



The Copyright Protection Of Online User-Generated Content

by
Sipho Mudau (MDXSIP003)

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Faculty of Law
University of Cape Town

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Supervisor: Dr Tobias Schonwetter
Department of Commercial Law
Faculty of Law
University of Cape Town

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Abstract

Online social networking sites such as Facebook and YouTube allow creative works to be more easily copied and distributed. This type of content is generally referred to as *user-generated content* and its creation has become a major component of our daily routine. As a result, user-generated content has the potential to influence not just the nature of social interactions but methods of doing business.

The advent of user-generated content poses new challenges to copyright law, the conventional medium of protecting these creative works. The global reach of the internet and the increasing ease of access thereto make infringement of original material more likely and more frequent.

User-generated content is also surrounded by legal uncertainty in the areas of defamation and privacy. It is beyond the scope of this paper to deal in any depth with these issues. This dissertation will focus on the implications of user-generated content within the realm of copyright. Specifically, this paper examines whether South African copyright law, in its present state, adequately protect the rights and interests of content creators on one end and website owners and proprietors on the other.

This assessment will be guided, in part, by judicial precedent and legislative policies adopted in other jurisdictions.

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Chapter 1: Introduction

1. Purposes and aims

In a small period of time, the use of social media and social networking has become pervasively widespread. Social networking tools are used, not just by individuals, but also by advertisers and marketers, by human resources departments, and by job-seekers and employees.¹ Material that is posted and shared on these sites is commonly known as user-generated content. User-generated content exists in a number of different forms including photographs, videos, podcasts, articles and blogs. This generally allows users to express their creativity and register their comments on any content posted on sites that enable sharing. Users now have unprecedented power in the virtual environment to initiate and influence change on various social, cultural, political and economic issues in the real world.²

Online social networking sites such as Facebook and Youtube allow creative works to be more easily copied and distributed. This has created a new challenge for copyright law. This paper seeks to address whether copyright law in South Africa is sufficiently capable of protecting the respective rights of the relevant parties in the user-generated content enterprise: content creators and website owners.

The first part of this paper gives an overview of user-generated content and its key uses. In the next chapter, the paper will highlight the basics of copyright law in the South African context, outlining some of the traditional justifications for copyright protection as well as the current state of protection for user-generated content. Leading from that, the third chapter addresses the challenges with the current system of

¹ Neal & McDevitt 'Top 10 Legal Issues in Social Media' (2010). Available at: http://www.nealmcdevitt.com/assets/news/Top_10_Social_Media_Legal_Issues_FINAL.PDF [Accessed 12 March 2014].

² George, Carlisle and Scerri, Jackie 'Web 2.0 and legal challenges in the new frontier' (2007) 2 *Journal of Law and Technology* at p 2.

copyright protection in the digital environment. Here, the ideas of implied licensing and Terms of Service Agreements are examined. What will follow is an examination of the traditional defenses to copyright infringement, particularly fair dealing, with a view to establish whether these defences are appropriate in the context of user-generated content. Finally, the paper will suggest policy reform to facilitate the effective balancing of rights.

Chapter 2: User-Generated Content in Context

1 Definitions of terms

1.1 *User generated content*

User-generated content describes a wide range of Internet-based activity from blogging to file-sharing.³ 'Content' refers to multimedia material including photos, videos, audio recordings and written works. The term 'user-generated' means the production or digitization on a computer and distribution among a network of relative equals.⁴

1.1.1 *Types of user-generated content*

There are three categories of user-generated content: user copied, user derived and user authored.⁵ User copied refers to plain copies of another individual's work. User derived means a transformative work using another individual's original work as raw material. User-authored, on the other hand, means a new wholly created work. This formulation shows the varying and intricate manner in which individuals now engage with digital works on the internet. The focus, here, has turned from the form of the work to what the user does with the work.⁶

³ Daniel J Gervais, "The Tangled Web of UGC: Making Copyright Sense of User- Generated Content" (2009) 11 *Vanderbilt Journal of Entertainment & Technology Law* 841 at 842. Available at: www.jetlaw.org/wp-content/journal-pdfs/Gervais.pdf. [Accessed 20 March 2014].

⁴ Westcott-Baker, A & Pure, R 'Implications of copyright in the context of user-generated content' (2010). Paper presented at AEJMC, Denver, Colorado. Available at: https://www.academia.edu/1695610/Copyright_in_the_context_of_user-generated_content_and_social_media [Accessed 21 May 2014].

⁵ Gervais, op. cit., p 842.

⁶ Scassa, T 'Acknowledging Copyright's Illegitimate Offspring: User-Generated Content and Canadian Copyright Law' at p 433 in Michael Geist *The copyright pentology : how the Supreme Court of Canada shook the foundations of Canadian copyright law* (2013).

It is difficult to adequately define ‘user-generated content’ because it refers to such a wide range of online activity. As a result, some have called it “content that is created in whole or in part using tools specific to the online environment and/or disseminated using such tools.”⁷ Other scholars categorise it in terms of its creators and not its content, writing that UGC is “used to describe activities engaged in by those typically seen not as cultural producers but cultural consumers.”⁸

1.1.2 Digital v Traditional user-generated content

Some types of user-generated content existed before the internet came to be. Examples of these include fan fiction, parodies and satires.⁹ Digital user-generated content, however, makes it easier for users to interact with the content and to disseminate it worldwide. Users can now also create and distribute their content without the participation of traditional cultural industry intermediaries.¹⁰ In the typical scenario, a user will upload their own original work to user-generated content sites. Often, however, users also post works that constitute, include or are based on copyright works of others.¹¹

Digital user-generated content differs from traditional content not just in the way that it is created but also in the way rights and liabilities arising from it are allocated. Normally, with traditional content, creators and distributors enter into contracts which include representations and warranties, indemnification clauses and other familiar language allocating their respective liabilities and designating ownership rights.¹² In the

⁷ Gervais, op. cit., p 842.

⁸ Halbert, D ‘Mass Culture and the Culture of the Masses: A Manifest for User-Generated Rights’ (2009)

¹¹ *Vanderbilt Journal Entertainment & Technology Law* 921 at 924.

⁹ Scassa, op. cit., p 433.

¹⁰ *Ibid.*

¹¹ Holmes, S and Ganley, P ‘User-generated content and the law’ (2007) 2 *Journal of Intellectual Property Law & Practice* at 338. For example, uploaded content may contain artistic works, films, musical works or sound recordings.

¹² Biederman, Charles and Andrews, Danny ‘Applying Copyright Law to User-Generated Content’ *Los Angeles Lawyer* (2008). Available at: <http://www.lacba.org/Files/LAL/Vol31No3/2483.pdf> [Accessed 4 September 2014].

digital domain, most of these issues are handled through end user license agreements.¹³

Furthermore, in the realm of user-generated content, a minimum of two different creators are relevant: the creator of the original or source work and the creator of the user-generated content. An appropriate balance must be struck between them. The rights of copyright holders, do not, however form the crux of this paper. It is nonetheless important to state that the creator of the source work typically seeks to profit economically from their work; conversely, creators of user-generated content usually distribute the modified source work non-commercially, and only so long as there is no adverse impact on the source work.¹⁴

1.1.3 Characteristics of user-generated content

Generally, user-generated content has several distinct characteristics. These central characteristics are likely, however, to change with time. As such they are useful in as far as laying groundwork for the wide range of content that qualifies as user-generated. Firstly, user-generated content is published.¹⁵ In theory, user-generated content could be made by a user and never be published online. However, the focus of this paper is work that has quite clearly been published online. Thus emails and instant messages are excluded from the definition.¹⁶

¹³ Ibid.

¹⁴ Scassa T, op. cit., p 436.

¹⁵ Organisation for Economic Co-operation and Development (OECD) Working Party on the Information Economy 'Participative Web User Created Content' (2007) at p 8. Available at: <http://www.oecd.org/sti/38393115.pdf>. [Accessed 27 July 2014].

¹⁶ Ibid.

Secondly, user-generated content involves a creative effort.¹⁷ This requirement implies that a certain amount of creative effort must be put into either creating the work or adapting an existing work to come up with the final product.¹⁸ The precise amount of creative effort required is however, unclear. This notwithstanding, it stands to reason that simply recording and uploading segments of a television series on to the internet does not constitute a sufficient creative effort to dub this user-generated content.¹⁹ On the other hand, the uploading of photographs onto a photo-sharing website, posting a blog entry or shooting of a music video which is then placed online all constitute user-generated content.²⁰ Thus, the minimum amount of creative effort is hard to define and depends largely on the context.

Third, user-generated content is mostly created independent of professional routines and practices and often does not have immediate or obvious commercial value.²¹ This type of content may, therefore, likely be produced with no expectation of profit. Motivating factors include connecting with peers, achieving a certain level of fame, notoriety, or prestige, and sometimes simply the desire to express oneself.²²

1.2 Social networks

Social networks are basically virtual online communities.²³ Examples of social networks are Facebook, Twitter and LinkedIn. In addition to these, there are a variety of specialized social networks including ones that are industry or profession driven or interest-based, such as dating sites, classmate search sites or sites focused on health topics.²⁴ These sites are often equipped with a directory to locate other members with

¹⁷ Ibid.

¹⁸ Hetcher, S 'User-Generated Content and the Future of Copyright: part One – Investiture of Ownership' (2008) 10 (4) *Vanderbilt Journal of Entertainment and Technology Law* 863 at 871.

¹⁹ OECD (n13).

²⁰ Ibid.

²¹ Ibid at p 9.

²² Ibid.

²³ Ossian K 'Legal Issues in Social Networking' (2009) at 1-1.

²⁴ Ibid.

similar interests. Members on these sites typically build their personal networks through connecting with other members via 'friend requests' or invitations. In this way, mutual consent is required before members are considered "connected."

A member's profile consists of information about that member: their interests and activities as well as affiliations, contact details, occupation and educational background. Members are often free to decide on their own personal security settings. They may decide to choose from different levels of privacy, ranging from whether to allow any member of the network to access and view their profile content to limiting access to connected members. Members may even have further security in place within their connections. Additionally, non-original content like photos and videos is very often posted to the profile pages of individual members.²⁵

1.3 The user

The party who creates user-generated content must be an individual.²⁶ This definition means that the user is a person who makes use of others' works which are protected by copyright.²⁷ This definition is problematic because it implies that only 'users' only borrow the content of others. Put differently, this definition postulates that the ordinary non-user generated content creator does not draw on or make use of the works of others.²⁸ While it may be true that typical creators do not explicitly borrow from the works of others, examples of appropriation of works from the public domain and from copyrighted works abound in the creative context. Moreover, by emphasizing the 'use' of the works of others, it is argued that the user-generated content enterprise is a

²⁵ Ibid.

²⁶ Scassa T, op. cit., p 436.

²⁷ Ibid.

²⁸ Ibid at p 437.

parasitic activity.²⁹ This is untrue as user-generated content can be highly creative, innovative and transformative.³⁰

The word ‘user’ in user-generated content emphasizes that the creator of the generated content is not part of the traditional content industries. Thus, instead of works generated by professional artists or creators through traditional models such as the music, film or publishing industries, much user-generated content is created by amateur content creators, who are very likely ordinary individuals in their own homes.³¹

1.4 Third Party Content

Third party content is material that appears on one website and can be accessed via links from that site.³² Anytime a user publishes text, graphics, photos or other media online it is important to ensure that they have complied with the relevant copyright laws.³³

1.5 Contributory copyright infringer

A contributory copyright infringer is a ‘one who, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another.’³⁴ Vicarious liability for another’s copyright infringement arises when there is the ‘right and ability to supervise’ the primary infringer coupled with ‘an obvious and direct financial interest’ in the infringing activity.³⁵ In another case, a US court held that the mere

²⁹ Ibid.

³⁰ Ibid.

³¹ Ibid at p 438.

³² OECD, op. cit., p 5.

³³ Ossian, op. cit., 1-3.

³⁴ *Gershwin Publishing Corp v Columbia Artists Management Inc*, 443 F.2d 1159, 1162 (2d Cir. 1971).

³⁵ *Shapiro, Bernstein & Co v HL Green Co*, 316 F.2d 304, 307 (2d. Cir. 1963).

presence of non-infringing uses does not take a service out of the realm of secondary copyright liability when, at the same time, the provider of that service demonstrates an intent to induce copyright infringement.³⁶

2 Value and importance of User-generated content

The use of the internet is most widespread in developed countries but is growing exponentially in the developing world too.³⁷ It is thus necessary for a unified and coherent policy framework that enables user-generated creation and distribution to be developed in South Africa. This is also because user-generated content is becoming increasingly economically valuable and is also an important source of innovation and an avenue for creative expression.³⁸

2.1 Economic

The economic value of user-generated content has increased as the amounts of it produced have increased.³⁹ This value lies in that in some instances, user-generated content is a source of revenue to its creators who receive payments, donations and licensing revenue.⁴⁰ The easy distribution of user-generated content has led to the dual

³⁶ Determann L, Holmes S, Brauer L & Ha Tang S 'User Generated content services: The UK and US perspectives' (2007) *Cross-border Quarterly* 47 at 49. Available at www.practicallaw.com/6-211-3078 [Accessed 21 March 2014].

³⁷ McNally M, Trosow M, Wong L, Whippey C, Burkell J & McKenzie P 'User-generated content online 2: policy implications' (2012) 17 *First Monday* 6. Available at: <http://firstmonday.org/article/view/3913/3267>. [Accessed 1 May 2014].

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ F. Le Borgne–Bachs Schmidt, S. Girieud, M. Leiba, S. de Munck, S. Limonard, M. Poel, L. Kool, N. Helberger, L. Guibault, E. Janssen, N. van Eijk, C. Angelopoulos, J. van Hoboken, and E. Swart 'User–created–content: Supporting a participative information society; Final report' (2008) Available at: http://ec.europa.eu/information_society/eeurope/i2010/docs/studies/ucc-final_report.pdf, [Accessed 30 July 2014].

business model of the social networking enterprise, comprising the subscription based model and the advertising revenue–based model.⁴¹

In some cases, the content itself generates significant value as demonstrated in the interactive online role-playing game franchise. Games such as *Counter–Strike* and *Second Life* have been created and then subsequently sold for millions.⁴² In the game, *Second Life*, user–generated content is interactively used to generate wealth, in both the fictional currency of the game and real dollars.⁴³ Gamers can buy and sell clothing, buildings and a variety of trinkets. This enables them to make marginal benefits and enjoy virtual economies of scale that translate to real revenues.⁴⁴

In addition to all this, some organizations such as Wikipedia are the result of successful user-generated content projects. Wikipedia continues to rely on the participation and content creation of its users.⁴⁵ User-generated content has several other potential avenues to create value. Platforms for user-generated content may very well be able to generate revenue through selling hard copies of related goods.⁴⁶ The debate is still on-going, also, as to whether virtual environments are also tax-free environments. The proposition of imposing tax on virtual space is an exciting one for the taxing industry but may have the converse effect of dulling content creators' interests in making the content.⁴⁷

⁴¹ Gangadharbatla H 'Facebook me: Collective self–esteem, need to belong, and internet self–efficacy as predictors of the iGeneration's attitudes toward social networking sites' (2008) 8 *Journal of Interactive Advertising* at p 1–28. Available at: <http://jiad.org/article100>. [Accessed 4 June 2014]. In the advertising model users get a free service, and owners of the service get to serve ads to this audience. In the subscription model, users regularly pay a fee to use the site or certain features on the site.

⁴² McNally et al, op. cit.

⁴³ Huffaker D, Simmons M, Bakshy E and Adamic L'Seller activity in a virtual marketplace' (2010) vol 15 *First Monday*. Available at: <http://firstmonday.org/article/view/2977/2569>. [Accessed 28 July 2014].

⁴⁴ Ibid.

⁴⁵ Andrew Lih, *The Wikipedia revolution: How a bunch of nobodies created the world's greatest encyclopedia* (2009) at p 4.

⁴⁶ McNally et al, op. cit.

⁴⁷ Ibid.

2.2 Business

The expansion of user-generated content is of value to business, particularly internet service providers, who stand to benefit immensely from the increased demand for Internet access attendant to the creation and consumption of user-generated content.⁴⁸ Similarly, mobile service operators stand to increase their revenue as use on mobile platforms increases.⁴⁹ While content creators are not usually paid directly for their contributions, there has been experimentation with ways and means to grant creators a share of the value generated from their content.⁵⁰

Incorporating user generated content with existing web content can further benefit a company in a number of respects by facilitating the creation of new and original content that websites need to climb up the search engine rankings.⁵¹ Customers are also encouraged to stay on websites longer and come back to a site, because the nature of user-generated content engages them by allowing them to comment and to take ownership of the site.⁵²

User-generated content may be an attractive means for some companies and brands to market their products online. This is mainly because of the unique opportunity that the internet affords for business to infiltrate and make full advantage of virtual communities.⁵³ Taking full advantage of user-generated content involves allowing and encouraging interactions between these different virtual communities that will enrich the experience for all the members therein.⁵⁴ In this regards, user-generated content is a useful vehicle to convince consumers of a product's merit by exposing them to real

⁴⁸ Ibid.

⁴⁹ Le Borgne-Bachshmidt et al, op. cit.

