 2008; Ritzer & Jurgenson, 2010).¹ In social media these practices include uploading, tagging, commenting, curating, and otherwise breathing life into commercial platforms which depend upon, at the same time that they enable, social interaction. One author has jeeringly referred to this voluntary self-dispossession of social, economic and affective labour as ‘loser-generated content’ (Petersen, 2008).

Scholarship in legal studies has been less concerned about the cultural status of UGC in society, focusing instead on the legal frameworks – and thus implicitly the political, social and economic relations – which structure, censure and incentivise bottom-up user creativity.² Particularly when paired with the fashionable rhetoric of the ‘creative economy’, probing the economic health of the largely unmapped reservoir of digital creativity has become an objective for intellectual property regulators (Towse, 2014). The discursive construction of the ‘user’ in UGC is reflective of on-going tension between the aims of incumbent media owners – concerned with maintaining control and ownership of the production value chain – and new digital platforms that increasingly compete against ‘legacy media’ for market and attention share (Dobusch & Quack, 2013; Edwards et al, 2014). Importantly, a great deal of UGC engages with pre-existing media content via the practices of remix, mashup and parody, and much of this content is protected by copyright owned by others. While limits to copyright are intended to circumscribe the exclusive rights of owners in such a way as to balance the incentive to create with the public interest, the precise nature of the balance is a point of on-going political debate. While statutory exceptions to copyright, such as those for purposes of criticism and review, current events reporting, and private study may be adopted by European member states under Article 5 of the Copyright Directive 2001/29/EC, these narrowly-drawn exceptions do not cover the rapidly growing array of uses that the public has found for copyright works, particularly in the context of digital participatory culture. Consequently, UGC has found itself at the centre of highly-contested policy debates about the future of copyright and the appropriate response by regulators to digital creative practices.

This article investigates the way that three major stakeholder groups (authors and their representatives, platform intermediaries, and user groups) choose to represent the ideologically flexible concept of ‘user-generated content’. The recent EC consultation on copyright³ provided an opportunity to sample from a large number of official published responses on the subject of UGC and compare the arguments, concerns and policy objectives advanced by each group.

In its consultation document, the European Commission supplied an incomplete definition of UGC, suggesting that the main impact of digital networking has been that “citizens can copy, use and distribute content at little to no financial cost.” (European Commission 2013, p. 28). While the ability to copy and distribute content is widely recognised as one of the features of internet communication, the focus on potential infringement of existing copyright material ignores the

broader and much more pressing problem raised by digital technology: a far more vast quantity of people than ever are becoming copyright holders themselves, on a regular basis, with no clear system for managing or understanding that creativity. The Commission acknowledged the limitations of its working definition in the consultation document, citing the outcome of the Licences for Europe working group, in which “No consensus was reached among participating stakeholders on either the problems to be addressed or the results or even the definition of UGC.” (European Commission 2013, p. 29).

The article proceeds by providing a short background on the EC consultation, as well as similar consultation exercises in the USA and the UK. The discourse analysis methodology is then discussed, followed by the results of the analysis of 203 published responses from stakeholders. Responses show that the concept of ‘user’ is far from closed in the on-going debate about the fitness of copyright in digital environments. Rather than converge on a single definition, the different stakeholder groups each assign differing levels of agency, creativeness and economic productiveness to the illusory and notional ‘user’.

BACKDROP TO THE EC CONSULTATION

Prior to the recent EC Consultation on Copyright, a series of reviews and consultations were launched by individual governments with a view to assessing their own national intellectual property frameworks in the context of digitalisation and the global reach of information networks. Although these consultations have taken different forms, each of the national initiatives featured the ‘user’ as one important actor in this new digital economy.

