User-Generated Content: Tensions Between Freedom of Expression and Copyright

Abstract: Rapid online growth of social media, wikis, blogs, and targeted websites has provided a diverse playing field for content creation. Today the means of production and distribution of information are not in the hands of a few. Anyone can create content for an array of purposes including news, entertainment, education, and research. However, content users and creators face a long-standing tension in the application of copyright laws and the exercise of free speech. This chapter explores the notion of user-generated content (UGC) to understand what it is, what its boundaries are, and how it can be classified. The chapter also explores the cultural and political relevance of user-generated content and its contribution to the development of democratic societies and examines legal concerns. Among the concerns is the constant discord between the rights to freedom of expression and copyright, and how existing legal solutions might contribute, or not, to the clash of rights. The chapter examines the role of online platforms in copyright law enforcement and the exercise of free speech. The chapter seeks to contribute to the understanding of what it means to protect the right of users and creators to free speech while at the same time protecting copyright.

Keywords: User-generated content; Freedom of expression; Copyright

Introduction

Digital technologies, especially the Internet, have had a profound impact on the ways content is created, disseminated, accessed, and consumed. Human creativity has found new spaces where it can express itself, which, in general, are within the reach of almost every person with an Internet-enabled device and connectivity. Today, the playing field has increasingly levelled. The means of production and dissemination are no longer only under the control of a few. In fact, although most of the online platforms where user-generated content (UGC) is available are privately owned, the business models in place are dependent on the creative activity of the users themselves who make their activity available to the public for consumption and sharing by other users. The Internet is a tool that has generated new and creative forms of expression from home videos showcasing the abilities...
of one’s pets, to the myriad memes that flood social media and digital communications, through to an illustration that pays tribute to a beloved public figure.

The impact that digital technology has had on freedom of expression is unparalleled. User-generated content frequently involves amateurs who have become empowered through interactive media tools to change the relationship between author and audience. Some of the new creators generate unique content; others mix existing content available producing video games, fan fiction, parodies, and citizen science, uploading, tagging, commenting, and curating. Some see digital creators as the groundswell of participatory culture; others use the term prosumers to describe those who both produce and consume content; and a few have referred to the new content as “loser-generated content” (Erickson 2014, citing others).

The infinite possibilities of expressing human creativity conflict with copyright regimes that, in the interest of protecting the legitimate interest of authors, creators and rightsholders, limit freedom of expression. Although copyright imposes what might be considered a reasonable limitation to the right to freedom of expression, the recent development of copyright norms and their enforcement in the digital realm can pose excessive restrictions to free expression.

This chapter explores the continuous tension between the freedom of expression of the users who create digital content, and copyright in the face of the exploding popularity of UGC. The first part describes in detail the characteristics of UGC highlighting its salient features including creative effort, non-professional status and public availability, the intention with which a person creates UGC, and the platforms on which it is hosted. The platforms discussed are primarily YouTube, Google, Facebook, and Twitter, but it is important to acknowledge the proliferation of online platforms for content distribution, social media, virtual worlds, and wikis.

The second part of the chapter analyses the global cultural and political relevance of UGC. While UGC is examined as a tool for the diffusion of culture and participation in democratic processes, the discussion also focuses on how UGC can be used as a tool to create counterfeit, misleading, and abusive content. The next section establishes the contours of freedom of expression and copyright in the digital age and how they clash with each other, and introduces international treaties to analyse the scope of copyright practices. The fourth part of the chapter provides an analysis of the role of platforms on which UGC is mounted in the tension between freedom of expression and copyright including platform moderation and copyright enforcement mechanisms in Canada, the United States, and Europe and analyses mechanisms for libraries to manage UGC in information retrieval and discovery systems. The final section provides a synthesis of observations on the topic.
User-Generated Content in the Digital Age

Definition of User-Generated Content

The creative activity of modern human society has found an unparalleled opportunity for distribution on the Internet. Anyone with an imaginative idea and a minimum of digital technology and skill can share creations in a matter of minutes with the whole world without any intermediary other than web access and a service provider. Thanks to technological advances, creative activity today is much more active and collaborative than ever. One example is Wikipedia which invited users to share their knowledge on specific topics. Another example is the emergence of open educational resources generated within the educational community which, connected by Internet-enabled technologies, share, adapt and enhance content created by others and made available on online platforms. UNESCO’s International Centre for Technical and Vocational Education lists platforms for sharing of online resources in technical and vocational education. OER platforms include Curriki, LibreText and Khan Academy listing everything from textbooks, curricula and instructional materials to learning exercises available for educational communities to mix and remix.

The manifestation of creative output on the Internet is commonly known as user-generated content (UGC), which refers to any type of content created by Internet users. The UGC discussed throughout this chapter pertains primarily to non-commercial UGC that is used for pleasure, knowledge-sharing, and cultural and political causes. There is no agreed single definition of UGC. There are many definitions representing different perspectives. One simple definition is: “User-generated content is content published on an online platform by users” (Wyrwoll 2014, 15). Wikipedia provides:

User-generated content (UGC), alternatively known as user-created content (UCC), is any form of content, such as images, videos, text, and audio, that has been posted by users on online platforms such as social media and wikis. It is a product consumers create to disseminate information about online products or the firms that market them. User-generated content is used for a wide range of applications, including problem processing, news, entertainment, customer engagement, advertising, gossip, research and many more. It is an example of the democratization of content production and the flattening of traditional media hierarchies.