⁵⁰ Ibid.

⁵¹ Paul Smithson 'User generated content – The Growing phenomenon that is changing the way we publish and consume media online' (2012) at p 10.

⁵² Ibid.

⁵³ A. Armstrong and J. Hagel 'The real value of on-line communities' In: E. Lesser, M. Fontaine, and J. Slusher (eds) *Knowledge and communities*. (2000) at p 85–98.

⁵⁴ Ibid.

reviews from satisfied customers.⁵⁵ Adding elements of user-generated content to a product site can also help businesses fine-tune their marketing strategies and obtain vital feedback from consumers about their products and services. This, furthermore, provides an effective forum for companies to address any consumer issues.⁵⁶

2.3 Innovation

One of the big advantages of user-generated content is that it encourages innovation. It is agreed by many scholars that the old industrial model of innovation that had at its helm the importance of centralized research and development departments is no longer applicable to intangibles.⁵⁷ The upsurge in user-generated content is proof of this change in tide; innovation is no longer dependent solely on the policy drawn up by central leaders in industry.⁵⁸ Consumers and creators are now starting to play a bigger role in the process of development. This is evidenced through the history and success of open source software.⁵⁹ This is consistent with the hypothesis in the field of patents that as opposed to patents encouraging innovation, it is in fact, innovation that results in increased patenting.⁶⁰

The opportunity that user-generated content provides for innovation is unique because the type of content that is created by individual users differs from that made by profit-seeking firms responding to market pressures.⁶¹ Because of this, user-generated content must be seen not as a threat to existing content providers but rather as a

⁵⁵ Smithson, *op. cit.*, p 10.

⁵⁶ *Ibid.*

⁵⁷ Strandburg K 'Evolving innovation paradigms and the global intellectual property regime' (2009) 41 *Connecticut Law Review* 861 at 880–920.

⁵⁸ Le Borgne-Bachshmidt et al, *op. cit.*

⁵⁹ McNally et al, *op. cit.*

⁶⁰ Baldwin J, Hanel P and Sabourin D 'Determinants of innovative activity in Canadian manufacturing firms: The role of intellectual property rights' (2000) *Statistics Canada Analytical Studies Branch Research Paper*, number 122. Available at: <http://www.statcan.gc.ca/pub/11f0019m/11f0019m2000122-eng.pdf>. [Accessed 30 July 2014].

⁶¹ Elkin–Koren, N 'What contracts cannot do: The limits of private ordering in facilitating a creative commons' (2005) 74 *Fordham Law Review* at 375 at 393–422.

complement to what has been and is already being produced.⁶² Content of this nature has the potential to open up new ways of connecting businesses with consumers and can generate new interest in old content.⁶³

2.4 Government policy

In the current age, it is imperative for governments to factor in the pervasive importance of user-generated content as part of their digital economic strategy.⁶⁴ Research and development, innovation and technological development of ICT skills can all be spurred on by facilitating more and diverse user-generated content.⁶⁵ Given the complex and dynamic interaction between user-generated content and traditional intellectual property devices, governments must attempt to carefully balance policy choices to maximize innovation in a very different context than the one that existed before.

2.5 Social, political and cultural

The production of new media products serves also to promote civic, political and social engagement.⁶⁶ Recently, several awareness campaigns have had their status elevated because of the sharing of links and ‘hashtag activism’ on social media. Moreover, user-generated content can be used as a means to develop skills for producing digital material.⁶⁷ The proliferation of user-generated content has led to the development of skills in computer and data usage amongst a younger demographic who are then equipped with a subsidiary skill set much earlier than their counterparts of

⁶² McNally et al, op. cit.

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Harrison, T and Barthel, B ‘Wielding new media in Web 2.0: Exploring the history of engagement with the collaborative construction of media products’ (2009) 11 *New Media & Society* at p 155–178.

⁶⁷ McNally et al, op. cit.

yesteryear were.⁶⁸ For example, in the past, students in film schools spent their initial years learning video editing techniques. However, because of user-generated content, many students now enrol having the basic techniques in their grasp.⁶⁹ What is more, some creators of user-generated content have been able to translate the skills and social wherewithal derived from their online presence to gain employment.⁷⁰

While user-generated content has economic value and its production can enhance the skills of creators, some scholars hold the view that the greatest use of user-generated content is socio-cultural.⁷¹ The production of this content is an expressive act and governments or corporations that limit its production disempower the creators thereof.⁷² Content creation often encourages collaboration in a variety of ways ranging from collaboratively authored works such as Wikipedia to user based ranking systems that can be found on YouTube.⁷³ These collaborative elements encourage discussion and review encouraging self-reflection and further conversation and interaction.⁷⁴ Furthermore, user-generated content is democratic as many sites have rating, review or commenting mechanisms that allow what end users view as important be made more preeminent on the sites. Therefore, in light of the power that user-generated content has for cultural expression, policy-makers should actively create an environment where such content can flourish and citizens can freely express themselves online.⁷⁵

⁶⁸ Ibid.

⁶⁹ Hargreaves, I 'Digital opportunity: A review of intellectual property and growth' (2011). Available at: <http://www.ipo.gov.uk/ipreview-finalreport.pdf>. [Accessed 30 July 2014].

⁷⁰ McNally et al, op. cit.

⁷¹ Ibid.

⁷² Gervais, (2009), op. cit., p 841–870.

⁷³ Elkin-Koren, N 'Tailoring copyright to social production' (2011) 12 *Theoretical Inquiries in Law* 309 at 310-347.

⁷⁴ Tushnet, R 'User-Generated Discontent: Transformation in Practice' (2008) 31 *Columbia Journal of Law & Arts* 101 at 105-110.

⁷⁵ Ibid.

3 Main issues for user-generated content

Content uploaded by users is likely to be a copyright protectable itself and may include copyright works owned by third parties. For instance, uploaded content may consist of artistic works, films, musical works, and sound recordings. For content providers, there are three main copyright questions: who owns the uploaded content; what exclusive rights in the work could be infringed; and what defences may be available to a party who infringes copyright in an original work.⁷⁶ These questions will be considered in detail in the ensuing chapters.

⁷⁶ Holmes and Ganley, *op. cit.*, 338.

Chapter 3: The Basics of Copyright Law

1 Introduction

As the focus of this dissertation is copyright law, it is imperative to consider the fundamental principles governing this area of law. This chapter outlines these principles and also considers the international system of copyright protection as well as the approaches adopted by individual countries to copyright protection. This is instructive in order to effectively compare these jurisdictions with South Africa.

2 General Principles of Copyright

2.1 Definition

Copyright gives the creator or author of a work the exclusive rights to the use and distribution of that work, usually for a limited time, with the intention of enabling the creator of intellectual wealth to receive compensation for their work. The law of copyright, as a species of intellectual property right, is propositionally distinct from other categories of rights: real, personal and personality rights.⁷⁷ In South Africa, copyright is regarded as an incorporeal immovable asset.⁷⁸ Further, the Copyright Act (hereafter 'the Act')⁷⁹ states that copyright may be transferred as movable property.⁸⁰

2.2 Nature of copyright

As a distinct category of right, copyright has several unique features. Firstly, copyright is territorial in nature which means that copyright protection is granted in the

⁷⁷ Hennie Klopper, Tania Pistorius, Brian Rutherford, Lee-Ann Tong, Pieter van der Spuy, Andries van der Merwe 'Law of Intellectual Property in South Africa' (2011) p145.

⁷⁸ *Gallo Africa Ltd v Sting Music (Pty) Ltd* 1103 JOC (A) 1108 at para 19.

⁷⁹ Act No. 98 of 1978.

⁸⁰ *Ibid* at s22(1).

particular country whose law governs the existence of copyright.⁸¹ Secondly, copyright, unlike many other rights, exists as a right to preclude others from doing certain things in relation to the copyright holder's work.⁸² In this sense, copyright has been called a 'negative right' because it prohibits third parties from executing infringing acts with respect to the work.⁸³ The set of acts that will be restricted differs according to what type of 'work' is in question.

Copyright is also a bundle of rights, protecting the author's moral and economic rights in respect of the particular work.⁸⁴ The author's moral right to the work is the right to claim authorship of the work and the right to object to any distortion of the work which would prejudice the author's reputation.⁸⁵ In contrast, the economic interest in a copyrighted work consists of the right to make commercial use of the work and the right to do or authorize others to do any of the restricted acts in respect of the work.⁸⁶

Further, copyright protects the expression of ideas and not simply the ideas themselves.⁸⁷ This means that copyright does not exist before a physical or material expression of an idea has come into being. Put differently, copyright protection is only available when the ideas in respect of a particular work are made into a visible form. To this end, South African courts have held that when ideas are put in words on paper they become an essential part of the work.⁸⁸ It can therefore be concluded that the focus of copyright law is the combination of ideas and the form in which they are conveyed.⁸⁹

⁸¹ Klopper et al, op. cit., p145.

⁸² William Cornish and David Llewelyn *Intellectual Property: Patents, Copyrights, Trade Marks and Allied Rights* 6ed (2007) at 1-04.

⁸³ Klopper et al, op. cit., p145-6.

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ *Galago Publishers (Pty) Ltd v Erasmus* 1989 (1) SA 276 (A) at 293G and 284.

⁸⁸ *Ross v Ramesar* 2008 JDR 0660 (C).

⁸⁹ Klopper et al, op. cit., p147.

2.3 Duration of copyright

Copyright, unlike many other rights, does not last for as long as the object of the right subsists. Copyright has a limited duration, varying according to the type of work.⁹⁰ When the term of copyright has come to an end, the work falls into the public domain and is no longer protected.⁹¹ This means that anyone may freely copy the work.⁹² How long copyright exists for is therefore essential in making a determination as to whether copyright exists in the work at the relevant time.

The Act states that the copyright in literary, musical and artistic works lasts for the lifetime of the author plus 50 years calculated from the end of the year in which the author dies.⁹³ However, if the work had not been published or performed in public before the author of the work died, then copyright will subsist for a period of 50 years from the date at which the first of these acts is done.⁹⁴

In terms of the Act, the copyright in a cinematograph film or photograph will last for 50 years from the end of the year in which the work is lawfully made available to the public.⁹⁵ To make a photograph or film available to the public means to make an announcement that copies of the work may be lawfully acquired by the public from a particular source.⁹⁶ If the work is not so made available to the public or published within 50 years of the making of the work, copyright will last for 50 years from the end of the year in which the work was made.

⁹⁰ Copyright Act (n79) at s3.

⁹¹ AJC Copeling 'Copyright and The Act of 1978' ed (1978) 85, para 63.

⁹² Klopper et al, op. cit., p 179.

⁹³ Copyright Act (n79) at s 3(2)(a).

⁹⁴ Klopper et al, op. cit., p 179.

⁹⁵ Copyright Act (n79) at s 3(2) (b).

⁹⁶ Copeling, op. cit., p 86.

For sound recordings, copyright lasts for 50 years from the end of the year in which the recording is first published.⁹⁷ Conversely, where there is more than one author in a work, copyright subsists for a period of 50 years from the date at which the first co-author dies.⁹⁸ The Act also stipulates the duration of copyright in other categories of work. However, most of these fall outside the scope and purposes of this paper.

2.4 Justification for Copyright

Several arguments have traditionally been advanced to justify copyright protection. Among these are the natural law, the cultural, the commercial argument, the cultural argument, the utilitarian argument and the incentive argument.⁹⁹

2.4.1 Natural law

Two central theories form the general natural law theories: the labour theory and the personality theory.¹⁰⁰ According to the labour theory, authors of a work are entitled to the benefits of their creative effort and accordingly have the right to control the exploitation or modification of their own creations.¹⁰¹ The personality theory posits that an individual's control over their assets expresses that person's personality, which is vital for autonomy, freedom, and confidence.¹⁰² Thus, to promote and facilitate self-development, the individual needs control over the surrounding resources.¹⁰³

⁹⁷ Copyright Act (n79) at s 3(2)(c).

⁹⁸ *Ibid* at s 3(4).

⁹⁹ Klopper et al, *op. cit.*, p144.

¹⁰⁰ Robert Merges 'Justifying Intellectual Property' (2011) at p 61-66.

¹⁰¹ Stewart S 'International Copyright and Neighbouring Rights' 2ed (1989) at p 3.

¹⁰² Jeremy Waldron 'The Right To Private Property' 13 (1988) at p 20.

¹⁰³ *Ibid*.

2.4.2 Cultural

On the other hand, the cultural argument supports the view that it is in the best interests of society in general and the enhancement of the cultural well-being of the nation to reward creativity.¹⁰⁴ This is because the profits that authors earn from their works are incentive for further creative endeavours by others.¹⁰⁵ Meanwhile, the social argument postulates that society is advanced and made more cohesive by the widest possible distribution of copyright works to the public.¹⁰⁶

2.4.3 Commercial

The question of copyright has always been closely connected to that of commercial value.¹⁰⁷ Indeed, in South Africa, the courts have noted that the Act is based on the commercial copyright model because the definition of 'author' covers persons who are not necessarily authors in the ordinary sense, but individuals with a financial interest in the end product.¹⁰⁸ This state of affairs is undergirded by the idea that it is just that authors be remunerated for the exploitation of their works.¹⁰⁹

It has long been the case that there are two kinds of copyright: in high authorship works, such as novels and narrative histories and in low authorship works. In the first instance, the purpose of copyright is to protect the author's contribution within the work. By contrast, copyright protection in low authorship works, such as telephone directories and compilations of stock quotations, protects the labor and resources invested in the

¹⁰⁴ Stewart, op. cit., p 3.

¹⁰⁵ Klopper et al., op. cit. p 144.

¹⁰⁶ Ibid.

¹⁰⁷ Ginsburg, J 'Creation and Commercial Value: Copyright Protection of Works of Information' (1990) 90 *Columbia Law Review* 1865 at 1866.

¹⁰⁸ *Biotech Laboratories (Pty) Ltd v Beecham Group plc* [2002] 3 All SA 652 (SCA) 659.

¹⁰⁹ Klopper et al, op. cit., p144.

work's creation. In this sense, copyright is intrinsically about both creation and commercial value.¹¹⁰

2.4.4 Utilitarian

One common justification for copyright is based on utilitarian considerations.¹¹¹ Copyright, like any other property right, is aimed to benefit as many people as possible in society and resultantly, to benefit society as a whole.¹¹² A focus on public welfare, as opposed to the benefits accruing to specific individuals, means that there is a justification for copyright as long as the public derives some benefit from this protection.¹¹³

2.4.5 Incentive

In some schools of thought, copyright law is thought to exist primarily to incentivize authors and creators of content to create works and thereafter disseminate these works publicly.¹¹⁴ This is the incentive argument. By providing a creator with the possibility of limited exclusionary control over creative expression at a particular time in the future, the system is thought to encourage the production of such expression in the present.¹¹⁵

¹¹⁰ Ginsburg, op. cit., 1870.

¹¹¹ Afori, O 'Human Rights and Copyright: The Introduction of Natural Law Considerations into American Copyright Law' (2004) 14 *Fordham Intellectual Property, Media and Entertainment Law Journal* 496 at 502.

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ Balangesh, S 'Forseeability and Copyright Incentives' (2009) 122 *Harvard Law Review* 1569 at 1577.

¹¹⁵ Ibid.

3 Requirements for copyright protection in South Africa

The Copyright Act prescribes the requirements for the vesting of copyright. The inherent features relating to the work are that it must be original¹¹⁶ and it must be reduced to material form. In terms of the external circumstances, the author must be a qualified person¹¹⁷ or the initial publication of the work must have taken place in South Africa. There is no requirement of registration in order for copyright to subsist in a work. This differentiates copyright from all other forms of intellectual property protection.¹¹⁸

3.1 Work

Among the requirements for the subsistence of copyright are that the object of copyright protection must be a work. The Act prescribes the productions that can be categorised as works.¹¹⁹ Whether an alleged work is actually proper subject-matter for copyright protection involves an objective test as to whether it has sufficient substance to warrant protection.¹²⁰

Protection is given, first, to literary works.¹²¹ This term is defined in s 1 to include, among others, novels, dictionaries and speeches. Protection is granted “irrespective of the literary quality” of the work. Literary works that have been protected by the courts include spare parts catalogues¹²² and salary forms.¹²³

¹¹⁶ *Macmillan & Co v Cooper* 1923 40 TLR 186 at 190.

¹¹⁷ Copyright Act (n79) at s3.

¹¹⁸ Klopper et al, op. cit., p 161-2.

¹¹⁹ Copyright Act (n79) at s 2.

¹²⁰ *Francis Day and Hunter Ltd v Twentieth Century Fox Corporation Ltd and others* [1940] AC 112.

¹²¹ Copyright Act (n79) at s 2(1)(a).

¹²² *Payen Components SA Ltd v Bovic* CC 1995 4 SA 441 (A).

¹²³ *Kalamazoo Division (Pty) Ltd v Gay* 1978 2 SA 184 (C).