UNITED STATES

In 2010, at the initiative of the US Department of Commerce, the Internet Policy Task Force was established with participation of the US Patent and Trademark Office (USPTO) and the National Telecommunications and Information Administration (NTIA). The purpose of the task force was to assess and provide policy guidance on important issues in internet governance including but not limited to online copyright. The initial consultation resulted in the publication of a Green Paper on Copyright Policy in 2013. The broad findings reported in the Green Paper were uncontroversial: copyright remains necessary in order to adequately incentivise the creation of new works; an efficient copyright system is consistent with internet innovation, although policy might be improved in key areas to promote efficiency and more adequate enforcement (Cooper, 2014). The issue of user-generated content was briefly discussed, although the report did not offer any clear guidance on policy approaches with respect to transformative UGC practices such as remix:

“[A] considerable area of legal uncertainty remains. The question is whether the creation of remixes is being unacceptably impeded. There is today a healthy level of production, but clearer legal options might result in even more valuable creativity. Is there a need for new approaches to smooth the path for remixes, and if so, are there efficient ways that right holders can be compensated for this form of value where fair use does not apply? [...] Are any of these alternatives preferable to the status quo, which includes widespread reliance on uncompensated fair uses?” (US Dept. of Commerce, 2013, p. 28)

With respect to UGC, the report offered more questions than answers, however the overall approach was to explore whether UGC could be made more compatible with licensing options.

The existing status quo to which the report refers, consists on the one hand of a doctrine of fair use in the United States and a patchwork of copyright exceptions in the EU that do not cover all types of online use and are not always understood by consumers. On the other hand, the expressive landscape for user-generated content at present consists of a limited number of online platforms on which the majority of use takes place. These services are global, further complicating regulatory efforts by individual states. Platforms such as YouTube and Facebook are licensed environments, meaning that all user expressions are subject to terms and conditions established by the private operators of the commercial platform. At the same time, most UGC platforms operate as intermediaries with respect to liability for copyright infringement by their users.⁴ In order to comply with the law, service providers must act expeditiously to remove infringing content once made aware of it through notification by rights holders. Semi-automated systems on these licensed environments are not adequate to make determination about whether fair use or a copyright exception applies in an individual case of user creativity, a source of significant debate (Von Lohmann, 2010).

The Task Force further called for canvassing of “public input on critical policy issues that are central to our nation’s economic growth, cultural development and job creation.”⁵ Following publication of the report, the USPTO organised a series of public stakeholder roundtable meetings.⁶ The themes selected for further public consultation were the unresolved issues of remix, first sale doctrine in digital environments, statutory damages and the operation of the takedown system introduced under the Digital Millennium Copyright Act (DMCA) § 512. On the subject of user-generated remix, an area in which the Green Paper authors acknowledged a shortage of reliable data, the public consultations were viewed as an opportunity “for the Task Force to have a complete and thorough record upon which to make recommendations.”⁷

CANADA

The government of Canada initiated a public consultation in July 2009, consisting of online questionnaires and physical town hall meetings. Questions put to stakeholders and members of the public were focused on assessing the usability of the current framework, comparing the Canadian copyright framework with other national jurisdictions, and promoting competitiveness and growth. The government acknowledged that “the emergence of the Internet has blurred the line between creators, users, producers, and distributors of copyrighted works,” while hoping that “updates [to copyright law] will also help foster creativity, innovation and economic growth.”⁸ The consultation exercise drew some 8,266 responses, but critics of the exercise pointed out that a large proportion of those (65%) were automated form letters generated by special interest groups (Owens, 2010).

In 2012, Canada adopted the Copyright Modernisation Act, which introduced several new copyright exceptions for education, parody, and format shifting. The Act also introduced strong protections for commercial works covered by technological protection measures, weakening permitted uses in those cases. Section 29.21 of the Act introduced a broad exception for non-commercial user-generated content, provided that the source of the work is identified, the underlying work is obtained without infringement and that dissemination of the new work does not have ‘substantial adverse effect’ on the exploitation of the original work.