Another definition is:

UGC refers to all publicly available media content that is produced by end-users. UGC can refer to all media technologies, from digital photos and videos to blogs, podcasts and mobile
phone content and is published by both traditional media sources (largely broadcasters) and non-traditional media sources (such as eBay, YouTube, and Facebook) (Stribbling and Scott 2008, 6)

UGC is a powerful tool for expression made possible by the digital age. What in the past was a letter to the editor with a restricted audience has been transformed into a supposedly journalistic analysis and critical podcast available to many, for example, the *Presunto Podcast* where a group of independent communicators analyze the work of the media in Colombia. The project is an initiative that began among a group of friends interested in scrutinizing with humor how the national mass media covers the news. Today it is supported by donations, but they have taken advantage of podcast platforms including GooglePodcasts, Apple, and Soundcloud, to create and distribute the content.

Much UGC is not of professional quality and rarely perfect but makes a connection with an audience due to its spontaneity and apparent authenticity. For the creators, the process can be a rewarding experience not only for the pleasure of producing something, but also for the satisfaction of seeing the work recognized by other users, companies and even by the platforms that were used to disseminate it. For consumers, UGC serves as a means of information or entertainment. But UGC can also be created and shared for deliberately harmful, hateful, or misleading purposes. This chapter introduces some salient mechanisms for flagging, moderating, and removing abusive or illegal UGC and identifies the challenges such mechanisms pose for users’ freedom of expression.

**User-Generated Content: Some Salient Features**

While it might be difficult to agree on a single definition of UGC, various descriptions have been presented (Krumm, Davies, and Narayanaswami 2007; Östman 2012; Ruz 2011; Wunsch-Vincent and Vickery 2007) and the following characteristics have been highlighted:

- Creative effort: content creators use their inventiveness to produce an original work or adapt an existing work to craft a new one, for example, when an amateur musician publishes a video performing an original song, or when a user transforms the interview of a politician into a video parody of the politician, for example Donald Trump interviewing himself in confusion (Brown 2020). With transformation, the creator adds a personal creative value to the work. The value might have a collaborative element as in the case of users who collaborate in the creation of entries in Wikipedia or in building another resource such as *OpenStreetMap*, a map of the world created by users. The
pandemic has seen a significant rise in the availability of UGC containing immensely creative and innovative content on topics related to the pandemic and/or generated as distractions from the pandemic.

- **Non-professional**: the creative activity of users usually occurs outside their everyday professional fields and does not represent their source of economic livelihood. Even if initially, they do not expect to receive any benefit or remuneration, it may be that the lack of intention of monetizing begins to blur. UGC placed in an initial phase of non-commercial activity on an advertising-based platform inevitably becomes monetized given the very business model of the platform itself which seeks to sell products. On the other hand, there are professionals who generate content in their free time as ordinary users. For example, a father who is a wedding photographer created a blog with photo-shopped pictures of his daughters in unusual situations as a fun way for their grandmother, diagnosed with cancer, to safely know what was going on with her granddaughters (Tom 2012). Blog postings and other UGC created by non-professionals demonstrate some of the ambiguity behind UGC. Non-professional users who are creators can generate highly sophisticated UGC, resulting in scenarios where the creators may generate profit. In many cases it is difficult to determine a person’s intention, monetary or otherwise, for creating content. The line is becoming increasingly difficult to draw, but most UGC seeks to separate user-created content for leisure or non-commercial purposes, from content created by entities, professionals, or others for clearly commercial purposes.

- **Publicly available**: the work created by users is available on an online platform to be consumed or shared with any person through a public social media account or a closed group of people on a social media platform.

The features mentioned are useful for establishing the contours of user-generated content, as opposed to professionally created content, from which a certain technical quality of the product is usually expected. User-generated content has become an important marketing tool with users posting recommendations, likes and dislikes for products or services.

### Typology of User-Generated Content

UGC can be classified according to the type, format or platform used for distribution (Wunsch-Vincent and Vickery 2007). UGC can take various forms including a poem or opinion piece; audio such as a remake or [cover song](#) or a podcast; graphic such as photos or illustrations; video such as a home video or a short
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film; or a combination of these elements. The platforms used for UGC distribution are varied. There are:

– Blogs created by individuals, groups or associations
– Websites like Reddit, a social news aggregator, or TripAdvisor providing travel services and ratings, which contain shared user-created entries and recommendations
– Wikis or text-based platforms such as Wikipedia, a not-for-profit multilingual online encyclopedia, which are written and maintained by a community of volunteers through a model of open collaboration, using a wiki-based editing system, with an educational emphasis
– Sites that allow feedback, commentary and creative input like FanFiction, where writers and readers can share their passions, or Fictionaut where writers can share their ideas, gain recognition and connect with audiences
– Platforms for podcast distribution such as Apple Podcasts where people can voice their opinions or SoundCloud, a music sharing website which allows users to create, promote and share content, and connect with audiences
– Social media sites such as Facebook or Snapchat connecting family or friends, Instagram, a photo and video social networking service, or Pinterest, an image sharing and social media service enabling saving and discovery of information in the form of pinboards
– Image-sharing services like Flickr, home to tens of billions of photographs and two million groups, TikTok, a site for sharing videos, or YouTube, sharing video content on one of the world’s most heavily used internet platforms, and
– Internet sites for the virtual world such as ActiveWorlds, providing opportunities in a three-dimensional world (Wunsch-Vincent and Vickery 2007; Wikipedia 2021).

Many of the platforms have a recommendation and rating system that leads to the extent of content consumption and to the popularity, recognition, and notoriety of the creator.

Another approach to the classification of UGC is to examine a person’s motivation for content generation. Some creators contribute content as a form of self-expression. Individuals or groups document occurrences in their lives, express opinions, share analysis, comment on other content or report on situations. Some seek social and communicative interaction with like-minded people; others entertain themselves or pass the time; some wish to inform or engage in citizen journalism; others seek to persuade people to certain perspectives; some seek to advertise products or services; some creators engage in activity for the purpose of professional progress; and some seek to educate (George and Scerri 2007).
In examining UGC, original content can be generated by a user independently, for example, creating a blog to document travel. Alternatively, content might be composed in which a user integrates a piece of creative content into an existing work without transforming it, for example, including a copyrighted photo by another author into a travel blog entry. Further transformation can occur with a user changing a pre-existing work, for example, by using a frame from a movie to create a meme that is included in the blog post. UGC can have varying layers of content with different copyright issues associated with each layer (Ruz 2011; Erickson 2014) and with the platform used.

