

COPYRIGHT (I): THE BEST THINGS IN LIFE ARE FREE - Freeing up Content Rights and moving towards Collaborative Innovation? Is Creative Commons/Open Source changing the way we perceive and manage IP?

FORDHAM-IPA 4th ANNUAL ASIAN IP LAW & POLICY DAY

USER-GENERATED CONTENT & THE OPEN SOURCE/CREATIVE COMMONS MOVEMENTS: HAS THE TIME COME FOR USERS' RIGHTS?

Mary W S Wong

Professor of Law, Franklin Pierce Law Center

The year 2007 marks the tenth anniversary of the 1996 WIPO Internet Treaties, which were aimed at updating international copyright law for the digital age¹. In recent months, however, several copyright-related developments and news items have served to remind us of the difference between international copyright standards and the national scope of copyright laws. At the same time, statistics reveal the continued growth of user-generated content (UGC) and the increasing spread of free software and open source (FOSS) and Creative Commons (CC) licensing. This paper will examine these various developments and phenomena, and consider if, taken together, they disclose a real opportunity for a change in copyright protection, toward a balance tilted in greater favor of copyright users than is presently the case. The crafting of such an opportunity may originate from several possibilities; first, the likelihood that exploiting the gaps between international copyright standards and national laws will facilitate the latter's evolving stronger protection for copyright users (as opposed to copyright owners); secondly, the possibility of recognizing UGC as either lawful use under copyright law, or more boldly, as a basis for the recognition of "users' rights"; and thirdly, a consideration of whether the FOSS and

¹ The WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) were concluded at the WIPO Diplomatic Conference in December 1996. However, the Treaties could come into force only after a three month period from the deposit of instruments of accession with WIPO by thirty countries; this date was reached in March 2002 for the WCT and May 2002 for the WPPT.

COPYRIGHT (I): *THE BEST THINGS IN LIFE ARE FREE - Freeing up Content Rights and moving towards Collaborative Innovation? Is Creative Commons/Open Source changing the way we perceive and manage IP?*

CC licensing models aid or retard the movement toward a greater recognition of user protections and rights in copyright law. As part of the analysis, the role of FOSS and CC in changing perceptions about the nature of copyright, and in furthering collaborative innovation, will also be noted and examined.

(a) INTERNATIONAL STANDARDS, TERRITORIAL VARIATIONS

Several well-publicized copyright-related incidents involving three well-known online companies or technology – Google, Youtube and Sharman Networks – will suffice to illustrate the international nature of copyright disputes and the differences between national copyright laws.

September 2006 saw a Belgian court restrain Google, Inc. from displaying excerpts from French and German language Belgian newspapers on Google News (through displaying of titles and snippets) and Google’s Belgian web search site (through the Google cache.) This ruling was affirmed in February 2007², and drew attention to a March 2005 lawsuit, filed in both the USA and France, by the Paris-based international news agency Agence France-Presse (AFP) against Google, alleging that Google’s use of AFP’s photographs, headlines and news snippets on Google News violated AFP’s copyright³. That lawsuit was settled in April 2007, with the parties agreeing on a licensing agreement similar to one reached between Google and the Associated Press in August 2006. The ruling in the Belgian case illustrates the differences between the scope of US copyright law (which may have provided greater protection to Google through its broader and more flexible fair use doctrine, in contrast to the narrow copyright exceptions found in some other countries’ laws, or through fairly protective “safe harbor” provisions applicable to Internet

² An English-language analysis of the decision is available from the Bird & Bird law firm, at <http://www.twobirds.com/english/publications/articles/Copiepresse-v-Google.cfm?RenderForPrint=1> (page last accessed April 3, 2007.)

³ The complaint filed in the US District Court for the District of Columbia can be found at <http://www.resourceshelf.co.uk/legaldocs/afpvgoogle1.pdf> (page last accessed April 3, 2007.)

COPYRIGHT (I): *THE BEST THINGS IN LIFE ARE FREE - Freeing up Content Rights and moving towards Collaborative Innovation? Is Creative Commons/Open Source changing the way we perceive and manage IP?*

service providers) and the copyright law of other countries⁴. At the same time, these cases, involving as they do Internet-based activity and multi-national corporations⁵, underscore the international reach of such activities, in contrast to the territorial application of national copyright laws.

In October 2006, another Internet “giant” – the popular video-sharing website Youtube – removed nearly 30,000 files from its website after complaints received from the Japan Society for Rights of Authors, Composers and Publishers to the effect that those video files had been uploaded in violation of Japanese copyright law. In February 2007, Youtube also agreed to post Japanese language copyright notices warning against the uploading of copyrighted files to its website, and to filter out copyrighted Japanese videos. During the same period, Viacom (parent company to Paramount Pictures, MTV, Nickelodeon and other entertainment content companies) requested that Youtube remove nearly 100,000 video clips. In March 2007, however, Viacom filed a complaint in the District Court for the Southern District of New York against Youtube

⁴ In other cases filed against Google in the USA, for instance, Google has been held not liable for caching and archiving digital content, either for lack of the volition required for direct copyright infringement, or because automatic caching and archiving fall within the “safe harbors” of the Digital Millennium Copyright Act: see *Gordon Ray Parker v Google, Inc.*, 422 F. Supp. 2d 492 (E.D. Pa. 2006) (decision available at <http://www.paed.uscourts.gov/documents/opinions/06D0306P.pdf>; page last accessed April 7, 2007) and *Field v Google, Inc.*, 412 F. Supp. 2d 1106 (D. Nev. 2006) (decision available at http://www.eff.org/IP/blake_v_google/google_nevada_order.pdf; page last accessed April 7, 2007.) The *Field* court also found in favor of Google on the issues of implied license and fair use; on the latter, contrast the February 2006 decision of the US District Court for the Central District of California in *Perfect 10 v Google, Inc.*, 416 F. Supp. 2d 828 (C. D. Ca. 2006) (decision available at http://www.google.com/search?hl=en&rlz=1T4GFRC_enUS208US209&q=%22Perfect+10+v+Google%22+citation; page last accessed April 7, 2007.) The *Perfect 10* case is currently on appeal to the Ninth Circuit.

⁵ Apparently, Copiepresse, the Belgian publisher in the Google case, made a similar allegations regarding Microsoft's MSN network: http://www.infoworld.com/article/06/10/13/HNpursuems_n_1.html (page last accessed April 7, 2007.)

COPYRIGHT (I): *THE BEST THINGS IN LIFE ARE FREE - Freeing up Content Rights and moving towards Collaborative Innovation? Is Creative Commons/Open Source changing the way we perceive and manage IP?*

and its parent Google⁶, alleging willful direct, contributory and vicarious infringement, and inducement of copyright infringement, of Viacom's US copyrights⁷. These incidents and complaints reveal the importance of any "safe harbor" protections under applicable national laws for operators such as Youtube, and, like the Google news cases, bring up the question of the scope of copyright infringement and defenses thereto, under various national laws.

In September 2005, the Australian Federal Court handed down its decision in *Universal Music Australia Pty Ltd & Others v Sharman License Holdings Ltd & Others*⁸. The Court found some of the defendants, who owned and operated the Kazaa peer-to-peer (P2P) filesharing network, liable for infringing authorization under Australian copyright law, for having "sanctioned, countenanced and approved" acts of direct copyright infringement by Kazaa users in Australia. Although the Court and counsel in the case made reference to the US Supreme Court decision in the *Grokster* case⁹, and although the Court agreed that there were similarities between the Kazaa and Grokster P2P systems as well as in the conduct of the defendant operators, the Court concluded that "the differences, both factual and legal, are such as to render *Grokster* of little assistance." Thus, while the defendants in both cases were found liable for the equivalent form of secondary copyright liability, the Australian defendant was held to have "authorized" primary infringing conduct where the US defendant was held to have "induced" primary infringing conduct.

All of the above factual examples show clearly how the Internet easily and obviously operates across territorial borders but that the territorial nature of copyright law means that

⁶ Youtube was acquired by Google in October 2006 for US\$1.65 billion.

⁷ The complaint can be viewed at <http://www.ipdemocracy.com/ViacomYouTubeComplaint3-12-07.pdf> (page last accessed April 7, 2007.)

⁸ [2005] FCA 1242 (the decision is available at http://www.austlii.edu.au/au/cases/cth/federal_ct/2005/1242.html; page last accessed April 5, 2007.)

⁹ *Metro-Goldwyn-Mayer Studios Inc v Grokster Ltd*, 125 S.Ct 2764.