UNITED KINGDOM

Two recent reviews of the copyright framework in the UK, the 2006 Gowers report and the 2011 Hargreaves review, were followed by a national consultation in December 2011. The public consultation resulted in a series of new fair dealing copyright exceptions brought into law in the UK in 2013 and 2014.^[8] The status of user-generated content was central to both exercises

although no explicit UGC exception was introduced. The earlier Gowers review identified bottom-up creativity as a potential area of concern for future regulation, noting that “a rise in user-led innovation, which allows users to both use and create artistic products, has driven a rise in creative outputs” (2006:16). The report further recommended that the UK government adopt a fair dealing exception for user-generated parody on the grounds that it would promote the creation of valuable new works and reduce transaction costs by removing the need for licensing in certain cases such as online non-commercial use (2006:68). In his 2011 report, Prof Ian Hargreaves similarly recommended the creation of a narrowly limited fair dealing exception for parody, on the grounds that allowing unlicensed parody would generate growth for UK media industries, and would “encourage [...] literacy in multimedia expression in ways that are increasingly essential to the skills base of the economy” (2011: 50). During the public consultation exercise the UK Intellectual Property Office received 471 responses from authors, rights holders and members of public, expressing a variety of perspectives on the changes proposed by Hargreaves. These views were consulted prior to drafting new changes to UK copyright law (IPO, 2013). The new fair dealing exceptions remain in line with the recommendations advanced by Hargreaves; it remains to be seen whether the legislative changes deliver the economic benefits anticipated in the review. The effectiveness of the new legislation depends on uptake by users and the public, a matter complicated by the fact that much online activity occurs within the bounds of licensed commercial environments where changes in UK law may not be reflected.

Along with new copyright exceptions, the UK government followed the recommendation to explore the possibility of licensing copyright material to users by establishing and funding the Digital Rights Exchange (later Copyright Hub). However, the impact of both licensing and exception approaches are limited by the relationship of the UK to the wider global digital economy; automated detection and licensing schemes such as YouTube’s ContentID system are emerging as *de facto* regulatory mechanisms beyond any single national jurisdiction. In the globalised context, a common EU copyright policy may prove more effective in defining the role of the European user.

EUROPEAN COMMISSION

Following a model of transparent evidence gathering and public consultation similar to the Canadian and UK consultations, the European Commission launched its Public Consultation on the Review of the EU Copyright Rules on 5 December 2013. This exercise followed the ‘Communication on Content in the Digital Single Market’ in 2012 and the ‘Licences for Europe’ initiative in 2013. The public was initially given until 5 February 2014 to respond, but the deadline was later extended to 5 March 2014. The request for comment took the form of a 36-page document, within which five questions were devoted explicitly to user-generated content. In its preamble to the section on UGC, the Commission highlighted the lack of clear direction on policy following the Licences for Europe consultation. The fundamental dichotomy was characterised as follows:

“Re-use is no longer the preserve of a technically and artistically adept elite. With the possibilities offered by the new technologies, re-use is open to all, at no cost. This in turn raises questions with regard to fundamental rights such the freedom of expression and the right to property. [...] One view was to say that a new exception is needed to cover UGC [...] Another view was that no legislative change is needed: UGC is flourishing, and licensing schemes are increasingly available.” (European Commission, 2013, p. 29)

The European Commission made available the corpus of more than 9,500 responses submitted by members of the public including businesses, political organisations, creators’ groups and academics. . The present study is based on a sample of 203 non-anonymous responses by registered organisations selected from within those published responses. As described in the following section, the research sample was chosen in order to gather a range of views from publicly identifiable stakeholders most directly interested by questions about user-generated content: authors and their representatives, platform intermediaries and users themselves.