The Cultural and Political Relevance of User-Generated Content

UGC is part of a digital age, where creative activity and cultural production are no longer in the hands of a few, with prescribed methods of production and distribution. For the most part, users who are creators seek to share and not compete for the content they have generated. The experience is “based on expressiveness, performance and collaboration” (Östman 2012, 1005) and involves knowledge, activity, and behaviour with cultural and political relevance.

UGC and users who are creators disrupt traditional media and content suppliers (Senftleben 2008). Yet some of the most significant platforms used for UGC production and distribution are dominant and even monopolistic players in the content-sharing industry, a crucial component of the digital economy. The concentration of power that rests in the hands of a few platform players is a growing concern across multiple fields such as antitrust. For example, the Antitrust Division of the United States Department of Justice filed a lawsuit to prevent Google’s anticompetitive and exclusionary behaviour, and to promote the innovative activities of other companies so that they could compete and thrive in the digital market (US Department of Justice 2020). The case, United States v. Google LLC1 illustrates the struggle amidst the dominant players and between platforms to host UGC.

The dominance of a few platforms also presents concerns about privacy and data collection. The overwhelming dissemination of, and engagement with, UGC on large platforms facilitates these platforms’ widespread collection of user data and information. Arguably most importantly, the dominance of a few key platforms such as Google, Facebook, and YouTube, and the concentrated ownership

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of such platforms by a small number, Alphabet and Meta, pose substantial issues for the democratization of content-sharing. Significant power over hosting UGC continues to rest in the hands of a few monopoly platforms, thereby undermining the democratization of content-sharing and expansion of user autonomy that UGC so aptly advances by its nature.

Cultural Relevance

The Internet has served as a vehicle for the diffusion of culture. The ease of access to technology to produce and broadcast content has paid off in the generation of creative activity, knowledge, and information. While recognizing the large digital divide between states, societies and individuals, anyone with a smartphone can produce cultural content that reflects personal creative interests or expresses and captures community culture. For example, the science fiction short films produced by a group of eight young Nigerians, The Critics Company, with scarce resources, slow internet, continuous power cuts, everyday objects, and low and mid-range smartphones, have gone viral on social media (Africanews 2019). Without a doubt, the contents are the result of the ingenuity and determination of their producers, who took advantage of technologies and other user content, in this case, tutorials available on YouTube explaining how to produce films with special effects, to find a means of expression and tell their science fiction stories.

The young Nigerian group harnessed the power of UGC, becoming innovators and contributing to the cultural richness of their community. The work of The Critics Company is an example of how UGC is relevant in fostering creation and cultural enrichment. As a result, there is greater autonomy, participation, and diversity. “Technological change empowers individuals to ‘tell their stories’, to produce cultural goods such as music and to transform the information and media content environment surrounding them... Users may derive a higher value ... as the content may be more personalised... users have a greater control” (Wunsch-Vincent and Vickery 2007, 35). Users transform the information and communication ecosystem to make it more relevant to their interests and contexts. UGC is also relevant to creating a sense of identity within a group, community, or society. UGC serves as a mechanism that harnesses collective intelligence to provide information and knowledge, with the potential to improve the quality and scope of access to culture and the right to education.

Cultural relevance is made possible by the proliferation of content in different languages. Although English continues to be the most widely used language on the Internet with 2020 figures at 25.9% followed by Chinese at 19.4% (Johnson 2021), the reality is that UGC is produced in any language, which in turn
allows for the enrichment of cultural heritage and the strengthening of different languages. For example, there are many efforts by cultural entities, collectives, and individuals to make visible the Guarani language, the official language in Paraguay spoken by just under 90% of its population (Galeano Olivera 2016, 15). The promotion of UGC in Guarani has used collective collaboration to translate Wikipedia, Firefox, and Facebook, and promoted use of the language, allowing it to progress, be visible and relevant to all the people who speak it. Perhaps UGC in Guarani or any other minority language may not have the same scope as content in English but is important in proclaiming local culture and contributing to keeping languages alive.

Much UGC is derivative in whole or in part, and many creators rely on copyrighted content. The Critics Company may rely on copyright music to create the soundtrack of its film productions, ignoring or disregarding copyright restrictions. Likewise, collective efforts to translate digital content into Guarani are transformational processes that may be infringing copyright. To the extent that creators do not have the authorization of the rightsholders to use content, or are using free licensed content, they are operating under copyright restrictions that can inhibit creative production that contributes to cultural diversity. Some content creators have gone under the radar, perhaps because they do not infringe copyright or perhaps because they have had the good fortune of not running head-on into issues associated with copyright. As copyright regimes become more restrictive, the potential for UGC to promote cultural creation and diversity is at risk.

**Political Relevance**

UGC plays an equally critical role in democratic participation, activism, and social and political mobilization. Producing and disseminating content in minority languages is both a cultural and political act: it challenges the dominance of hegemonic knowledge production and visibility and fosters and fights to keep alive the world view connected to the society speaking the language. As Östman (2012) argues, UGC is indivisibly involved in political participation and in the acquisition of political attitudes, knowledge, and behaviour.

