

# Introduction of a New Exception: The Protection of User-Generated Content under UK Copyright Law

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**Abstract:** *The rapidly developing Web 2.0 technologies positively affect the development of User-generated Content (UGC). UGC is considered as various types of multimedia content generated by online users that are available publicly. The situations of UGC are not optimistic in the UK, as the current copyright protection for original works is deemed to be over strict, which leads to a series of problems such as an inhibition of freedom of users and hindrance to economic growth and innovation. In order to explore how to effectively introduce the new exception into the copyright law of the UK, this paper refers to the copyright protection approaches of the copyright laws of Canada and the US for UGC. With respect to the Canadian experience, Canadian copyright law adopts a semi-open dealing system, whereas US copyright law establishes a fair use system to protect UGC. Both methods have achieved some degree of success in practice. However, each of them has its drawbacks. The introduction of semi-open fair trade system into the UK copyright system will improve the flexibility and efficiency copyright protection of UGC. But it has also been criticized for imposing too much emphasis on non-commercial purposes and for overlapping protection issues. The core advantage of the US fair use system is that it is flexible to balance exclusive rights with satisfying social, cultural and economic needs, but one of the realistic problems is that the UK does not have a tradition of fair use system and whether it can be implemented in the UK copyright law remains to be seen. After a comparison between the US approach and Canadian approach to the copyright protection of UGC, it can be concluded that a semi-open fair dealing regime for a UGC exception in UK copyright law with reference to Canadian experience is much more suitable for the UK, which will provide more flexibility and legal certainty.*

**Keywords:** *User-Generated Content, Copyright Protection, Legal Exception, Fair Use, Fair Dealing*

## 1. Introduction

In recent years, users are capable of using broadly accessible and ever more advanced tools to generate, aggregate and distribute digital content, and share it with other users with the rapid expansion of Web 2.0 technologies <sup>[1]</sup>. The popularity of user-generated content (UGC) leads to multiple problems in the field of copyright law. Although the assumption of introducing a UGC exception in Article 5 of InfoSoc Directive has existed since 2008, the European Commission still opts not to make any change for the time being <sup>[2]</sup>. The introduction of a UGC exception in copyright legislation will present both pros and cons. The aim of this essay is to examine whether there is a necessity of introducing a new user-generated content exception into UK copyright legislation. Firstly, the definition, classification and main characteristics of UGC will be presented, followed by an overview of the judicial treatment of UGC in the UK. Secondly, problems caused by the existing court processing will be pointed out. Thirdly, two assumptions of introducing a new UGC exception in UK copyright law will be put forward with reference to the Canadian semi-open fair dealing doctrine and the principle of fair use in US law and strengths and weaknesses of each doctrine will be analyzed. Finally, an applicable exception regime for UGC will be proposed after an evaluation of the applicability of each assumption to UK copyright law.

## 2. Definition and Main Characteristics of UGC

There is no official definition of user-generated content (UGC) that is widely accepted and this may be caused by its features of various forms, rapid change, and large scale of user participation. In a general way, it can be interpreted as diverse types of multimedia content that are produced by users, typically hobbyists and semi-professionals, and that are publicly accessible <sup>[3]</sup>. Foremost, one of the typical characteristics of UGC is that it exists in various forms. It can be divided into traditional forms such as

Blogger, Wikipedia and YouTube and new forms such as Facebook, Instagram and Tik Tok<sup>[4]</sup>. It also can be divided into user-authored content, user-copied content and user-derived content, which refer to content completely created by users, content completely copied by users and content adapted and transformed by users<sup>[5]</sup>. Additionally, it changes continuously. UGC is most generally produced and disseminated in virtue of Web technologies, which makes UGC change continuously with the development of Web 2.0 technologies and the emergence of novel online applications. As regards the scale of users' activities, millions of users are engaging in distributing content and reviews made by themselves or third parties, and in watching, listening or reading content created by other users. Further, there is still a rapid increase in its scale. For instance, from September 2005 to March 2008, the percentage of individuals who reading blogs online increased from 53% to 76%, while the number of YouTube visitors climbed to over 240 million<sup>[6]</sup>. Thus, increasingly users get rid of the strict constraint through diverse approaches, and that the content created by them now has access to the public freely.