Musical works are eligible for copyright protection under the same section of the Act. The creator of a musical work has the right to, among other things, reproduce and publish the work, perform it in public and make an adaptation thereto.¹²⁴ Reproduction in this context refers to reproducing the work in the form of a record or a film and protects reproductions that are themselves from other works.¹²⁵ Publication is made when copies of the work are issued to the public¹²⁶ and a musical work is performed in public when it is performed before people who would not normally constitute the domestic circle.¹²⁷ In respect of musical works, adaptation means

*'any arrangement or transcription of the work, if such arrangement or transcription has an original creative character'*¹²⁸

Artistic works are recognised in section 2(1)(c) of the Act and include paintings, sculptures, drawings, engravings and photographs. The granting of copyright protection to artistic works does not depend on their artistic quality nor does the work need to have been made with any artistic intent.¹²⁹ Other categories of works included in the Act are cinematograph films, sound recordings, broadcasts, programme-carrying signals, published editions, computer programs.¹³⁰

User-generated content may evidently take many of the forms of expression protected as works by the South African statute. However, it is not enough for content to fall under the respective definitions of 'works'; the content must also meet the other requirements in order for copyright to subsist in it.

¹²⁴ Copyright Act (n79) at s 6.

¹²⁵ Copeling, op. cit., p 9 -10.

¹²⁶ Copyright Act (n79) at s 1(5).

¹²⁷ *Southern African Music Rights Organisation Ltd v Svenmill Fabrics (Pty) Ltd* 1983 (1) SA 608 (C).

¹²⁸ Copyright Act (n3) at s 1(1). Para (b).

¹²⁹ *Klep Valves (Pty) Ltd v Saunders Valve Co Ltd* 1987 2 SA 1 (A) at 20F. Accordingly, works of a technical nature are also protected. See Owen Dean *Handbook of South African Copyright Law* (1989) at 1-10.

¹³⁰ Copyright Act (n79) at s 2(1)(d)-(i).

3.2 Originality

The Act states that a work listed in s 2 is not eligible for copyright protection unless it is original.¹³¹ Originality is not defined in the Act and as a result, the courts have interpreted the meaning of this term.

In *Appleton & another v Harnischfeger Corporation & another*¹³² it was held that originality does not mean that the idea must be new or expressed in a way that is without precedent.¹³³ In order to be original, the work must be that of the author and must not have been copied from another source.¹³⁴ When this requirement is met, a work is original regardless of whether an identical work exists.¹³⁵ Originality is thus determined by the amount of skill, labour and judgment that has gone into the making of the work.

With regard to the approach that the courts follow in relation to how much time and effort are required to make a work original, reference can be made to the decision in *Waylite Diary CC v First National Bank Ltd.*¹³⁶ Here, Harms JA stated that while

*'the actual time and effort expended by the author is a material factor to consider in determining originality, it remains a value judgment whether that time and effort produces something original.'*¹³⁷

It was also said that,

*'whether an alleged work is proper subject-matter for copyright protection involves an objective test, both in respect of originality and work.'*¹³⁸

¹³¹ Klopper et al, op. cit., p 162.

¹³² 1995 (2) SA 247 (A).

¹³³ Ibid at 262.

¹³⁴ Dean (1989), op. cit., at 1-8.

¹³⁵ Klopper et al, op. cit., p 162.

¹³⁶ 1995 1 SA 645 (A).

¹³⁷ Ibid at 649H.

The court pointed out that the two inquiries can become entwined and stated that where the work is of doubtful substance, a court would have regard to what the consequences of affording protection to that work would be in order to decide whether to actually grant protection.¹³⁹

In the context of user generated content, the role of originality is exceedingly important because user generated content is more than merely the wholesale appropriation of content.¹⁴⁰ For example, when a user simply uploads a copy of their favourite television show on YouTube, they are not deemed to be generating new content. Rather, user generated content must contain an element of originality. Originally authored creative content ranging from blog posts, a Wikipedia article or new open source software program are *prima facie* examples of how users can produce and distribute new, economically and socially valuable works.¹⁴¹

However, it is not always easy to determine whether certain user-generated content fulfills the originality requirement. One such problematic category is content where the author or creator has drawn on existing works and transformed them into a new work. Examples of such transformative works may include a photo mash-up that brings together two different images or a video remix that draws on hundreds of pieces of content. Using a work as a building block for an argument, or an expression of the creator's imagination is transformative in purpose. This stands in contrast to consuming a work where the purpose is to use the work for its entertainment value.¹⁴² However, this type of user-generated content draws on preexisting materials and resultantly it is more probable that it will have potential infringement implications.¹⁴³

¹³⁸ Ibid.

¹³⁹ Ibid at 650D.

¹⁴⁰ McNally et al, op. cit.

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³ Ibid.

3.3 Reduction to material form

The Act states that a work will only be eligible for copyright if it has been ‘written down, recorded, represented in digital data or signals or otherwise reduced to a material form.’¹⁴⁴ This means that a work must exist in some other form before it can qualify for copyright protection.¹⁴⁵ This requirement is a progression of the fact that copyright only protects the expression of ideas and not the ideas themselves.¹⁴⁶ Further, it is also required that this material fixation have a sufficient degree of permanence. This has not been precisely defined in the South African case law, but in *Merchandising Corporation of America Inc v Harpbond Ltd*¹⁴⁷ the court held that face-make up was not sufficiently enduring to warrant copyright protection. Similarly, it was held elsewhere that ‘sand pictures’ that were produced by a device did not meet the requirement of permanence.¹⁴⁸

3.4 Author must be a qualified person

The Act states that:

*‘copyright is conferred on every work eligible for copyright if the author is a qualified person at the time at which the work or a substantial part of it is made’*¹⁴⁹

In terms of the Act, a qualified person is either a natural person who is a South African citizen or is domiciled or resident in the Republic or a body incorporated under the laws of the Republic.¹⁵⁰ A person is a resident of a country if that country is the place where they live with some degree of continuity.¹⁵¹

¹⁴⁴ Copyright Act (n79) at s 2(2).

¹⁴⁵ Klopper et al, op. cit., p 164.

¹⁴⁶ Ibid.

¹⁴⁷ [1983] FSR 32 (CA).

¹⁴⁸ *Komesaroff v Mickle* [1988] RPC 204.

¹⁴⁹ Copyright Act (n79) at s 3(1).

¹⁵⁰ Ibid.

¹⁵¹ *Levene v Inland Revenue* [1928] AC 217.

This requirement brings to bear several questions. Firstly, given the global operation of the market for user-generated content and the fact that potentially infringing users post from various places around the world, where can a proceeding can be initiated? Secondly, under which rules will such proceedings be decided? A further query relates to whether a judgment in a proceeding will therefore be enforceable in another jurisdiction.¹⁵²

These concerns are alleviated by s 32 of the Act, which extends the scope of ‘qualified person.’ This section establishes a ‘qualified person’ as not just as a citizen or resident of South Africa, but a citizen of any country that is part of the Berne Convention. It is safe to assume that very few individuals will fail to meet this requirement as most countries are signatories to the Berne Convention anyway.

4 Copyright creation

For the most part, many of the forms of user-generated content are protectable under the Act. For example, uploaded content may contain artistic works, films, musical works or sound recordings in the form of text, photographs, music and videos.¹⁵³ The loose requirement for originality also helps ensure that most user-generated content will be protectable.¹⁵⁴

¹⁵² Linda Goin ‘Social Media and Copyright Issues’ (2009) *DMXZone.com* at p 1. Available at: http://www.dmxzone.com/Downloads/Tutorial_20090916_Copyright.zip/13-09-09-copyright.pdf [Accessed 15 May 2014].

¹⁵³ Determann et al, op. cit., p 48.

¹⁵⁴ Clark, W ‘Copyright, Ownership and Control of User-Generated Content on Social Media’ at p 6. Available at: <http://www.kentlaw.edu/perritt/courses/seminar/papers%202009%20fall/Jerry%20clark%20final%20Copyright,%20Ownership,%20and%20Control%20of%20User-Generated%20Content%20on%20Social%20Media%20Websites.pdf> [Accessed 15 March 2014].

Concern has been raised about whether the short length of updates on social networking sites such as Facebook and Twitter would prevent this matter from being copyrightable.¹⁵⁵ In the absence of any statutory guidelines or requirements as to the length of a work in order to be copyrightable, it is reasonable to conclude that tweets and status updates are protectable as literary works. The usual requirements of originality and reduction to a material form will, accordingly, need to be met. A tweet or status update will fulfill the originality requirement fairly easily, provided that it has not been copied or resent from another author.¹⁵⁶ The reduction to material form requirement is also simply met as tweets and status updates are stored on a central server.¹⁵⁷

5 Current scope of protection for user-generated content

5.1 International framework for copyright protection

The law of copyright is undoubtedly the most significant mode of protection afforded to the production and distribution of user-generated content.¹⁵⁸ Many aspects of copyright are internationally harmonized through global copyright treaties including the Berne Convention,¹⁵⁹ the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)¹⁶⁰ and the World Intellectual Property Organization (WIPO) Copyright Treaty.¹⁶¹

¹⁵⁵ Ibid at p 7.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

¹⁵⁸ McNally et al, *op. cit.*

¹⁵⁹ Berne Convention for the Protection of Literary and Artistic Works, 9 September 1886, as last revised at Paris on 24 July 1971, 1161 U.N.T.S. 30.

¹⁶⁰ Agreement on the Trade-Related Aspects of Intellectual Property (TRIPS), 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197.

¹⁶¹ WIPO Copyright Treaty (WCT), 20 December 1996, S. Treaty Doc. No. 105-107 (1997), 36 I.L.M. 65 (1997).

It must be noted that it does not matter in which jurisdiction a user creates content in; these international agreements in conjunction with national copyright legislation grant copyright owners control over adaptations (otherwise known as derivative works).¹⁶² On the other hand, according to the Berne Convention,

*“...adaptations...shall be protected as original works without prejudice to the copyright in the original work.”*¹⁶³

The danger is that creating content based on an existing work has the risk of infringing of the underlying work. Therefore, creators often have to license their content to individual sites and retain the copyright therein in order to distribute content.¹⁶⁴ The issue of licensing shall be addressed in more detail in a later part of this paper. For now, it suffices to state that extensive use has been made of licenses to the benefit and detriment of both content creators and hosts of user-generated content.

The scope of international copyright protection also covers computer programs and software. In most cases, software is generally treated as a literary work. While computer programs are not user-generated content per se, it may be instructive to consider in brief how they have been protected firstly because some components of computer programs may involve content creation and thus overlap with conventional user-generated content. Secondly, computer programs in most jurisdictions are protected as literary works as are many forms of user-generated content.¹⁶⁵

¹⁶² McNally et al, op. cit.

¹⁶³ Berne Convention (n159) at Art. 2(3).

¹⁶⁴ McNally et al, op. cit.

¹⁶⁵ Tong, L ‘Copyright protection of computer programs in South Africa: Aspects of Sui Generis Categorization’ (2009) 12(4) *Journal of World Intellectual Property* 266 at 268.

The TRIPS agreement requires its signatories to afford software copyright protection.¹⁶⁶ As previously mentioned, copyright law gives copyright owners the sole right to produce and create derivative works. Thus content creators need to ensure that material taken from an existing work is licensed or used within the scope of limitations or exceptions such as fair dealing. These exact limitations and exceptions will be further discussed in the proceeding chapters.

5.2 Individual country approach

At an international level, individual countries have differing approaches to copyright law. This section addresses whether and how provision is made for the specific copyright protection of user-generated content in the national legislation of other countries. This is important because user-generated content raises a number of issues that the traditional application of South African copyright law in non-digital media is ill-equipped to address.¹⁶⁷ These precise issues will be expounded on in the next chapter. For now, it is instructive to describe the copyright protection afforded to user-generated content in foreign jurisdictions.

5.2.1 USA

The US Digital Millennium Copyright Act¹⁶⁸ (hereafter 'DMCA') contains what are referred to as safe harbor provisions.¹⁶⁹ These are clauses in the statute that limit the liability of service providers where users of their services commit infringing acts.¹⁷⁰ The courts have held that this provision applies equally to websites that host user-generated

¹⁶⁶ TRIPS Agreement (n160) at Art. 10(1).

¹⁶⁷ Scassa, op. cit., p 432.

¹⁶⁸ Pub. L. 105-304-Oct 28, 1998.

¹⁶⁹ Ibid at s 512.

¹⁷⁰ Electronic Frontier Foundation 'Digital Millennium Copyright Act' (2014). Available at: <https://www.eff.org/issues/dmca>. [Accessed 28 August 2014].

content.¹⁷¹ This means that where users post infringing material on these sites, the site owners will be able to escape liability if they comply with the requirements set out in the DCMA itself.

Conversely, the DCMA also provides some degree of protection for content creators who through their activities could potentially infringe the copyright in existing works, through fair use provisions.¹⁷² The fair use doctrine allows for the creation of adaptations of original works without infringing the copyright in the original works. The practical application of this doctrine has, however, been constrained. For example, in the case of *Grand Upright v. Warner*,¹⁷³ rapper Biz Markie was found liable for copyright infringement by sampling a song from another artist. This was held to be a violation of US statute. Similarly, in the appeals court case of *Bridgeport Music v. Dimension Films*¹⁷⁴, it was found that the use of three notes from another musical score constituted copyright infringement. The court further enunciated and endorsed the principle of: 'get a license or do not sample.' The effect of these decisions has been to discourage content creators from fully making use of their rights.¹⁷⁵ In this way, it appears that the protection of user-generated content in the USA generally operates in favour of website owners and proprietors.

5.2.2 Canada

Developments in copyright legislation in Canada mean that now user-generated content is eligible for copyright protection in its own right, distinct from the other

¹⁷¹ *Viacom Int'l, Inc. v. YouTube, Inc.*, S.D.N.Y., No. 07 Civ. 2103, June 23, 2010. The court here held that Youtube was only obligated to remove access to infringing content when the copyright owner informed them of specific and identifiable infringement.

¹⁷² Supra note 98 at s 1201.

¹⁷³ 780 [F. Supp.](#) 182 (S.D.N.Y. 1991)

¹⁷⁴ 410 F.3d 792 (6th Cir. 2005)

¹⁷⁵ Elkin-Koren (2005), op. cit.

categories of work.¹⁷⁶ The amended Copyright Act¹⁷⁷ makes it non-infringing conduct for content creators to perform certain acts with regard to original works.¹⁷⁸ For example, posting covers to copyrighted songs or fan fiction tributes online are permitted as long as they are not used for commercial purposes and have no adverse effect on the original work.¹⁷⁹

It is noted that while these changes in Canada are commendable as an attempt to make the law compatible with the realities of the digital age, the provision in Canada possibly has wider application than previously thought.¹⁸⁰ This is because there are various ways in which content creators can adapt original works into their creations. The qualification: 'non-commercial' uses and 'must have no substantial adverse effect' on the original are an effort to keep the balance between the rights of creators and those of copyright holders in the original works. It remains to be seen whether this balance will be effectively struck.

5.2.3 South Africa

Unlike Canada, South Africa does not provide any specific protection to consumers who remix or mash-up copyright works for non-commercial purposes nor is there any mention of user-generated content in the Act.¹⁸¹ These acts may be protected through other exceptions and limitations, dependent on the circumstances.¹⁸² This notwithstanding, there is nothing to bar user-generated content from being protected under the enumerated categories of work in the Act, depending on the nature of the content itself.

¹⁷⁶ Scassa, T 'User Generated Content Under Canadian Copyright Law' (2013). Available at: http://www.teresascassa.ca/index.php?option=com_k2&view=item&id=128:user-generated-content-under-canadian-copyright-law. [Accessed 29 August 2014].

¹⁷⁷ RSC 1985, c C-42.

¹⁷⁸ Ibid at s 29.21(1)(a)-(b).

¹⁷⁹ Ibid.

¹⁸⁰ Scassa (n176), op. cit.

¹⁸¹ A2K Network 'Consumers in the digital age' Available at: <http://a2knetwork.org/reports/south-africa>. [Accessed 19 June 2014].

¹⁸² Ibid.

However, for uploaders of videos on popular sites such as YouTube and Vimeo, the Performer's Protection Amendment Act¹⁸³ may find some utility. Performers under this act are entitled to payment for broadcasts of their performances fixed in sound recordings.¹⁸⁴ While not protecting the content itself from infringing uses, this Act provides content creators with compensation for their creative endeavours. Similarly, s 9A of the Copyright Act provides for the payment of a royalty when a person communicates or transmits a sound recording to the public.

Elsewhere, the Electronic Communications and Transactions Act¹⁸⁵ (hereafter 'the ECTA') limits the liability of internet and content service providers where users post infringing material on their sites or through their networks provided they are members of a representative body and have implemented the code of conduct of that body.¹⁸⁶ In practice, the effect of these requirements is that user-generated content websites are not afforded protection from liability because it is neither practical nor possible, in some cases, for them to be members of representative bodies.¹⁸⁷ Evidently, this approach differs significantly from the USA and there is also a need in South Africa for the balance to be re-dressed.

6 Possible alternatives to copyright protection of user-generated content

6.1 Patents

¹⁸³ Act 8 of 2002.

¹⁸⁴ Ibid at s 5.

¹⁸⁵ Act 25 of 2002.

¹⁸⁶ Ibid at s 72.

¹⁸⁷ Cominos, A 'Intermediary liability in South Africa' (2012) *Association for Progressive Communications* at p 14-15. Available at: http://www.apc.org/en/system/files/Intermediary_Liability_in_South_Africa-Comminos_06.12.12.pdf [Accessed 29 August 2014].