COPYRIGHT (I): *THE BEST THINGS IN LIFE ARE FREE - Freeing up Content Rights and moving towards Collaborative Innovation? Is Creative Commons/Open Source changing the way we perceive and manage IP?*

allegations of copyright infringement have to be scrutinized within the specific context of national laws. This can lead to confusion and frustration amongst both copyright holders and Internet users, although, given the minimum standards prescribed by international copyright treaties and standards, this is perhaps not surprising. Where, for example, Article 10 of the Berne Convention speaks, *inter alia*, of the right of reproduction of literary and artistic works and of the right of communication to the public of the performance of dramatic, dramatico-musical and musical works, national laws implement these rights in various forms and ways. For instance, Section 31 of the Australian Copyright Act grants the copyright owner of a literary, dramatic and musical work the right to, *inter alia*, “reproduce the work in a material form”, to “publish” it, to “perform the work in public” and to “communicate the work to the public”; where “communicate” means “make available online or electronically transmit ...”¹⁰ For sound recordings and cinematograph films, the relevant rights in Section 85 and 86 are to “make a copy” of the work, to “cause” it to be seen or heard in public, and to “communicate the work to the public.” In comparison, Section 106 of the US Copyright Act¹¹ grants the copyright owner of literary, musical, dramatic, pantomime, choreographic, pictorial, graphic, sculptural and architectural works, and motion pictures, audiovisual works and sound recordings the rights, *inter alia*, to “reproduce the copyrighted work in copies or phonorecords”, “distribute copies or phonorecords ..”, and certain rights to “perform the copyrighted work publicly”, where this includes transmitting performances such that they can be received either at the same time or not, and at the same time or not, by the public. The 1996 WIPO Copyright Treaty in turn speaks of a right of distribution through the “making available to the public” of original or copies of literary and artistic works (Article 6) and a right of communication to the public “by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them”

¹⁰ The Australian Copyright Act 1968, as amended by the 2000 Digital Agenda Act.

¹¹ 17 U.S.C. §106.

COPYRIGHT (I): THE BEST THINGS IN LIFE ARE FREE - Freeing up Content Rights and moving towards Collaborative Innovation? Is Creative Commons/Open Source changing the way we perceive and manage IP?

(Article 8.)¹² As can be seen from the examples cited from the Australian and US copyright legislation, these concepts and the language has been implemented in somewhat different ways.

It will be a very tall order to expect a change in the way international copyright law and policy are formulated, and this paper does not suggest such an attempt. Rather, the next few sections of this paper will attempt to formulate a means by which international copyright norms (as opposed to “hard law”) can be developed, that will leverage the gap between the standards and language of international copyright, and national implementations thereof. In short, by emphasizing the difference between existing international standards and varying national laws, it becomes possible also to highlight the flexibilities inherent in the international standards enshrined in the Berne Convention, the WIPO Treaties and TRIPS. Specifically, urging a strengthening of users’ rights to balance those of copyright-holders becomes more of a possibility when countries examine their national laws and proposed amendments thereto with a view toward achieving a proper balance between owners and users in the digital age, but without the fear of derogating from their obligations under international treaty terms. It may be possible to augment this persuasive effort by examining whether the emergence of UGC will change prevailing views of authorship and creativity. This possibility is the subject of the next section of this paper.

(b) CHALLENGING THE STATUS QUO: THE RISE OF USER-GENERATED CONTENT

Recent years have seen the evolution, even an explosion, in what has come to be generally labeled “user-generated content” (UGC.) Using technological tools previously unavailable on such a wide scale, from software to MP3 players, and relying on developments in broadband communications and wider Internet access, end-users of copyrighted content have become able to edit, modify, remix, sample, “mash up” and collaborate on new ways to use such content, as well as create their own, original material. Correspondingly, websites have sprung up

¹² Similar rights are provided to performers whose performances are “fixed in phonograms” under the 1996 WIPO Performances and Phonograms Treaty”, by Articles 8 and 10 thereof.

COPYRIGHT (I): THE BEST THINGS IN LIFE ARE FREE - Freeing up Content Rights and moving towards Collaborative Innovation? Is Creative Commons/Open Source changing the way we perceive and manage IP?

that take advantage of these new uses and tools, and that allow for the dissemination and sharing of UGC. Examples include Wikipedia and the use of “wikis” to collaborate on and edit text and content, Flickr, Myspace and other “social networking” websites, Youtube, “podcasts”, weblogs (“blogs”), RSS (Really Simple Syndication) and other forms of “newsfeeds”, as well as Digg, Del.icio.us and other social bookmarking technology. Many of the tools and technology that are vital to UGC have increasingly been described as “Web 2.0” technology, with the two terms sometimes used interchangeably¹³. UGC has grown to such an extent that Time Magazine named “You” (meaning users who contribute to UGC) as its Person of the Year in 2006. Perhaps the most visible – for bringing together many of these technological tools and resulting UGC – is the development of the “virtual world”, of which “Second Life” is probably and currently the most well-known and fastest-growing¹⁴. Corporations and businesses are reportedly taking an interest, and either developing an online presence in a virtual world, using blogs and social networking software to communicate with employees and customers, or otherwise exploring ways to exploit Web 2.0 technology¹⁵. A study by Nielsen/Net Ratings showed that the top three online brands in the United Kingdom in 2006 were Youtube, Flickr and Myspace, respectively. Recently, media giants CBS, NBC Universal, Fox and Viacom announced that they would collaborate to create a video-sharing website that would compete directly with Youtube (owned by Google.) Industry

¹³ Web 2.0 refers in general to websites and technology which treat the Internet and computer networks as platforms, rely on network effects, and encourage participation and a high level of user interaction; see Tim O’Reilly, WHAT IS WEB 2.0 (September 2005), available online at <http://www.oreillynet.com/pub/a/oreilly/tim/news/2005/09/30/what-is-web-20.html> (page last accessed April 7, 2007.) See also the history and data presented in the background paper by the Pew Internet Project, RIDING THE WAVES OF WEB 2.0 (October 2006), available online at http://www.pewinternet.org/pdfs/PIP_Web_2.0.pdf (page last accessed April 7, 2007.)

¹⁴ From 1 million registered accounts in October 2006 to 5 million in March 2007. The number is predicted to grow to 25 million by March 2008: <http://secondliferesearch.blogspot.com/2007/03/second-life-residents-statistics.html> (page last accessed April 7, 2007.)

¹⁵ There has been a recent upsurge in research studies on this, by companies such as Mckinsey, Forrester and Gartner. For a summary and listing, see <http://blogs.zdnet.com/Hinchcliffe/?p=103#more-103> (page last accessed April 7, 2007.)

COPYRIGHT (I): THE BEST THINGS IN LIFE ARE FREE - Freeing up Content Rights and moving towards Collaborative Innovation? Is Creative Commons/Open Source changing the way we perceive and manage IP?

estimates are that by 2010, the volume of downloads/views on sites such as Youtube and Myspace will exceed US\$65 billion, with revenues attributable to UGC video (such as advertisements, embedded video and branded channels) to exceed \$850 million.

The explosive growth of UGC and Web 2.0 technology has not been limited to the West. As of May 2005, there were over 60 million blogs¹⁶. The table below shows the geographical breakdown:

¹⁶ Source: <http://www.blogherald.com/2005/05/25/world-wide-blog-count-for-may-now-over-60-million-blogs/> (page last accessed April 2, 2007.)

COPYRIGHT (I): *THE BEST THINGS IN LIFE ARE FREE - Freeing up Content Rights and moving towards Collaborative Innovation? Is Creative Commons/Open Source changing the way we perceive and manage IP?*

Anglosphere

(US/ Canada/ UK/ Australia/ NZ)

Google: 8.5 million

MSN Spaces: 10 million

Six Apart Live Journal/ TypePad/MT: 8.7 million

Other hosted (US): 9 million

Sub Total: 36.2 million

Asia

Japan: 3.35 million

China: 4 million

South Korea: 15 million

Other Asia (Malaysia, Singapore, Thailand and the Phillipines): (approx) 1 million

India/ Pakistan: (approx) 1 million

Sub Total: 24.35 million

Europe

Sub Total: 2 million

Middle East

Iraq: at least 151

Others (including Israel): (approx) 100,000

Africa: (approx.) 10,000

TOTAL: 62.66 million blogs

Perhaps more impressively, almost three quarters (74%) of the Japanese users who participated in the survey reported reading blogs at least once a week. This number contrasts with 43% in South Korea, 23% in the UK, 22% in France, and, interestingly, just over a quarter in the USA (27%). It is notable, however, and (speculatively) perhaps a result of cultural differences, that fewer of the Japanese group (29%) were likely to take action (such as attend a

COPYRIGHT (I): *THE BEST THINGS IN LIFE ARE FREE - Freeing up Content Rights and moving towards Collaborative Innovation? Is Creative Commons/Open Source changing the way we perceive and manage IP?*

public meeting, sign a petition or other activities) as a result of reading a blog, compared to 41% in South Korea, 48% in the UK and 49% in the US (49%).

Wikipedia has also been relatively successful in terms of international and multilingual adoption. As of August 2006, the Japanese edition had 250,900 articles, the Chinese 86,319 and the Bahasa Indonesia version 31,072. Other numbers include the South Korean version at 26,565 articles, the Arabic version at 16,593, the Bahasa Malaysia version at 14,521, and the Thai version at 13,949. For reference purposes, it should be pointed out that the English-language version of Wikipedia surpassed 1 million entries in March 2006.

