
***Addressing Ambiguities in The Copyright Act Of 1957: Relating to
The Ownership Of User-Generated Content (UGC) In Social Media***

*Shreya Sampath Kumar, School of Law, Christ University.**

Abstract

UGC production has grown substantially since its debut in 2005. This massive new trend that lets consumers actively participate in the publication of information opens up a lot of fascinating prospects. However, it also provides avenues to indulge in large-scale infringing activity. Major obstacles to the continued growth of UGC include issues of eradicating infringing content. Who should be contacted in a complex system with several actors when infringing content is discovered online? Who could be held accountable for harm caused as a result of this? In contrasting the roles of established actors in the information value chain and new intermediaries, on the one hand, and normative definitions and underlying justifications of current liability models, on the other, this study seeks to analyse the conceptual foundation for legal liability for UGC through Sections 52(b) of the Copyright Act, 1957. The goal of the study is to develop some suggestions in anticipation of a more precise determination of the extent of new UGC owners' legal culpability for infringing content published through their platforms.

Keywords: *Copyright, User-Generated Content, Infringement, Section 52(b), Copyright Act, 1957.*

* The author is a third-year Law student pursuing B.A. LL.B. (Hons.) from, School of Law, Christ University, Bangalore.

I. What Constitutes User-Generated Content In Social Media?

When building towards a more specific definition of “social media” in reference to UGC in the current context, its defining feature is a set of internet-based applications that permit the exchange and creation of UGC. In its essence, UGC covers various forms of content created and shared publicly by social media users. A slightly more technical understanding of UGC may be found in the Organisation for Economic Cooperation and Development’s (OECD) definition from a 2007 study - “UGC refers to any content made available to the public through the internet. It reflects a certain level of creative effort, and is created beyond the confines of professional practices and routines.” UGC can also be said to possess one of three elements - transformability, originality, or a mix of the two.

It must be noted that not all UGC consists of a user’s completely original content - it may also be trans formatively produced. In order to understand this, consider the example of a Pinterest post in which two images have been combined to create a collage - this is a transformative use of another individual’s original content. Nevertheless, content that is simply copied and posted to a social media site will not be referred to as UGC - this would merely be “user-uploaded content”. To qualify one’s content as “user-generated”, a user ought to do more than copy pre-existing content. The user must add some element of creativity to the original content.¹

This, of course, raises the question of what is the minimum amount of creativity needed for some piece of content to count as user- generated.² Consider the sort of situation that may provide a minimal threshold of creativity.³ A common situation would involve the unauthorised use of a piece of video or audio (or both) as part of some larger work.⁴ One can go on YouTube and see videos in which someone has laid a piece of music over a piece of video. What constitutes the minimum level of creativity required to render content user-generated can be explained through an example - one may consider the example of an infringing audio clip placed over a certain YouTube video to constitute UGC. Having said that, a reasonable derivation from this observation would be that the creativity requirement is low.

¹User-Generated Content and the Future of Copyright: Part One -- Investiture of Ownership Vanderbilt Journal of Entertainment and Technology Law (JETLaw), <https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1377&context=jetlaw> (last visited Nov 3, 2022)

²*Ibid.*

³*Ibid.*

⁴*Ibid.*

Although the internet has turned all forms of social media into global arenas, the availability of some UGC may be limited to certain groups. The creation of a private account on Instagram, has given users the ability to share content with a selected group of people they “follow”. Nevertheless, online availability appears not to be a part of what constitutes UGC. In noting that there is no element of intrinsic dependency on the internet about UGC’s creation, a user could “cut and paste” content from other users to create her own, never upload it online, and yet, her work would constitute UGC.

Since it has been established that online availability of UGC is not essential, perhaps its digitisation is one of the most important characteristics of UGC, to the extent of being fixed in a digital form and being computer-generated.⁵ For the time being, it is understood that one element of essentiality, nevertheless a defining feature of UGC, is its online presence. In such a context, it is not often that the identity of the author is common knowledge. When the author herself is unknown, who must be held responsible for infringement that occurs as a result of usage of such content? The globalisation of the internet has led scholars to ponder upon a question of utmost importance - who takes up the roles of editor, author and publisher in respect of content posted online?