UGC has been used for critical, political, and social justice purposes. Perhaps the best example of the latter is the role of citizen journalism where individuals take an active role in making and disseminating news content (Bowman and Willis 2003). Citizen journalists often become the only source of information within war zones, as was the case with the war in Syria, where citizens took the risk of documenting the conflict, filling an important void in understanding what had been happening in the country since the 2011 uprising. Many of the UGC
products of citizen journalists in Syria today are stored and verified in the Syrian Archive, a digital memory project that preserves UGC and collects human rights violations, so that content can be retained for the future to support accountability and contribute to post-conflict reconstruction and stability (Syrian Archive n.d.).

One of the great appeals of UGC is its honesty, which allows for greater involvement and identification with the message of the content, hence its political relevance. The fact that a group of people can be identified or reflected in the content generated by others can give them enough confidence to express ideas and political views, leading to active civic participation (Östman 2012, 1008).

For example, in 2015, the Canadian initiative Project 60 used UGC strategically to encourage First Nation youth to create and share short videos explaining the voting process. The project sought to politically engage a crucial segment of the population, while the content creators educated and empowered their youth peers about the impact and importance of elections for their community (Indigenous Social Media and User-Generated Content n.d.).

Although UGC is a crucial source of cultural and political participation that allows individuals and groups to disseminate knowledge about causes, UGC is, as noted earlier, a tool that has also been used for ill-intentioned and malicious purposes. UGC has been weaponized by people seeking to misinform or influence democratic processes through the creation and dissemination of fake news, abusive content, and deepfakes, a form of synthetic media that uses an image or video to create a fake scenario. One deepfake video created by the Flemish socialist party Vooruit in 2018 which circulated on Twitter and Facebook portrayed Donald Trump teasing and insulting Belgium for remaining in the Paris Agreement. The party’s deepfake was intended to raise awareness and generate public discussion about the climate crisis and the video contained several indications that it was fake (Velicer 2021). Yet this instance demonstrates the significant role UGC can play in threatening an informed citizenry and contributing to “epistemological anarchy” (Galston 2020).

UGC, therefore, can be seen as a vehicle in the digital age for freedom of expression. However, as this chapter continues to explore, UGC not only faces issues of user and creator misuse, but also various legal and technological barriers, which are often emanating from the powerful agents of the copyright industry.
The Clash between Freedom of Expression and Copyright

Freedom of Expression

Article 1 of the Universal Declaration of Human Rights states that: “All human beings are born free and equal in dignity and rights”.

Human rights are universal and inalienable; indivisible; interdependent and interrelated. They are universal because everyone is born with and possesses the same rights, regardless of where they live, their gender or race, or their religious, cultural or ethnic background. Inalienable because people’s rights can never be taken away. Indivisible and interdependent because all rights – political, civil, social, cultural and economic – are equal in importance and none can be fully enjoyed without the others. They apply to all equally, and all have the right to participate in decisions that affect their lives. They are upheld by the rule of law and strengthened through legitimate claims for duty-bearers to be accountable to international standards (UNFPA 2005).

Freedom of expression is a basic human right and constitutes the right of people to express their ideas and opinions, and to issue, access, seek and receive information of all kinds. The right of freedom of expression also protects the ability of individuals to disseminate information and ideas by any means, regardless of borders.

Freedom of expression is recognized as a cornerstone of any free, democratic, and participatory society and is fundamental to the realization of the human being. It protects the most basic of human freedoms, namely the right to think and share opinions with others. It is also fundamental to democracy and the exercise of other rights (UN. Human Rights Committee 2011). For democracy to function, the full and effective participation of citizens is essential, which occurs, in large part, through the realization of freedom of expression. In addition, it also allows for the exercise of other rights such as the right to participate in cultural life, and to enjoy the benefits of scientific progress and its applications. Institutions including libraries often safeguard the right to freedom of expression and participation in cultural and innovative life.

Although, in principle, all expressions are protected by freedom of expression, it is not an absolute right, and it can be limited. For a limitation on freedom of expression to be permissible, according to international human rights standards, the following principles must be met:

– Legality: a law formulated with sufficient precision and accessible to all persons has provided for the limitation
Legitimacy: the limitation pursues a legitimate aim, that is, the respect for rights, for example, intellectual property, or reputation of others, or the protection of national security, public order, public health, or morals, and

Necessity and proportionality: the limitation is necessary and proportionate; that is, the interference must adopt the least restrictive means necessary to achieve the intended aim (UN Human Rights Committee 2011).

It is worth noting that, according to international human rights standards, any measure restricting freedom of expression on the internet “must be applied by a body which is independent of any political, commercial, or other unwarranted influences in a manner that is neither arbitrary nor discriminatory, and with adequate safeguards against abuse, including the possibility of challenge and remedy against its abusive application” (La Rue 2011, 8). However, regarding the application of copyright on platforms carrying UGC, as will be addressed later in this chapter, the implemented measures tend to use the platforms as a proxy for restricting freedom of expression, in breach of the aforementioned obligation.

The Human Rights Council has stated that human rights offline must be equally protected and guaranteed online. “Freedom of expression applies to the Internet, as it does to all means of communication” (La Rue et al. 2011). At its 20th session the Human Rights Council adopted a resolution that unanimously stated: “the same rights that people have offline must also be protected online, in particular freedom of expression” (UN Human Rights Council 2012, 2). The Internet has undoubtedly provided people with greater access to all kinds of information, but it has also given them unusual opportunities to be active subjects in the creation and dissemination of knowledge and information as seen in relation to UGC. The catalytic power that technology has given people to exercise their rights to freedom of expression has created tension between governments and the powerful, including economic agents of the copyright industry. Technologies that enhance the exercise of freedom of expression confront the legitimate interest of protecting copyright.