### 3. Problems Caused by the Current Copyright Protection under UK Copyright Law

The generation and the evolution of UGC lead to both considerable positive effects and problems. In relation to its merits, it plays a crucial role in promoting comprehension and cooperation between individuals and organizations, the democratization of the news process and social networking<sup>[6]</sup>. Whereas, it is also suggested that difficulties and controversies may generate in the aspect of copyright law applied to UGC and also in the aspect of the quality of obligation<sup>[7]</sup>. According to the above classification of UGC and judicial practices, apart from user-authored content, user-copied content and user-derived content is both likely to infringe the existing copyright law and social order<sup>[4]</sup>. As the academic community reaches a consensus that user copied content is an infringement of copyright, practically most issues and disputes are resulted from user-derived content.

UK copyright law has been highly questioned and criticized for its overstrict copyright protection regime and lack of adopting detailed rules for UGC in the context of Web 2.0 era. According to UK Copyright, Designs and Patents Act 1988 (CDPA), the UK copyright law system attach a highly strict protection of copyrights, which grants authors the exclusive right to create and distribute new expressive works without the requirement of registering. Although to some extent the Act creates a temporary exclusion, there are exceptions that allow using specific materials without copyright owner's permission, which is interpreted as fair dealing. This concept is similar to 'fair use', which is applied in the US. However, there is a difference in essence. The principle of fair dealing is more limited and strict than fair use in the US<sup>[8]</sup>. The UK copyright principle of fair dealing, thus far, emphasizes the use of a closed list of blow-by-blow certain uses of an artistic work that do not require the author's consent<sup>[8]</sup>. In other words, in addition to the purposes listed in the CDPA, such as quotation, criticism and comment, news reports and parody<sup>[9]</sup>. Other content, including most UGC, which uses the artistic work without the consent of the copyright owner may be regarded as infringement. It is argued that the strict protection of copyright may do harm to the birth of great artistic arts and deprive freedom of users to create and to engage in cultural life<sup>[10]</sup>, because this means that most creation of UGC will require a license from the copyright owner at all times, which seems challenging to meet the rapidly increasing demand for UGC and increase the cost of UGC creation. Furthermore, there is a high likelihood that this system is hazardous to promote innovation and economic growth in the UK<sup>[11]</sup>. It is unreasonable to accept this situation passively, therefore, advocates of reformation put forward a proposal that new exceptions for UGC should be introduced<sup>[11]</sup>. In the next part of this essay, two possible modes for adding a new UGC exception into UK copyright law will be shown and each of their advantages and limitations will be analyzed.

### 4. Two Assumptions of the Introduction of a UGC exception

#### 4.1. The Canadian Experience: A Semi-Open UGC Exception

The first assumption is to establish a semi-open UGC exception regime, referring to the Canadian experience. Canada is the only country that considers UGC as a copyright exception legally at present and Canadian copyright law used to adopt a traditional closed list system similar to the UK copyright law, thus it is significant to research the evolution of Canadian copyright law. Foremost, in 2004, Canadian Supreme Court adopted two great approaches in the case of CCH<sup>[12]</sup>, which completely changed the state of copyright law. The first approach is to announce that fair dealing is users' right more than just a defense, which defines the outer boundaries of copyright. Additionally, the court emphasized

that in order to keep a balance between the interests of copyright owners and that of users, it shall not be interpreted restrictively<sup>[12]</sup>. Further, according to Art 29(21) of Canadian Copyright Act (CCA), on the premise that the four requirements are met, the use of existing works for generation and dissemination by individuals does not constitute copyright infringement: firstly, it is generated for non-commercial purposes; secondly, it is reasonable in the circumstances to use existing works; thirdly, the original work is not illegal; fourthly, it does not cause economic or substantial damage to the used existing works<sup>[13]</sup>. Although it is argued that these four conditions show that the fair dealing system in Canada is gradually moving closer to the fair use system in the US, there is still an obvious distinction between these two principles. The most distinguished difference is that the purposes list stipulated by Canadian law are still considered to be specific and detailed, compared to the US fair use which is a general principle. Nevertheless, the idea, which is supported by the Canadian Supreme Court in CCH and indicates that interpretation should be broad rather than restrictive, seems to release the constraints of the four requirements in a gentle way<sup>[12]</sup>. In other words, when compared to traditional fair dealing, the function of the specific purposes list is more likely to be a flexible template rather than a restrictive boundary, which can be applied to other related or similar lawsuits. Therefore, on the basis of the current Canadian copyright law, UGC can be treated as a semi-open exception.

The similarity that both UK copyright law and Canadian copyright law are based on the principle of fair dealing may make it possible for the UK to introduce an analogous semi-open UGC exception into legislation. Possible merits and potential disadvantages of the introduction of a UGC exception referring to Canadian copyright law will be clarified in the next section.