II. Why Is Determining the Owner Of Such UGC In Social Media Problematic?

Section 52(b) of the Copyright Act, 1957, which states that “electronic storage” of digital copyrighted matter does not constitute infringement, finds its application in determining ownership of UGC to be ambiguous because the mere act of re-sharing UGC does not necessitate its storage (even incidental storage), as a result of which it is difficult to identify the “author” with respect to any computer-generated literary, dramatic, musical or artistic work. The definition of the term author in this regard has been provided under Section 2(d)(vi) of the Act. In order to even arrive at the secondary question of what constitutes and does not constitute infringement as per Section 52(b), the author’s identity must be determined to take any action on either of the two grounds. However, since “electronic storage” of digital copyrighted matter does not accommodate UGC, it may bring about an unwarranted conclusion that UGC does not carry copyright despite being sufficiently original or transformative content.

⁵*Ibid.*

III. Methodology and Reasons For Using It

In relation to ownership of UGC in social media, this research paper seeks to identify and explore ambiguities and reasons for the ambiguities. To do so, the author employs the doctrinal method of research to examine the provisions of the Copyright Act, 1957. Further, it proposes solutions to resolve these ambiguities. In adopting a qualitative approach to analyse the objectives of research, strong evidence is presented to substantiate the paper's claim that UGC ownership-related issues cannot be addressed through the provisions on ownership in the Copyright Act of 1957 - with specific reference to Section 52(b), which discusses electronic storage of UGC. Content analysis has been key to interpreting ownership-related sections in an attempt to support the central claim that the Act's extant provisions cannot be sufficiently extrapolated to UGC in social media. Data used in the research comprises statutes, case laws from SCC Online and other reliable international case law databases, articles from reputed journal databases such as JSTOR, SSRN, HeinOnline, EPW, Taylor and Francis and other secondary sources. Thematic analysis has been applied to the data collected from the above sources to derive supporting insights on the central claim.

IV. Limitations of Current Study

The scope of this study is limited to the Copyright Act of 1957. A reading of the Copyright Act's sections addressed in this paper along with certain provisions of the Information Technology Act, 2000 and the Information Technology Rules, 2021 may provide further insight into solutions for the problems addressed in the current study; however, they are out of the author's scope of research, which remains restricted to the Copyright Act for simplicity reasons.

V. Jurisprudence Associated with The Problem

“Natural rights” as a component of the Natural Rights Theory of Intellectual Property imply the possession of fundamental rights by an individual. This theory accommodates the idea that all creators have a natural property right to any ideas they may have. Inspired by Lockean philosophy, the rationale for this principle is that any idea is the fruit of labour and creativity of the one who brings it to fruition.⁶ The theory may be extrapolated to constitute the right to exclude others from use of the subject matter of ownership, and further, the right to transfer the same.

⁶Locke's Political Philosophy, Stanford Encyclopedia of Philosophy, <https://plato.stanford.edu/entries/locke-political/> pg. 4

On applying this theory to determine ownership of UGC, it may be noted that those who have invested considerable time and effort into creating a certain UGC will be considered its owners⁷, but social media inherently would lose all appeal since a new slew of applications since TikTok appear to attract users with the ability to be able to haphazardly use any content on the internet that may not belong to them to derive commercial benefit.⁸ This loss of appeal to users may not be particularly desirable to the social media sites due to the possibility of acquiring low profits as a result of discontinued use by the average consumer.⁹

According to the ethic and reward theory, in order for the ethics of intellectual property rights to be achieved, a creator must be compensated for their work. It should be emphasised that the ethics and reward theories continue to be linked to the question of whether rewards provided to creators and innovators for benefits to society as a whole genuinely merit the same or not.¹⁰ While the idea assumes that innovators deserve to be paid¹¹, it also makes it clear that they do not deserve to be awarded twice. Many people believe that the creators have already been paid given the exclusive rights they have to their works.¹² That will also be used to make money for the inventor in the future. Thus, it is abundantly clear that the creator's exclusive ownership of their work is excessive.