An obvious question to ask at this juncture is whether these statistics comport with broader statistics relating to Internet usage growth and penetration rates. A March 2007 survey shows the number of Internet users in Asia to be almost 400 million, with Europe at 315 million, North America at 233 million, Latin America at 96 million, Africa at 33 million, the Middle East at 19 million and Australia/Oceania at 18 million¹⁷.

The following table shows the Internet penetration rate for the same period:

World Regions	Population (2007 Est.)	Population % of World	Internet Usage, Latest Data	% Population (Penetration)	U s a g e % of World	Usage Growth 2000-2007
A f r i c a	933,448,292	14.20%	33,334,800	3.60%	3.00%	638.4%
A s i a	3,712,527,624	56.50%	398,709,065	10.70%	35.80%	248.8%
E u r o p e	809,624,686	12.30%	314,792,225	38.90%	28.30%	199.50%
M i d d l e E a s t	193,452,727	2.90%	19,424,700	10.00%	1.70%	491.40%
N o r t h A m e r i c a	334,538,018	5.10%	233,188,086	69.70%	20.90%	115.70%
Latin America/Caribbean	556,606,627	8.50%	96,386,009	17.30%	8.70%	433.40%
O c e a n i a / A u s t r a l i a	34,468,443	0.50%	18,439,541	53.50%	1.70%	142.00%
WORLD TOTAL	6,574,666,417	100.00%	1,114,274,426	16.90%	100.00%	208.70%

The figures show that, as a percentage of population, Internet penetration rates in Asia (not including the countries included as Oceania) are low, although usage growth is rapid and

¹⁷ Source: <http://www.internetworldstats.com/stats.htm> (page last accessed April 7, 2007.)

COPYRIGHT (I): THE BEST THINGS IN LIFE ARE FREE - Freeing up Content Rights and moving towards Collaborative Innovation? Is Creative Commons/Open Source changing the way we perceive and manage IP?

healthy. Where Hong Kong, Japan, Korea, Singapore and Taiwan all have Internet penetration rates of 60% or higher¹⁸, countries such as Bangladesh and Laos report less than 1%, with India at 3.5%, Pakistan at 7.2% and the Philippines (three English-speaking countries with a small but rapidly-growing number of computer professionals and where many US technology companies have outsourced their call center and software development operations) at 9%¹⁹. Factors explaining this gap in the Asian/Oceanic countries include the lack of an adequate telecommunications and information infrastructure, uneven levels of education across large populations, and poverty. While a thorough analysis of the “digital divide” is beyond the scope of this paper, what these statistics show is that Asia (including Oceania) is a large and diverse area, with very different levels of Internet access and sophistication. Any changes to be contemplated in international copyright law and policymaking therefore needs to bear these differences in mind, instead of treating (however inadvertently) Asia as a single and cohesive area or category (similar considerations apply, of course, for “Africa”, the “Middle East” and “Latin America”).

With that caveat in mind, however, it remains encouraging to note that UGC is clearly growing in those parts of Asia that have high Internet penetration rates (which presumably includes or will include broadband access) and increasing Internet access. This means that copyright issues regarding the rise of UGC are of concern to Internet users globally and not just in the West, most particularly, the US where many of the more popular websites and technology are based or originated. The issues center primarily on the thorny question of whether current copyright laws adequately balance the needs and interests of copyright-holders with those of copyright users, when the latter are now clearly emerging as content-creators in their own right.

¹⁸ Source: <http://www.internetworldstats.com/top25.htm> (page last accessed April 7, 2007.) Iceland ranked highest with 86.3%, followed by New Zealand, Sweden, Portugal and Australia at over 70%. The United States reported a 69.6% penetration rate.

¹⁹ Source: <http://www.internetworldstats.com/stats3.htm#asia> (page last accessed April 7, 2007.)

COPYRIGHT (I): *THE BEST THINGS IN LIFE ARE FREE - Freeing up Content Rights and moving towards Collaborative Innovation? Is Creative Commons/Open Source changing the way we perceive and manage IP?*

The problem, of course, is that some of the UGC being created is derived from, based on and uses existing copyrighted work. As such, however creative the remix or the new use, the user/creator may have committed an act of copyright infringement in order to create her work. This issue is not new or particular to Web 2.0; the music sampling, appropriation art, mashup and remix cases²⁰ had already raised the issue and highlighted the tension between the “new” creativity represented by UGC, which relies on the creativity and output of other authors, and the rights conferred by copyright law on those authors. Does the persistence and explosion in the growth of UGC justify these “re-uses” of copyrighted content? To what extent, can the various forms of fair use or fair dealing adapt to and accommodate UGC? More generally, will it be necessary, and if so, is it even possible, to “elevate” these limitations and exceptions to copyright protection to a stronger form of “users’ right”?

The next section of this paper attempts to deal with these questions.

(c) **LIMITATIONS & EXCEPTIONS TO COPYRIGHT: FINDING A BASIS FOR
USERS’ RIGHTS IN INTERNATIONAL COPYRIGHT**

(a) *The Existing Legal Regime Internationally and in Selected Common Law & Asian
Countries*

²⁰ For example, just in the US alone, there was *Bridgeport Music, Inc. v Dimension Films LLC*, 230 F. Supp.2d 830 (M.D. Tenn. 2002) (a music sampling case); in terms of appropriation art, artist Joy Garnett's use in a painting of a photograph by photographer Susan Meiselas was alleged by Meiselas to infringe her copyright (see <http://firstpulseprojects.net/joywar.htm>; page last accessed April 5, 2007) and there were two cases involving artist Jeff Koons: *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992) and *Blanch v Koons*, 2005 U.S. Dist. LEXIS 26299. In terms of mashups and remixes, a good example is the Grey Tuesday album by DJ Dangermouse, who combined the Beatles' White Album and Jay-Zee's Black Album, and received a cease-and-desist letter from EMI Music. As an example, further, of the communications and sharing potential of the Internet, websites and users launched a “Grey Tuesday” online protest: see <http://www.greytuesday.org/> (page last accessed April 5, 2007.)

COPYRIGHT (I): *THE BEST THINGS IN LIFE ARE FREE - Freeing up Content Rights and moving towards Collaborative Innovation? Is Creative Commons/Open Source changing the way we perceive and manage IP?*

It may be helpful to set out in detail those provisions of the Berne Convention that are particularly relevant to UGC and the need to balance the rights and interests of copyright owners and users. First, Article 9(2) states what has become known as the “three-step test” as follows:

“It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in *certain special cases*, provided that such reproduction *does not conflict with a normal exploitation* of the work and *does not unreasonably prejudice the legitimate interests of the author.*” (emphasis added)

Secondly, Article 10²¹ states that:

“(1) It shall be permissible to make *quotations* from a work which has already been *lawfully made available to the public*, provided that their making is *compatible with fair practice*, and their extent *does not exceed that justified by the purpose*, including quotations from newspaper articles and periodicals in the form of press summaries.

(2) It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of *illustration in publications, broadcasts or sound or visual recordings for teaching*, provided such utilization is *compatible with fair practice.*” (emphasis added)

Professor Sam Ricketson has engaged in extensive and detailed analysis, based on the drafting history, study group reports and other interpretative aids, of the meaning and interpretation of these exceptions and limitations²². With respect to the “three-step test” and its constituent three steps, he postulates that, for the first step, while an exception needs to be clearly defined and confined in scope, it need not be for special delineated purposes. For the second step, he suggests a normative approach that factors other than economic competition between the copyright-holder and the user be taken into account, so as to take on board non-economic uses by libraries and the like, free speech considerations and other factors that call into play a balancing

²¹ In addition, Article 10bis contains provisions relating to reproduction of works by the press and the reporting of current events.

²² Sam Ricketson, WIPO STUDY ON EXCEPTIONS & LIMITATIONS TO COPYRIGHT IN THE DIGITAL ENVIRONMENT, WIPO Document Number SCCR/9/7, April 5, 2003 (a paper prepared for the WIPO Standing Committee on Copyright & Related Rights, meeting in its Ninth Session in June 2003.)

COPYRIGHT (I): *THE BEST THINGS IN LIFE ARE FREE - Freeing up Content Rights and moving towards Collaborative Innovation? Is Creative Commons/Open Source changing the way we perceive and manage IP?*

process that looks beyond the economic exploitation of the work in question. For the third step, he emphasizes the underlying rationale of reasonable proportionality, which balances the author's legitimate interests in restraining the use in question.

Article 9(2) is specifically included in the TRIPS Agreement, not as part of the general incorporation of Articles 1 to 21 of the Berne Convention (under Article 9(1) of TRIPS) but as a free-standing treaty provision, slightly amended. In this regard, TRIPS Article 13 provides that "Members shall confine limitations and exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right-holder." Where, therefore, the Berne Convention expressly linked the "three-step test" to reproductions of literary and artistic works, TRIPS applies it to all exclusive rights that pertain to copyright works. Where Article 9(2) of the Berne Convention spoke of "authors", TRIPS Article 13 makes mention of the "right-holder".