Copyright

Intellectual property has two traditional legal domains: copyright and industrial property, that is, patents and trademarks. Copyright deals with the rights of intellectual creators. Its object of protection covers original works in the literary, scientific, and artistic fields, whatever the mode or form of expression. Copyright grants authors the right to authorize or prohibit, for a specific limited time, particular uses of their works. In other words, limited monopolies are granted
to creators in relation to their creations. Moreover, copyright regimes protect the activity of expression rather than the ideas, concepts, processes, or procedures themselves. Therefore, copyright protections in themselves do not pose limits on the sharing of ideas. Copyright protection is justified as an important means of encouraging authors and artists to create, thus promoting, enriching, and disseminating a nation’s cultural heritage, creative activity, and innovation.

Copyright protects two types of rights: moral and economic. “Economic rights allow right owners to derive financial reward from the use of their works by others. Moral rights allow authors and creators to take certain actions to preserve and protect their link with their work” (WIPO 2016, 9–10). Moral rights allow authors to preserve and protect their connections to their work. Usually, the moral right cannot be transferred to third parties. However, the application of moral rights varies under different national laws. Authors, on the other hand, can grant their economic rights to others known as rightsholders, so they can obtain monetary compensation for certain uses such as reproduction, distribution, public performance, broadcasting or communication, translation, or other adaptations.

Copyright is not an absolute right; it can be limited with the aim of protecting the public interest. Copyright regimes include a list of exceptions and limitations that, according to the Berne Convention, are understood not to conflict with the normal exploitation of the work and not to unreasonably prejudice the legitimate interest of the authors. In general, the list of exceptions and limitations ensures that copyright does not interfere with the exercise of other rights.

Existing copyright regimes can have important implications for the protection and promotion of human rights, particularly freedom of expression. As the increasingly powerful economic agents of the copyright industry are pressing to claim creative works and forms of knowledge, human rights are being infringed (Chapman 2001). Creators are progressively losing control of their works with the result that society faces increasingly insurmountable barriers to the free exchange of information.

Industrialized countries have pushed for increased global copyright protection. The World Intellectual Property Organization (WIPO) reinforces this maximalist copyright view, in which there is little room for discussion, consideration and effective protection of the public interest and human rights. Governments use copyright laws to enhance a country’s competitive economic advantage. Policies developed often favour major economic interests, particularly large multinational corporations, to the detriment of protecting access and promoting development in local societies.

The conflict between copyright and human rights has attracted the attention of United Nations (UN) human rights bodies and continues to do so. In 2000, the UN Sub-Commission on the Promotion and Protection of Human Rights,
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later known as the Advisory Committee of the Human Rights Council, adopted as part of its deliberations a Resolution on Intellectual Property Rights and Human Rights, affirming that the right to the protection of the moral and material interests resulting from one’s scientific, literary or artistic productions is a human right, subject to limitations in the public interest with primacy over trade law. The resolution:

Affirms that the right to protection of the moral and material interests resulting from any scientific, literary or artistic production of which one is the author is, in accordance with article 27, paragraph 2, of the Universal Declaration of Human Rights and article 15, paragraph 1 (c), of the International Covenant on Economic, Social and Cultural Rights, a human right, subject to limitations in the public interest.
Declares, however, that since the implementation of the TRIPS Agreement does not adequately reflect the fundamental nature and indivisibility of all human rights...there are apparent conflicts between the intellectual property rights regime embodied in the TRIPS Agreement, on the one hand, and international human rights law, on the other.
Reminds all Governments of the primacy of human rights obligations over economic policies and agreements... (UN Sub-Commission on the Promotion and Protection of Human Rights 2000, 28–9).

Five years later, the UN Committee on Economic, Social and Cultural Rights, in its General Comment No. 17, distinguished between the human rights recognized in Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights, and the rights recognized in the intellectual property regimes:

Whereas the human right to benefit from the protection of the moral and material interests resulting from one’s scientific, literary and artistic productions safeguards the personal link between authors and their creations and between peoples, communities, or other groups and their collective cultural heritage, as well as their basic material interests which are necessary to enable authors to enjoy an adequate standard of living, intellectual property regimes primarily protect business and corporate interests and investments.

The Committee went on to note that: “The right to benefit from the protection of the moral and material interests resulting from one’s scientific, literary and artistic productions seeks to encourage the active contribution of creators to the arts and sciences and to the progress of society as a whole...[and] is intrinsically linked to the other rights recognized in article 15 of the Covenant...” (UN Committee on Economic, Social and Cultural Rights 2006, 2). The other rights, which are mutually reinforced and limitative, are: the right to take part in cultural life, the right to enjoy the benefits of scientific progress and its applications, and the freedom for scientific research and creative activity. Thus, the rights of authors and creators must facilitate, rather than limit, cultural participation and broad access to the benefits of scientific progress.
As for the rights recognized in copyright regimes, the Committee indicated that they should not be equated with human rights. “Human rights are fundamental as they are inherent to the human person as such, whereas intellectual property rights are first and foremost means by which States seek to provide incentives for inventiveness and creativity” (ibid, Para. 2). Nor can the rights associated with copyright be considered human rights as they protect the commercial and business interests and investments of legal entities, whose rights are not protected at the level of human rights. Additionally, copyright, unlike human rights, “are generally of a temporary nature, and can be revoked, licensed or assigned to someone else” (ibid).