VI. Originality Requirements - Setting the Stage

In the following few paragraphs, the author sets the stage for a problem quintessential to the points to be discussed. Is UGC original? Is it a work of authorship? Is it fixed in a physical medium of expression? Addressing these concerns will form the first of a three-part study of the core copyright problems surrounding UGC. In the last part of this paper, the answers to these questions, primarily the one establishing the author of UGC will be answered after a surplus of contemplation and strong evidence.

⁷Yoo, Christopher S., "Rethinking Copyright and Personhood" (2019). *Faculty Scholarship at Penn Carey Law*. 423. https://scholarship.law.upenn.edu/faculty_scholarship/423

⁸Jon M. Garon, Normative Copyright: A Conceptual Framework for Copyright Philosophy & Ethics, 88 CORNELL L. REV. 101 (2003).

⁹*Ibid* at 7.

¹⁰Theories of copyright | Copyright Corner The Ohio State University Libraries, <https://library.osu.edu/site/copyright/2014/05/09/theories-of-copyright/> (last visited Nov 3, 2022)

¹¹Bruncken, Ernest. "The Philosophy of Copyright." *The Musical Quarterly*, vol. 2, no. 3, 1916, pp. 477–96. *JSTOR*, <http://www.jstor.org/stable/737903>. Accessed 1 Nov. 2022.

¹²The Philosophy of Intellectual Property cyber.harvard.edu, <https://cyber.harvard.edu/IPCoop/88hugh.html> (last visited Nov 5, 2022)

The most elementary ties connecting UGC and copyright law will be outlined in this section. The prime objective of copyright, conventionally defined as the advancement of the arts and sciences, and more recently as the enhancement of social welfare, is where this discussion must begin. Since UGC has prompted an unprecedented surge in the creation of creative content, it may appear at first glance that UGC serves the objectives of copyright. However, it has become apparent that more does not necessarily mean better, at least in terms of UGC. Before evaluating how UGC fits into the broad objectives of copyright, there are other issues that spring up when UGC is examined in contrast to the legislative provisions of copyright law. What characteristics do the two share, if not others? Is all UGC content protected by copyright? The latter is a prerequisite question that must be asked before one proceeds to the former.

Basic ownership questions subsequently surface. Is it ideal to classify UGC as works created for hire, joint works, compilations, collective works, or any other classification if it represents the combined efforts of a significant number of people?¹³ What and who causes copyright to vest is a more basic matter. It is no accident that many, if not all, copyright casebooks begin with queries about what constitutes authorship and what qualifies as copyrightable subject matter.¹⁴ These are the fundamental, perhaps even constitutional questions that support all other dimensions of copyright. The use of these questions in the context of UGC is novel, as this paper outlines.

¹³*Ibid* at 1.

¹⁴*Ibid* at 1.

VII. How Did Courts Across India And Abroad Accommodate UGC Within Extant Copyright Provisions?

To explore this question, the following judgments have been examined and the author's learnings from each of them have been presented in the following few paragraphs.

A. *Frankfinn Entertainment Company v. Unisys Infosolutions Pvt. Ltd. and Anr.*¹⁵

This case concerned the ownership of a YouTube channel. The plaintiff claimed that per the Agreement between parties, it was recorded that the Defendant company's role was to "acquire content" and then licence it to the defendant for commercial exploitation. Thus, it was contended that the Defendant had no ownership rights over the YouTube channel. Single Judge of the Delhi High Court, Justice Asha Menon, J. found a prima facie case in favour of the Plaintiff and issued certain directions. It was held that there was only a reference to the platform owners, but not a whisper of the same on the YouTube channel. The Defendant had failed to disclose any right or interest that would make it a proper or necessary party to this suit and had not been transferred any ownership rights by the creator of the YouTube channel by registering the domain name. The YouTube channel was to be "exclusively" used for the plaintiff's content. This judgement's relevance lies in the fact that ownership of UGC in social media depends on the identity of the true owner of the content in its initial form.

