



FOSTERING CREATIVITY IN THE DIGITAL AGE: BALANCING USER- GENERATED CONTENT WITH COPYRIGHT PROTECTION

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Abstract

User-generated Content (UGC) significantly impacts consumer behaviour due to its perceived trust and authenticity. However, copyright law needs to work on keeping pace with the explosion of UGC online. Fair use limitations and complex licensing schemes create challenges for creators and copyright holders. Social media platforms often exploit UGC without fair compensation, blurring the line between moderation and infringement. Content creators retain copyright ownership but may grant platforms licenses for sharing. The public domain and fair use allow limited use of copyrighted material. International efforts are underway to adapt copyright laws to the digital age, with the European Union's Copyright Directive and WIPO Copyright Treaty as critical examples. The future demands a balance that protects creators' rights while fostering innovation and user expression in the evolving digital copyright landscape.

Keywords: User-Generated Content (UGC), Fair use, infringement, creators' right

Introduction

In the digital age, fostering creativity while balancing user-generated Content User-generated Content (UGC) with copyright protection presents a complex challenge. The evolution of copyright law has not kept pace with the rapid growth of digital platforms that facilitate UGC, leading to tensions between creators' rights and users' freedoms. This discourse is critical as it impacts both the creative industries and the broader public sphere.

Copyright law is designed to encourage creativity by protecting the rights of authors and creators. However, it can also hurt creativity. While copyright can motivate people to create original works, it can also make it difficult for others to use those works in new ways. This is especially true in user-generated

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content, where people often remix or build upon existing content. The challenge is to create a legal system that promotes innovation without limiting creativity.

Commercial interests can sometimes conflict with restrictive copyright protections. In China, for instance, media enterprises have only sometimes supported stringent copyright laws, suggesting that a more flexible approach could foster innovation and collaboration.

Automating copyright enforcement raises concerns about the monetization of UGC and the potential for platforms to prioritize profit over user rights. This can have a chilling effect on creativity, as users may hesitate to engage with content for fear of infringement.

To address these challenges, there is a growing call for reforming copyright laws to better accommodate UGC. For example, introducing specific exceptions for UGC could provide a legal framework that supports transformative uses while still protecting the rights of original creators.

Understanding UGC: Its Influence and Credibility

What do we know about User-Generated Content (UGC)?

UGC is Content created by an individual on a social media platform related to a product or service but not sponsored by the brand company. UGC encompasses social media updates, reviews, blog posts, videos and podcasts. It is done in many ways. For instance, a customer sharing a video through unboxing videos, Q&A forums or photos that flaunt their purchases².

User-Generated Content and its Impact on consumer behaviour:

User-generated Content, or electronic word-of-mouth (eWOM), operates similarly to traditional word-of-mouth. However, instead of spreading through face-to-face interactions, UGC disseminates online. UGC encompasses Content—such as reviews, blog posts, photos, videos, and social media updates—created by non-media individuals. Its Impact on consumer behaviour is significant, as it is perceived as more credible and trustworthy than producer-generated content. Consumers increasingly rely on UGC to inform their purchase decisions, considering it an authentic reflection of real experiences.

Hennig-Thurau et al., (2004) define eWOM/UGC as “any positive or negative statement made by potential, actual, or former customers about a product or company, which is made available to a multitude of people and institutions via the Internet”³.

² Duke, D. (2024). Council post: Why user-generated Content is winning, Forbes. available at: <https://www.forbes.com>. (last visited on august 19 2024).

³ Nguyen Thi Thanh Thao Tong Shurong, “Is It Possible for “Electronic Word-of-Mouth” and “User-Generated Content” to be Used Interchangeably?” *Journal of Marketing and Consumer Research* ISSN 2422-8451 An International Peer-reviewed Journal Vol.65, p42 (2020).

1. Influence of UGC:

- UGC has a significant impact on people's consumption decisions.
- Consumers trust Content created by their peers more than traditional advertising.
- Platforms like Facebook, YouTube, Twitter, and Instagram are common channels for sharing UGC.

2. Credibility of UGC vs. Producer-Generated Content (PGC):

- UGC is perceived as more credible because it is based on actual consumer experiences.
- Consumers trust UGC over PGC (which often involves hired endorsers and celebrities) because they believe UGC creators do not have commercial interests.