Given the challenges associated with copyright law, the question is whether there are alternative means of protecting user-generated content. The normal use of patent protection is to cover novel, useful and inventive products and processes. Over the last few years the scope of patentable subject matter has been expanded in some countries to protect computer-based processes.¹⁸⁸ This avails potential for certain types of user-generated content to be protected by patents.

Next generation multiplayer online games allow gamers to share an interactive experience in real time. In many of these systems, users can easily communicate with each other, carry out transactions in a centralized marketplace and create, customize and personalize game related content.¹⁸⁹ This content often consists of text, pictures, audio, and video files that may be created and can alter the game environment.¹⁹⁰ Indeed patents have been granted for games, including interactive aspects of games that can be modified by users.¹⁹¹

In Canada, court decisions seem to have the effect of allowing the patenting of other kinds of online content¹⁹² As an example, in 1998 *Amazon.com* filed a patent application for a one-click buying process which avoided the need for customers to enter their address and billing information before making purchases. The application was rejected by the Commissioner of Patents and *Amazon* instituted court action. In the Federal Court, it was held that this method of doing business, as this system was, was patentable. However, whether interactive methods of doing business fit into the

¹⁸⁸ B. Hall 'Business and financial method patents, innovation and policy' (2009) *NBER Working Paper*, number 14868. Available at <http://www.nber.org/papers/w14868>. [Accessed 20 June 2014].

¹⁸⁹ Aleo-Carreira, C 'Is Sony Censoring Little Big Planet's User-Generated Content?' *Industry Standard*, November 18 2008. Available at: <http://www.thestandard.com/news/2008/11/18/sony-censoring-little-big-planets-user-generated-content>. [Accessed 28 August 2014].

¹⁹⁰ US Patent Application Number US 12/796,219. Available at: <http://www.google.com/patents/US20110302052>. [Accessed 28 August 2014].

¹⁹¹ Gosh, S 'Patenting Games: *Baker v Shelden* Revisited' (2009) *11 Vanderbilt Journal of Entertainment & Technology Law* 871 at 879.

¹⁹² *Amazon.com, Inc. v. Canada*, 2010 FC 1011 and *Canada v. Amazon.com, Inc.*, 2011 FCA 127.

definition of user-generated content is unclear. Thus it is uncertain whether this precedent will apply to all types of content.

6.1.1 Problems with patenting user-generated content

One of the main problems with patenting user-generated content is that these patents will only be applicable to content that is similar to that discussed above. Most other forms of user-generated content will therefore remain under the auspices of copyright. It is argued by some scholars that having multiple schemes of IP protection for user-generated content is likely to discourage innovation and content creation because the prospect of having to overcome the twin hurdles copyright and patent may dissuade users from creating anything at all.¹⁹³

Another notable drawback of patenting in general is the increasing registration of patents by firms or individuals who only have the intention to exploit the exclusive rights provided by the patent as an asset that can be used in litigation. These are what are known colloquially and pejoratively referred to as 'patent trolls.' The prevalence of patent trolls appears to have had a knock on effect in the area of copyright. For example, in 2010, *Rightshaven*, an American copyright holding company, partnered with media companies to launch copyright infringement claims against various bloggers and content aggregators in what resembled traditional patent trolling.¹⁹⁴

In view of the conceptual challenges associated with potentially patenting user-generated content, copyright remains the primary method for balancing the rights of the respective stakeholders in user-generated content. The next chapter will, however,

¹⁹³ C. Shapiro, 'Navigating the patent thickets: Cross licenses, patent pools, and standard setting' In: A. Jaffe, J. Lerner, and S. Stern (eds) *Innovation policy and the economy* (2009) Vol 1. at p119–150.

¹⁹⁴ D. Kravets 'Second newspaper chain joins copyright trolling operation' *Wired* (30 August 2010) Available at <http://www.wired.com/threatlevel/2010/08/copyright-troll-expanding/>. [Accessed 20 June 2014].

discuss some of the challenges associated with enforcing copyright in the digital environment.

Chapter 4: Challenges of Copyright Protection in the Digital Environment

1 Introduction

While the previous chapter outlined the basics of copyright protection, this chapter seeks to illustrate that there still exist notable difficulties in the application of the law of copyright in the digital sphere. The international system for the protection of material on the internet will first be considered, followed by a discussion of the public and private ordering mechanisms that have been created in an attempt to solve problems of enforcement. The most noteworthy is the licensing system. Consideration will be made of the use of licenses on content-hosting sites and the effect this practice has on the balance of rights between content creators and website owners. Finally, the chapter will conclude with brief recommendations for content creators in light of the difficulties associated with licensing.

2 Main Challenges for copyright in the digital realm

One of the main criticisms of the application of traditional copyright law to online content is that it often restricts the circulation of valuable creative works.¹⁹⁵ Because the creation of user-generated content inherently involves frequent copying of text, images and data, the protection of these works curtails the creation of new kinds of internet-based content.¹⁹⁶

At a more practical level, copyright in the digital environment is a challenge because it is possible for users to make perfect copies of works and distribute them

¹⁹⁵ D Bollier 'Intellectual Property in the digital age' at p 5 in Ben Walmsley *Key Issues in the Arts and Entertainment Industry* (2011).

¹⁹⁶ *Ibid.*

instantly. This makes it difficult to identify and apprehend infringers.¹⁹⁷ Added to this is the fact that relatively few copyright cases are actually litigated anyway.¹⁹⁸ This decreases the probability that infringement suits would arise with regard to user-generated content. In response to these and other challenges in the digital age, the international community has drawn up various agreements.

3 International system for Internet Protection

The broad reach of the internet contends against the ability of national governments to adequately enforce statutory copyright against foreign content creators.¹⁹⁹ The result is a conflict in international laws.²⁰⁰ As a result, international copyright law has been adapted to respond to technological advances. Notably, in 1996, the World Trade Organization enacted the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).²⁰¹ TRIPS requires signatories thereto to provide minimum levels of protection for copyright holders in their respective countries.

Further additions to international copyright protection came in the form of the WIPO-endorsed 'digital treaties.' The most important of these are the Copyright Treaty²⁰² (hereafter 'WCT') and the Performance and Phonograms Treaty²⁰³ (hereafter 'WPPT'). Both of these treaties clarified and extended the then existing Berne Convention and TRIPS provisions by allowing copyright holders to encrypt their works in

¹⁹⁷ Halbert, op. cit., p 931-933.

¹⁹⁸ Lee, E 'Warming Up To User-Generated Content' (2008) 5 *University of Illinois Law Review* 1459 at 1479.

¹⁹⁹ Gasser, U 'Copyright and Digital Media in a Post-Napster World' (2003) *Harvard University -Berkman Centre for Internet & Society* at p 9. Available at: <http://cyber.law.harvard.edu/publications> [Accessed 24 June 2014].

²⁰⁰ Ibid.

²⁰¹ [Agreement on Trade-Related Aspects of Intellectual Property Rights](#), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C.

²⁰² WIPO Copyright Treaty (WCT), 20 December 1996, S. Treaty Doc. No. 105-107 (1997), 36 I.L.M. 65 (1997).

²⁰³ S. Treaty Doc. No. 105-17, 36 ILM 76 (1997).

order to protect their rights.²⁰⁴ The collective effect of these treaties has been to establish a modern international system of copyright and related rights and to bring that system into the digital age.²⁰⁵

Copyright and other intellectual property rights are typically provided for by national legislation in individual countries.²⁰⁶ International treaties link the various national laws by ensuring that at least a minimum level of rights will be granted to creators under each national law. The treaties do not grant rights in and of themselves, but they instead require the signatory nations to non-discriminatorily grant certain rights.²⁰⁷ The WCT and WPPT contain a number of new standards and bring clarity to the older treaties.²⁰⁸ These treaties provide additional responses to the challenges of new digital technologies.²⁰⁹

The treaties aim to ensure that the rightful holders of copyright and related rights will continue to be adequately and effectively protected when their works are disseminated through new technologies and communications systems such as the Internet.²¹⁰ In effect, the treaties clarify, first, that the traditional right of reproduction also applies in the digital environment. Second, they make it clear that the owners of rights can control how their creations are made available online to individual consumers at any particular time and in any given place chosen by the consumer themselves.²¹¹

²⁰⁴ 'International Copyright – Protection of Copyright in The Digital Age' Available at: <http://law.jrank.org/pages/5740/Copyright-International-Protection-Copyright-in-Digital-Age.html> [Accessed 24 June 2014].

²⁰⁵ World Intellectual Property Organisation 'The WIPO Internet Treaties.' Available at: http://www.wipo.int/copyright/en/activities/internet_treaties.html. [Accessed 23 March 2014].

²⁰⁶ Ibid.

²⁰⁷ Ibid.

²⁰⁸ Ibid.

²⁰⁹ Ibid.

²¹⁰ Ibid.

²¹¹ Ibid.

3.1 Criticisms of the international instruments

The WCT and WPPT are not without their critics. The arguments advanced against these treaties are that they are too far-reaching and give countries too much flexibility in how they apply digital copyright.²¹² They also apply a blanket standard to all signatories in spite of widely differing stages of economic development and knowledge industry in each.²¹³ Ultimately, despite the adjustments to the old order of international copyright regulation, the global nature of the internet and attendant content creation has remained a challenge for the enforcement of copyright across international borders.²¹⁴

4 Private systems for copyright protection on the internet

In view of the challenges of the international system of internet protection, private mechanisms may be an alternative. Statutory intellectual property laws are 'public ordering mechanisms' which are maintained and upheld by national governments.²¹⁵ In contradistinction, private ordering mechanisms allow private entities wider leeway to dictate the terms and conditions in which intellectual content can be used and content generated without breaching copyright.²¹⁶

It is noted, however, that private ordering mechanisms can actually be a significant barrier to content creation and distribution themselves.²¹⁷ These techniques can be either technological, such as Technological Protection Mechanisms (TPMs) including Digital Rights Management (DRM) software, or legal devices such as licensing agreements and End User Licensing Agreements (EULA) specifically.

²¹² Okediji, R 'The Regulation of Creativity Under the WIPO Internet Treaties' (2009)77 *Fordham Law Review* 2379 at 2400.

²¹³ *Ibid.*

²¹⁴ Gasser, *op cit.*, p 10.

²¹⁵ McNally et al, *op. cit.*

²¹⁶ *Ibid.*

²¹⁷ *Ibid.*

4.1 Informal copyright practices

Private ordering mechanisms may also take the form of practices that are neither sanctioned by statute nor by formal copyright licenses.²¹⁸ Examples of such practices include the making of derivative works of popular movies in fan fiction and the creation of pseudo-movie trailers.²¹⁹ These practices are not specifically provided for in formal licenses or copyright exceptions such as fair dealing. Thus they fall into a 'gray area' of the copyright system.²²⁰

It is important to acknowledge and allow these practices because the gaps in the current copyright system cannot realistically be filled fast enough to keep pace with the vast number of uses of copyrighted works that occur daily on the internet.²²¹ Indeed, it seems that in the case of non-commercial uses of copyrighted works on blogs or in fan fiction, the copyright holders publicly condone these general practices.²²²

4.2 Formal copyright practices

Formal contractual terms and conditions dictating how content can be used frequently limit how end users can engage in the full range of lawful activities that they may otherwise be entitled to. It is noted that although copyright permits the licensing of content to users, private firms will probably limit the granting of such licenses where commercial opportunities exist for financial returns.²²³ The issue of licensing forms the crux of the remainder of this chapter and will be discussed in further detail in the following sections.

²¹⁸ Lee, *op. cit.*, p 1461.

²¹⁹ *Ibid.* at p1462.

²²⁰ *Ibid.*

²²¹ *Ibid.* at p 1461.

²²² *Ibid.*

²²³ Elkin-Koren, N 'What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons' (2005) 74 *Fordham Law Review* 375 at 376. Available at: <http://ir.lawnet.fordham.edu/flr/vol74/iss2/3> [Accessed 28 June 2014].

5 Licensing

Arguably, the biggest issue in the context of user-generated content on social media sites is the potential for commercial exploitation of users' content by the enterprises that run the sites.²²⁴ It is in this context that the scope of copyright licensing finds relevance. The question here is how to protect creators of content from exploitative licensing. To answer this question, it is important to first know the principles governing this area of law.

5.1 Principles of licensing

In South Africa, copyright is transmissible as movable property. It has already been stated earlier that various forms of user-generated content are protectable by copyright according to the tenets of South African copyright law. Transmission of copyright can occur by assignment, testamentary disposition, operation of the law or through a licence.²²⁵ A copyright licence is:

*'an agreement in terms of which the copyright owner grants the licensee permission to perform an act or exercise a right in relation to the property which act or exercise would, in the absence of the licence, amount to an infringement of the right concerned.'*²²⁶

The grant of a license does not usually give the person who is granted the license, the licensee, the right to enforce any of the copyright rights against infringing parties.²²⁷ However, a license may be granted in respect of one or several acts that are within the scope of the particular copyright.²²⁸ The Act also does not prescribe any formalities that need to be carried out before a simple license is granted. Accordingly, it

²²⁴ Clark, op. cit., p10.

²²⁵ Copyright Act (n79) at s 22(1).

²²⁶ Klopper et al, op. cit., p194.

²²⁷ Ibid.

²²⁸ Ibid.

can be inferred that a license may be granted through written or oral means, or through the conduct of the licensor and the licensee.²²⁹

5.2 Types of licence

5.2.1 Exclusive and Non-exclusive licenses

The Act does, however, distinguish between non-exclusive and exclusive licences. An exclusive licence gives the licensee the right to use the licensed intellectual property to the exclusion of all other persons.²³⁰ An exclusive licence must be in writing and must be for a prescribed amount of time.²³¹ On the other hand, a non-exclusive license only gives the licensee the right to use the intellectual property but does not grant them any proprietary rights in that property. Under a non-exclusive license, the licensor may still grant licences for use to other persons.²³²

5.2.2 Implied licences

Licenses that are granted without any written agreement are known as implied licenses. For example, in the Canadian case of *Planification-Organisation-Publications Systèmes (POPS) Ltée v. 9054-8181 Québec Inc.*²³³, a license by verbal agreement and a course of conduct was granted by one party. In that case, the court found the lack of a written agreement irrelevant to the existence of an implied license. An implied licence is not formed solely from an oral undertaking but can arise through the conduct of the licensor and licensee.²³⁴ It is worth noting that not all oral licences are implied

²²⁹ Ibid.

²³⁰ Copyright Act (n79) at s1 (1).

²³¹ Julien Hofman 'Introducing Copyright' (2009) at p 48.

²³² Klopper et al, op. cit., p 194.

²³³ 2013 FC 427.

²³⁴ Richard Stobbe 'Revoking an Implied software license' (2013) Available at: <http://www.lexology.com/library/detail.aspx?g=5ec3f965-3860-4e86-825c-e503f88d7808> [Accessed 29 April 2014].

licences because parties to a contract can expressly verbally agree to the terms and conditions of the agreement.²³⁵

5.2.3 Click-wrap licences

The increased use of licenses on the internet is obvious through 'click-wrap licenses.' In these contracts, the signatory does not need to place their signature at the annex of the agreement but must simply declare their acceptance of the terms of the license.²³⁶ Click-wrap licenses are often laid out on website pages which contain the specific terms of the contract. These types of contracts may range from contracts of sale, contracts to acquire information or to exploit new technology or simply permission to download software.²³⁷

There have been no cases in South Africa dealing with click-wrap licenses. Guidance can be sought, therefore, from the USA, where the case of *ProCD Inc v Zeidenberg*²³⁸ held that a shrink-wrap license is an ordinary contract and thus will be enforceable as such, under the general principles of contract.²³⁹

The immediate result of the *ProCD* decision is that it is still unclear whether it is apt to enforce click-wrap licences for copyright works, such as user-generated content. Some scholars are of the opinion that such licences should only be excluded if they have the effect of reducing competition or stagnating innovation.²⁴⁰ Other writers, and

²³⁵ *Cellular Insurance Managers (Pty) Ltd v Foschini Retail Group (Pty) Limited* [2011] ZASCA 85 (27 May 2011) at para 5.

²³⁶ Klopper et al, op. cit., p 195.

²³⁷ Davies C 'Electronic Commerce: Practical implications of Internet Legislation' (1998) *Communications Law* 82 at 83.

²³⁸ 86 F 3d 1447 (7th Cir 1996).

²³⁹ Ibid at 1454.

²⁴⁰ Reichman J and Franklin J 'Privately legislated intellectual property rights: The limits of article 2B of the UCC', paper delivered at Intellectual Property and Contract Law in the Information Age: The Impact of Article 2B of the Uniform Commercial Code on the Future of Transactions in Information and Electronic Commerce, conference held on 23-25 April 1998, *University of California (Berkeley)*.

indeed courts in other jurisdictions, hold that click-wrap licences are unenforceable as contracts.²⁴¹ Another group holds that there appears to be no reason why these agreements should not be enforced as the customer is aware of the terms before signing.²⁴²

What is clear is that, at least in theory, the overall benefit of the licensing regime is to allow access to copyright protected works and also to prevent others from changing those works to new products.²⁴³ In this way, a balance is struck between the competing interests of copyright holders and content creators. Click-wrap licences continue in the form of online Terms of Service agreements. Because of their prominence on user-generated content hosting websites, these agreements will be discussed in detail in the next section.