METHODOLOGY AND DISCUSSION

Critical Discourse Analysis (CDA) is the study of the way in which power relations are reproduced through the acts of speaking and writing. It also describes a methodology for investigating the way in which communication practices and texts reflect political structures, routines and ideologies (Van Dijk, 2008; Fairclough, 2013; Gee, 2014). An ideology is “a system of ideas, values and beliefs oriented to explaining a given political order, legitimizing existing hierarchies and power relations and preserving group identities.” (Chiapello & Fairclough, 2002: 187). Because of the way in which modern institutions are compelled to produce, compile, measure and audit information about their activities, CDA is particularly apt to studying the troves of textual content that organisations produce (Foucault, 1991; Dean, 2010). In the first instance, a critical discourse analysis normally proceeds by systematically analysing the features of text, whether written or spoken. According to Blommaert and Bulcaen (2000), this might include consideration of choices and patterns in vocabulary (e.g. wording, metaphor), grammar usage or text structure. Texts may be drawn from oral histories (interviews), political speeches, official documents or mundane acts of speaking in everyday life (in communication scholarship this increasingly includes digital expressions such as tweets, posts, SMS messages or comments).

A CDA approach is deemed appropriate to studying the EC copyright consultation process because the latter is principally a discursive activity: The European Commission sought to engage public stakeholders in communication about their points of view and political positions. Participation in the exercise was by self-selection, so any effort to quantitatively analyse responses would be ineffectual (see for example Owens’ 2010 analysis of the Canadian consultation). Instead, like the European Commission, we are interested in the way that stakeholders construct meaning in their responses. The textual units of analysis chosen are written responses by individual organisations. These responses are treated as reflections of the way that organisations, individuals and firms produce and reinforce ideology: in this case the ideological construct of a particular ‘user’ and ‘content’ relationship.

The public consultation process yielded 9,599 responses from among different categories of respondent (individuals, firms, organisations, government agencies) as well as different modes of response (registered or unregistered, anonymous or identifiable).⁹ Since the present research is concerned with identifying stakeholder positions and since the overall corpus of responses was deemed too large for meaningful analysis, the population was reduced by sampling only from among the non-anonymous, registered stakeholders. Within this category, responses from authors and authors’ representatives, platform intermediaries and users were deemed to be the most relevant to the issue of UGC. This yielded 203 individual written responses (summary in Table 1).

The discourse analysis was focused on questions 58-63 of the consultation survey,¹⁰ which asked

respondents specifically to identify any previous problems encountered with copyright when dealing with user-generated content, and to propose potential legislative and non-legislative solutions. Not all respondents chose to answer those questions; in cases where letters or other formats were supplied, the author read through the entirety of the response to identify any views expressed on UGC.

Stakeholder responses were instrumental: they expressed *concerns*, which could be defined as problems or ‘wrongs’ with the existing status quo, including the existing copyright regime or online behaviours. Most respondents also mounted *arguments*, defined as the deployment of evidence or rhetorical strategies intended to persuade the reader of the existence of a particular problem or desirable course of action. Finally, the majority of responses contained *policy choices* or recommendations, often described in relation to an existing policy or system (for example to remove an existing legal provision or to strengthen another). In this sense the discourse was already heavily shaped by the nature of the exercise – the response document guided the public toward legal intervention, constructing the meaning of UGC as a policy problem. However, the structured format of the response document provided adequate range within which to discern the presence of competing discourses, which are described in the following section. Briefly, these can be summarised as (i) a discourse of threat to professional authorship, (ii) a discourse of economic growth and (iii) a discourse of transformative creativity.