3. Why UGC Matters:

- Trustworthiness: UGC is considered trustworthy, helpful, and unbiased.
- Decision-Making: Potential consumers rely on UGC to inform their purchase decisions⁴.

Understanding Indian Copyright Law: A Look at Sections 51 & 52

Section 52 of the Indian Copyright Act establishes a balance between the rights of copyright holders and the public's interest in accessing and using copyrighted material. It achieves this by outlining exceptions to copyright infringement, permitting certain actions under specific conditions.

Fair Dealing

This is a crucial exception that allows limited use of copyrighted works for purposes such as:

The fundamental principle is that the use must be fair and not harm the copyright holder's market.

Computer Program Exceptions

This section recognizes the need for compatibility between software programs. It permits limited copying for:

⁴ Azlin Zanariah Bahtar, Mazzini Muda, "The Impact of User-Generated Content (UGC) on Product Reviews towards Online Purchasing – A Conceptual Framework, *Procedia Economics and Finance*", Volume 37, Pages 337-342, ISSN 2212-5671(2016).

Computer Program Exception	Description
Creating backup copies	Lawful owners can create backup copies of software for protection against loss or damage.
Ensuring interoperability	Limited copying is allowed to ensure compatibility between computer programs.

Education and Libraries

Section 52 acknowledges the importance of education and research by allowing exceptions for:

Exception for Education and Libraries	Description
Educational institutions	Teachers, students, and institutions can make copies of copyrighted works for educational purposes.
Libraries	Libraries can make copies of particular works for preservation or research purposes under certain conditions.

The section also covers exceptions for government works, public domain works, and ephemeral recordings by broadcasting organizations.

Section 52⁵ is vital in fostering innovation, education, and research. It establishes a legal framework for using copyrighted material without infringing upon the rights of copyright owners. This balance is essential for a healthy, creative ecosystem.

Section 51⁶ of the Copyright Act serves to play a significant role as the legal backbone of copyright protection in India. It ensures that the creator's rights are respected and protected.

⁵ The Copy Right Act, 1957(Act No 14 of 1957), s.52

⁶ The Copy Right Act 1957(Act No14 of 1957), s.51.

It is the foundation of legislation for protecting and observing creators' rights, as it discourages possible infringers and gives copyright holders legal redress when their creations are utilized or distributed illegally.

Section 51 of India's Copyright Act was enacted in 1957 and has undergone amendments to accommodate technological improvements and changing times. This regulation aims to balance upholding the rights of creators and enabling society to profit from their creations.

Breaking down section 51: layman terms.

1. Unauthorized Use of Copyrighted Material
2. Unauthorized Distribution and Sale

Real-world examples

- Music piracy
- Movie piracy
- Plagiarism in literature
- Software copyright infringement ⁷

The Copyright Act of 1957 is the law that governs copyright in India. It protects the following types of content works: creative, theatrical, musical, and literary pieces, as well as sound and cinematograph films. Since the Act came into force, the Copyright Act of 1957 has been amended multiple times. However, the most notable is the 2012 modification added with respect to the WIPO Internet Treaties, i.e., the WIPO Copyright Treaty (WCT) and WIPO Performance and Phonogram Treaty (WPPT). The WPPT and WCT grants the following rights to the authors:

- (i) the right of distribution.
- (ii) the authority to approve the commercial leasing of the public;
- (iii) the freedom to speak or to make accessible to the general public, and
- (iv) reproduction rights.

The Contracting parties are required by the Internet Treaties to offer legal national legislation that provides remedies against evading technical measures (such as encryption, electronic signatures, digital watermarking, etc.) as well as safeguarding the data that is necessary for the administration of the writers' rights (including the name of the writer/performer, nature of the piece). However, the 1957

⁷ What is Section 51 of the Copyright Act in India? available at: <https://vakilsearch.com/blog/what-is-section-51-of-the-copyright-act/> (last visited on august 20, 2024).