Professor Ricketson notes that, although the limited stated objective of the Berne Convention is to protect the rights of authors²³, the inclusion of its provisions in TRIPS coupled with the broader scope of TRIPS as a trade-related agreement points toward the need to interpret these treaty provisions in a more nuanced fashion, to take into account other public policy interests such as education and development²⁴. Nonetheless, he cautions against reading Article 13 as providing a "charter" for creating and imposing broader limitations and exceptions than are presently allowed by the Berne Convention, due to the clear relationship between that Convention and TRIPS. In particular, the express obligation not to derogate from the provisions of the Berne Convention would operate to limit any potential interpretation of TRIPS Article 13

²³ According to Article 1, "The countries to which this Convention applies constitute a Union for the *protection of the rights of authors* in their literary and artistic works." (emphasis added)

²⁴ See TRIPS Article 7, which states that "The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge, and in a manner conducive to social and economic welfare, and to a balance of rights and obligations."

COPYRIGHT (I): THE BEST THINGS IN LIFE ARE FREE - Freeing up Content Rights and moving towards Collaborative Innovation? Is Creative Commons/Open Source changing the way we perceive and manage IP?

as permitting an expansion of limitations and exceptions beyond those contemplated by the Berne Convention.

The 1996 WIPO Copyright Treaty (WCT) also incorporates the “three-step test” through Article 10, which reads:

- “(1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.
- (2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.”

In addition, the 1996 Diplomatic Conference which adopted the WCT also adopted an Agreed Statement which reads:

“It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.

“It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.”

As with TRIPS Article 13, however, Professor Ricketson cautions against an expansive reading of Article 13 through the Agreed Statement, noting that Article 10(2) would be superfluous if this were the case. He notes, further, that with its adoption in TRIPS and the WCT (as well as the WIPO Performances and Phonograms Treaty, also at the same 1996 Diplomatic Conference), the “three-step test” has become even more firmly planted in the international copyright landscape.

As such, and in considering the possibility of crafting stronger user rights in the digital environment within the existing international framework of rights and limitations, the question is this: is any room to argue that Article 9(2) of the Berne Convention, as adopted in TRIPS and as

COPYRIGHT (I): *THE BEST THINGS IN LIFE ARE FREE - Freeing up Content Rights and moving towards Collaborative Innovation? Is Creative Commons/Open Source changing the way we perceive and manage IP?*

incorporated into the WCT, permits a broad, flexible view of what sorts of uses do not fall within the copyright owner's realm of exclusive rights, not because they are not covered by an exclusive right, but because they are recognized by copyright law as being as important – in the public policy balance – as maintaining the copyright owner's rights, such that these uses cannot be interfered with even by the copyright owner?

From the outset, it has to be recognized that the very wording of Article 9(2) seems to militate against a pro-users' right interpretation. The language of Article 9(2) contemplates limitations and exceptions as “carve-outs” to the exclusive rights of a copyright owner, such that they need to be clearly defined and are permitted only to the extent that they do not unreasonably interfere with the copyright owner's enjoyment and exploitation of her exclusive rights. Legislative models such as that represented by the European Union's Information Society Directive²⁵, which set out narrow, specific exceptions to copyright, would conform to this view of the “three-step test”.

Interestingly, however, the US doctrine of fair use, as set out in the US Copyright Act, represents a substantially different view and implementation. Although the US Copyright Act contains a number of fairly specific exceptions and limitations²⁶, Section 107 provides a general exception wherein “the fair use of a copyrighted work, including ... for purposes such as criticism, comment, news reporting, teaching ..., scholarship, or research, is not an infringement of copyright.” The section then goes on to list a number of factors (inclusive and not exhaustive) to be considered in weighing a finding of fair use, including the purpose of the use and its effect on the market for and value of the original copyrighted work. To the extent that Professor Ricketson's characterization of the Berne Convention's “three-step test” is accepted as accurate,

²⁵ See, e.g., Article 5 (Directive 2001/9/EC; available online at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML>; page last accessed April 5, 2007.)

²⁶ See, e.g., Section 108 dealing with libraries and archives, Section 110 dealing with public performances and displays, and Section 117 dealing with backup copies of computer programs. The US Copyright Act also contains a number of compulsory licensing provisions dealing with, *inter alia*, cable transmissions, satellite broadcasts, retransmissions and certain acts in relation to musical works and sound recordings.

COPYRIGHT (I): *THE BEST THINGS IN LIFE ARE FREE - Freeing up Content Rights and moving towards Collaborative Innovation? Is Creative Commons/Open Source changing the way we perceive and manage IP?*

it can be said that the US doctrine of fair use represents an exemplary implementation that tries to balance the competing interests of the right-holder and the user. By providing inclusive criteria that are linked directly to a consideration of whether a use is in fact “fair” or not, the US provision emphasizes flexibility and a fact-specific approach. To be sure, some element of certainty (particularly on the predictive ability to declare a user fair or otherwise) is lost thereby; in addition, much is left to the courts to determine the contours of the doctrine, such that there is always a risk in such an approach that cautious judges might overly limit the applicability and scope of the doctrine. Nonetheless, the US approach on paper at least illustrates how the “three-step test” can be implemented in a reasonably flexible way, and with an emphasis on fairness.

Other common law countries have generally not, however, taken as flexible an approach with their equivalent “fair use” provisions. The copyright laws of the United Kingdom, Australia, Canada and New Zealand all contain “fair dealing” provisions, which limit the fairness finding to certain delineated purposes, *viz.*, for research, private study, news reporting and several other specific uses²⁷. Nevertheless, recent developments indicate that changes to these provisions are afoot in several countries, although these do not, unfortunately, go as far toward strengthening the existing limitations and exceptions as they might, much less expand them substantially or create users’ rights.

Perhaps the most encouraging move in this direction was taken by the Canadian Supreme Court in the 2004 case of *CCH Canadian Ltd v Law Society of Upper Canada*²⁸, in which decision the Court declared that “fair dealing, like other exceptions in the Copyright Act, is a user’s right” and as such both owners’ and users’ rights have to be given a “fair and balanced reading” in light of the public policy objectives of the Copyright Act. The Court opined that “research” should be given a “large and liberal interpretation in order to ensure that users’ rights

²⁷ See Sections 29-30 of the United Kingdom Copyright, Designs and Patents Act 1988, Sections 176-178 of the Australian Copyright Act 1968, Sections 29-30 of the Canadian Copyright Act and Sections 42-43 of the New Zealand Copyright Act 1994.

²⁸ 2004 SCC 13, [2004] 1 S.C.R. 339, available online at <http://www.canlii.org/en/ca/scc/doc/2004/2004scc13/2004scc13.html> (page last accessed April 6, 2007.)

COPYRIGHT (I): *THE BEST THINGS IN LIFE ARE FREE - Freeing up Content Rights and moving towards Collaborative Innovation? Is Creative Commons/Open Source changing the way we perceive and manage IP?*

are not unduly constrained” and thus not limited to non-commercial research. Despite this promising sign, however, the Canadian Government’s proposal to amend the Copyright Act in 2005 did not propose any changes to the language of the Canadian fair dealing provisions; rather, in attempting to craft detailed exceptions that would enable digital archiving and educational time- and space-shifting, Bill C-60 appeared to endorse a narrow, specific approach to copyright exceptions.

Another promising development occurred in Singapore in 2004, when the Singapore Copyright Act was amended (in part to fulfill obligations under the recently-concluded US-Singapore Free Trade Agreement.) Where previously Singapore’s fair dealing provisions were, like in the UK, Canada, Australia and New Zealand, tied specifically to particular uses, the 2004 amendments removed the “research or private study” limitation, thus bringing the Singapore position closer to the US approach of fair use (while retaining the phrase “fair dealing” and, perhaps more curiously, retaining the other specific purposes of criticism and review, and for the reporting of current events.)²⁹

Unfortunately, recent changes to Australian copyright law, and upcoming proposed changes to the New Zealand copyright law, do not follow the same expansive trend. In December 2006, the Australian Parliament passed the Copyright Amendment Act³⁰, which updated Australian copyright law beyond the previous (2000) amendments, adding exceptions for time- and format-shifting, for parodic and satirical uses, and for certain purposes pertaining to libraries and archives, amongst other provisions³¹. The new Act does not, however, alter the fair dealing provisions in any substantial manner. The Copyright Law Review Committee had recommended moving to a more open-ended fair dealing exception in 1998, and the Senate

²⁹ See the Singapore Copyright Act, Cap. 63, available online at <http://statutes.agc.gov.sg/> (page last accessed April 8, 2007.)

³⁰ The Bill as passed can be found at <http://parlinfoweb.aph.gov.au/piweb/Repository/Legis/Bills/Linked/19100601.pdf> (page last accessed April 5, 2007.)