Table 1: Summary of stakeholder arguments in EC Copyright Consultation

<p><u>Authors</u> Respondents: 93 Sample voices: <i>Associazione 100autori, Buma Stemra, British Copyright Council, Danish Composers and Songwriters, Austrian Screenwriters Association, Danish Actors Association, European Composer and Songwriter Alliance ECSA, International Federation of Actors EuroFIA, European Federation of Journalists, European Writers Council, Sindacato Lavoratori della Comunicazione, Writers Guild of Sweden</i></p>	<p><u>Concerns:</u></p> <ul style="list-style-type: none"> • No agreed definition of UGC • Loss of metadata in digital environment • Users claim credit for work (attribution) • Cost/benefit of seeking remuneration <p><u>Arguments:</u></p> <ul style="list-style-type: none"> • Licensing options should be prioritised over new exceptions to copyright. • UGC already flourishes in absence of regulation • Protect EU cultural heritage (moral rights) • Online services profit at expense of EU authors <p><u>Policy choices:</u></p> <ul style="list-style-type: none"> • Reject UGC copyright exception • Increase copyright liability for intermediaries • Promote mechanisms for licensing, such as via the proposed Digital Rights Exchange or similar schemes.
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<p><u>Platform Service Providers</u> Respondents: 32 Sample Voices: <i>Association of German Cable Operators, Federal Association for Information Technology, Telecommunications and New Media (BITKOM), Deutsche Telekom, Google, ICT Unie, O.S., Orange UK, Association of Television Programming Distributors (Signal), Telefonica, Wikimedia Italia, Yahoo</i></p>	<p><u>Concerns:</u></p> <ul style="list-style-type: none"> • Transaction costs incurred when policing, blocking content • Licensing mechanisms favour large US platforms • Copyright can restrict innovation by amateurs • UGC contributions often plagiarised by media <p><u>Arguments:</u></p> <ul style="list-style-type: none"> • User creativity generates new goods and value • Undeserving parties may benefit from automated licensing in cases where substantial value added by users. • UGC has democratic, social, non-economic benefits <p><u>Policy choices:</u></p> <ul style="list-style-type: none"> • Introduce statutory UGC exception to copyright • Reduce ISP liability for copyright infringement • Territorially harmonise EU copyright law • Adopt US principles of ‘transformative use’ <p>11</p>
<p><u>Users</u> Respondents: 78 Sample Voices: <i>BEUC European Consumer Organisation, European Digital Rights EDRI, Quadrature du Net, Europeana Foundation, Network of European Digital Youth, Wikimedia Foundation, Zentralverband Informationstechnik und Computer-industrie e.V. (ZitCo), Numerous individuals</i></p>	<p><u>Concerns:</u></p> <ul style="list-style-type: none"> • No agreed definition of UGC • Takedowns occur without recourse for users • Automated takedown oblivious to rights & exceptions • Transformative authorship not adequately recognised <p><u>Arguments:</u></p> <ul style="list-style-type: none"> • EU citizens have more limited rights than US citizens • Remix and parody do not harm rights holder income • Obtaining permission carries high transaction costs <p><u>Policy choices:</u></p> <ul style="list-style-type: none"> • Mandatory UGC exception for member states • Extend safe harbour protection to UGC uploaders • Remix exception allowing recombination of works • Allow commercial exploitation of transformed works

A large number of respondents from all three groups highlighted as a concern the lack of an agreed definition of UGC (although this seldom prevented them from providing a response to the consultation questions). In this sense, respondents acknowledged the ‘openness’ of the question, which prompted some to adopt a more persuasive stance: given that no agreed definition exists, this was seen as an opportunity to advance a particular politically expedient definition of UGC.

USERS AS THREAT TO PROFESSIONAL AUTHORSHIP

All three groups of stakeholders differed substantially in the way that they defined UGC and characterised ‘users’. Authors’ groups, which in this sample consisted of individual creators as

well as larger collecting societies speaking on behalf of members, were largely ambivalent about the prospect of UGC. Authors’ groups almost uniformly perceived UGC as a force external to the practice of artistic creation and as a threat to both moral rights and licensing revenue. Some respondents voiced their concerns in normative ethical language of fairness, while others employed the legal framework of moral rights. Moral rights were threatened by UGC, they argued, because of the facility for copying and decontextualising work introduced by digitalisation. This was constructed as both an individual and a collective and national problem: the preservation of European heritage depends upon ensuring the integrity and fixity of artistic works. Small and independent creators were particularly hostile to the possibility of infringement of moral rights introduced by the prevalence of UGC. One respondent from UK film distributor Peccadillo Pictures characterised the issue in personal and immediate terms:

“For most filmmakers (especially in the independent sector) their films are their lives, it can take years to finance them and years to make them. They have ownership of their own work. No one should be allowed to alter or change the meaning of that work without permission of the rights holder. Very often individuals and criminal organisations will take others work and monetise it for their own ends. No one should ever sanction this.” (Peccadillo Pictures, 2014)

Furthermore, UGC was seen to deprive rights holders and authors of legitimate licensing opportunities, particularly when users were able to monetise or derive additional benefit from the resulting work. The value of creative inputs by the user were minimised by respondents who frequently characterised the use of copyright material by users as non-transformative copying bordering on piracy. Some authors’ groups focused on the unknown quality of user-generated content, drawing attention to the often anonymous nature of online communication and the uncontrolled and deceptive behaviours enabled by the lack of discrete authorship. Responding authors used turns of phrase intended to draw attention to this ambiguity (“so-called...”, “unclear”, “undefined”). This rhetorical technique was employed by the Austrian Association of Literary and Scientific Translators:

“Currently, ‘user-generated content’ is a hyped-up buzzword for material of wildly different quality: sometimes it refers to the creative use and comment of existing material by methods and techniques such as sampling, but often it is just an act of copy-and-paste, for using copyrighted material on one track and one’s own on another (e.g. the text of a translation to accompany a music track or a video/film) [...] This question is equally misleading and suggestive: those who make user-generated content (the so-called ‘prosumers’) normally do not want any remuneration; it’s the authors of the copyright-protected material who have problems in obtaining any remuneration for the use of their works.” (Austrian Association of Literary and Scientific Translators, 2014)

The policy choices favoured by authors and collecting societies reflected their concerns about the anonymity and lack of respect for the integrity of works on the internet, as well as their view that users and platform intermediaries derive illegitimate economic gains from use of copyright material. Authors’ groups nearly uniformly opposed the introduction of any fair dealing exception for user-generated content, and further advocated for removing the exemption from liability currently enjoyed by information service providers under the European e-Commerce Directive 2000/31/EC articles 12-15.

USERS AS SOURCE OF ECONOMIC GROWTH

By contrast, the concerns of platform operators and service providers appear diametrically opposed to authors’ groups on the issue of copyright. Respondents consisted of cable and mobile phone network operators as well as software platforms such as Google, Yahoo and Wikimedia Commons. Platform service providers expressed differing views on the relationship between UGC and copyright, however these actors broadly maintained a positive view of user-generated creativity, drawing attention not only to its economic value, but also its contribution to democratic principles and free expression. For example, Czech technology industry group ICT Unie cited statistics claiming that 11 % of Europeans used UGC platforms to engage in political or civic discourse, arguing that UGC was capable of “enriching political and societal debates, diversity of opinion, free flow of information and freedom of expression,” allowing citizens to “talk back to culture”. (ICT Unie, 2014)

More frequently, technology providers expressed concern that overly restrictive copyright laws might stifle bottom-up production of new works, using language from economics to draw attention to transaction costs that may be incurred by the need to police, moderate or control the activity of users. Many of the responses included usage statistics intended to draw attention to the scale of online user activity, such as the above mentioned response from ICT Unie as well as the submission by German IT industry group Bitkom:

“[U]sers [...] do not only passively consume copyright protected works, but instead create new content on the basis of pre-existing works and thereby actively participate in the creative process. To give an idea of the relevance: today 130 hours of video are uploaded to YouTube every minute and there are 41,000 posts a second on facebook. [...] New digital technologies have stimulated creativity and participation online in an unprecedented manner. This process should not be hindered by an overly broad copyright.” (Bitkom, 2014)

The policy choices favoured by service providers were uniformly oriented towards reducing transaction costs as well as liability for monitoring the potentially infringing behaviour of users. They promoted adoption of a statutory exception for UGC as well as territorial harmonisation of EU copyright rules in order to reduce administrative operating costs across Europe.