6 Terms of Service Agreements

Many websites in which user-generated content is produced make use of Terms of Service. These are essentially extensions of click-wrap licenses.²⁴⁴ Often these agreements include provisions in the terms and conditions that vest ownership of the content in the provider of the site.²⁴⁵ These are distinguishable from browse-wrap agreements which contain posted terms that do not require any manifestation of acceptance in order to be considered binding.²⁴⁶ Terms of Service Agreements usually

²⁴¹ Klopper et al, op. cit., p 198.

²⁴² Snail, S 'South African e-consumer law in the context of the ECT Act' (2007) 15 *The Quarterly Law Review for People in Business* 40 at 46.

²⁴³ Free Software Foundation "What is copyleft?" (2010). Available at <http://www.gnu.org/copyleft/> [Accessed 1 May 2014].

²⁴⁴ Sandeen, S 'The Sense and Nonsense of Web Site Terms of Use Agreements' (2003) 26 *Hamline Law Review* 499 at 503.

²⁴⁵ Tasker T & Pakcyk, D 'Cyber Surfing On The High Seas of Legalese Law and Technology of Internet Agreements' (2008) *Albany Law Journal of Science & Technology* at 85.

²⁴⁶ Pistorius, T 'Click wrap Agreements and Web Wrap Agreements' (2004) 16 *SA Mercantile Law Journal* 560 at 570.

require a user to accept the conditions by an action, such as clicking on an image, or typing 'yes' in a text box before proceeding further on the web site.²⁴⁷

6.1 Uses of Terms of Service Agreements

The use of these types of agreements is possibly an outgrowth of the intellectual property regime as a whole.²⁴⁸ Terms of Service allow website owners to control the use of their intellectual property rights by stipulating the conditions under which users can make use of their sites.²⁴⁹ It is worth noting that in many cases, these licences are essential for the website owners to operate their services efficiently.²⁵⁰ For example, the effect of Twitter's Terms of Service is to enable a user to redistribute, in the form of retweets, content posted by other users without asking the poster for permission to do so. Moreover, users are not required to transfer ownership of their content to the site hosts or other users.²⁵¹

6.2 Problems with Terms of Service Agreements

It is acknowledged by most social media sites that users who post their own content on these sites have copyright in the works thereon. On Facebook, for example, the content creator 'own[s] all of the content and information [they] post on Facebook, and can control how it is shared through [their] privacy and application settings.'²⁵²

²⁴⁷ Ibid.

²⁴⁸ Sandeen, op. cit., p 524.

²⁴⁹ Ibid at p 525.

²⁵⁰ Walden, M 'Could Fair Use Equal Breach of Contract?: An Analysis of Informational Web Site User Agreements and Their Restrictive Copyright Provisions' (2001) *58 Washington & Lee Law Review* 1625 at 1626-1628.

²⁵¹ Twitter Help Center, 'Retweeting another person's Tweet.' Available at: <https://support.twitter.com/articles/20169873-retweeting-another-person-s-tweet>. [Accessed 1 September 2014].

²⁵² Facebook, Statement of Rights and Responsibilities. Available at: <http://www.facebook.com/terms.php?ref=pf>. [Accessed on 2 July 2014].

YouTube's Terms of Service also state, "you retain all of your ownership rights in your User Submissions."²⁵³

However, in most cases, the social media sites also grant themselves broad rights to exploit users' content in the respective Terms of Service. Facebook, for example, states that for content that is covered by intellectual property rights, like photos and videos, the user specifically gives the proprietor of the site permission, subject to privacy and application settings to grant Facebook a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any intellectual property content that is posted on or in connection with Facebook. This license ends when the user deletes this content or deletes their account unless their content has been shared with others, and Facebook has not deleted it.²⁵⁴

Similarly, Twitter gives itself extensive rights.

'You retain your rights to any Content you submit, post or display on or through the Services. By submitting, posting or displaying Content on or through the Services, you grant us a worldwide, non-exclusive, royalty-free license (with the right to sublicense) to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute such Content in any and all media or distribution methods (now known or later developed). You agree that this license includes the right for Twitter to provide, promote, and improve the Services and to make Content submitted to or through the Services available to other companies, organizations or individuals who partner with Twitter for the syndication, broadcast, distribution or publication of such Content on other media and services, subject to our terms and conditions for such Content use. Such additional uses by Twitter, or other companies, organizations or individuals who partner with Twitter, may be made with no compensation paid to you with respect to the

²⁵³ YouTube, Terms of Service § 6(C), <http://www.youtube.com/t/terms>.

²⁵⁴ Facebook, Statement of Rights and Responsibilities, op. cit.

*Content that you submit, post, transmit or otherwise make available through the Services.*²⁵⁵

These types of provisions grant the social media sites nonexclusive licenses to make use of users' content in a very broad arena in a number of ways. For example, some of the above provisions provide for the social media site taking users' images or videos and using them in the site's advertising campaigns. Inevitably, the site gains revenue from any advertising activity that it engages in. What is notable is that these and many similar provisions specify that the licence granted to the site-owner is royalty-free. This means that the content-creating user will not be compensated for any revenue gains that the site owners derive from this content.²⁵⁶ Put differently, social media sites, and indeed any other sites employing such terms, will be able to profit from users' content without notifying the users or rewarding them with a share of the revenue.

It is possible to illustrate the effect of these kinds of terms through positing the hypothetical scenario where a musical artist uploads their music onto a popular music streaming site for free listening to the public in the hopes of building a larger fan-base and garnering a recording contract. If the proprietor of the site makes use of this artist's music in what eventually becomes a successful advertising campaign, it seems fair that the artist should derive some of the financial benefit.²⁵⁷ Under the current regime of Terms of Service agreements, it is conceivable that the band will not receive any kind of compensation in the form of royalties.

Clearly then, the scope of these licenses is generally very broad. They do, however, have limits. As previously stated, many social media sites provide that their license ends either when a user deletes their content or deletes their account.

²⁵⁵ Twitter, Terms of Service. Available at: <http://twitter.com/tos>. [Accessed 3 July 2014].

²⁵⁶ Clark, op. cit., p 13.

²⁵⁷ Ibid.

Additionally, like Facebook, many of the sites do not use content that is marked 'private.' This effectively widens the scope of the licence automatically. Finally, social media sites intentionally limit their exploitation to the sites or 'in connection with' these sites. Because the phrase is couched in such uncertain terms, it is not clear what the actual limit is. It is however noted that despite this uncertainty, the term by itself, should prevent a social media site from retailing copies of a work.²⁵⁸

Terms of Service Agreements, thus, potentially distort the balance of copyright protection for user-generated content in favour of site owners. Accordingly, it is instructive to briefly consider how users can escape these terms while still being able to publish and distribute their creative content.

6.3 Escaping terms of service agreements

6.3.1 Licence granted for no consideration

In the already cited *Planification* case, a secondary question that the court addressed was the circumstances under which that license could be revoked holding that a license granted for no value or no consideration could be revoked on the request of one of the parties.²⁵⁹ Significant value had been transferred over many years by the licensee in the form of 'conceptual contributions' to the software, software testing, compensation for developers and other inputs for the software.

From the jurisprudence on this issue, then, the question that emerges is whether the owners of social media sites derive 'consideration' from content creators' use of these sites that can be equated with the compensation that software developers and programmers receive. If such consideration is indeed shown to exist, then this is an

²⁵⁸ Ibid at p 12.

²⁵⁹ 2013 FC 427 at paras 12-28. This conclusion had already been reached in the prior case of *Katz (c.o.b. Michael Katz Associates) v. Cytrynbaum*, where an architect unilaterally revoked the consent that he had given to the transfer of copyright.

additional hurdle for content creators to revoke the implied licences they may be subject to. It is yet unclear what form this consideration could take. As South African courts have already rejected the idea of consideration in the contractual context, it seems unlikely that the precedent from the Canadian courts will find application here.²⁶⁰

6.3.2 No intention to be bound

The most frequent focus of litigation in online contracting has been regarding the element of assent.²⁶¹ In some cases, users argue that they did not know that the terms existed.²⁶² Other times, users may actually notice terms of service but still seek to avoid them by arguing that they were being induced to refrain from reading the provisions.²⁶³ Both scenarios evince no intention to be bound by the agreement.

In South Africa, under traditional contract law, parties may not avoid contracts if their own neglect to read terms was unreasonable under the circumstances.²⁶⁴ Furthermore the ECTA states that unilateral statements made by means of data messages in online agreements are valid.²⁶⁵ There seems to be no avenue, then, for a user to escape a Terms of Service Agreement based on a lack of intention under South African law.

In other jurisdictions, in normal contracts outside of online agreements, courts have required parties alleging the validity of a contract to provide supporting documents incorporated by reference into the signed document.²⁶⁶ Thus, content creators on social media can escape the terms of online contracts and licencing agreements as long as

²⁶⁰ Dale Hutchison and Chris-James Pretorius (eds) 'The Law of Contract in South Africa' (2009) at p 7.

²⁶¹ Tasker & Pakcyk, *op. cit.*, p 87.

²⁶² Pistorius, *op. cit.*, p 572.

²⁶³ *Ibid.*

²⁶⁴ *S v De Blom* 1977 (3) SA 513 (A) at 514E-F.

²⁶⁵ ECTA (n185) at s 24(1).

²⁶⁶ Tasker & Pakcyk, *op. cit.*, p 87.

the site owner cannot provide reasonable notice of terms available for reading on a web page. Users may, however, be bound by unread terms if they violated the duty to use reasonable care to read them.²⁶⁷

Argument has been made that a user may be able to avoid a Terms of Service Agreement based on a reasonable failure to read the terms in the situation where that user has become so familiar with the particular terms after numerous visits, and therefore does not expect that on subsequent visits, the terms could be modified.²⁶⁸ Another technical possibility is that a user's computer may not load the most current Internet terms because it loads a file previously stored on the computer, called the 'cache.'²⁶⁹ Accordingly, if web terms were added or updated after the user entered a web site once, it may happen that the computer will not download the updated terms. As a result, it has been stated that the onus should be on the owners of the sites to make users of its sites aware of any changes to the Terms of Service.²⁷⁰

In the scenario cited above, where the Terms of Service Agreement is varied, the contractual procedures for doing so must be clearly stated and followed.²⁷¹ In *Noemalife SpA v Infinitt UK Limited*²⁷² the failure to do so resulted in the defendant being held to have infringed the copyright holder's rights by using software where no licence existed.²⁷³ It also caused the defendant to continue to provide services despite being under no obligation to do so.

²⁶⁷ Ibid. For example, in the US case of *DeJohn v. The .TV Corp. Int'l*, the court held that a web-user was bound to a contract because they failed to click on a hyperlink to read the relevant terms.²⁶⁷ The court considered the possible deception involved in contract formation and found that the clause was against public policy. In *Zurakov v Register.com* a court found a record to be unclear concerning whether a user reasonably would have noticed certain policy disclosures where they were separated from a broadly worded contract that expressly constituted the "entire agreement."

²⁶⁸ Tasker & Pakcyk, op. cit., p112.

²⁶⁹ Ibid.

²⁷⁰ Gwendolyn Mariano, *Juno Settles Terms-of-Service Dispute* (2002). Available at: <http://news.com.com/2102-1023-901740.html>. [Accessed 14 July 2014].

²⁷¹ Ibid.

²⁷² [2013] EWHC 2376 (TCC).

²⁷³ Ibid at paras 83-85.

7 Recommendations for content creators

To protect themselves from exploitative licensing practices, content creators ought to try to ensure that the licensor warrants that it has authority to grant the licence. It is also important to ensure that the licensor provides protection against any third party claims that could impact upon the licensee's use of the particular site (such as a claim that the third party's intellectual property rights are being infringed).²⁷⁴ Ultimately, content-creators must carefully consider whether and how Terms of Service will impact upon their intended use of the site. Creators must also take care, if they agree to these terms, not to post on or use the site[s] in a manner that infringes copyright. The next chapter will consider the ways in which copyright can be infringed online and the remedies available for such infringement.

²⁷⁴ Tasker & Pakcyk, *op. cit.*, p 113-114.

Chapter 5: Copyright Infringement

1. Introduction

The previous chapter looked at the challenges associated with the protection of online user-generated content through copyright. The following section of the paper builds on the previous chapter by considering how copyright protects the interests of website owners and copyright holders in original works from infringement by content creators. On the other hand, the interests of users and content creators in producing more content will also be considered through an assessment of the traditional defences to infringement. This chapter discusses whether the protection afforded to both the interests of website owners and content creators is adequate to establish a fair balance between these respective interests.

2. Copyright Infringement

2.1 General Principles

As previously referenced, any work that is in a 'fixed' form and is sufficiently original is eligible for copyright protection.²⁷⁵ Registration of the copyrighted work is not necessary for its protection.²⁷⁶ As a result, virtually all forms of user-generated content are copyrightable. As a corollary to this, copyright infringement may also occur in respect of user-generated content on the Web. It is also possible that the user-generated content itself infringes on the copyright held by another in respect of an original work.

2.1.1 Direct and Indirect Infringement

In South Africa, copyright infringement may be direct or indirect.²⁷⁷ Direct infringement is when a person, without the licence of the copyright owner does any of

²⁷⁵ Klopper et al, op. cit., p 164.

²⁷⁶ Ibid at p 147.

²⁷⁷ Ibid at p 199.

the acts that only the owner has the exclusive right to authorize.²⁷⁸ The most common of these acts are reproduction and adaptation. Indirect infringement occurs when,

'a person who, without the licence of the owner of the copyright and a time when copyright subsists in a work –

(a) imports an article into the Republic for a purpose other than his private and domestic use;

(b) sells, lets or buys...any article;

(c) distributes in the Republic any article for the purpose of trade, or for any other purpose...that the owner of the copyright in question is prejudicially affected...

*if to his knowledge the making of that article constituted an infringement of that copyright or would have constituted such an infringement if the article had been made in the Republic'*²⁷⁹

For present purposes, indirect copyright infringement is not important. The rest of this paper will, therefore, focus on direct infringement. Whether there has been direct copyright infringement is a question of fact which is answered in objective and subjective stages.²⁸⁰

2.1.2 Establishing Infringement

To establish infringement, the allegor of infringement must show an objective similarity between a substantial part of the original work and the infringing work as well as a causal connection between the two works.²⁸¹ The question of objective similarity goes to whether the copyright protected work is the source from which the infringing work is derived.²⁸² Added to this, the notion of a substantial part is based on the common law maxim that the law does not concern itself with trivia.²⁸³ Thus, a significant part of the copyrighted work must have been infringed. This refers to both the quantity

²⁷⁸ Ibid.

²⁷⁹ Copyright Act (n79) at s 23(2).

²⁸⁰ Klopper et al, op. cit., p 200.

²⁸¹ Dean, op. cit. 1-37.

²⁸² *Bosal Afrika (Pty) Ltd v Grapnel (Pty) Ltd* 1985 (4) SA 882 (C) 889B-C.

²⁸³ Klopper et al, op. cit., p 202.

and the quality of that work.²⁸⁴ Finally, to establish a causal connection between the original work and the allegedly infringing work, it must be shown that the creator of the infringing work had access to the original work.²⁸⁵

A copyright holder has a number of exclusive rights in an original work. This means that members of the public cannot copy, sell or make adaptations of the work while it is under copyright. Anyone who violates, or causes anyone else to violate, any of the exclusive rights of the copyright owner is an infringer of copyright.²⁸⁶ Under this formulation then, the person alleging infringement does not need to show intentional copying or reproduction. What must be shown is ownership of valid copyright and copying of constituent elements of the work that are original.²⁸⁷

2.2 Infringement in respect of user-generated content

The Act provides for the copyright protection of the various forms of user-generated content as works.²⁸⁸ Thus, allowing for copyright infringement claims has the effect of affording protection for copyright holders, whose works may potentially be infringed upon.

The potential for infringement is two-fold: against the website and against the content creator. In the first instance, it is trite that users often upload content that they do not own onto websites and this constitutes infringement.²⁸⁹ In the latter case, because copyright subsists in much of that kind of content, by facilitating the publication of infringing material on the website the website owner increases the risk of claims of

²⁸⁴ Dean, op. cit. 1-37.

²⁸⁵ Klopper et al, op. cit., p 203.

²⁸⁶ Copyright Act (n79) at s23(1).

²⁸⁷ Sheshadri, R 'Bridging the Digital Divide: How the Implied License Doctrine Could Narrow the Copynorm-Copyright Gap (2007) *UCLA Journal of Law & Technology* 3. Available at: http://www.lawtechjournal.com/articles/2007/03_071220_seshadri.php#FN_42. [Accessed 14 July 2014].

²⁸⁸ George and Scerri, op. cit., 2.