B. *McGucken v. Newsweek, LLC*¹⁶

The plaintiff sued Newsweek for violating the copyright on a photo that he posted to his public Instagram feed. According to the plaintiff, the defendant posted an article on its website with the photo embedded without consent. According to the Defendant, embedding the image did not violate any of the Plaintiff's exclusive rights under Section 106 of the United States Copyright Act.

¹⁵ *Frankfinn Entertainment Co. (P) Ltd. v. Unisys Infosolutions (P) Ltd.*, (2022) 1 HCC (Del) 650

¹⁶ *McGucken v. Newsweek LLC*, 19 Civ. 9617 (KPF) (S.D.N.Y. Mar. 21, 2022)

He also claimed that Newsweek had an express or implied licence to embed the image and that its use to cover a noteworthy event amounted to transformative use, permitted under fair use. Furthermore, they argued that even if the Instagram post was embedded, Instagram had provided an express or implicit sublicense to embed the photo, which rendered the Plaintiff's allegation of infringement legally inadmissible.

Despite the fact that the embedded image was never kept on Newsweek's servers, it was determined that it qualified as a "display" under US copyright law. Because it did not specify what an Instagram user may do with UGC on Instagram and under what circumstances the user may do so, District Justice Failla concluded that Instagram's platform policy during the relevant time period was not sufficiently clear to support the existence of a sublicense between Instagram and Newsweek. This case further explains the level of detail that social media platform regulations must consider while stating the ability to sublicense UGC.

C. *Shreya Singhal v. Union of India*¹⁷

In this case, the Bench constituting Hon'ble Justices Chelameshwar and Nariman, reasoned that while Section 52(1)(a) and (b) of the Copyright Act, 1957, speak of transient or incidental storage, namely, primary liability, the proviso to Section 52(1)(b) speaks of facilitating access to infringing content, which seems to refer to secondary liability. The proviso shows an intent to consider primary and secondary liability simultaneously when using the term "storage." According to this judgement, the intermediary is obligated, *suo motto*, to remove any content that it has "reason to suspect" violates intellectual property rights. As a result, the intermediary is required to both monitor the content it hosts and to block access to that content when it gets a takedown notice. This case clarifies the intention to infringe with regard to both primary and secondary liability under the term "electronic storage" as per Section 52(1)(b) of the Copyright Act, 1957.

¹⁷ *Shreya Singhal v. Union of India*, AIR 2015 SC 1523; Writ Petition (Criminal) No. 167 OF 2012

D. Sinclair v. Ziff Davis, LLC¹⁸

The Plaintiff owned and ran a website that was accessible to the general public where she posted her photographs and sought licence offers. Her copyright lawsuit against Defendant Mashable Inc. and its parent company, Ziff Davis LLC, was dismissed by the District Court, but she appealed. The plaintiff claimed that the publication of her image in the Mashable article hurt her reputation and made it harder for her to negotiate better terms in future licencing deals. Mashable claimed that in uploading the image to a public Instagram account, the plaintiff had given Instagram permission to sublicense the picture, and that Instagram had then used that permission by giving Mashable permission to display the image. Mashable therefore completely rejected the plaintiff's claim of copyright infringement.

While it was undeniable that the Plaintiff granted Instagram permission to use her public Instagram content, the court concluded that the terms of use of the site were open to various interpretations, perhaps even malicious, with regard to sublicenses. The district court ruled that "the pleadings offer inadequate information to be able to infer that Instagram gave Mashable a sublicense to integrate Plaintiff's Photograph on its website" considering Mc Gucken and the fact that Instagram's Platform Policy statement was open to many interpretations. This case shines a light on how social media platform policies may be interpreted differently when it comes to determining the owner of the right to sublicense UGC.