Within the group of internet service provider respondents, there were differing opinions about the way that revenue from UGC is captured and shared. European platform operators in particular were wary of the influence of large American platforms (i.e., Facebook, YouTube) which were seen to benefit from economies of scale related to their dominant market positions and, in the case of YouTube, from financial benefits associated with their proprietary fingerprint matching and licensing system, ContentID.¹² Smaller European entities such as the Association of German Cable Operators highlighted costs that might be incurred depending on the type of licensing system or liability regime imposed on online service providers in the future.

USERS AS CREATORS

In contrast to authors and platforms, users advocated for the most boldly progressive legislative solutions to UGC, arguing that transformative online activities do not directly interfere with exploitation of works by rights holders. This group included individuals, consumer advocacy groups such as the European Consumer Organisation, representatives of archival and memory institutions such as the Europeana Foundation, and content providers such as the Wikimedia Foundation. The primary concern of user groups was that activities they wished to undertake online were being blocked by rights holders via notice and takedown measures, without

adequate consideration of fair dealing exceptions. For example, user rights group La Quadrature du Net, whose own non-commercial parody video, “Robocopyright” was taken down from YouTube, shared the complaint by others that automated takedown systems such as ContentID routinely ignore user’s rights. The group also expressed discontent with the language of the consultation document itself, noting that the definition of UGC provided by the European Commission did not adequately account for the creativity and labour contributed by ‘users’ in many types of online expression:

“[I]t uses the erroneous term ‘user-generated content’ to speak of remix, mashup and other such practices. These transformative works constitute original work even as they borrow material from previous works. To speak of user-generated content introduces a false hierarchy and a value judgement that separates the amateur ‘user’ from the ‘professional’ author, whereas this distinction does not exist in copyright law and is meaningless in the digital environment.” (La Quadrature du Net, 2014)

The policy options favoured by user groups would expand the scope of existing copyright exceptions to more fully carve out a ‘safe harbour’ for content uploaders, who feared legal repercussions for using and sharing remixed work or felt unable to complain when such work was taken down. Their policy preferences included extension of limits on liability for infringement to include uploaders as well as platform operators, the introduction of a mandatory UGC exception in EU member states, as well as introduction of a new exception for remix that would allow the recombination of two or more existing copyright works. Arguments underpinning these ambitious policy objectives included the burden of transaction costs imposed on users by the need to obtain permission from rights holders for small incidental uses, as well as comparisons with the fair use regime in the USA where it was argued that users enjoy more freedom to transform copyright works.

UGC: AN IDEOLOGICALLY FLEXIBLE DEFINITION

The aim of this article has been to demonstrate that the definition of UGC is politically contingent and ideologically constructed in the context of the copyright reform debate. Certain authors and collecting societies wish to maintain the dichotomous separation between what they perceive to be professional artistic creation and the amateur work of mere users. From the perspective of these rights owners, the internet is conceived as a constitutive outside, where uncertain and frightening things are done to artistic works by non-artists. In contrast, internet platforms and service providers deploy a view of user-as-curator/creator, intended to highlight the transformative aspects of user creativity. The enthusiastic approval of UGC by platform operators may appear to signal alignment with the interests of users. However, this representation may conceal the ways in which immaterial labour of users, transformative or not, is appropriated and commercialised on internet platforms. Users themselves wittingly or unwittingly reproduce certain aspects of the author and platform discourses. Users wish for their activities to be understood as residing outside of the legal restrictions that govern the production and circulation of commercial copyright works. At the same time, however, they wish to claim a status as creators, through the transformative practices of remix, mashup and parody.

The lack of a stable definition of user-generated content may be politically advantageous for all stakeholders: rights holders choose to highlight the potential for direct infringement and piracy, while platform owners and users can evoke the creative and yet non-commercial status of UGC

while it nevertheless circulates within a capitalist system of exchange. To evoke the metaphor of the illusionist: each of the stakeholder groups attempt to draw the audience’s attention away from one aspect of user-generated content and towards another. Policymakers will seek to converge on a more stable and objective definition of online creativity as they craft rules to respond to the issue of online copyright. Doing so will require turning up the lights in the theatre to illuminate contradictions in the way that users and their activities are represented.