³¹ Including enhanced criminal provisions and hotly-debated provisions dealing with technological protection measures, see *ibid.*

COPYRIGHT (I): THE BEST THINGS IN LIFE ARE FREE - Freeing up Content Rights and moving towards Collaborative Innovation? Is Creative Commons/Open Source changing the way we perceive and manage IP?

Select Committee on the US-Australia Free Trade Agreement had recommended expanding the fair dealing exception to more closely resemble the US fair use doctrine. In conducting its Fair Use Review in 2005, the Attorney-General had requested, and received numerous favorable, submissions in response to these recommendations. The final Bill that was presented to Parliament and passed, however, retained the existing specific purposes language, even while making several adjustments to their operation.

At the same time as the Australian amendments, New Zealand introduced a proposal to amend its Copyright Act. The Copyright (New Technologies and Performers' Rights) Amendment Bill includes amendments such as format-shifting and additional uses for education, but leaves intact the existing specific purposes of fair dealing (even while clarifying certain aspects of their operation.)³² The Bill has passed its first reading, and is currently in committee stage. It would seem, therefore, that New Zealand has, like Australia, elected to adopt a conservative approach toward broadening fair use.

In light of these legislative developments, it will be interesting to see what effect the November 2006 Gowers Review of Intellectual Property³³ will have on copyright law reform in the United Kingdom (UK). Besides recommending clarifications and amendments that would extend UK copyright exceptions to distance and online learning and to parody and satire, the Gowers Report referred to the US fair use doctrine in noting concerns that the UK's fair dealing exceptions might be too narrow. It recommended that a limited private copying exception for format-shifting be adopted, and that the UK Government seek to amend the EU Information Society Directive to allow an exception to be adopted for "transformative uses" along US fair use lines. Should the UK Government pursue this particular recommendation, it will bring the fair use/fair dealing debate – and the differences between a flexible general exception and the specific narrow exception – into the EU. Perhaps unsurprisingly, and also given the relatively

³² See http://www.parliament.nz/NR/rdonlyres/5A88D15B-C4A1-42C2-AE75-9200DD87F738/51071/DBHOH_BILL_7735_40199.pdf (page last accessed April 5, 2007.)

³³ The Report is available online at http://www.hm-treasury.gov.uk/media/53F/C8/pbr06_gowers_report_755.pdf (page last accessed April 7, 2007.)

COPYRIGHT (I): *THE BEST THINGS IN LIFE ARE FREE - Freeing up Content Rights and moving towards Collaborative Innovation? Is Creative Commons/Open Source changing the way we perceive and manage IP?*

minor status of this particular recommendation in light of other recommendations dealing with, *inter alia*, enforcement and patent rights, the UK Government's initial response³⁴ to the Gowers Review omitted mention of the "transformative use" question, although it acknowledged the need to update and clarify the education-related exceptions.

Looking beyond the common law countries in the Asia-Pacific region, and particularly those countries with high Internet penetration rates and adoption of Web 2.0 technology, it should be noted that current Japanese copyright law does not have a general exception to copyright infringement, nor a limitation pertaining explicitly to fair use. Instead, the Japanese copyright law has a series of specific exceptions, including a "private use" exception and several relating to education³⁵. In similar vein, the Korean copyright law contains a series of specific exceptions that also include a "private use" exception³⁶. China's copyright law contains a fairly long and detailed list of specific exceptions, again including a "private use" exception and provisions dealing with quotations, translations and educational users, among others³⁷.

Hong Kong recently launched a consultation process on Copyright Protection in the Digital Environment. The consultation paper, released in December 2006 and calling for submissions by April 2007³⁸, deals largely with issues relating to P2P criminalization and the protection for online service providers, and only with one direct copyright exception: the

³⁴ Chapter 3 of the UK Government's Pre-Budget Report 2006, available online at http://80.69.6.120/media/571/B7/pbr06_chapter3.pdf (page last accessed April 7, 2007.)

³⁵ See Chapter II, Section 3, Subsection 5 of the Japanese Copyright Law (as translated): http://www.cric.or.jp/cric_e/clj/clj.html (page last accessed April 7, 2007.)

³⁶ See Chapter 2, Section 6 of the Korean Copyright Law (as translated): http://www.copyright.or.kr/copye/main.asp?ht=../law/law_b_koe.htm&ca=6&se=1 (page last accessed April 7, 2007.)

³⁷ See Chapter 2, Section 4, Article 24 of the Chinese Copyright Law, as translated: <http://www.chinaiprlaw.com/english/laws/laws10.htm> (page last accessed April 7, 2007.)

³⁸ See http://www.citb.gov.hk/cib/ehhtml/pdf/consultation/Consultation_document.pdf (page last accessed April 7, 2007.)

COPYRIGHT (I): *THE BEST THINGS IN LIFE ARE FREE - Freeing up Content Rights and moving towards Collaborative Innovation? Is Creative Commons/Open Source changing the way we perceive and manage IP?*

possibility of adopting an exception pertaining to temporary copies. Hong Kong therefore looks set to retain its existing specific purpose exceptions relating to fair dealing.

In contrast to the preceding examples, Taiwan's copyright law contains both a list of specific exceptions (including private use, quotation and a fairly broad exception for libraries and "other cultural institutions open to the public"), as well as a general fair use provision that very closely resembles Section 107 of the US Copyright Act, including the factors to be taken into account in determining fair use³⁹.

Reviewing the various copyright laws of those Asian countries that have high Internet penetration rates, it appears that, except for Taiwan and (to a certain extent) Singapore, the US fair use model has not gained more than a foothold in the region. Further, the fact that Japan is a civil law system, and China a mixed civil and socialist law system, explains at least in part the parallel between these countries' reliance on a list of specific exceptions and the similar practice in European civil law jurisdictions. Finally, in view of the continuing hesitation amongst other major common law countries to do away with the required link between fair dealing and a specific purpose for such dealing, it seems unlikely that national legislatures in this part of the world will unilaterally change their approach and embrace a broader approach to limitations and exceptions to copyright.

More generally, the structural limitations posed by the language of the Berne Convention, as adopted by TRIPS and the WCT, would make liberal expansion of permitted limitations and exceptions to copyright difficult and unlikely. As such, and despite the valiant efforts of the Canadian Supreme Court in the *CCH* case, it may prove extremely difficult for copyright law to go even further and adopt a notion of "users' rights" that would encompass UGC and other forms of creativity not hitherto recognized.

(b) Changing the Notion of "Authorship" for UGC, and Similarities & Differences Between UGC and FOSS/CC-licensed Content

³⁹ See Article 65 of the Taiwanese Copyright Law: <http://www.tipo.gov.tw/eng/laws/e1-4-1an93.asp> (page last accessed April 7, 2007.) An interesting point to note is that the fair use exception is expressly applicable only to "economic rights".

COPYRIGHT (I): THE BEST THINGS IN LIFE ARE FREE - Freeing up Content Rights and moving towards Collaborative Innovation? Is Creative Commons/Open Source changing the way we perceive and manage IP?

Thus far, this paper has not examined the various types of content that can make up UGC, or compared its characteristics with that of FOSS- and CC-licensed content. This section of the paper will illustrate how UGC is far from a coherent, common body of “works” in copyright parlance, and that similarities as well as differences between it and the type of copyrighted works licensed under FOSS and CC, which call for further analysis as they may determine whether the growth of FOSS and CC can inform the transformation and acceptance of UGC into mainstream rights under copyright law.

As stated previously, the key question in an increasingly prevalent UGC world is whether current copyright laws adequately and appropriately balance the relevant public and private interests of the underlying copyright owner whose work is being re-used, and of the user/creator who is generating the UGC. As also mentioned previously, however, not all UGC relies on or uses underlying existing content (whether copyrighted or public domain); since it is not a legal or technical term of art, “UGC” merely describes the myriad types of content an Internet & technology user can and does create using these technological tools. In dealing with the central copyright conundrum, therefore, it is important to distinguish between UGC that is, in essence, an original creation (according to familiar copyright principles) and UGC that is a form of “derivative work” (using this term at its broadest and most descriptive, which includes but is not limited to the types of “derivative work” or “adaptations” commonly given a certain extent of copyright protection under existing copyright laws.) It is the latter form of UGC that leads to the copyright problem set out above.

To the extent that the UGC in question amounts to a derivative work or an adaptation, applying current copyright law principles entails asking two different questions; one, whether the derivative work or adaptation possesses sufficient originality (or the equivalent concept) to enjoy copyright in its own right; and two, regardless of the answer to the first question, whether the creation and dissemination of the derivative work or adaptation – to the extent that it incorporates or uses existing copyrighted content – also amounts to an infringement of the

COPYRIGHT (I): *THE BEST THINGS IN LIFE ARE FREE - Freeing up Content Rights and moving towards Collaborative Innovation? Is Creative Commons/Open Source changing the way we perceive and manage IP?*

copyright in the existing content being incorporated and used⁴⁰. To the extent that the answer to this second question is yes (for example, because the user/creator had not sought permission from the original copyright owner), the question then becomes whether the use in question is one that falls within an existing limitation or exception to the copyright. Generally speaking, this enquiry will most commonly fall to be determined by the relevant fair use/fair dealing exception. Thus, the strengthening and extension of such exceptions will provide greater legal protection to these types of UGC; moreover, the acknowledgement and creation of users' rights will confer on these types of UGC a legitimacy and equality of footing with the underlying content that was used to create the UGC.