#### **4.2. Merits and Defects of the Semi-Open Exception**

The concept of semi-open fair dealing may lead to a far more positive effect on elevating the flexibility of UK copyright law in dealing with UGC. As an illustration, in the case of *SOCAN v Bell Canada*, the Canadian Supreme Court held that the conduct which provided a brief preview for consumers of music streaming platform should be deemed as a fair dealing for the aim of ‘research’, and explained that the users were able to listen to the music clips in order to judge whether it is worth paying for it, which can be assumed to be doing ‘research’<sup>[14]</sup>. This large and liberal interpretation applied to the above case eventually makes UGC become a fair dealing exception. In addition, *Alberta (Education) v Access Copyright*, the superiority of this semi-open fair dealing regime is particularly prominent when compared to the strict closed list regime. From the perspective of traditional fair dealing, the word ‘private study’ is strictly interpreted, which caused a ridiculous problem. The Copyright Board of Canada (CBC) pointed that teacher’s copies of textbooks made on the suggestion of students were considered fair dealing, whereas those made on the initiative of teachers were not, because the latter shall be deemed as ‘instruction’ rather than ‘private study’<sup>[15]</sup>. This verdict resulted in bunches of criticisms for artificially splitting the purpose of private learning. Fortunately the court finally overturned the decision made by Access Copyright according to the large and liberal interpretation. Therefore, it is well proven that the semi-open fair dealing regime can provide effective protection for UGC under a broad interpretation in Canadian judicial practices and it is therefore predictable that it will also enliven UK copyright law system.

The semi-open fair dealing system also has its defects. Foremost, it is questioned for paying too much attention to the requirement of non-commercialism. There are often complex indirect benefits as a result of Web 2.0 technology innovation and the increasing complexity of UGC and the continual expansion of its scope. This exception system also confuses amateur creation with non-commercial use, which will be ineffective in actuality<sup>[16]</sup>. Furthermore, there is an obvious overlapping area between the first requirement (non-commercial use) and the fourth requirement (not causing economic and substantial loss to the used work) regulated by the CCA. To be specific, it attempts to be in accordance with two methods: one is to use an indirect, process-oriented approach, focusing on the requirement of non-commercialism of the content; then the other is to adopt a direct, result-oriented approach, that is, the requirement of ‘substantial adverse effect’, which negatively affects the legal certainty and legal flexibility<sup>[17]</sup>. Finally, there is also an overlapped area in the process of the protection of UGC. As mentioned above, while in 2012 Canadian copyright law introduced a non-commercial UGC exception, it also added more types of fair dealing, hence certain UGC can be involved with both fair dealing and UGC exceptions<sup>[18]</sup>. In other words, there is an overlapped protection between UGC exceptions and fair dealing, which may confuse users to decide which copyright exception should be chosen as the exemption basis.

### **4.3. The US Experience**

Another assumption to introduce a UGC exception in UK law is to introduce a completely open specification for exceptions and limitations with reference to the fair use system in US copyright law. The fair use doctrine is one of the fundamental methods of restricting existing copyright, which is stipulated by the Section 107 of the United States Code [19]. There are four factors that should be taken into consideration when deciding whether a practice of using an existing work falls down the exceptions under the fair use doctrine: firstly, the use's purpose and nature; secondly, the copyrighted work's essence; thirdly, the amount and significance of the piece used relating to the copyrighted work overall; fourthly, the impact of the use on copyrighted work's prospective market or value [19]. In the light of this legislative structure and existing case laws, the court will conduct a case-by-case analysis in order to clarify if certain specific uses can be out of the copyright owner's control [20]. It is worth illustrating that in the case of *Sony Co of America v Universal City*, the Supreme Court held that the sale of video recorder to the public did not constitute an infringement of the defendant's copyright [21]. In addition, the conduct that individuals who record television programs for non-commercial use on VCRs in their homes involves fair use of copyrighted content [21]. Furthermore, in the case of *Acuff-Rose Music Inc v Campbell*, transformative use rule was introduced and taken into account apart from the four above factors [22]. Specifically, the Supreme Court held that the more transformative the new work is, the less will be the significance of other factors, such as the user's purpose and nature, the copyright works' essence and commercialism, that may weigh against a finding of fair use [22]. It is argued that introducing the notion of transformative use rule into fair use system may be interpreted as an attempt to touch directly upon the fundamental goal of copyright [23].