²⁸⁹ Misquitta, A ' User Generated Content – Risks, Prevention & protection for Service Providers in the UK: Part 2' (2011) Farrer & Co at p 2. Available at: <http://www.farrer.co.uk/Global/Briefings/16.%20Briefing/User%20Generated%20Content%20pt2.pdf>. [Accessed 4 September 2014].

copyright infringement against themselves.²⁹⁰ By storing uploaded user generated content on servers and making further technical copies during transmission, a social networking site could be held to be copying the material for the purposes of copyright infringement.²⁹¹ The situation is worsened where the internet sites do not actively police for infringement through content filters or other devices.²⁹²

Naturally, copyright owners take the issue of infringement seriously because they invest significant time and resources in developing their content. The widespread distribution thereof without consent deprives them of potential financial gains.²⁹³

Infringement actions may be against individual uploaders and creators of works.²⁹⁴ This will likely occur when the works they upload have been made through one or more of the listed prohibited acts with respect to a copyright protected work. The most common of these acts are reproduction and adaptation (for example through mash-ups and dramatisations of original works) and broadcasting (through uploading content to a worldwide audience).²⁹⁵ The kind of infringement will, however, depend on the nature of the works themselves.²⁹⁶

2.3 Remedies for copyright infringement

Section 24 of the Act lists the forms of relief that may be granted in the event of an infringement of copyright. The relevant relief for the purposes of user-generated content consists of damages, reasonable royalties and additional damages.²⁹⁷

²⁹⁰ Ibid.

²⁹¹ Northwood Reid 'Online Intellectual Property Infringement and Digital Media' (2008). Available at: <http://www.northwoodreid.com/Art.DigitalmedialP%20.html> [Accessed 5 September 2014].

²⁹² Complaint, Viacom International Incv YouTube, Inc No 07 Civ. 2103 (S.D.N.Y. Mar. 13, 2007).

²⁹³ James Gill and Robert Goldstone 'Web Site Operators & Liability for UGC - Facing up to Reality?' (2008). Available at: <http://www.scl.org/site.aspx?i=ed9981> [Accessed 12 May 2014].

²⁹⁴ Hetcher, S 'User-Generated Content and The Future of Copyright: Part Two – Agreements Between Users and Mega-Sites' (2008) *10 Vanderbilt Journal of Entertainment & Technology Law* 830 at 841.

²⁹⁵ Osborne, D 'User generated content (UGC): trade mark and copyright infringement issues' (2008) 3(9) *Journal of Intellectual Property Law & Practice* 555 at 556-562.

²⁹⁶ Ibid.

²⁹⁷ Copyright Act (n79) at s 24(1).

2.3.1 Damages

The aim of a damages award is to compensate the proprietor for the patrimonial loss they have sustained as a result of the infringement.²⁹⁸ The damages award includes loss of profits that the copyright holder would have made from the work had the defendant not infringed copyright in it.²⁹⁹

2.3.2 Reasonable royalties

Where copyright is infringed through, for example, the unauthorised public performance of a work, the copyright holder can claim damages on the basis of a reasonable royalty.³⁰⁰ This means that the plaintiff will be paid the equivalent of the licence fees that the defendant would have paid during the duration of the infringement.³⁰¹ There is no need to prove actual damage or guilty knowledge to succeed in this action.³⁰²

This concept may be applicable in the case of user-generated content that involves the uploading of video or music content that comprises an original work. However, the definition of 'public performance' in the Act specifically excludes the broadcasting or re-broadcasting of a work.³⁰³ The fact that most of the decided cases in this area of the law are based on public performance makes it unclear whether reasonable royalties will be available for other types of prohibited acts, although there is no reason to believe that this is an absolute bar.

2.3.3 Additional damages

Additional damages are damages available to a copyright holder that would not have otherwise been available to them either because they cannot be proved or

²⁹⁸ *Gramophone Record Co (Pty) Ltd v Ban-Nab Radio and TV* 1988 (2) SA 281 (D) 292.

²⁹⁹ Klopper et al, op. cit., p 224.

³⁰⁰ *South African Music Rights Organisation Ltd v Trust Butchers (Pty) Ltd* 1978 (1) SA 1052 (E).

³⁰¹ Ibid at 1057-1058.

³⁰² Klopper et al, op. cit., p 224.

³⁰³ Copyright Act (n79) at Ch 1, Sec 6(e).

because no cause of action exists by which they could be claimed.³⁰⁴ These are provided for in the Act.³⁰⁵

The range of remedies available to the copyright holders of works in the event of copyright infringement means that the need to clarify the methods of recourse available to content creators and website owners is much more urgent. This is because it is these groups that will likely be the defendants in any infringement proceedings.

3 Defences to copyright infringement

Having looked at the ways that copyright holders can have their interests protected through the remedies for copyright infringement, attention now shifts to the other end of the scale; to users and content creators. The defences to copyright infringement, when successfully applied, generally absolve the alleged infringer(s) from liability. This section of the paper will look at the defences available to both the content creators and the website owners in cases of alleged infringement and how these defences have been developed in different jurisdictions.

3.1 General principles

The most notable defences to copyright infringement exist in the form of statutory limitations and exceptions. These typically narrow the copyright owner's monopoly in a particular work under certain identified circumstances.³⁰⁶ Copyright law has used exceptions and limitations to effectively achieve a balance between users and rights-holders in the analogue world.³⁰⁷ There is, however, little established case law dealing specifically with copyright infringement as it relates to user-generated content in the

³⁰⁴ Duba VVW 'Additional damages and section 24(3) of the Copyright Act 1978' (1989) 106 *SALJ* 467 at 468-9.

³⁰⁵ Copyright Act (n79) at s 24(3). In deciding whether to award these damages, the court will have regard to (a) the flagrancy of the infringement; and (b) any benefit shown to have accrued to the defendant by reason of the infringement.

³⁰⁶ Klopper et al, *op. cit.*, p 211.

³⁰⁷ Ncube, C and Schonwetter, T 'New Hope for Africa? Copyright and access to knowledge in the digital age' (2011) 13(3) *Info* 64 at 69. Available at: <http://www.emeraldinsight.com/journals.htm?articleid=1912065> [Accessed 27 August 2014].

digital sphere.³⁰⁸ To provide guidance on how this would operate in South Africa, the approaches of other jurisdictions to defences available to both content creators and website owners will be discussed.

3.2 Defences that can be used by content creators

3.2.1 USA

The fair use defence is available in the situation where a user's content references or makes use of a nominal amount of copyright material for the purposes of parody or criticism.³⁰⁹ This is widely regarded in the USA as the most important defence to copyright infringement.³¹⁰ The fair use defence as applied in the realm of user-generated content applies in the same way as for general copyright infringement. A US court held that

*'...the doctrine of fair use . . . permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.'*³¹¹

The USA has also statutorily codified the fair use doctrine. The DCMA states that:

*'the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work'*³¹²

³⁰⁸ Biederman, Charles and Andrews, Danny 'Applying Copyright Law to User-Generated Content' (2008) *Los Angeles Lawyer* at p 14. Available at: <http://www.lacba.org/Files/LAL/Vol31No3/2483.pdf> [Accessed 4 September 2014].

³⁰⁹ Ibid.

³¹⁰ Clark, op. cit., p 16.

³¹¹ *Iowa State Univ. Research Found., Inc. v. Am. Broad. Cos.*, 621 F.2d 57, 60 (2d Cir. 1980).

³¹² Digital Millennium Copyright Act Pub. L. 105-304-Oct 28, 1998 at s 107.

There are four factors to consider when applying the fair use defence.

The first factor is the purpose of the use of the work. If the purpose of the use of the work is commercial, then there is a presumption against fair use.³¹³ The implication is that for content creators whose content is to be used commercially, the defence of fair use does not apply. The second factor examines the nature of the copyrighted work. This deals with the question of whether the work is informational. An example of a work that is informational is a news report. The fair use doctrine allows for more widespread use of such a work.³¹⁴ The effect in the realm of user-generated content is that tweets, blog posts and status updates that are news reports or akin thereto have less protection than works that are purely for entertainment.³¹⁵

The amount of the portion used in relation to the work as a whole is the third factor. This stops a user from using more of the work than is necessary for the intended purpose.³¹⁶ Finally, the fourth factor, the effect of the use upon the potential market for or value of the copyrighted work, has the effect of protecting some kinds of content-creators but not others. The content created by the average user who has no intention to use his or her work for any commercial benefit, is much more easily exploited as a result of this factor.³¹⁷ However, the band that posts its videos on YouTube with the hope that it will gain fame and eventually make money off of its work is more protected from fair use by this factor.³¹⁸

The fair use defence is unnecessary for social media sites that use express licenses. The defence is also not necessary for the target consumers of most user-generated content, who have implied licenses.³¹⁹ The fair use defence, then, mainly

³¹³ Clark, op. cit., p 17.

³¹⁴ *Sony Corp. of America v Universal City Studios, Inc.*, 464 U.S. (1984) at 496-498.

³¹⁵ Clark, op. cit., p 17.

³¹⁶ Ibid.

³¹⁷ Ibid.

³¹⁸ Ibid.

³¹⁹ Ibid at p 16.

applies to consumers who want to further distribute content for the purposes of education or information.

3.2.2 UK

The UK does not provide specific defences for user-generated or digital content. It can therefore be assumed that copyright infringement involving these types of work will be treated in the traditional manner. In the UK, the UK Electronic Commerce Directive Regulations of 2002³²⁰ (hereafter the Regulations) govern when defences to alleged infringement will be available to content creators.³²¹ Under the regulations, there is no legal requirement to prosecute infringers if the infringing content has been removed from the site.³²²

There are also are limited circumstances in which copyright material may be reproduced by users and content creators without first obtaining the copyright owner's consent. This is in terms of fair dealing³²³ and the authorization for domestic consumers to record a broadcast for the purpose of watching it at a later time.³²⁴

It is the fair dealing provisions that are most pertinent for creators of user-generated content. Use of copyright works is permitted if such use is for the purpose of research or private study, criticism or review and reporting current events.³²⁵ In order to succeed in this defence, the defendant must show that their dealing in the work fell into one of the listed categories, the use of the work was fair and there was acknowledgment of the original source.³²⁶ Thus, a user who posts copyright infringing

³²⁰ *SI2013/2002*.

³²¹ Determann et al, op. cit., p 50.

³²² Ibid.

³²³ Copyright, Designs and Patents Act 1988 at s 29 – 30.

³²⁴ Ibid at s 70.

³²⁵ Ibid at s 29 - 30. U.K. courts have claimed that research and private study must be for a noncommercial purpose. To fit into the category of criticism and review, the work must have been made available to the public, be fair dealing and acknowledge the source. Current events reporting is wider than mere news reporting. (see D'Agostino G 'Healing Fair Dealing? A Comparative Copyright Analysis of Canada's Fair Dealing to UK Fair Dealing and US Fair Use' (2008) 53 *McGill Law Journal* 309 at 339).

³²⁶ Ibid.

content onto a website in the UK can make use of the fair dealing defence, provided that the requirements are met.

3.2.3 South Africa

South African copyright law, like the UK and the USA, recognizes statutory defences to infringement claims. 'Fair dealing' in South Africa resembles the fair dealing provisions in the UK and allows users to make use of copyright works without the owner's permission.³²⁷ Several exceptions are provided for under fair dealing: research, private study, personal and private use and criticism, review and reporting of current events. Use of a copyrighted work for any of these purposes will not constitute infringement.³²⁸

Like the UK Copyright Patents and Designs Act, the Act places restrictions on the way that fair dealing is utilized.³²⁹ Firstly, the work must be dealt with fairly in relation to the stated purposes.³³⁰ Moreover, fair dealing also only applies to certain works; fair dealing for the purpose of research, private study or personal and private use will not apply when the work is a cinematograph film, a sound recording or a computer program.³³¹ This means that for certain user-generated content such as uploaded Youtube videos, the fair dealing provision will not protect the site owner from copyright infringement if they make private use of the work.

Furthermore, as previously discussed, the basic uses of user generated content on social media and other such sites are often protected by implied licenses. When a user uploads their work onto a website and proceeds to publish it, they have created, through this act, an implied, non-exclusive license for other users on the same network or group to make certain uses of the work.³³² These uses such as distribution from the server, reproduction on the user's computer, and display on the user's computer would

³²⁷ Ibid at p 211.

³²⁸ Ibid.

³²⁹ Copyright Act (n79) at s 12.

³³⁰ Klopper et al, op. cit., p 213.

³³¹ Ibid.

³³² Melville B Nimmer & David Nimmer 'Nimmer on Copyright : A Treatise on the Law of Literary, Musical and Artistic Property, and the Protection of Ideas' (2008) at 3-10.

normally violate the user's exclusive rights.³³³ The rationale behind this formulation is that the reason most people post and share content online is primarily for these uses by friends or dissemination to the public. Thus the existence of an implied licence provides non-commercial users with protection from being charged with infringement for their legitimate consumption of user generated content.³³⁴ Accordingly, for such users, the defences of fair use and fair dealing will be unnecessary.

3.3 Defences that can be used by websites

The crux of the defences available to hosts of user-generated content is that a person who provides facilities for making a communication should not be taken to have authorised an infringement of copyright just because a user uses the facilities to carry out an infringing act.³³⁵

3.3.1 USA

In the US, providers of user-generated content may be held directly liable for the breach of the copyright owners' exclusive rights.³³⁶ This is known as secondary or contributory infringement. The DMCA, however, provides an exemption for website owners who remove infringing material within a safe harbour period after the copyright owner notifies them of the alleged infringement.³³⁷ To come within this safe harbour period, the website owner must establish that it did not know about the infringing material being posted on its website at the time. YouTube, for example, would argue that it cannot monitor every video clip that individual users upload to its website.

³³³ Ibid.

³³⁴ Clark, op. cit., p 16.

³³⁵ Calame T, Dagg N, Matheson S, Osha J, Ulfsdotter S, Yoshida K 'Exceptions to Copyright protection and the permitted uses of Copyright works in the hi-tech and digital sectors' (2010) Working Guidelines of Association Internationale pour la protection de la Propriete Intellectuelle at p 3. Available at: <https://www.aippi.org/download/commitees/216B/WG216BEnglish.pdf> [Accessed 5 September 2014].

³³⁶ Northwood Reid, op. cit.

³³⁷ Determann et al, op. cit., p 50. This notification must meet strict formal requirements. After the site owner has removed infringing material posted by a user, it can notify that user and allow them to respond to the claim of infringement. If the allegedly infringing content creator claims that their content does not infringe copyright, the party claiming infringement does has 14 days to file a claim after which the material can be put back on the site.

At this juncture, it is useful to differentiate safe harbor provisions from statutory exceptions and limitations. Safe harbor provisions aim to protect *intermediaries* such as internet service providers from liability when they could not have been aware of infringing content posted by users. Limitations and exceptions, on the other hand, allow *users* to make legitimate use of copyright works.³³⁸ Thus the focus of these two regimes is different. As will be seen, in South Africa, these provisions are also contained in different sets of legislation.

3.3.2 UK

The fair dealing defences are unlikely to provide protection to a website operator who offers users the ability to upload infringing UGC. There are, however, other defences available to exclude operators from criminal liability and damages.³³⁹

The hosting defence applies when the website owner provides a content hosting forum and the user posting the infringing content did so independently.³⁴⁰ The website owner must not have actual knowledge of the unlawful activity or information. This means that where a claim for damages is made, the provider must not be aware of any facts or circumstances which would indicate that the user's activity was unlawful.³⁴¹ Alternatively if the owner of the site knew of any infringement, they must have acted quickly to remove the infringing content.³⁴² This proviso has, however, not yet been tested in the English courts.³⁴³

³³⁸ Lemley, M 'Rationalizing Internet Safe Harbors' (2007) 6 *Journal on Telecommunications & High Technology Law* 101 at 101-103.

³³⁹ Ibid.

³⁴⁰ UK Electronic Commerce Directive Regulations (n320) at Regulation 19. 'Independent' means not under the control of the provider.

³⁴¹ Hugh Jones and Christopher Benson 'Publishing Law' (2011) at p 190 -192.

³⁴² Ibid. YouTube has defended claims both in the US (by Viacom) and Europe (byTelecinco) for mass copyright infringement. In both cases, the Court held that YouTube were operating an effective take-down policy, and given the scale of uploads they could not have had actual knowledge of the particular infringing material. These cases highlight the fact that "general knowledge" of copyright infringement, an apparent inevitability on websites as large as YouTube, is not sufficient to lead to a finding of infringement

³⁴³ Goldstone R and Gill J 'Web Site Operators and user-generated content – facing up to reality' (2008). Available at: <http://www.scl.org/site.aspx?i=ed9981>. [Accessed 25 July 2014].

The mere conduit defence covers the act of using a service provider's network to deliver content at the user's request. The defence allows the site owner to escape liability from damages as well as any criminal or civil action resulting from the content itself. However, the site owner cannot use this defence if it initiates the transmission, selects the recipient or modifies the content.³⁴⁴

The main defence available under the CDPA is the 'temporary copies' exception.³⁴⁵ Under this defence, copies of a work that are temporary but are simultaneously a vital part of a technological process will not infringe copyright if their only purpose is to enable transmission in a network between third parties. Examples of such temporary copies are user created videos that are buffered in memory in order to play smoothly. These videos are temporarily stored on internet caches or on web pages.³⁴⁶ In the absence of this provision, the persons who stored infringing content would be guilty of infringement. It is noteworthy that the temporary copies provision will not protect a site owner if it makes an economic gain from the service, such as through advertising.³⁴⁷

3.3.3 South Africa

The ECTA provides limitations on the liability of intermediaries in a manner similar to the US safe harbour provisions.³⁴⁸ The provisions of the ECTA can override

³⁴⁴ Holmes, S and Ganley, P 'User generated Content and the law' (2007) 2 *Journal of Intellectual Property Law & Practice* 338 at 340.