These consequences are naturally troubling, particularly the latter, and especially for copyright owners whose view – supported by the current legislative framework and language of copyright law – is likely to be that unlicensed uses of their content should not be legalized, much less recognized as works of equivalent legal standing in their own right. While a user's right to use existing content does not equate to or automatically translate into copyrightability status (which enquiry will depend on the usual copyright concepts of originality and so on), the practical effect of permitting and/or recognizing UGC of this nature can amount to the same thing. In order, therefore, for this type of UGC to attain this legal position, it is necessary to rely on more than its growth as a phenomenon, or even its likely continued existence and influence on future creative processes and products. A firmer theoretical foundation has to be found.

One possibility is to look toward, and if necessary, review our notions of “authorship” for copyright purposes, and adopt a more liberal and expansive view of “authorship”⁴¹ so as to

⁴⁰ Note that the possibility that, and the extent to which, the original content was “used unlawfully” can in some countries affect the extent of copyright in the derivative work, see, e.g., Section 103(a) of the US Copyright Act.

⁴¹ Much has been written about how the Romantic notion of authorship became the leading trope in the Western copyright law tradition: see, e.g., Mark Rose, *Authors & Owners: The Invention of Copyright* (Cambridge: Harvard University Press, 1993), Carla Hesse, *Publishing and Cultural Politics in Revolutionary Paris, 1789-1810* (Berkeley: University of California Press, 1991)

COPYRIGHT (I): *THE BEST THINGS IN LIFE ARE FREE - Freeing up Content Rights and moving towards Collaborative Innovation? Is Creative Commons/Open Source changing the way we perceive and manage IP?*

encompass the kind of “second comer” creativity that marks this type of UGC. In other words, by recognizing that all creative works originate in some fashion from existing works (not just those in the public domain), and by acknowledging that “authors” are all “users” in some sense⁴², re-using of another author’s work begins to become more palatable as a legitimate activity.

This view has the obvious advantage that, by downplaying the centrality of the “author” figure (which prevalence dominates the Western copyright tradition), it fits well within various non-Western traditions and cultural perceptions of the role of creativity and its products. For example, Professor William Alford asserts, in his seminal book “To Steal a Book is an Elegant Offense”, that in traditional Chinese culture, the act of creation was a social activity that depended on a long and illustrious body of shared knowledge⁴³. Further, Professor Rosemary Coombe has argued that a continued American/Eurocentric view of “authorial rights”, increasingly separated from any “authorial responsibilities”, does not sufficiently protect traditional knowledge and cultural traditions (including communal and collaborative creativity)⁴⁴. Finally, adopting a broad concept of authorship would provide much-needed support to any proposal to recognize, create and broaden “users’ rights.”

Even allowing for a more expansive concept of authorship to include creators who re-use the work of others and collaborative creations beyond the currently-recognized boundaries of joint authorship, however, it cannot be that all such forms of UGC will necessarily and

and Jane Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TULANE L. R. 991 (1990.)

⁴² See, e.g., Abraham Drassinower, TAKING USER RIGHTS SERIOUSLY, University of Toronto Legal Studies Series Research Paper No. 09-05 (November 2005), available online at <http://ssrn.com/abstract=839988> (page last accessed April 1, 2007.)

⁴³ William P. Alford, TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION (Stanford University Press, 1995.)

⁴⁴ Rosemary Coombe, FEAR, HOPE AND LONGING FOR THE FUTURE OF AUTHORSHIP AND A REVITALIZED PUBLIC DOMAIN IN GLOBAL REGIMES OF INTELLECTUAL PROPERTY, 52 DePaul L. Rev. 1171 (2003.)

COPYRIGHT (I): *THE BEST THINGS IN LIFE ARE FREE - Freeing up Content Rights and moving towards Collaborative Innovation? Is Creative Commons/Open Source changing the way we perceive and manage IP?*

justifiably be protected. There will be some re-uses that are valued by the objectives of copyright law⁴⁵, and those that may be less so, or not at all. In this context, assistance may perhaps be sought from the Gowers Review's suggestion that "transformative use" be factored into, and expand if necessary, the limitations and exceptions to copyright law. Such uses could be contrasted with the kind of "consumptive uses" that US courts, in applying the fair use doctrine, have frowned upon⁴⁶. Thus, UGC that amounts to a transformative use of the underlying content could not just be fair use, but could also be validated under a form of "user's right" based on this concept. The advantage of crafting a "user's right" rather than rely on a fair use or equivalent limitation in this context is that it would avoid the possibility that UGC of this nature would actually fail to qualify under the more restrictive fair dealing and other limitations and exceptions in some countries. The corresponding problem with such an approach, however, is the risk that this would create a new protected copyright category for UGC through the "back door" of fair use.

Yet, given the centrality of the traditional "author" figure at the heart of the major copyright treaties and the comparative narrowness of the existing limitations and exceptions to authors' rights, a theoretical argument of this nature, without more, seems unlikely to make much headway. One can only hope that, with the vast and continual increase in UGC, combined with the ability of creators, users and advocates of change to rally, collaborate and press their

⁴⁵ Without going into the necessarily-intricate comparative analysis that attends an argument for the conferment of exclusive rights based on the objectives of copyright law, the differences between a utilitarian and natural rights approach toward copyright law should be noted. Where the latter theory would lean toward a greater recognition of authorship, the former – exemplified by US copyright law – would require a justification based on whether such new or additional rights would serve as a valid economic incentive for creativity that would ultimately contribute toward the progress of science and useful arts (as Constitutionally required.) See Drassinower, *supra* n 42, for a discussion of the differences in approach between US and Canadian copyright law; more generally, see William W. Fisher, THEORIES OF INTELLECTUAL PROPERTY, in S. Munzer (ed), NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY (Cambridge University Press, 2000)

⁴⁶ See, e.g., *Perfect 10 v Google, Inc.* and the decisions cited therein, *supra* n 4.

COPYRIGHT (I): *THE BEST THINGS IN LIFE ARE FREE - Freeing up Content Rights and moving towards Collaborative Innovation? Is Creative Commons/Open Source changing the way we perceive and manage IP?*

causes using the same UGC tools and modern communications technology⁴⁷, this kind of argument will gain some traction and eventually contribute toward a change in the norms governing the use and exercise of copyright rights. If and when customs and soft law norms change, it may then become more likely that a consequent change can be urged in hard law⁴⁸.

At this juncture, one important, if obvious, feature about UGC needs to be noted, particularly in contrast to FOSS- and CC-licensed content, *viz.*, UGC and these types of content are not identical. UGC is not necessarily collaborative in the sense of its creation or its dissemination, and its creation does not necessarily use or rely on FOSS- or CC-licensed content, although there are some similarities.

The similarities between UGC and the type of content licensed under FOSS and CC models lie mostly in a general philosophy⁴⁹ and the potential ability of these forms of content to mobilize, democratize and empower those individuals that create them. It is true that UGC and the tools that enable their creation and dissemination have enabled user engagement, interaction, feedback and sharing at a level much deeper and richer than previously. It is true also that many of the most popular and well-known types of UGC – wikis, blogs and virtual worlds, for example – depend on and flourish precisely because of their collaborative nature and facilitation of interaction, as well as their participative features⁵⁰. Through participation, interaction and

⁴⁷ See, e.g., the Grey Tuesday protest, *supra*. For other examples, see also the collaborative efforts that led to the 2005 Adelphi Charter (<http://www.adelphicharter.org/default.asp>; page last accessed April 8, 2007), the Draft Access to Knowledge Treaty of 2005 (http://www.cptech.org/a2k/a2k_treaty_may9.pdf; page last accessed April 8, 2007) and the 1993 Bellagio Declaration (<http://www.case.edu/affil/sce/BellagioDec.html>; page last accessed April 8, 2007.)

⁴⁸ This is the approach favored by the founders of Creative Commons, see discussion *infra*.

⁴⁹ i.e., valuing collaborative effort, sharing and open/free access to the works of others: see the definition of “open source” from the Open Source Initiative: <http://www.opensource.org/> (page last accessed April 8, 2007) and the philosophy behind Copyleft and “free software” from the Free Software Foundation: <http://www.fsf.org/> (page last accessed April 8, 2007.)

⁵⁰ In Time Magazine's writeup of “You” as Person of the Year 2006, it raved that it “a story about community and collaboration on a scale never seen before” a “massive social experiment” and

COPYRIGHT (I): *THE BEST THINGS IN LIFE ARE FREE - Freeing up Content Rights and moving towards Collaborative Innovation? Is Creative Commons/Open Source changing the way we perceive and manage IP?*

collaboration, it is believed that individuals will find self-expression, and desirable outcomes such as participative democracy can be facilitated.

