

Examining User Generated Content from an Industry Perspective

October 17, 2013 by Fraser Turnbull

On October 10, 2013, IP Osgoode hosted a full-day symposium on “User Generated Content Under Canadian Copyright Law” discussing the new UGC copyright exception with guest speakers from government, industry, private practice, and academia. After a morning showcasing examples of user-generated content (“UGC”) – including a [DJ Lance Romance track, *Psycho slowed down to 24 hours*](#), and surprisingly, a viewing of “The Fox” (yes, [this one](#)) – the afternoon sessions of IP Osgoode’s User-Generated Content symposium dealt with the practical implications of the exception through the perspectives of three different business models.

Bell’s Perspective – Adapting to UGC

The first speaker, Tanya Woods, is the resident copyright specialist for BCE Inc. (Bell TV, Bell Mobility, Bell Canada, etc.). Because the company is a massive distributor, intermediary, content broadcaster and creator, [section 29.21](#) of the *Copyright Modernization Act* (the “Act”) presents a unique challenge for a business that acts both as a copyright user and copyright owner.

Woods began her presentation with a discussion of what UGC means; referring to how users draw on new technologies to express themselves and that this category of works includes blogs, social media, and potentially the news. In examining section 29.21, Woods made an interesting observation – the provision does not specify that UGC has to be digital, which implies that analog forms of UGC may also be covered by the exception.

To appropriately navigate section 29.21, Woods advises to follow two objectives: (1) respect legal obligations and (2) engage your viewers.

As an example of respecting legal obligations and engaging viewers, Woods referred to Bell’s “[Make it Epic](#)” app developed for the 2012 Olympic games. The app allows users to record a short video which, when watched, plays back in slow motion with the theme to *Chariots of Fire* as the background music. This app engaged Bell’s audience and encouraged the creation of UGC, while also respecting the legal obligation to properly licence the music and clear the rights to the *Chariots of Fire* theme.

Woods then offered practical advice for businesses entering the UGC space, with some general advice applicable to users as well:

- Businesses and users have to be aware that for UGC to fall into the exception, it has to be non-commercial;
- Users should also be mindful of the Terms and Conditions of UGC sites, because you may lose your intellectual property rights to your material depending on where you post it; and
- For businesses actively engaging with their audience on social media like Facebook and Twitter, it’s important to realize that bad UGC is inevitable (such as a post on the TSN Facebook page criticizing the decision to hire Drake as the ambassador for the Toronto Raptors).

Respecting the copyright owners have in their works and responsibly engaging in the creation and encouragement of UGC were two of the key takeaways from this presentation, both of which allow for section 29.21 to be properly navigated and adapted to.

SOCAN’s Perspective – UGC and the (De)valuation of Music

Eric Baptiste, CEO of the [Society of Composers, Authors and Publishers of Canada](#) (“SOCAN”), spoke about how section 29.21 affects the performing rights organization’s business model.

SOCAN is assigned the performing rights to musical works by artists and publishers in Canada. Through reciprocal foreign agreements with international performing rights organizations, SOCAN essentially owns the performing rights in Canada for most of the music in the world.

How their business model works is simple: SOCAN provides a blanket licence to establishments like restaurants, bars, broadcasters, and shops (among other entities) to use all the music they want. It's essentially a one-stop shop for users. The difficulty of this system is in the valuation of music licences.

SOCAN is [required](#) under the *Act* to file proposed tariffs with the Copyright Board. Different uses of music are licenced at different rates. And within those rates there can be further fluctuations based on the size of the venue and how many days the establishment operates. The Copyright Board publishes these proposed tariffs and then hears objections from third parties before certifying an appropriate royalty. Baptiste suggests that section 29.21 will prove problematic in determining an appropriate royalty for the use of music on online services such as YouTube.

Currently, SOCAN has an "experimental" agreement with YouTube where the online service pays the same royalties as a traditional broadcaster. This agreement only lasts until the end of 2013, and does not take into consideration section 29.21 – meaning that music used in non-commercial UGC, which does not require a licence, is licenced under this agreement. What will happen after the agreement expires remains to be seen, although YouTube may pursue a lower royalty because of the UGC exception.

Baptiste closed his presentation by saying that the UGC exception is unique and that it does not exist anywhere else in the world. He also thinks the UGC exception is an unnecessary addition to the *Act* and that it creates uncertainty and complexity, while posing a threat to appropriate compensation for professional musicians.

Legitmix's Perspective – The "Win-Win" Model?

Omid McDonald, the CEO and Co-Founder of [Legitmix](#), wants UGC creators *and* original artists to be properly compensated for their work. And he's come up with a creative solution to work within the law to make it happen.

After a friend's documentary was never released because he could not afford the fees to clear the music, McDonald realized that something was backwards about the copyright regime. Remixes and mash-ups have become mainstream, but it is a time-consuming and expensive process to get the proper licences from the publishers and composers of multiple works. While section 29.21 streamlines the process for non-commercial UGC and exempts creators from "clearing the rights" to their works, it is still not perfect. The non-commercial UGC creators still cannot get paid unless they clear the rights, and McDonald views that to be a gap in the legislation.

Legitmix's model works by separating a remix into its constituent parts: the remix file and the sampled works. Users who want to listen to their favourite remix have to buy the remix file and the Legitmix software scans their iTunes library to see if the user owns the sampled works. If the user does not own the sampled work, then they have to buy the individual tracks from iTunes or another legal music provider. Once all the sampled tracks are available, the remix file can then play the new work.

In this model, UGC creators can be compensated because they are not technically "using" existing works. They are selling their original work (the remix file), while the actual sampling of the existing works is done in the privacy of the user's home, once legal copies of the existing works exist on the user's computer.

McDonald said that record companies love the idea because UGC creators essentially become salespeople for record companies' back catalogues.

Concluding Thoughts

The speakers for this session demonstrated wildly different perspectives of section 29.21, from determining the appropriate way to adapt within the requirements of the provision, to lamenting the new change and the uncertainty it creates, and finally to creatively working around the section to remedy perceived shortfalls.

Many of the speakers noted that section 29.21 is the first exception of its kind in the world. It will be interesting to see if this provision delivers on its promise to clarify the legality of UGC and be adopted by

other countries, or whether the restrictive requirements and the uncertainty the section allegedly creates will doom it to the margins.

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