³⁴⁵ Ibid at s 28A.

³⁴⁶ Maira Sutton 'Temporary Copies: A TPP Provision Disconnected from the reality of the Modern Computer' *Electronic Frontier Foundation*, 26 July 2012. Available at: <https://www.eff.org/deeplinks/2012/07/temporary-copies-another-way-tpp-profoundly-disconnected> [Accessed 6 September 2014].

³⁴⁷ Determann et al, op. cit. p 50.

³⁴⁸ Cominos, A 'Intermediary Liability in South Africa' (2012) Independent research commissioned by the Association for Progressive Communications and supported by Google and the Open Society Foundation at p 4.

the fair dealing provisions in the Copyright Act and may, in some instances, attach criminal liability for legitimate uses of copyright works.³⁴⁹

According to the ECTA, a service provider will not be liable in the case where a user posts infringing content online if the service provider is a mere conduit of infringing material.³⁵⁰ The service provider will also escape liability if they stored unlawful content with the intention of making the transmission of that content more efficient.³⁵¹ A service provider is not liable for hosting unlawful content or for damages arising from data stored for a user if it had no knowledge of infringing activity or data.³⁵² Finally, liability does not attach to a service provider if it provided links or references.³⁵³

In order to qualify for these limitations on liability, a service provider must respond to notices to take down infringing content from the relevant sites and must designate an agent to receive notifications of infringement.³⁵⁴ If service providers fail to comply with take-down notices, they risk losing their protection from liability.

As previously stated, however, the main problem with the ECTA, in its current state, is that it does not include define user-generated content websites as service providers.³⁵⁵ South Africa stands out in this regard as website operators are protected from liability under similar provisions in the USA and the UK.³⁵⁶ The direct implication is that South Africa has unbalanced protection for website operators that leaves them open for liability when users post infringing content on their sites.

³⁴⁹ Schonwetter T, Ncube C, Chetty P 'South Africa' at p 245 in C Armstrong, J De Beer, D Kawooya, A Prabhala, T Schonwetter (eds) *Access to Knowledge in Africa: The role of Copyright* (2010).

³⁵⁰ ECTA, supra note 75, s 73. That is, when they are merely "providing access to or for operating facilities for information systems or transmitting, routing or storage of data messages". The service provider must not initiate the transmission, must not select the addressee, and must perform the functions in an automatic and technical manner without selection of data, and not modify the data contained in the transition.

³⁵¹ Ibid at s 74.

³⁵² Ibid at s 75. The data or activity relating to that data must infringe the rights of a third party.

³⁵³ Ibid at s 76.

³⁵⁴ Ibid at s 75.

³⁵⁵ Cominos, op. cit., p 14-15.

³⁵⁶ Glickman, L and Fingerhut, J 'User-Generated Content: Recent Developments in Canada and the US' (2011) 12(6) *Internet and E-Commerce Law in Canada* 49 at 53-55.

3.4 Canada: the anomaly

In contrast to the USA, UK and South Africa, Canada has enacted a specific statutory exception into its copyright legislation for user-generated content. As mentioned earlier, the provision legitimizes the adaptation of copyright protected works in their literary, artistic, dramatic or musical forms.³⁵⁷ This is a recognition by the Canadian government of the ways in which users interact with works online and an attempt to encourage creative engagement with them.³⁵⁸

The provision, by allowing for the adaptation of copyright works, minimizes the risk of infringement by content creators. Moreover, in the event of infringement, the Copyright Act provides for the use of the 'fair dealing' defence by website operators.³⁵⁹ The Canadian situation is thus anomalous in that it provides specific provision for both creators of user-generated content and website operators in the same statute and attempts to protect the interests of both. In this way, Canada appears to strike an ideal balance between these respective rights and those of copyright holders.³⁶⁰

The Canadian exception will be examined in more detail in the following chapter but for present purposes, it is worth noting that the legislative scheme provides a useful template on how to deal with the reality of user-generated content in South Africa and other jurisdictions.

4 Difficulties in copyright infringement claims

This chapter concludes with a description of some of the main challenges associated with bringing claims of copyright infringement for user-generated content.

³⁵⁷ Scassa (n176), op. cit.

³⁵⁸ Ibid.

³⁵⁹ Glickman and Fingerhut, op. cit., p 52. Website operators can raise this defence if the user-generated content is used on their websites for the purposes of research, private study, criticism, review or news reporting.

³⁶⁰ This is because the user-generated content exception only applies when the content is made for non-commercial purposes and there is no adverse effect on the original.

4.1 Costs

Firstly, it may be expensive and inefficient for copyright holders to sue each individual infringer. This is because there are potentially millions of such infringers. Also, litigation is costly and a great number of infringers would only be liable for minimal damages.³⁶¹ As far back as 2003, bringing a low-stakes copyright infringement suit to a court cost over US\$100,000.³⁶² Costs of this magnitude mean that only the wealthiest content-creators can bring claims. In order for the average user to bring an infringement suit, there must be relatively high stakes involved. Even then, the high cost is still a massive barrier to bringing suits.³⁶³

4.2 Enforcement

Second, the international character of the Internet can cause enforcement problems. Infringers may move offshore or conceal their identity by using sophisticated encryption technologies.³⁶⁴ Furthermore, it may be very difficult for domestic courts to enforce court orders to shut down or block access to an infringing site placed on a foreign web server.³⁶⁵

4.3 Formalities

In the USA, copyright formalities present another obstacle to bringing successful infringement suits. Here, in order to launch an infringement action in the first place, the copyright holder must register with the Copyright Office. Additionally, the US Copyright Act requires timely registration within three months of publication in order for statutory damages and attorney's fees to be available.³⁶⁶ Most users are unaware of copyright

³⁶¹ De Beer, E & Fiandiero, J 'Exceptions to Copyright protection and the permitted Uses of Copyright works in the hi-tech and digital sectors' (2011) p 8. Available at: https://www.aippi.org/download/committees/216B/GR216Bsouth_africa.pdf. [Accessed 2 June 2014].

³⁶² Clark, op. cit., p 18.

³⁶³ Ibid.

³⁶⁴ De Beer & Fiandiero, op. cit., p 8.

³⁶⁵ Ibid.

³⁶⁶ DCMA (n168) at s 412.

law registration requirements and as a result statutory damages and attorney's fees are often unavailable.³⁶⁷ Furthermore, actual damages are often not available to users of social media. Without actual damages, statutory damages, and attorney's fees, litigation is practically rendered pointless.³⁶⁸

5 Conclusion

This chapter has illustrated that South Africa's copyright legislation is not adequately equipped to establish an equitable balance that sufficiently takes care of the interests of both content creators and website operators in the event of infringement. This is because of the dearth of remedies available to website operators to escape claims of infringement against them when users post infringing content on their sites. Also the absence of a provision that legitimizes transformative uses of copyright works operates against content creators as reproduction is fundamental to the nature of most forms of user-generated content.

Discussions concerning legislative and policy initiatives about the protection of users in the digital environment and data security are just beginning. The aim is to ensure that users and content creators are given the same amount of protection as they would have had in conventional commerce.³⁶⁹ The next chapter, therefore, proposes policy changes to best ensure that this balance is created and maintained.

³⁶⁷ Clark, *op. cit.*, p18.

³⁶⁸ *Ibid.*

³⁶⁹ De Beer & Fiandiero, *op. cit.*, p 8.

Chapter 6: Policy Response to User-Generated Content

1 Introduction

Given the difficulties already described in applying the existing law of copyright within the digital environment, this chapter seeks to propose policy changes that will take into account the various interests of content creators, website hosts and copyright holders. Particular attention will be given to the legislative changes in Canada and the possibility of transplanting them into South Africa.

2 Justifications for policy changes

2.1 Threats to content creators and website owners

Copyright laws on the use of material on the internet have had the effect of causing two significant perceived threats to both website owners and users of content on these sites.³⁷⁰ Proprietors typically fear that the revenue they generate through sales or licensing will decrease significantly, which will jeopardise their financial investment in these works. Users, on the other hand, are apprehensive that more stringent copyright laws will lead to reduced access to society's intellectual and cultural heritage.³⁷¹ Further, it is submitted that looser regulation is vital to maintaining an interest in the hosting and presentation of copyrighted work within a digital environment by minimizing the risk attached to an innocent party or a party who did not know about the infringing act.³⁷²

³⁷⁰ De Beer & Fiandiero, op. cit., p 7.

³⁷¹ Ibid.

³⁷² Ibid at p 8.

2.2 Purposes of copyright law

One of the purposes of copyright law is to promote the creation and dissemination of information for the progress of culture and social justice.³⁷³ Copyright should, therefore, not protect business models that have become outdated but instead protect the societal interest in the creation and distribution of works.³⁷⁴ In light of this justification, copyright law should not prevent online user-generated content from being created and disseminated.³⁷⁵ However, for many user-generated works, problematic issues arise from the copyright holder's right to control the making and exploitation of derivative works.³⁷⁶ This is because every work is, in the widest technical sense, derived from some other individual work or catalogue of works. A real example of this is when, in 2003, a band from Moldova released a song containing the words: "nu ma, nu ma."³⁷⁷ Sometime later, an individual user posted a video of themselves dancing to the song online. The initial video inspired other users to make similar videos of that and other songs.³⁷⁸

Under most of the copyright regimes outlined in the previous chapter, the original video uploader would have been found to infringe the copyright in the band's music by not paying royalties for using the song or not obtaining permission to perform it. The uploader would also have violated the copyright holder's right to authorize derivative works by making new works and spawning others.³⁷⁹ However, the contention is that permitting such usage of original works by content-creators facilitates more creativity

³⁷³ Mtima, L & Jamar, S 'The Copyright Social Justice Promise of Digitizing Textual Information' (2010) 55 *New York Law School Law Review*.

³⁷⁴ Ibid.

³⁷⁵ Jamar, S 'Crafting Copyright Law to encourage and protect user generated content in the Internet Social Networking Context' (2010) 19 *Widener Law Journal* 843 at 856.

³⁷⁶ Ibid.

³⁷⁷ Wolk, D *The Syncher, Not the Song: The Irresistible Rise of the Numa Numa Dance*, Believer (2006) Available at: http://www.believermag.com/issues/200606/?read=article_wolk. [Accessed 25 July 2014].

³⁷⁸ Ibid.

³⁷⁹ Joseph Diaz, *The Kid Who Rocked the World from His New Jersey Bedroom*, ABCNEWS, Aug. 24, 2007. Available at: <http://abcnews.go.com/print?id=3515665>. [Accessed 25 July 2014].

and encourages a greater number of people to become involved in the creative enterprise. These are the very things that copyright ostensibly encourages.³⁸⁰

3 Factors to consider in crafting policy

Although user generated content has been hailed as a vital source of economic growth, innovation and cultural expression,³⁸¹ policy-makers have been hesitant to remove the barriers which constrict the production of user-generated content.³⁸² Much of this stems from the fact that many countries are unable to draw out new limitations and exceptions to copyright infringement in their national legislation because of binding international copyright agreements.³⁸³ Both the Berne Convention and TRIPS contain tests that limit the exceptions to copyright. In terms of these tests, exceptions to infringement will only be permitted in special cases, where there is no conflict with the normal use of the work and the interests of the right holder are not unreasonably prejudiced.³⁸⁴

In carving out a new copyright framework, it must be noted that effective policy frameworks for all countries will require pre-emptive thinking on the changing nature and context of the digital environment. Copyright policies must facilitate the creation and protection of user-generated content by allowing the production of content from other source materials. Moreover, they ought to simultaneously limit the ability of site owners to restrict the rights of users through Terms of Service.

³⁸⁰ Jamar, op. cit., p 864.

³⁸¹ Marino, G 'The future of user-generated content is now' (2013) 3 *Journal of Intellectual Law & Practice* at p 183.

³⁸² McNally et al, op. cit.

³⁸³ Ibid.

³⁸⁴ Berne Convention of 1979 Art 9(2); Agreement on Trade Related Aspects of Intellectual Property Law (TRIPS) 5 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197.Art 13.

To this end, the Organisation for Economic Co-operation and Development has come up with policy guidelines for digital content where it is recommended that ‘policies that encourage a creative environment that stimulates market and non–market digital content creation, dissemination, and preservation of all kinds’ should be drawn up.³⁸⁵ The main principles in crafting such policies should be balancing of the interests of stakeholders in social networks and other content creating sites and creating an enabling environment.³⁸⁶

Any policy framework dealing with user-generated content must aim to give originators of works some sort of reward or recognition for their activity, but does not need necessarily to provide them the full social value of their work.³⁸⁷ The full extent of the benefit received by creators should be tempered by the need to balance creator’s claims against those of remixers and end users.³⁸⁸

As previously stated, the overprotection of original works has the potential to lead to a decrease in secondary works that use original works as source material. Thus an effective policy on user-generated content will seek to avoid this by enabling individuals to use and transform original content.³⁸⁹ This will ensure an increased quantity of creative works by users while garnering greater exposure and recognition for creators of the underlying material.³⁹⁰ In this sense then, the balancing exercise is efficaciously carried out to the benefit of all relevant parties. The challenge, therefore, remains how to implement such policies and overcome the undesirable results of some of the legislation that has dealt with transformative content in the past.

³⁸⁵ Organisation for Economic Cooperation and Development (OECD). Directorate for Science, Technology and Industry. Committee for Information, Computer and Communications Policy ‘Policy guidance for digital content’ (2008) at p 3. Available at <http://www.oecd.org/dataoecd/20/54/40895797.pdf>, [Accessed 30 June 2014].

³⁸⁶ McNally et al, op. cit.

³⁸⁷ Ghosh, S “The fable of the commons: Exclusivity and the construction of intellectual property markets,” (2007) 40 (3) *University of California Davis Law Review* 3 p 855–890.

³⁸⁸ Merges R. ‘Locke remixed ;-’) (2007) 40 *University of California Davis Law Review* at p 1265.

³⁸⁹ McNally et al, op. cit.

³⁹⁰ Ibid.

4 Implementing the change

4.1 Policy

The principal way of effecting change in the digital copyright sphere in South Africa would be through changes in domestic copyright policy. Using the experience of other countries, particularly Canada, as templates this section will look at how these changes could be made. These proposals will be categorized as applying to content creators and website hosts respectively.

4.1.1 Content creators

4.1.1.1 Fair dealing

The varying types of user-generated content ought to be governed by clear rules explicitly stating what is permitted and what is not. A lack of clear direction can stifle the development of new works. Apart from re-interpreting what is meant by ‘derivative works’ or amending the actual wording in the statute, legal protection of user-generated content will rely heavily on the correct application of the fair dealing provisions in the Act.³⁹¹ To this end, fair dealing should be applied equitably in order to support the burgeoning domain of creation and sharing of user-generated content.³⁹² Appropriate application of these doctrines can also help balance the incentive of granting a copyright against the social purposes of copyright law.³⁹³

In South Africa, the scope of the fair dealing doctrine has yet to be ascertained.³⁹⁴ It is argued by some scholars that the provision in the Copyright Act is unclear and lacks predictability.³⁹⁵ As a result, it is proposed that The South African Law

³⁹¹ Jamar, op. cit., p 869.

³⁹² Ibid.

³⁹³ Leval, P Toward a Fair Use Standard (1990) 103 *Harvard Law Review* at 1105, 1107.

³⁹⁴ De Beer & Fiandiero, op. cit., p 9.

³⁹⁵ Ibid.

Commission interrogate the possibility of new legislation on this and other provisions. South Africa is a member of the WTO and other international treaties; the guidelines provided therein should help to guide and establish the contours of the policies that should be adopted.³⁹⁶ Copyright legislation in South Africa ought to be amended to address the two main threats to copyright brought about by user-generated content, namely the rights and obligations of copyright holders and the rights and obligations of content users.³⁹⁷

The recent draft IP policy in South Africa takes encouraging steps forward in this regard by recommending that:

*'South Africa[n] internet users must be entitled to fair use rights such as making and distributing copies from electronic sources in reasonable numbers...'*³⁹⁸

However, this recommendation is qualified as applying only to the production of content for education and research purposes and for commentary and criticism.³⁹⁹ Although this is an expansion of the current fair dealing provision in the Act, not all forms of user-generated content are made for these purposes.⁴⁰⁰ As a result, not all forms of content creation will be legitimized by this proposal.

Unfortunately the legislative trend in the USA has been to increase the length of terms for copyright holders and stronger enforcement mechanisms at the expense of freedom for secondary users.⁴⁰¹ In the UK, a review of the intellectual property landscape recommended that transformative works be subject to an exception akin to

³⁹⁶ Ibid.

³⁹⁷ Ibid at p 10.

³⁹⁸ Draft National Policy on Intellectual Property (Notice 918 of 2013) *Government Gazette* 36816.