VIII. Basic Ownership Considerations

We must investigate what is owned in order to uncover who owns what. We must clarify where the border is between UGC that is copyrightable and non-copyrightable if all UGC is not original in the manner necessary to extend copyright protection. The first case that supports the widespread concept that originality in the sense of artistic value is not a sufficient criterion for establishing the copyrightability of a work is *Bleistein v. Donaldson Lithographing Co.*¹⁹

¹⁸ *Sinclair v. Ziff Davis, LLC*, 454 F. Supp. 3d 342 (S.D.N.Y. 2020)

¹⁹ *Bleistein v. Donaldson Lithographing Co.* 188 U.S. 239, 23 S. Ct. 298 (1903)

Several contemporary courts have applied this concept. The principle elucidated in *Feist Publications, Inc. v. Rural Telephone Service Co.*²⁰ - is also similar to that of Bleistein in that it entails a low bar for copyrightability. Feist does not define the terms "modicum" or "de minimis quantity," just that there must be some innovation present. The phrases "original" and "creative" are neither provided tests to be determined or defined under the Copyright Act of 1957.

In order to address this definitional gap, courts and commentators have resorted to the facts of the Feist case, in which the court determined that the white pages of a phone directory lack the element of bare minimum innovation required to constitute copyrightability. Nevertheless, a plethora of UGC, albeit some outrageously so, is creative. A fundamental criterion, the fixation requirement to constitute copyrightability dictates that UGC must also be fixed in a physical medium of expression extant or invented subsequently, from which it can be perceived, reproduced, or conveyed, either directly or through use of a machine or mechanism.

As most UGC is fixed to the degree of its existence in the digital form, such that it can be experienced with the naked senses, duplicated, or transmitted using ubiquitous digital technology, it seems obvious that much UGC would pass this condition.²¹ The condition of fixation will be met as long as this digital manifestation is present for a length of time that is longer than transitory duration. Thus, at least for a large fraction of UGC, the fundamental criteria for copyrightability—originality and fixation—appears to be readily met. But when one looks closer, complications begin to surface.

IX. A Nexus Of UGC And Fair Use

The question of whether a usage falls under the fair use doctrine is important to predict whether UGC that incorporates copyrighted work constitutes an infringement of the copyrighted material. The copyright holder may claim that a user has violated their exclusive rights outlined in the Act when the user uploads and streams UGC that incorporates components from a work protected by copyright. The majority of claims pertaining to UGC presumably centre on the exclusive rights to duplicate, distribute, and create derivative works of the copyrighted work. A copyright holder may likewise claim that the rights to exclusive performance and display have been violated.

²⁰*Feist Publications, Inc. v. Rural Telephone Service Co., Inc.* 499 U.S. 340, 111 S. Ct. 1282 (1991)

²¹*Ibid* at 1.

The copyright holder will often be able to argue that at least one of the exclusive rights provided under the Act was violated depending on how a piece of UGC makes use of materials derived from a copyrighted work. It is less apparent if the fair use theory would apply to such a piece of UGC.

There has been extensive literature on the difficulty of determining how fair use truly operates, or should operate. Goldstein argues that courts have demonstrated a consistent interpretation of fair use within certain contexts or categories. This can be construed to courts' tendencies to look for practical solutions that meet the challenges brought by particular settings. In many fair use instances, for instance, the issue of "new methods for the distribution of copyrighted information [such as] photocopying, cable retransmission, and home videotaping" is raised. Goldstein thinks that courts have consistently used fair use analysis in the unique setting of "new technology" situations.

X. Suggestions - Why Would These Work?²²

As the reader will see below, creators, publishers, and owners initially retain ownership of rights in user-generated content through the application of the End User Licence Agreement's terms and conditions, almost always in direct opposition to the rights that would naturally accrue under the system the international general principles of intellectual property rights. However, some virtual worlds, like "World of Warcraft", a game that requires and encourages the creation of UGC to advance through the game play, state in their End User Licence Agreements that, with the publisher's permission, UGC can be sold on the World of Warcraft platform and revenues can be split between the World of Warcraft developers, the publisher, and the player as well as underlying rights to the content.