To give substance to Article 15(1)(c) of the Covenant and to distinguish its measures from copyright as understood in intellectual property regimes, the Committee outlined further details of the elements and wording contained in Article 15:

- "Authors" are recognized as “natural persons”, as opposed to the recognition in copyright regimes for “legal entities”
- “Any scientific, literary or artistic production” refers to creations of the "human mind" including “scientific productions’, such as scientific publications and innovations, including knowledge, innovations and practices of indigenous and local communities, and ‘literary and artistic productions’, such as, inter alia, poems, novels, paintings, sculptures, musical compositions, theatrical and cinematographic works, performances and oral traditions”
- “Benefit of protection”, does not establish modalities according to the Committee, but it should not be understood at the same level and means of copyright protection. States can establish higher protections, if they do not unreasonably limit other human rights such as freedom of expression
- “Moral interests” refer to the authors’ interests in their creations and their rights to object to any distortion, modification, prejudicial action or other derogatory action and noted creations as an expression of personality. The Committee further noted that most national copyright regimes protected moral rights, and
- “Material interests” relate to property rights, the rights of workers to receive adequate remuneration and an adequate standard of living (Articles 7 and 11 of the Covenant). The Committee further stated that an adequate standard of living “can also be achieved through one-time payments or by vesting an author, for a limited period of time, with the exclusive right to exploit his [sic] scientific, literary or artistic production” (ibid, 5).

To be consistent with all the provisions of Article 15 of the International Covenant on Economic, Social and Cultural Rights, the type and level of protection
afforded under any copyright regime must facilitate and promote cultural participation and intellectual progress and do so in a manner that is broadly beneficial to members of society both individually and collectively. These considerations go far beyond the economic calculation that guides copyright. Copyright could be reformed to be more respective to human rights regimes and current tensions with the right to freedom of expression would be reduced.

**Online Platforms and Copyright Management**

User-generated content would not exist if there were no platforms for publication and broadcast. Types of UGC were presented earlier in the chapter and they can be distinguished by different types of platforms used. The term online platform is used variously to include search engines, social media, creative outlets, communications services, and collaborative services. Some are interactive. Platforms might be non-profit or commercial. The growth of UGC and online platforms has been stimulated by the expanding use of mobile devices along with the increasing sophistication of personal computing capacity.

“An online platform is a digital service that facilitates interactions between two or more distinct but interdependent sets of users (whether firms or individuals) who interact with the service via the internet” (OECD 2019, 20). Platforms or internet intermediaries themselves can be classified in various ways: by types of users, the kinds of data and content mounted, the actions taken in relation to data collected, or sources of revenue. (ibid). Wyrwoll described platforms on which UGC is mounted as blogs, forums, location sharing and annotation platforms, media sharing platforms, microblogs, question and answer platforms, rating and review platforms, and social networks (2014, 20). UGC includes messages, product recommendations, instructions, learning materials, news, comments, advice, articles, blogs, profiles, reviews or creative content ranging from poetry, stories, ideas, to videos posted on forums like Twitter or Reddit; social media like Facebook, TikTok or WeChat; encyclopaedias like Wikipedia; creative outlets like LiveJournal; commercial services like Amazon; shared video sites like YouTube or Vimeo; musical recording sites like Spotify or SoundCloud; and podcasts on Spotify for Podcasters.

The platforms allow people to contribute, evaluate and consume content online. The business models of many platforms are based on third party production of content; the platform providers create the systems to maintain attention and interest, the most common of which is the evaluation and feedback of users and suggestions for similar content.
Management of User-Generated Content by Digital Platforms

Each platform regulates in its terms and conditions the legal aspects related to the dissemination of content by third parties including the intellectual property rights of creators and others that might be affected, rules for behaviour, and any applicable legislation and jurisdiction. Terms and conditions vary across platforms.

The policies are adopted to give users information about the rules that operate in them, but they also translate legal obligations. One legal obligation in the US is the Digital Millennium Copyright Act (hereinafter the DMCA), which requires US-based platforms to takedown content that allegedly infringes copyright. The terms and conditions provide certainty and predictability about the digital behaviour that platforms expect from their users and the possible consequences. As a rule, all platforms recognize that the authorship of content remains with the person who creates it. However, for the platforms to function as they have been conceived, the terms and conditions include the transfer of rights to store, copy, share and disseminate the content produced by users. All platforms recognize the importance of copyright. The use of the platforms’ services by users is subject to respect for copyright. The terms and conditions of some of the most popular platforms, particularly regarding the transfer of rights, are stated in the following.

Google

Google creates a licence for the use of UGC that is subject to intellectual property protection while the content remains on any platform owned by the company, including YouTube (Google 2020). Content created by users includes docs, sheets, and slides, blog posts uploaded through Blogger, reviews submitted through Maps, videos stored in Drive, emails sent and received through Gmail, pictures shared through Photos and travel itineraries shared with Google. The licence is global, non-exclusive, and royalty-free. In addition, it allows Google to save and allow public access to the content, as well as to transform it through changing its format or translation. The agreement includes sublicensing to other users so that they can, for example, share the content according to how their platform services work. In relation to the company’s video-sharing service, YouTube, users have the option of granting permissions for use through Creative Commons licences.
Facebook

Facebook’s terms and conditions include the creation of a “non-exclusive, transferable, sub-licensable, royalty-free, and worldwide license to host, use, distribute, modify, run, copy, publicly perform or display, translate, and create derivative works of your content”, consistent with the user’s profile settings, that is, whether the profile is open or closed (Facebook 2020). The licence terminates with the removal of the content, unless third parties who keep their profiles active have shared the content (Facebook 2020).

Twitter

Terms are similar for Twitter. The company has a global, non-exclusive, royalty-free permission to use, copy, modify, publish, and distribute the content that a user shares on the social media platform. “By submitting, posting or displaying Content on or through the Services, you grant us a worldwide, non-exclusive, royalty-free license (with the right to sublicense) to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute such Content in any and all media or distribution methods now known or later developed (for clarity, these rights include, for example, curating, transforming, and translating). (Twitter 2021).

