User Generated Content: Generating More Questions than Answers

October 18, 2013 by Mona Zarifian

IP Osgoode and the Genest Memorial Fund hosted an electric and vibrant panel on Thursday, October 10 to discuss the newly enacted *User-Generated Content* (UGC) provision in the *Copyright Act*. While there were many disagreements between proponents and skeptics of the provision, the panellists all seemed to agree on one thing – it's legislative ambiguity.

The preamble of the *Copyright Modernization Act* emphasizes the importance of developing a "cultural policy instrument that, through *clear, predictable and fair* rules, supports creativity and innovation." To help lawyers and judges keep in line with the goals of balance in copyright, and to achieve clear and comprehensive laws, it is important that we examine two vital questions concerning the UGC provisions.

1. What exactly *is* a "commercial purpose"?

One of the factors that places a limit on UGC is the condition that the new work is done solely for *non-commercial purposes* (an undefined concept in the Copyright Act). To limit the uncertainties created by s.29.21(1)(a), it is therefore crucial to look beyond the words (or lack thereof) of the provision itself, and instead look toward a purposive and holistic approach to the UGC exception.

Samuel E. Trosow, an Associate Professor at the University of Western Ontario, argues that in order to help overcome ambiguity, the UGC provision should be interpreted in the same context as the fair dealing provision.

What we can learn from incorporating a fair dealing analysis to the UGC exceptions is that we are to define commercial purposes on a continuum (recall that in *CCH Canadian v LSUC,* [2004] 1 SCR 339, 2004 SCC 13 the court endorsed a non-restrictive test to assess the user's purpose). Moreover, the facts of the *CCH* decision involved some "commercial" element since the materials were distributed to lawyers in the course of their professional employment.

Viewing s.29.21(1)(a) and s.29.21(d) together, we should therefore understand *commercial purpose* as a matter of degree. In doing so, we leave open the possibility for new-works to have at least some commercial element, so long as this element is not *substantial.*

2. How can we define a "substantial adverse effect" on an existing or potential market?

s.29.21(d) requires that the new-work shall not have a *substantial adverse effect*, *financial or otherwise*, on an existing work. This condition raises several difficult questions. First of all, do the words "*or otherwise*" extend to include an author's moral rights? If so, wouldn't including moral rights in user exceptions to infringement be legislatively redundant? (Moral rights run parallel to economic rights, and can be exercised regardless of copyright exceptions.)

It is also unclear what a *substantial adverse effect* on a (potential) market means. s29.21(1) describes UGC as a "new work" or other subject matter in which *copyright subsists.* This may indicate that the courts consider UGC to be an original work, possibly attracting its own copyright protection.

When interpreting s29.21(1)(d), it may be useful to look to the American decision of *Campbell v Acuff-Rose Music (1994) 510 US 569* to understand that the market of a new work is necessarily distinct from the market of the original. For example, music covers disseminated on YouTube can be understood as a separate market from existing works. Rather than competing with an existing work, it is possible to argue that by transforming an existing work into a new work, a different market and/or audience is thereby created.

We must nonetheless recognize that the author of the new work may invariably compete with the market of the existing author. Take for example Justin Bieber's early YouTube cover of Chris Brown's

song “W*ith You*.” It can safely be said that these two authors are now competitors in the same pop-music market.

Panellists, Professor Trosow and legal practitioner Marian Hebb, alluded to the possibility of a remuneration scheme whereby revenues of commercially successful UGC is allocated between authors, users, and disseminators. This arrangement of revenue allocation through collective societies may be a useful option to consider. Of course, fairly compensating artists is an essential objective, but we must also consider that this may inhibit users from creating UGC due to fears of taxation.

Conclusion

Before users begin to fully enjoy the benefits of this new UGC provision, it is my opinion that a number of clarifications related to definitions must be sorted out. First, I think the scope of *“commercial purpose”* should be limited to works which have a *substantial* commercial element. Purposes should be viewed on a continuum, giving flexibility to UGC provisions by permitting some nominal commercial success.

In situations where a UGC competes *substantially* with an existing work, I think we should consider setting up an allocation model whereby authors of existing works are remunerated by intermediaries and authors of new-works. Borrowing from the analysis in *Campbell*, we should be careful not to interpret s.29.21(1)(d) too broadly since the market of UGC works and existing works can be understood as distinct from one another.

While this provision is certainly a step toward a more progressive, user-friendly model, I think we have some work to do before the benefits of the UGC exceptions come to fruition.

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