Copyright Act does not offer any detailed clause that addresses social networking platforms or intermediaries. It only offers protections against widespread infringement of copyright. According to the judiciary's recent stance, it is noted that the Copyright Act's sections have been considered for and used in the works shared online or on social media networks. Still, the Information Technology Act of 2000 stipulates the intermediaries' "safe harbour" clause. Presently, the IT Act, 2000 is accompanied by the recently notified Information Technology (Intermediary et al. Ethics Code) Rules, 2021 (2021 Rules), which superseded The Information Technology (Intermediaries Guidelines) Rules, 2011 (2011 Rules).⁸

The Copyright Maze of User-Generated Content: Challenges and Rights

Challenges

1. Challenges with Existing Copyright Framework:

- Copyright law was initially designed to regulate the professional, commercial use of copyrighted works.
- The rise of amateur, individual users creating and sharing Content online has destabilized this traditional model.
- Copyright holders have tried to apply copyright against these individual end-users, but the system is not well-equipped to license or enforce against millions of small-scale users.⁹

2. Limitations of copyright exceptions and fair use/fair dealing doctrines:

- These were designed for the analogue world and struggled to accommodate the scale and characteristics of UGC in the digital age.
- The uncertainty and unpredictability of fair use/fair dealing make it an inadequate framework for UGC creators.

3. Complexities of licensing schemes:

- Public licensing models like Creative Commons must be simplified for many UGC creators to navigate.
- UGC often involves remixing and reusing multiple copyrighted works, making licensing difficult.

4. Imbalance of power between UGC creators and platforms:

⁸ Prachi Tyagi "Social media and Copyright: An Indian Perspective" Journal of Intellectual Property Rights Vol 28, pp 402-412(2023).

⁹ Daniel Gervais, "The Tangled Web of UGC: Making Copyright Sense of User-Generated Content", 11 Vand. J. Ent. & Tech. L. 841 (2009).

- UGC platforms use terms of use/service to grant themselves broad, royalty-free licenses to exploit UGC without fairly compensating creators.
 - The oligopolistic nature of major platforms leaves UGC creators with little bargaining power.
5. Ambiguity around safe harbor protections for platforms:
- The boundaries between platforms as neutral intermediaries and active content providers have blurred.
 - Legal interpretations of safe harbour requirements have shifted, leaving platform liability uncertain.
6. Challenges in tracing and monetizing dispersed UGC:
- UGC's vast scale and distributed nature make it difficult for copyright owners to monitor and monetize.
 - Individual UGC creators need more resources to enforce their rights against platforms.¹⁰
7. Sharing copyrights as a challenge
- Copyright laws protect users' rights, and they also allow social media companies to obtain broad licenses. This can lead to users' Content being exploited commercially without compensation.
 - The rapid pace of sharing on social media increases the risk of copyright infringement, potentially exposing users to legal action.¹¹.

Rights of the content creators

1. Copyright ownership: The person who creates the Content is the copyright owner; it is an implied exclusive right of them to reproduce, distribute, display, and perform their work.
2. License to the platform: Users who upload Content on the platform grant the platforms a non-exclusive license to use, copy, distribute, and show Content. As a result, the Content can be shared on the platform.
3. Terms of service and agreement: Content creators and users often agree to terms of service or user agreements that outline their rights and responsibilities, including how the platform can use and moderate user-generated Content.
4. Public domain and Fair use: Content in the public domain is not protected by copyright and can be used freely. The "fair use" doctrine allows limited use of copyrighted material for specific purposes without permission.

¹⁰ Yahong Li & Weijie Huang, "Taking Users' Rights Seriously: Proposed UGC Solutions for Spurring Creativity in the Internet Age", 9 QUEEN MARY J. INTELL. PROP. 61 (2019).

¹¹ Jessica Gutierrez Alm Sharing" Copyrights: The Copyright Implications of User Content in social media", Journal of Public Law and Policy volume 35, pages 105-130 (2014).

5. Content moderation and removal: The platform exercises the right to moderate and remove user-generated Content that violates its policies¹²
6. Creator rights in commercial or branded use: Using user-generated content for commercial purposes requires permission, especially involving influencers. UGC contracts should explicitly address these rights to protect content creators and those using their Content commercially.
7. Enforcing intellectual property rights and compensation: Using Content protected by intellectual property law without permission can lead to legal issues. This includes using copyrighted material like music in user-generated content. All necessary permissions must be obtained, which can be costly.¹³

The Doctrine of Fair Use in India

The Copyright Act, of 1957 states in its provision that fair dealing with a literary, dramatic, musical or artistic work that is not a computer program is not considered¹⁴ An infringement of copyright.