Pinterest, TikTok and Soundcloud

Pinterest grants a licence with similar characteristics to terms and licences already outlined, stating “You grant Pinterest and our users a non-exclusive, royalty-free, transferable, sublicensable, worldwide licence to use, store, display, reproduce, save, modify, create derivative works, perform and distribute your User Content on Pinterest solely for the purposes of operating, developing, providing and using Pinterest” (Pinterest 2018). There is a separate section on Copyright. TikTok includes in its terms the same transfer of rights, but the license is considered irrevocable and perpetual (TikTok 2019). TikTok has a separate intellectual property policy.

SoundCloud’s Terms of Use involve users granting the company a limited, worldwide, non-exclusive, royalty-free and fully paid licence to store, distribute and use the content uploaded to the platform (SoundCloud 2021). The transfer of rights is sub-licensable. However, the termination of the license applies only to the audio, text, and images that users have uploaded to their accounts, but not
to the comments or other contributions they have made. The license is perpetual and irrevocable for the latter.

**Wikipedia**

Wikipedia, unlike commercial platforms, is committed to supporting access to knowledge, free culture, and the promotion of common goods. To this end, it requires users who contribute to the project to “grant broad permissions to the general public to re-distribute and re-use their contributions freely” (Wikimedia Foundation 2020). Hence, the general rule at Wikipedia is the use of licences such as Creative Commons copyright licences which are free and easy-to-use, and provide a simple, standardized way to give permission to share and use creative work and the GNU General Public License, a series of free software licences that provide users with the freedom to run, study, share, and modify the software.

**Rules of Behaviour and Copyright Enforcement**

The use of platforms is subject to respect for the copyright of others. By accepting the terms and conditions, users agree not to upload any material that violates the copyrights of third parties. However, many users publish material belonging to other authors, either in its original version or in an adapted form, perhaps in ignorance of requirements to observe copyright, and with or without an intention to infringe on such a right.

Copyright infringement is further complicated when copyright law and policies are misaligned with the practices, cultures, and norms of online platforms. The issue is especially apparent on social media platforms such as Instagram and Twitter that foster redistribution and reposting across other platforms (Meese and Hagedorn 2019, 5). Platform users have a nuanced understanding of copyright. While some users are aware of copyright policies and legislation, copyright law is not always clear about how users can create, share, attribute and manage their content in a practical setting (ibid, 4). For instance, adequate attribution on social media platforms can be difficult for users who are unable to locate the original copy amidst countless other copies (ibid). While some users creating content are aware of copyright law, they may be uncertain how to implement attribution practices; others deliberately infringe copyright in the creation and dissemination of content, once again demonstrating the complexity in users’ behaviour.

The platforms have created content moderation mechanisms to enforce copyright and, in the vast majority, respond to the DMCA's legal requirements.
In general, content moderation requires rightsholders to request a platform to remove content based on an alleged infraction of rights. The platform must act on any complaint. According to the DMCA, the action to be taken involves removing the content and then notifying users. If the removal of the content is erroneous or represents an abuse by rightsholders, users have the option of contesting the complaint with a counter-notification.

Some contend that the system is designed to encourage complaints from rightsholders and to discourage complaints from users (Cortés Castillo 2013). On the one hand, it is inexpensive for copyright owners to make complaints about alleged violations of their copyright, while on the other hand, the system provides a strong incentive for platforms to “en el puerto seguro de la ley/be in the safe harbour of the law”; that is, to take actions which will ensure legal immunity, and avoid being caught up in legal proceedings against them (Cortés Castillo 2013, 5). Moreover, the platforms have neither the mission nor the incentive to confirm the veracity of allegations or to defend their users against possible excesses by rightsholders. Applying the DMCA’s notice, and takedown system guarantees that the platforms are not legally responsible for infringements caused by their users. Therefore, the platforms respond to rightsholders’ claims, even when an exception to the copyright or a legitimate use might be involved. The DMCA and platform responses have led to numerous cases of unjustified and abusive content removal, often violating the users’ rights to freedom of expression and due process (Cortés Castillo 2013).

Another copyright enforcement mechanism is the European one. Until very recently, Europe mirrored the US notice and takedown system, which recognizes that the platforms are not legally responsible for copyright infringing content but are required to remove it once flagged. With the adoption of the 2019 European Union Directive on Copyright in the Digital Single Market (hereinafter the DSM Directive), the scenario began to change. The controversial Article 17 of the said standard requires platforms to request the rightsholders’ authorization, for example, by means of a licence, before copyright-protected works can be uploaded to the website. Without such authorization, the platform would be liable for the copyright infringement of its users. Paragraph 4 states: “If no authorisation is granted, online content-sharing service providers shall be liable for unauthorised acts of communication to the public, including making available to the public, of copyright-protected works and other subject matter, unless the service providers demonstrate that they have: (a) made best efforts to obtain an authorisation ...” (Directive (EU) 2019/790 2019). In other words, the European safe harbour for platforms in copyright cases is the implementation of an upload filter, which will screen content before it is published. The system in practice creates a censor-
ship mechanism, in which users will have to obtain the approval of the platform before being able to publish and broadcast content (Heldt 2019).

In international human rights law, there is a strong presumption about the prevention of prior censorship and a focus on the ability to comment on public issues without censorship or restraint to inform public opinion (UN Human Rights Committee 2011; Lanza 2017). Given the importance of the right to freedom of expression for democracy, any sanction for expressions that may infringe on the rights of others should be imposed only subsequently to the publication of content and should never precede it. This ensures, for example, that unpopular ideas or opinions are circulated, and that public debate is not suppressed. Upload filters, as proposed by the DSM Directive are nothing more than a prior censorship mechanism.

Another approach to dealing with the issue can be found in the Canadian copyright regime with its notice and notice system. Rightsholders who believe that users are violating their copyright must send a notification of possible infringement to the platform. In turn, the platform must forward the notification to the users. The intent of this approach is to discourage online infringements (Stephens 2018). The Canadian system adopted an educational and awareness raising approach, rather than a retaliatory one. Rightsholders do not lose their right to sue, but only a court can determine whether there has been an infringement of copyright and what sanction or remedy might be deemed appropriate.