³⁹⁹ Ibid.

⁴⁰⁰ Daigherty T, Eastin M and Bright L 'Exploring Consumer Motivations For Creating User-Generated Content' (2008) 8(2) *Journal of Interactive Advertising* 16 at 17-18. The authors note that the reasons users create user-generated content vary from entertainment, recreation, utilitarian and marketing.

⁴⁰¹ Jamar, op. cit, p 873.

fair use.⁴⁰² However, the U.K. government has not yet enacted this exception nor has it proposed a general exception from the rigid application of copyright law for user-generated content in general.⁴⁰³

The fair dealing exception could also be developed through statutory interpretation by the courts.⁴⁰⁴ South African courts could create an exception from liability for infringement by stating that non-competing, non-commercial, user-generated content distributed online is per se fair dealing. In addition, the courts could develop the meaning of the concepts of derivative works and the scope of copyright protection afforded to transformative aspects of works to support the mushrooming of works online.⁴⁰⁵

However, relying solely on judicial interpretation means waiting for many years, over a great number of cases before a satisfactory interpretation is made. This creates further uncertainty because such an interpretation may not be reached and because no clear rules that balance the interests of the holders of copyright and users will develop.⁴⁰⁶ Also, because South Africa unlike its developed counterparts, has very limited copyright case law it is recommended that any amendment to the fair dealing provision be left to the legislature.⁴⁰⁷

⁴⁰² Gowers, A 'Gowers review of intellectual property' (2006) at p 67. Available at: <http://www.official-documents.gov.uk/document/other/0118404830/0118404830.asp>. [Accessed 25 July 2014].

⁴⁰³ Hargreaves, op. cit.

⁴⁰⁴ This approach has been adopted in the USA. In *Campbell v. Acuff-Rose Music, Inc* a court interpreted the use of a prior work protected by fair use as parody. Canada has also adopted this in *Alberta (Education) v. Canadian Copyright Licensing (Access Copyright)*, 2012 SCC 37 (12 July 2012). The Canadian Supreme Court applied a set of very similar factors to their fair dealing provision, which closely resembles South Africa's fair dealing provision.

⁴⁰⁵ Jamar, op. cit., p 873.

⁴⁰⁶ Wong, M 'Transformative' user-generated content in copyright law: Infringing derivative works or fair use?' (2009) 11 *Vanderbilt Journal of Entertainment and Technology Law* 1075 at 1130–1168.

⁴⁰⁷ Schonwetter T, Vawda Y, Ncube C, Rens A, Baker B, Louw A, Maister B & de Jonge B 'Draft National Policy On Intellectual Property (IP) of South Africa, 2013 – Comments' (2013) at p 14. Available at: http://ip-unit.org/wp-content/uploads/2013/10/IP-Policy-Academics-Submission_final171013.pdf [Accessed 9 September 2014].

4.1.1.2 User-generated content exception

The response to user-generated content in other countries contrasts with Canada, where active steps have been taken to include a special exception for user-generated content in that country's copyright legislation.⁴⁰⁸ The details of this exception have been highlighted in previous chapters and will not be restated here.

What is important is that the Canadian exception provides an attractive model to be transplanted into South Africa.⁴⁰⁹ The advantage of transplanting this exception into South African law is that it would allow South Africa to take a free ride on the legislative developments in Canada.⁴¹⁰ This transplanting can happen through modelling and adaptation. Modelling refers to copying the legislation and applying it as is, while adaptation means adjusting the way transplanted legislation is applied to suit local conditions.⁴¹¹

Modelling is an inappropriate option because the Canadian exception was designed to provide balance within a holistic package of copyright law.⁴¹² This means that for the exception to have effect in South Africa, it would have to be in tandem with other reforms in copyright law. Sadly, South Africa's recent draft IP policy does not make mention of user-generated content nor does it, through any of the proposed reforms, facilitate something akin to this exception.

This omission is compounded with challenges that even Canadian policy-makers have encountered. Firstly, the exception may not apply to many popular sites that have

⁴⁰⁸ McNally et al, op. cit.

⁴⁰⁹ Yu, P 'Can The Canadian UGC Exception Be Transplanted Abroad' (2014) 26 *Intellectual Property Journal* 177 at 184.

⁴¹⁰ Ibid.

⁴¹¹ Ibid at 188–201.

⁴¹² Ibid.

commercial uses but generate large amounts of user created content.⁴¹³ This means that the exception is meaningless to sites that would most require it. Also, the argument is advanced that if users have to prove there is no substantial adverse effect on the original work, the exception will become useless.⁴¹⁴

Furthermore, it could be argued that content created by a user which draws predominantly from a single piece of original content unfairly steals the potential market for that original work.⁴¹⁵ Critics of the Canadian user-generated content exception have also highlighted the lack of clarity regarding its scope as a huge drawback. What is more, there has been considerable disagreement among legal practitioners as to how it is to actually be applied.⁴¹⁶ Accordingly, while the Canadian exception provision provides an ideal template for South Africa, there would undoubtedly be serious challenges in its application.

4.1.1.3 TRIPS Flexibilities

It is argued that the flexibilities in TRIPS are insufficient to cover the needs of a country like South Africa.⁴¹⁷ This notwithstanding, it must be noted that South Africa's domestic legislation does not make full use of these flexibilities anyway.⁴¹⁸ Thus to better balance the interests of stakeholders, the overall objective of copyright law must be stated clearly.⁴¹⁹ It is this overarching objective that should inform policy-and lawmaking in this field.⁴²⁰

⁴¹³ Gervais, D 'User-generated content and music file-sharing: A look at some of the more interesting aspects of bill C-32' in Michael Geist (ed) *'From Radical Extremism to Balanced Copyright': Canadian Copyright and the Digital Agenda* (2010) at p 466. Examples of these types of sites are Youtube and Vimeo, where the core business is production of user-generated content.

⁴¹⁴ Ibid.

⁴¹⁵ McNally et al, op. cit.

⁴¹⁶ Trosow, op. cit., p 531-536.

⁴¹⁷ Ibid.

⁴¹⁸ Schonwetter et al, op. cit., p 14.

⁴¹⁹ That is: to create and maintain a fair balance between the legitimate interests of rights holders and the public interest in far-reaching access opportunities.

⁴²⁰ Ibid.

4.1.2 Website owners

4.1.2.1 ECTA

As outlined before, the penalties doled out to service providers in the ECTA go beyond what is prescribed by the WCT. An obvious solution to this would be for South Africa to ratify the treaty and thus fall in line with its obligations.⁴²¹ Policy-makers could also include website owners and hosts of blogs as service providers by amending the ECTA accordingly.⁴²²

4.2 Private ordering schemes

To date, policy shifts in response to the challenges posed by user-generated content in most developed countries have been unsatisfactory. In the USA, this has led to the private sector resorting to self-regulation.⁴²³ This has prevented the production and distribution of user-generated content from being completely smothered. Meanwhile in the U.K. and E.U. the issue has at the very least warranted some discussion. These forms of private ordering schemes can be arranged as those geared at content creators and those targeted at owners of websites.

4.2.1 Content creators

The most notable example of private ordering was when, in 2007, several large corporations that hold intellectual property rights, among them Disney, CBS, Fox Sony Pictures and Viacom, established a set of principles intended to give guidance to users

⁴²¹ Visser C 'Technological Protection Measures: South Africa Goes Overboard. Overboard' (2006) 7 *The Southern African Journal of Information and Communication* 54 at 61-62.

⁴²² Cominos, A 'Intermediary liability in South Africa' (2012) *Association for Progressive Communications* at p 14-15. Available at: http://www.apc.org/en/system/files/Intermediary_Liability_in_South_Africa-Comminos_06.12.12.pdf [Accessed 29 August 2014].

⁴²³ Niva Elkin-Koren 'Governing Access To User-Generated Content: The Changing Nature of Private Ordering in Digital Networks' at p 328. In Eric Brousseau, Meryem Marzouki and Cecil Meadel (eds) *Governance, Regulations and Powers on the Internet* (2012).

on how to disseminate content without upsetting rights-holders.⁴²⁴ The intention behind these principles is the elimination of infringing content on user-generated content services, the encouragement of uploads of wholly original and authorized user-generated audio and video content, the accommodation of fair use of copyrighted content on content creating platforms and the protection of legitimate interests of user privacy.⁴²⁵

It is doubtful whether in South Africa a consortium of content generating enterprises would come together to self-regulate in the manner described above. Whether this happened would depend on whether there is sufficient profit motive for these firms as well as the size of the content industry. Currently, very few countries have content creating industries that are comparable to the US and therefore there is lesser incentive for self-regulation.⁴²⁶

4.2.2 Website owners

In the UK, several private strategies have been recommended to reduce the risk of providers being held liable for user-generated content uploaded by users. Some of these could easily be utilized by internet service providers and website proprietors in South Africa. Notable among these is prompting users to affirmatively accept prominently displayed terms and conditions that prohibit them from posting infringing and illegal content, reserve the site operator's right to remove content at its discretion and disclaim any liability for offensive content.⁴²⁷

⁴²⁴ 'Principles for user-generated content services' (2007). Available at: <http://www.ugcprinciples.com>. [Accessed 26 May 2014].

⁴²⁵ Ibid.

⁴²⁶ Christopher May 'Digital Rights Management: The Problem of Expanding Ownership Rights' (2007) at p 102-106.

⁴²⁷ Latham R, Butzer C and Brown J 'Legal Implications of User-Generated Content: YouTube, MySpace, Facebook' (2008) 20(5) *Intellectual Property & Technology Law Journal* 1 at 9.

Furthermore, it is suggested that internet service instate robust and well-maintained “notice and take-down” policies to deal with complaints from third parties in respect of uploaded content. Where it is practicable to do so, uploaded content should be assessed as to whether it contains any infringing content.⁴²⁸ Such an exercise can reduce the risks of lawsuits arising from the content itself. Site owners should also require users submitting content to warrant that they have obtained consent from individuals identifiable in any video content to mitigate infringement risks.⁴²⁹

Site owners ought also to consider not taking ownership of the content on their sites. This reduces the risk of litigation for copyright infringement because it is harder to sue individual users as opposed to single entities.⁴³⁰ Owners of content creating sites should also resolve rights clearance issues with rights holders on and limit the length of any uploaded video in order to restrict users’ ability to upload longer or more valuable types of videos.

Another useful method to side-step infringement claims is to restrict users to streaming from sites, as opposed to allowing them to download content, and resultantly limit the possibility of reproduction and adaptation. A more elaborate, and likely costly, response would be to instate software that analyses uploaded content and compares the results against a database of known copyright content.⁴³¹

⁴²⁸ Lauinger, T., Onarlioglu, K., Chaabane, A., Kirda, E., Robertson, W., & Kaafar, M. A ‘Holiday Pictures or Blockbuster Movies? Insights into Copyright Infringement in User Uploads to One-Click File Hosters’ at p 389 In Salvatore J Stolfo, Angelos Stavrou & Charles V Wright (eds) *Research in Attacks, Intrusions, and Defenses* (2013).

⁴²⁹ Ibid.

⁴³⁰ Determann, op. cit., p 48.

⁴³¹ Ibid.

4.3 Policy v Private Ordering

Generally in the online social networking context, the purpose of copyright will be best achieved by setting out relatively clear guidelines through legislation and judicial precedent as opposed to private ordering.⁴³² Legislation and court decisions ought to protect the ability of both users and content creators, which includes creators of derivative works, to make use of the full functionality of social networking technologies and technologies that make networks open, free and vibrant-without being at the mercy of the originators of the works and the copyright holders.⁴³³

Online copyright law, especially relating to social networking, should ultimately give explicit authorisation to the types of acts⁴³⁴ and the nature of interactions that already occur on social media now. Codification of these contemporary practices would, arguably, have little adverse effect on the exploitation or commercial viability of copyrighted works for site owners or other interested enterprise.⁴³⁵ Any negative impact would be insubstantial and financial incentives attendant to the copyright monopoly for the creation of new works would still be more than sufficient because this reform would not stop the creation and commercial exploitation of music, literature, and movies.⁴³⁶

The envisaged codification of online practices would see ordinary, non-commercial users of social networks being allowed to lawfully post links to copyrighted works as part of their status updates or tweets and to further post portions of the actual copyrighted works without permission. Provision would further be made for a broad right to create and disseminate derivative works online for non-commercial purposes as well as a right to create derivative works for commercial purposes where substantial portions of the original work are used. This will be permitted provided that the new work is

⁴³² Jamar, op. cit., p 874.

⁴³³ Ibid.

⁴³⁴ Acts such as sharing and re-blogging.

⁴³⁵ Ibid.

⁴³⁶ Ibid.

original, transformative or constitutes parody, satire, or commentary and does not directly compete with the original work.⁴³⁷

5 Challenges to formulating policy on user-generated content

A policy on user-generated content will likely have as its base, copyright law. As previously discussed, there are some notable difficulties in the application of the 18th century concept of copyright in digital technology.⁴³⁸ This is because technology is a 'double-edged sword': on one hand, it creates new means to fix the expression of an idea in a fixed medium or form but on the other hand, it is a vehicle by which these works are exploited through activities such as caching, browsing, mirroring, downloading, uploading, and file swapping.⁴³⁹ These activities may result in the easy transfer of information from one computer system to another, unauthorized storage of such information in violation of the copyright owner's exclusive rights to make copies, infringement of the right to exclusive distribution, infringement of the right to image through a web browser and infringement of rights to derivative works.⁴⁴⁰

What is more, the old industrial era dichotomies that characterized the production of tangible commodities no longer hold in the digital age.⁴⁴¹ The ideas of producer and consumer need to be aligned to those of creator and user. This is because the production and distribution of cultural content in the digital age is no longer the preserve of a handful of large organisations.⁴⁴²

⁴³⁷ Nimmer & Nimmer, op. cit., 1-111.

⁴³⁸ Vakul Sharma, *Information Technology-Law and Practice* 3ed (2011) at p 465.

⁴³⁹ Ibid.

⁴⁴⁰ Ibid.

⁴⁴¹ McNally et al, op. cit.

⁴⁴² Ibid.

It is worth noting that other pieces of domestic legislation may have an effect on the production of user-generated content, albeit inadvertently. For example, in the USA, attempts to stop online theft through various proposed bills received a hostile reaction from pre-eminent content creators and websites.⁴⁴³ The collective action by big corporates and interest groups such as Google, Amazon and Facebook to stop this legislation has seen a stall in the implementation thereof.⁴⁴⁴ However, only time will tell if the US government will not impose similar legislation in the future.

In South Africa, legislation such as the Protection of Personal Information Act⁴⁴⁵ which prescribes minimum requirements for the processing of personal information by public and private bodies, may yet affect the manner and frequency with which certain content is created and shared online.⁴⁴⁶ The challenge, then, is regulating other legislation, not just copyright, to mitigate its effect on user-generated content.

The results of a failure to create an environment where user-generated content can flourish threatens to be stunted economic growth, diminished cultural exchange and fewer possibilities for innovation.⁴⁴⁷ Given the importance of user-generated content in addressing important social and economic goals, formulators of policy must engage with and find creative and sustainable solutions the various policy challenges posed by user-generated content.⁴⁴⁸

⁴⁴³ BBC News 'Google, Facebook warn against new US privacy legislation' (16 November 2011). Available at: <http://www.bbc.co.uk/news/technology-15757282>. [Accessed 29 July 2014].

⁴⁴⁴ Weisman, J 'In fight over piracy bills new economy rises against old' (18 January 2012) *New York Times*. Available at: <http://www.nytimes.com/2012/01/19/technology/web-protests-piracy-bill-and-2-key-senators-change-course.html>. [Accessed 29 July 2014].

⁴⁴⁵ Act No. 4 of 2013.

⁴⁴⁶ Michalsons 'Protection of Personal Information Act – POPI' (27 July 2014). Available at: <http://www.michalsons.co.za/protection-of-personal-information-act-popi/11105>. [Accessed 29 July 2014].

⁴⁴⁷ Ibid.

⁴⁴⁸ Ibid.

Conclusion

This dissertation has explored the main tenets of South African copyright law as it relates to user-generated content. The finding is that, in its current form, the Copyright Act does not provide a fair balance between the interests of the creators of user-generated content and the owners of sites that host this content. This is primarily because of the prejudicial effect that Terms of Service Agreements and other forms of online licensing can have on content-creators and the fact that the defences to claims of copyright infringement provided for in the Act can only be used by allegedly infringing content creators.

With regard to the latter, the Copyright Act does not, in itself, provide defences for site owners to escape claims of contributory infringement. The Electronic Communications and Transactions Act attempts to remedy this problem by providing for pseudo-‘safe harbor defences’ for providers of internet services. However, most hosts of user-generated do not meet the requirements to use these defences and as such are unable to make use of them.

The paper then discussed possible means of policy reform that could be undertaken in South Africa to establish an equitable balance between the rights and interests of users and website owners. The main point is that South Africa, in order to keep pace with the burgeoning horizon of copyright in the digital area, should follow the approach of Canada and provide for an exception to copyright infringement for user-generated content. This will reduce claims of copyright infringement against both content creators and the websites onto which the content is uploaded while simultaneously encouraging the production of valuable social and cultural works.

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