### **4.4. Impacts of Introducing an Open Exception Regime into UK Copyright Law**

Both positive effects and negative results will generate if UK copyright law introduces an open doctrine similar to fair use in US copyright law. In relation to the strengths, the core advantage of the fair use regime is that it has sufficient flexibility to maintain the delicate balance of copyright between exclusive rights and the limitations of meeting social, cultural and economic needs [24]. Within this flexible fair use framework, the court can broaden and limit the restrictive scope. In this way, it is effective to adapt the copyright restriction infrastructure to new circumstances and challenges, such as continuously changing UGC. Furthermore, granting discretion to the courts may reduce legislative pressure to keep up with the pace of evolving technology [20]. However, the idea of introducing an open exception is fiercely resisted by some copyright lawyers in the UK and other European countries. The reason is related to concerns about insufficient legal certainty and an incompatibility with UK legal traditions [17]. Interestingly, the fair use system does not reflect the disadvantage of legal uncertainty in the US judicial practices, due to its long-term adherence to the fair use principle, which has accumulated a wealth of established case law [20]. Thus, the experience of the US courts in determining copyright restrictions case by case enhances the predictability of future decisions. On the contrary, if fair use is introduced in a short period of time, the legal certainty may be destabilized because of the long tradition of UK copyright law using a strict closed purposes list system and lacking field-related case laws and judicial experiences.

There is a high likelihood that the semi-open fair dealing doctrine is better suited to the current state of UK copyright law. After the analysis of these two assumptions of introducing a UGC exception into UK copyright law system, it can be discovered that both of them has its strengths and defects. Introducing a semi-open fair dealing exception regime into UK copyright legislation may lead to flexible, effective protection of UGC, whereas its excessive emphasis on non-commercial purposes and the defects of overlapping protection can not be ignored. Nevertheless, the problems of the semi-open fair dealing created by Canadian copyright law mostly and only involve with the irrationality of a small part of the law and the overlapping of the law, thus on the premise that specific problems have been clarified, defects can be effectively remedied by making appropriate modification to the requirements for a UGC exception and the overlapping parts of legal protection without changing the essence of the principle. On the contrary, with respect to the introduction of a fair use doctrine similar to US copyright law, it is with great difficulty to solve the legal uncertainty, for the UK lacks the legal tradition of fair use that the US has, as well as a rich accumulation of case laws of fair use. Therefore, after appropriate amendments to the relevant laws, the Canadian-style semi-open fair dealing system is more applicable likely to help improve the status quo of the copyright system in the UK, while the US fair use system is not suitable for the current copyright system in the United Kingdom due to its irreparable shortcomings.

## 5. Conclusions

Overall, it is feasible to introduce a semi-open fair dealing regime for a UGC exception in UK copyright law with reference to Canadian experiences, since the advantages far outweigh the disadvantages, whereas the US fair use doctrine may not suit the current UK copyright regime. This essay has put forward two assumptions of introducing a UGC exception in UK copyright law and critically analyzed each pros and cons in four sections. Foremost, the introduction of UGC has clarified its general definition, classification and characteristics. It can be then found that the current situation of UGC in the UK can not be optimistic and there is a lack of proper protection of UGC in UK copyright law, which leads to a series of problems such as an inhibition of freedom of users, hindrance to economic growth and innovation. Therefore, it is necessary to introduce a UGC exception in the UK. Referring to two different successful legal practices in Canada and the US, two reasonable assumptions have been raised, those are, the semi-open fair dealing system and the fair use system. It turns out that a semi-open fair dealing system may be effective because it can add sufficient flexibility into the current law system without doing harm to legal certainty and its shortcomings found in Canadian judicial practices, such as the over-emphasis of the non-commercial purpose and the overlapping of legal protections, may have a negative effect that can be covered by its merits or improved at a lower cost, such as amending the provision to shift the focus to 'substantial adverse effect' and the requirements for the a UGC exception. As regards to the fair use doctrine, although it is more flexible compared to a semi-open fair dealing doctrine, the risks it may cause, such as legal uncertainty and the insufficiency of field-related case law in the UK resulting from the difference of legal tradition between the UK and the US, are really challenging to solve. Finally, with the increasing popularity of UGC, there is no good reason for UK to stick to the current strict and rigid copyright system and it is crucial to introduce a UGC exception into copyright law in order to strive for more flexibility and legal certainty for users.