A similar theme runs through the FOSS and CC movements, particularly with reference to the democratizing and educational benefits to developing countries in their adoption of FOSS⁵¹. It is tempting, therefore, to see if the evolution and successes of FOSS and CC can inform the future legal direction of UGC as either exempted uses or as possessing rights in the form of users' rights. In this respect, however, one significant feature of FOSS and CC that makes them less-than-ideal models for UGC in terms of crafting users' rights is the fact that neither FOSS nor CC actually creates or carves out additional rights from the existing copyright regime. Rather, despite their philosophy and emphasis, in their operation, they co-exist with, and even exist within, the current copyright framework. In order to determine whether or not FOSS and CC have effected changes in public perceptions of copyright and IP, and whether or not they may facilitate a further move toward recognizing collaborative innovation (e.g. in the form of UGC) – it is necessary to briefly examine the nature of the FOSS and CC licensing models and the movements more generally.

(D) FOSS & CC: HOW THEY WORK AND WHAT THEY ACTUALLY DO –
INCOMPLETE MODELS AND INOPERATIVE PHILOSOPHIES

(a) *Free and Open Source Software (FOSS)*

“an opportunity to build a new kind of international understanding, not politician to politician, great man to great man, but citizen to citizen, person to person.”

⁵¹ See, e.g., Niranjan Rajani, Juha Rekola & Timo Mielonen, “Free as in Education: Significance of Free/Libre and Open Source Software for Developing Countries”, a 2003 study for the Finnish Ministry of Foreign Affairs, available online at http://www.itu.int/wsis/docs/background/themes/access/free_as_in_education_niranjan.pdf (page last accessed April 8, 2007) and Nah Soon Hoe, “Breaking Barriers: The Potential of Free and Open Source Software for Sustainable Human Development”, UNDP-APDIP ICT4D Series (2006), available online at <http://www.apdip.net/publications/ict4d/BreakingBarriers.pdf> (page last accessed April 8, 2007.)

COPYRIGHT (I): THE BEST THINGS IN LIFE ARE FREE - Freeing up Content Rights and moving towards Collaborative Innovation? Is Creative Commons/Open Source changing the way we perceive and manage IP?

There have been a number of studies on the impact of FOSS –in terms of its adoption by governments and businesses in various countries and regions – and its likely role in affecting economic progress in developing countries⁵². There are fewer that address the philosophy behind FOSS; more specifically, research examining the “free as in freedom/speech” mantra that characterizes free software (as exemplified by the Free Software Foundation’s (FSF) principles of “copyleft” found in its GNU General Public License), and the less politically-charged but no less focused on “freedom” principles that underlie open source software (as exemplified by the licenses sanctioned by the Open Source Initiative (OSI)), with a view toward determining whether the rhetoric and philosophy of FOSS (collectively)⁵³ may be too closely tied to an American view of freedom, and hence be limited in its applicability and attractiveness to different cultures and perceptions.

⁵² See, e.g., Rishab Aiyer Ghosh, UNU-MERIT STUDY ON THE ECONOMIC IMPACT OF OPEN SOURCE SOFTWARE ON INNOVATION AND THE COMPETITIVENESS OF THE ICT SECTOR IN THE EU (November 2006), an extremely detailed study on the adoption rates of FOSS in Europe and elsewhere, and in which the author notes that little information is available on this topic regarding the Asia-Pacific region. He cites studies reporting an 80% market penetration rate for FOSS applications in China (including adoption by China’s largest bank), and figures from 2004 showing Linux accounting for 14% of servers and 5% of desktops, which was projected to grow to 24% and 9% respectively by 2008. See also Nirajan Rajani, FREE AS IN EDUCATION: SIGNIFICANCE OF FREE/LIBRE AND OPEN SOURCE SOFTWARE FOR DEVELOPING COUNTRIES, Ministry for Foreign Affairs, Finland (2003), and Bibek Debroy & Julian Morris, OPEN TO DEVELOPMENT: OPEN SOURCE SOFTWARE AND ECONOMIC DEVELOPMENT, Working Paper for the International Policy Network (2004), available online at <http://www.eldis.org/cf/search/disp/DocDisplay.cfm?Doc=DOC18888&resource=f1ict> (page last accessed April 8, 2007), arguing that FOSS may not contribute positively to economic development, for reasons including the lack of profitability of using FOSS licenses such as the GNU General Public License.

⁵³ For the differences (primarily in political philosophy) between the two, see the FSF’s explanation at <http://www.gnu.org/philosophy/free-software-for-freedom.html> (page last accessed April 8, 2007.)

COPYRIGHT (I): *THE BEST THINGS IN LIFE ARE FREE - Freeing up Content Rights and moving towards Collaborative Innovation? Is Creative Commons/Open Source changing the way we perceive and manage IP?*

On this view⁵⁴, the “free” and “open” principles of FOSS are inexorably tied to an American perspective that views the exercise of rights through a Constitutional lens, in terms both of yoking freedom to “free speech” considerations, and viewing copyright as an instrumental means to further a utilitarian approach toward knowledge and progress. Contracts, property rights and economic incentives thus play a key role in fashioning rights over content. To the extent that the rhetoric employed by FOSS advocates and institutions steeped in this view is the predominant perspective, it can become difficult to remember that FOSS is but one – although a singularly successful – method and manifestation of community knowledge production.

An analysis of the leading FOSS licenses is beyond the scope of this paper. Suffice it to say, however and for present purposes, that these primarily originate or are drafted from a US legal perspective. Further, the English-language GNU GPL does not officially have authorized, localized versions and translations, although the FSF has sister organizations in Europe, India and Latin America that aim to facilitate greater involvement by developers and interested parties in those regions in free software development and policy work. While this ensures certainty and uniformity of application, it also universalizes a particular view of freedom.

Despite the potential limitations of the underlying free software and open source philosophies, however, their spread and increasing popularity would seem to show that the practical benefits of adopting FOSS, compared to the more traditional “closed” or proprietary software licenses – from its lower (or non-existent) price to its source code access and lack of restrictions on modifications and distributions – far outweigh any philosophical and theoretical dilemmas. As there are numerous types of FOSS licenses available, ranging from the fairly rigid GNU GPL to the brief and substantially more flexible Berkeley Systems Distribution (BSD) license, no single license has a monopoly on FOSS implementations. Essentially, all FOSS

⁵⁴ See Martin Hardie, FLOSS AND THE CRISIS: FOREIGNER IN A FREE LAND?, Sarai Reader 4 (2004), available online at http://www.sarai.net/publications/readers/04-crisis-media/51martin_hardie.pdf (page last accessed April 8, 2007.)

COPYRIGHT (I): THE BEST THINGS IN LIFE ARE FREE - Freeing up Content Rights and moving towards Collaborative Innovation? Is Creative Commons/Open Source changing the way we perceive and manage IP?

licenses share the same basic characteristics of source code access, permissive modification and redistribution.

Even more fundamentally, they operate as licenses to copyrighted software. Although the FSF considers the GPL to be a bare, property-type license rather than a contractual license, some of the language in the current version of the GPL⁵⁵ seems more consistent with contract usage rather than property law. Other FOSS licenses, such as the Mozilla license, seem to contemplate a contractual framework⁵⁶. Where the GPL terms illustrate the FSF's principle of copyleft, in that users (licensees) should be free to copy and modify the software, their redistribution of the software (whether modified or not) has to pass along the same right to copy, modify and redistribute, other (open source) licenses may have less strictly-regulated terms. Underlying these terms and licensing structure, however, remains a copyrighted work (the original software.) Indeed, the FSF's description of copyleft contrasts it with placing a copyrighted work into the public domain⁵⁷.

Despite the rhetoric of freedom and openness that characterizes FOSS, and the undeniable success it has had as a freer and far less copyright-restrictive alternative to traditional proprietary copyright licenses, the fact remains that FOSS is at bottom one form of mechanism that has been developed to exploit freedoms inherent in the copyright framework. A FOSS work becomes such only if the original copyright owner elects to make it so, by exercising her entitlement as the right-holder not to exploit her exclusive rights. Thus, while FOSS can offer tremendous practical benefits and greater freedoms than proprietary copyright licenses, it does not create a parallel or expanded copyright regime.

⁵⁵ The FSF released the third and final draft of a proposed version 3 of the GPL in March 2007: <http://gplv3.fsf.org/> (page last accessed April 8, 2007.) The current version (version 2) dates from 1991. Version 3 is expected to be finalized and released officially within the next three months.

⁵⁶ For a detailed discussion of this issue, see Lawrence Rosen, *OPEN SOURCE LICENSING: SOFTWARE FREEDOM AND INTELLECTUAL PROPERTY LAW* (Prentice-Hall, 2004), at Chapter 4.

⁵⁷ See <http://www.gnu.org/licenses/licenses.html> (page last accessed April 8, 2007.)