This is a profound and credible way to address the issue between the rights that belong to users, players, and participants since they are the producers of original expressive works as defined by copyright law. In other words, the contract that specifies the rules of engagement between users, participants, and producers, publishers, and owners has the authority to supersede any potential right established by copyright law.

²²Neha Ahuja, Commercial Creations: The Role of End User License Agreements in Controlling the Exploitation of User Generated Content, 16 J. Marshall REV. INTELL. PROP. L. [ii] (2017).

Some contend that the End User Licensing Agreement "is an imperfect special contract guaranteeing democratic accountability of players and game developers," wherein its flaws are perceived to be negligible opportunity costs compared to the increased accountability it brings to the administration of virtual worlds.

Contrary to World of Warcraft, the success of, and within, some games like "Second Life" depends on players/users/participants being owners of the content that they create. This is because, according to some academicians, ownership provides an incentive to create by establishing an attachment to the tools, and players' ownership and ability to profit from their efforts and "will homestead a new frontier." As a result, Second Life's Terms of Service grant users/players/participants far greater rights than World of Warcraft's do.

Over the last twenty years, international laws and accords have struggled to keep up with advancements in technology and intellectual property. Professor Graeme B. Dinwoodie of Chicago-Kent College of Law urged a "broader knowledge of international copyright lawmaking" in a 2000 article he authored.²³ Both governmental organisations like WIPO and countries' national courts as well as private dispute settlement mechanisms have an impact on international copyright laws. National courts must seek to establish and uphold international standards, and private dispute resolution institutions should play a bigger part in the process of international lawmaking. Geoffrey Scott, a law professor at Pennsylvania State University, asserts that in international intellectual property agreements, "it is indispensable to effective decision making that participants investigate, understand and appreciate not only the political and financial implications, but also the social and cultural implications of the debate."²⁴ In 2005, Niva Elkin-Koren called for a "sustainable alternative to the current copyright regime [that] would require enforceable legal measures that would restrain the power of copyright owners to govern their works" and a "legal regime that would validate Creative Commons' licences would also enforce contracts that restrict access to creative work."²⁵ These excerpts²⁶ serve as an example of the need for alterations to international copyright laws, particularly those that go beyond the scope of the Creative Commons.

²³Elizabeth J. Tao, A Picture's Worth: The Future of Copyright Protection of User-Generated Images on Social Media, 24 IND. J. GLOBAL LEGAL Stud. 617 (2017).

²⁴*Ibid.*

²⁵*Ibid.*

²⁶*Ibid.*

The WTO and WIPO are the two organisations best suited to take the lead and implement this transformation. Both organisations uphold international agreements with universal copyright norms for all signatory countries. The WTO or the WIPO should support re-examining and amending the TRIPS Agreement or the Berne Convention, respectively, to include a more globalised approach to copyright protection, considering the success and drawbacks of the Creative Commons. In the present digital era, this copyright protection can encourage greater open access to works that are protected by it while still giving creators some control.

XI. Conclusion

The propagation of cultural trends, how companies interact with their consumers, and how friends keep in contact are all ruled by social media and information sharing through the Internet. These are all significant justifications for the courts to be lenient in their interpretation of the law as it pertains to UGC. Courts should promote the interconnection that the Internet makes possible, just as they should be cautious to assess the quality of a work, as a single erroneously reasoned case might severely restrict free expression. In granting rights to just one party in a cooperative effort, determining the value of each party's contribution, and making any decision that may stifle the rich exchange that defines digital communication and makes social media platforms a dominant cultural and economic force, courts should exercise the same caution. The Internet and our culture depend on collaboration; therefore, judges should be sympathetic when it comes to defending these alliances.