## References

- [1] George C E, Scerri J. *Web 2.0 and user-generated content: Legal challenges in the new frontier*[J]. *Journal of Information, Law and Technology*, 2007, 2: 1-22.
- [2] European Commission. *Copyright in the knowledge economy*[M]. Commission of the European Communities, 2008.
- [3] Sarikakis K, Krug C, Rodriguez-Amat J R. *Defining authorship in user-generated content: Copyright struggles in The Game of Thrones*[J]. *New Media & Society*, 2017, 19(4): 542-559.
- [4] Osborne D. *User generated content (UGC): Trade mark and copyright infringement issues*[J]. *Journal of Intellectual Property Law & Practice*, 2008, 3(9): 555-562.
- [5] Gervais D. *The tangled web of UGC: Making copyright sense of user-generated content*[J]. *Vanderbilt Journal of Entertainment and Technology Law*, 2008, 11: 841-870.
- [6] Valcke P, Lenaerts M. *Who's author, editor and publisher in user-generated content? Applying traditional media concepts to UGC providers*[J]. *International Review of Law, Computers & Technology*, 2010, 24(1): 119-131.
- [7] Helberger N, Guibault L, Janssen E H, et al. *Legal aspects of user created content*[J/OL]. (2009-11-03)[2022-09-17] <http://dx.doi.org/10.2139/ssrn.1499333>.
- [8] Dnes A W. *Should the UK move to a fair-use copyright exception*[J]. *IIC-International Review of Intellectual Property and Competition Law*, 2013, 44(4): 418-444.
- [9] Intellectual Property Office. *Exceptions to copyright*[EB/OL]. (2021-01-04)[2022-09-17] <https://www.gov.uk/guidance/exceptions-to-copyright>.
- [10] Cabay J, Lambrecht M. *Remix prohibited: How rigid EU copyright laws inhibit creativity*[J]. *Journal of Intellectual Property Law & Practice*, 2015, 10(5): 359-377.
- [11] Hargreaves I. *Digital opportunity: A review of intellectual property and growth*[M]. UK Department for Business, Innovation & Skills, 2011.
- [12] *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339, 2004 SCC 13[R/OL]. (2004-03-04)[2022-09-17] <https://www.canlii.org/en/ca/scc/doc/2004/2004scc13/2004scc13.html>.
- [13] Tawfik M J. *The supreme court of Canada and the fair dealing trilogy: Elaborating A doctrine of user rights under Canadian copyright Law*[J]. *Alberta Law Review*, 2013, 51: 191-200.
- [14] *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36 (CanLII), [2012] 2 SCR 326[R/OL]. (2012-07-12)[2022-09-17] <https://canlii.ca/t/fs0vf>.
- [15] *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37 (CanLII), [2012] 2 SCR 345[R/OL]. (2012-07-12)[2022-09-17] <https://canlii.ca/t/fs0v5>.
- [16] Awan M. *The user generated content exception: Moving away from a non-commercial requirement*[J]. *Canadian Intellectual Property Review*, 2016, 32: 27-42.

- [17] Lambrecht M, Cabay J. *Remix allowed: avenues for copyright reform inspired by Canada*[J]. *Journal of Intellectual Property Law & Practice*, 2016, 11(1): 21-36.
- [18] Scassa T. *Acknowledging Copyright's Illegitimate Offspring: User-Generated content and Canadian copyright law*[M]//Geist M. *The Copyright pentalogy: How the supreme court of Canada shook the foundations of Canadian copyright law*. Ottawa, CA: University of Ottawa Press, 2013: 437.
- [19] 17 U. S. C s 107[S]. Washington, US: United States Government Publications Office, 2006.
- [20] Senftleben M. *Bridging the differences between copyright's legal traditions-the emerging EC fair use doctrine*[J]. *Journal of the Copyright Society of the U.S.A.*, 2009, 57(3): 521-552.
- [21] Burks M A. *Sony Corporation of America v. Universal City Studios, Inc.*, 104 S. Ct. 774 (1984): *Is copyright law in need of congressional action*[J]. *Northern Kentucky Law Review*, 1985, 12: 157.
- [22] *Acuff-Rose Music Inc v Campbell* [1992] 6th Cir [1992] 972 F.2d 1429[R/OL]. (1992-08-17)[2022-09-17] <https://casetext.com/case/acuff-rose-music-inc-v-campbell>.
- [23] Woo J. *Redefining the Transformative use of copyrighted works: toward a fair use standard in the digital environment*[J]. *Hastings Comm. & Ent. LJ*, 2004, 27(1): 51-78.
- [24] Von Lohmann F. *Fair use, film, and the advantages of Internet distribution*[J]. *Cinema Journal*, 2007, 46(2): 128-133.