COPYRIGHT (I): *THE BEST THINGS IN LIFE ARE FREE - Freeing up Content Rights and moving towards Collaborative Innovation? Is Creative Commons/Open Source changing the way we perceive and manage IP?*

(b) *Creative Commons (CC)*

In similar vein, the CC licenses also operate, like FOSS, within the existing copyright framework. Indeed, this fact has been a source of recent critiques of CC⁵⁸; viz., that they focus on the positive aspects of licensing, depend on potentially subjective drafting, encourage the proliferation and incompatibility of licenses (and the over-lawyering thereof) and generally encourage users/creators to think of their works in mainly economic terms.

The Creative Commons seeks to “build a layer of reasonable, flexible copyright in the face of increasingly restrictive default [copyright] rules”⁵⁹ by promoting a variety of licenses where “some rights [are] reserved”. Its various licenses are the practical tools by which it hopes to achieve its mission, which has been described as a “social movement with revolutionary aims”⁶⁰ that hopes to effectuate social, normative and, eventually, legal change by first building up a repository of “commons”-based works. Since it released its first license in 2002, CC licenses have been authorized in some 35 countries, including, in Asia, China, Japan Korea, Malaysia and Taiwan⁶¹. Its success has led to the creation of the Science Commons, an initiative aimed at facilitating information-sharing in scientific research through the use of appropriate licenses and educational tools, and ccMixter, a community website that features remixes of

⁵⁸ See, e.g., Niva Elkin-Koren, CREATIVE COMMONS: A SCEPTICAL VIEW OF A WORTHY PURSUIT, in P. Bernt Hugenholtz & Lucie Guibault (eds.), THE FUTURE OF THE PUBLIC DOMAIN (Kluwer Law International, 2006) available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=885466 (page last accessed April 8, 2007), and WHAT CONTRACTS CAN'T DO: THE LIMITS OF PRIVATE ORDERING IN FACILITATING A CREATIVE COMMONS, 74 Fordham L. Rev. 375 (2005.), available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=760906 (page last accessed April 8, 2007.) See also Kimberlee Weatherall, WOULD YOU EVER RECOMMEND A CREATIVE COMMONS LICENSE?, [2006] AIPLRes 4, available online at <http://www.austlii.edu.au/au/other/AIPLRes/2006/4.html> (page last accessed April 8, 2007.)

⁵⁹ See the Creative Commons website statement of its mission at <http://creativecommons.org/about/history> (page last accessed April 7, 2007.)

⁶⁰ See Weatherall, *supra* n 55.

⁶¹ See <http://creativecommons.org/worldwide> (page last accessed April 7, 2007.)

COPYRIGHT (I): THE BEST THINGS IN LIFE ARE FREE - Freeing up Content Rights and moving towards Collaborative Innovation? Is Creative Commons/Open Source changing the way we perceive and manage IP?

music licensed under CC licenses⁶². CC licenses offer a substantial amount of choice to a licensor, in that she may select the conditions (e.g., attribution, no commercial uses, share-alike requirements and the preparation of derivative works) under which she is prepared to offer her work under a CC license⁶³.

In some ways, the mission and the tools of CC can be compared and likened to the philosophy and mechanics of FOSS. Both movements seek to propagate a change in user/author perceptions of copyright law by promulgating practical tools for granting access and use rights to otherwise-copyrighted content, in the form of licenses. Both movements also fit within the existing copyright framework, in that they do not require that copyright owners waive or give up their copyrights and donate them to the public domain. Instead, by recognizing the existence of these rights but offering flexible ways of granting permissions to those rights, FOSS and CC provide copyright owners who wish to participate in a more open, flexible and accessible copyright system a fairly simple and familiar way to do so. Both FOSS and CC also build their license tools on a philosophical foundation that embraces openness (in the form of greater access, collaborative changes and further sharing) in the face of the ability engendered by copyright law for rights-holders to restrict access, use and dissemination of their creations. Like FOSS, it should also be noted of CC that it functions squarely within the copyright realm.

Unlike some aspects of FOSS, however (such as the GNU GPL), CC has displayed a greater willingness to localize and customize its licensing terms to varying laws and countries. Ironically, this may have contributed to the criticism of its over-emphasis on licensing, with the resulting risk that its very success in promoting these tools may detract from its long-term goal of effectuating social and legal change⁶⁴. Statistics also show that a large majority (74%) of CC

⁶² See <http://sciencecommons.org/> and <http://ccmixter.org/> (pages last accessed April 7, 2007.)

⁶³ See <http://creativecommons.org/license/> (page last accessed April 7, 2007.) The latest version (Version 3) of the CC licenses were released in February 2007.

⁶⁴ CC's own estimated statistics show a remarkable growth in the number of CC-licensed works; for example, in August 2005, the photo-sharing website Flickr hosted 4.1 million; by March 2007 the number had grown to 32.5 million. Similarly, in the six months between December 2005 and

COPYRIGHT (I): THE BEST THINGS IN LIFE ARE FREE - Freeing up Content Rights and moving towards Collaborative Innovation? Is Creative Commons/Open Source changing the way we perceive and manage IP?

license adopters chose the non-commercial use (NC) option for their license grants, while a significant number (32%) elected to prohibit derivative works (ND), thus pointing to the possibility that a substantial number of CC licensors do not share fully in CC's vision of a "commons"⁶⁵.

Ultimately, an analysis of FOSS and CC demonstrates that they have been extremely successful in promoting the adoption of alternative, more "open" licensing models to the traditional "closed" proprietary licenses that allowed the copyright owner greater control over access to and use of her content. Because of the inherent flexibilities of the CC licenses, CC-licensed content is likely to be provided under more varying terms than some FOSS software, particularly GPL'd software. Similarly, because of the increasing number of localized versions of CC licenses, there may be a greater degree of variation in their legal scope in different countries; the "trade-off" for this, however, may be a greater degree of certainty in their validity and enforceability in those jurisdictions, compared to the GPL and its single authorized version.

At the same time, there is as yet scant evidence that CC licenses have made headway in becoming the license of choice for content other than that created by individuals, academics and other less economically-influential persons. This stands in marked contrast to the international success, in both business and government deployments, of FOSS, although the reason probably has much more to do with the nature of the content in question, and the attendant benefits of using non-proprietary software, than of any inherent flaws in the CC system. Where both FOSS and CC seem to flounder, however, is in matching their practical success to their philosophical mission. As previously mentioned, this may be due to the fact that FOSS and CC use familiar licensing mechanisms (albeit in novel ways) and as such it is possible for adopters to separate the theory from its practical application. To the extent that FOSS and CC are to be set up as models

June 2006, a Google query yielded 45 million and 140 million CC-licensed pages, respectively. See http://wiki.creativecommons.org/License_statistics (page last accessed April 8, 2007.)

⁶⁵ See Zachary Katz, PITFALLS OF OPEN LICENSING: AN ANALYSIS OF CREATIVE COMMONS LICENSING, 46 IDEA 391 (2006.) Interestingly, however, apparently no CC licensor chose a combination of ND and NC.

COPYRIGHT (I): THE BEST THINGS IN LIFE ARE FREE - Freeing up Content Rights and moving towards Collaborative Innovation? Is Creative Commons/Open Source changing the way we perceive and manage IP?

for UGC and, more generally, creative uses of copyrighted content, to build upon as theoretical basis for legal recognition, their limitations may prove such a choice unwise.

CONCLUSION

This paper has been a somewhat wishful and tentative foray into an arena that hitherto has brought up fundamental questions, but provided few realistic answers, about the appropriate balance to be struck in copyright law between copyright owners and copyright users, in light of the rapid growth of UGC. In examining the existing legal framework of international treaties and national laws, the preliminary conclusion is that legal recognition of UGC (beyond the existing boundaries of fair use, fair dealing and other limitations and exceptions) in the form of hard law is highly unlikely. Even more unlikely is the possibility of crafting a new form of “users’ rights” based on the nature and creativity of UGC. The possibility remains of a change in societal norms toward UGC eventually effectuating a change in legal norms and, ultimately, rules. This is the approach adopted by the Creative Commons movement.

In attempting to garner further support from the features and development of Creative Commons (CC) and the similar philosophy and growth of the free and open source software (FOSS) movement, however, it was found that their inherent limitations are likely to render them of relatively little assistance. Of these limitations, the most significant is the fact that both FOSS and CC operate within the existing copyright framework, despite their philosophical aims. Their practical tools, consisting as they do of licenses, are also not helpful.

In the final analysis, while FOSS and CC may be of limited assistance to shoring up a call for legal recognition of UGC, it is undeniable that they have had a substantial impact internationally and on creators (licensors) and users (initially, licensees but who themselves become creators through the freedoms conferred by FOSS and CC licenses.) They have highlighted the usefulness and validity of collaborative innovation, and their success may go a long way toward changing perceptions – and eventually norms and rules – about the nature of IP rights, at least in the copyright sphere.

COPYRIGHT (I): *THE BEST THINGS IN LIFE ARE FREE - Freeing up Content Rights and moving towards Collaborative Innovation? Is Creative Commons/Open Source changing the way we perceive and manage IP?*