EPILOGUE

In July 2014, the Directorate General for Internal Market published its own report summarising the more than 9,500 responses received during the consultation.¹³ The largest group of respondents were end users (58%), followed by authors (25%) and publishers (8%). The report addressed responses separately according to the survey question (from 1-80) and the category of respondent. In the case of user-generated content (questions 58-63), the report aggregated views from end users, institutions, member states, authors and performers, collective management organisations, publishers, broadcasters, and intermediaries. Many of the positions identified in the preceding article were also expressed in the official report. The report does not offer any official policy recommendations, nor does it provide any clarity in response to the widely divergent positions on the role of UGC.

In September 2014, responsibility for copyright was separated from other intellectual property policy and moved to the Directorate General Digital Economy and Society. In a Mission Letter dated 10 September 2014, European Commission President Jean-Claude Juncker wrote of the “need to ensure that the right conditions are set, including through copyright law, to support cultural and creative industries and exploit their potential for the economy,” suggesting a greater emphasis on economic rationales for copyright reform.¹⁴ Almost certainly new consultation exercises will follow.

FOOTNOTES

1. Axel Bruns (2013) has suggested that the concept of *produsage* be distinguished from the more passive prosumption as independent creative production outside of commercial platforms and networks, noting that, “...produsage processes can operate with significant success independently of commercial entities, as Wikipedia and many other community-driven projects have demonstrated. Whatever terms we use to describe them, the principles and processes of produsage must be understood on their own terms, rather than through the lens of industrial-age producer/consumer relationships.” (2013: 74).

2. In addition to copyright, other legal frameworks which bear upon user-generated content include freedom of expression (Dutton et al, 2010) as well as journalistic liability for libelous, illicit and obscene content (Valcke & Lenaerts, 2010).

3. European Commission Public Consultation on the Review of the EU Copyright Rules. 5 December 2013 - 5 March 2014. Accessed online:
http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/index_en.htm

4. In the USA, Internet Service providers are defined in the Digital Millennium Copyright Act (DMCA) 17 U.S.C. § 512. In Europe the responsibilities of information service providers are set out in the Electronic Commerce Directive 2000/31/EC, sections 13 - 15.

5. See <http://www.uspto.gov/ip/global/copyrights/>

6. The Los Angeles Green Paper roundtable was held 29 July 2014 at the Loyola Law School. The final public roundtable was held at the Berkeley School of Law on 30 July 2014.

7. Internet Policy Task Force 2014 Public Meetings
<https://www.signup4.net/Public/ap.aspx?EID=THEG32E>

8. These include exceptions for private copying, quotation, parody, and text mining. See <http://www.ipo.gov.uk/response-copyright-techreview.pdf>

9. The anonymous and non-anonymous contributions may be downloaded from the consultation website:
http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/index_en.htm

10. The consultation document containing survey questions:
http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/consultation-document_en.pdf

11. The amount of transformation of an original work is one of the factors used by US courts to determine whether use of a work is ‘fair’. See:
<http://fairuse.stanford.edu/overview/fair-use/four-factors/>

12. ContentID is an automatic detection system that flags content when it matches a reference file supplied by rights holders. If user-uploaded video or audio matches a known copyright work, the rights holder is given the opportunity to block the content, monetise the uploaded video and divert revenue to themselves, and/or monitor its viewership. Only holders of significant catalogues of commercial material may register with ContentID. The system is controversial for favouring commercial rights holders over users and for its potential to erroneously flag uses that may be ‘fair’.

13. The official EC report can be found at:
http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/contributions/consultation-report_en.pdf

14. Mission Letter to Günther Oettinger dated 10 September 2014. Accessed at:
http://ec.europa.eu/about/juncker-commission/docs/oettinger_en.pdf

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