1. The term “Fair dealing” includes anything excluding a computer program that is used for
 - (i) “Private or personal use” including research;
 - (ii) Criticism or review of that work or any other work
 - (iii) Reporting on current events and affairs, including reporting on a lecture given in public.
2. Technical Storage: Temporary storage during electronic transmission or communication is allowed.
3. Linking and Integration: Temporary storage for linking, accessing, or integrating Content is allowed unless prohibited by the rights holder.
4. Judicial Purposes: Reproduction for judicial proceedings or reports is allowed

The court considers both legal provisions and case law to determine whether an abridged work constitutes “fair use” of a copyrighted work. The court's decision is based on a case-by-case analysis of technical factors.

In Hubbard & Another v. Vosper & Another, Lord Denning stated that:

“It is impossible to define what is “fair dealing.” It must be a question of degree. You must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long, to be fair? Then you must consider the use they make. That may be fair dealing if they are used as a basis for comment, criticism or review. That may be unfair if they are used to convey the same information as the

¹² Xanthe Melikian, available at: <https://getflowbox.com/blog/user-generated-content-permission/>. (last visited on august 25, 2024).

¹³ Available at: <https://www.brandbassador.com/en-gb/resources/user-gen>. By Brandbassador (last visited on August 25,2024).

¹⁴ What is fair use of copyright doctrine? available at <https://www.mondaq.com/india/copyright/1348352/what-is-fair-use-of-copyright-doctrine/>. (last visited on august 25, 2024).

author for a rival purpose. Next, you must consider the proportions. To take long extracts and attach short comments may be unfair. However, short extracts and long comments may be fair. Other considerations may come to mind also. However, it must be a matter of impression.”¹⁵.

In *M/s. Blackwood & Sons Ltd. v A. N. Parasuraman*, Justice Rajgopala Ayyangar observed: "Two points have been urged in connection with the meaning of the expression 'fair' in 'fair dealing.'

(1) that in order to constitute unfairness, there must be an intention to compete and to derive profit from such competition and

(2) that unless the motive of the infringer were unfair in the sense of being improper or oblique, the dealing would be fair.”

Fair dealing of Digital works

The interaction between copyright and technology has led to challenges for copyright owners. Easy access to copyrighted works online has increased concerns about infringement. The main copyright issues in the digital age can be grouped into three categories.

- i. Issues relating to a whole new set of work, namely, computer programs, databases and multimedia works;
- ii. Issues relating to reproduction, distribution and communication to the public of work through digital media and
- iii. Issues relating to the management and administration of copyright in the digital environment. A significant challenge posed by digital technologies to a user who is a public member is the right to “informed decision-making.”¹⁶

Looking ahead to the digital age

Intellectual property laws are adapting to the digital age. Governments and international organizations are working towards digital harmony and international cooperation to create a unified approach to IP protection and address social media challenges.

¹⁵ Fair use in India copyright act Available at: <https://blog.ipleaders.in/fair-use-law-india-copyright-act/>. (last visited on august 24, 2024).

¹⁶Sufiya Ahmed, "Fair Dealing in Indian Copyright Law", *Journal of Intellectual Property Rights* Vol 26, pp 96-102, (2021).

Some key developments in this area include:

1. **The European Union's Copyright Directive** introduces new measures to protect copyright holders in the digital sphere.
2. **The World Intellectual Property Organization's (WIPO) Copyright Treaty** sets international standards for copyright protection in the digital environment.
3. **The United States Copyright Alternative in Small-Claims Enforcement (CASE) Act** provides a new framework for resolving copyright disputes involving online Content.

These developments show that IP laws adapt to the digital age to protect online creators and innovators¹⁷

¹⁷ The Impact of social media on Intellectual Property Protection available at: <https://aaronhall.com/the-impact-of-social-media-intellectual-property-protection/>. (last visited on august 24, 2024).