Libraries and User-Generated Content

There are various ways in which libraries engage with UGC. Library systems may use an information retrieval platform that includes UGC from other knowledge- and content-sharing platforms. Libraries with websites and social media pages will create and share their own UGC. Additionally, libraries’ digital information retrieval and discovery systems can enable users to comment, review, and rate content on the library’s platform. The latter practice permits users’ contribution to the information retrieval process which can critically foster users’ expression and knowledge-sharing about the library’s materials.

For libraries that use information retrieval or discovery systems incorporating UGC, it is important that the “Libraries … should adopt policies that define the time, place, and way the user contributes the content to the library’s discovery system. Additionally, libraries should make it very evident which content is generated by the library and which content is generated by other users (American Library Association 2019). Management mechanisms are important as the way a library system
presents and incorporates UGC may influence the way users select books and materials, for instance, based on reviews and ratings other users’ postings.

As previously stated, libraries that incorporate UGC in their systems may be supporting users’ freedom of expression by providing a public digital space in which users can freely discuss, recommend, or even critically comment on a range of topics. Therefore, libraries should exercise caution when removing UGC, ensuring that it is removed under due process and because of exceptional situations.

Copyright Enforcement and Freedom of Expression

Online platforms have developed reactive content moderation mechanisms including applications of artificial intelligence (AI) to act against potential infringements to their rules and legal obligations (Llansó 2020). The mechanisms rely on another user flagging the content as abusive or illegitimate and potentially a copyright infringement. Pressured by governments, the copyright industry and civil society including non-governmental organizations, non-profit organizations, and users themselves, the platforms have been forced to design proactive mechanisms that allow them to quickly contend with the issues that arise from the dissemination of abusive or illegitimate content (Llansó 2020; Romero Moreno 2020).

Managing UGC on digital platforms also involves the task of addressing false, hateful, or inappropriate UGC with the growing quantities of so-called fake news and deepfakes. Detecting and removing malicious, erroneous abusive content while protecting the right to freedom of expression is a difficult debate in digital environments. Whether platforms should permit the circulation of UGC for leisure, creative innovation, cultural expression, and political causes only, or allow users to be exposed to a full range of UGC regardless of its accuracy, validity or appropriateness presents ongoing conflict and debate between platforms, civil society, and governments. Copyright law can be used to remove certain UGC based on safeguarding an author’s copyright-protected work, assuming there is no involvement of fair use or other exceptions to copyright infringement under specific circumstances. Government bodies have increased their attention, taking actions such as the proposal to amend Section 230 of the US Communications Decency Act which protects online intermediaries from laws applied to publishers holding them legally accountable for the speech they host (Electronic Frontier Foundation n.d.). Mechanisms such as fact-checking and labelling concerning UGC as potentially misleading help reduce falsities and offer mechanisms respectful of protecting users’ right to freedom of expression (Bazelon 2020).
Proactive systems can use manual or automated techniques. Manual approaches include human review before deciding what action to take, which may be to remove the content, warn the user who uploaded the content or allow the content to be uploaded. Automated techniques use algorithms to flag abusive or illegal content by measuring patterns, matching them to a database of works or any other criteria determined by the platform (Llansó, 2020; Romero Moreno 2020). YouTube, for example, developed a system called Content ID, which makes it easier for rightsholders to identify content uploaded to the platform without authorization (YouTube 2021). The system requires that rightsholders share with YouTube a database with the catalogue of works that belong to them. The automated system then matches the contents found on the platform with those in the database. The Content ID guide states it is available only to rightsholders who hold “exclusive rights to a substantial body of original material that is frequently uploaded by the YouTube creator community.” The video-sharing platform has other tools for reporting copyright infringement: an online claim form, a content verification program available to rightsholders to send content removal notifications for several videos at once, and a Copyright Match Tool which is available to any YouTube user who has submitted a valid copyright takedown request and can be used to identify automatically video matches.

Increasingly, platforms rely on AI for content moderation, either proactively to detect content that violates their rules or legal obligations, or to perform automated content evaluation (Llansó 2020). The automated content moderation mechanisms are less dependent on user flagging or enforcing the decision on whether a material violates the platform’s content policy, or the law, by automatically removing or degrading the content.

Content moderation is used to identify potential copyright infringement, whether reactive or proactive, and does not examine the veracity of the complaint or whether copyright protections are being abused. In a state of law, it would also not be expected or desirable for a private agent to have the power to determine whether a copyright infringement is occurring. However, content moderation mechanisms are very often used arbitrarily or have the unwanted effect of suppressing freedom of expression (Cortés Castillo 2013, 6). They also ignore the very limitations and exceptions to copyright, thus weakening them.

The DMCA has been used as a tool to takedown and stifle what is considered fair use in some countries. The Ecuadorian government has reportedly invoked the DMCA takedown notice to censor online criticism (Nazer and Stoltz 2017). Content including videos, images, audio clips, text, and memes on Facebook, Twitter, and YouTube criticizing the president and the Ecuadorian government have been taken down from the sites on which they were posted through the DMCA’s notice and takedown mechanisms on the grounds of copyright infringe-
ment (Vivanco 2014). While using copyright to silence political expression is an extreme step, complainants have exploited copyright to remove opinions, criticisms, poor reviews and to restrict the overall public domain of information resources available to users. Flagging and taking down UGC can serve a legitimate and important purpose especially when protecting democratic processes, the truth, and populations in vulnerable contexts; however, the practice should not jeopardize constitutional rights and freedoms established in specific countries (Heldt 2019).

If content moderation mechanisms are implemented prior to content uploading, as suggested in Article 17 of the DCM Directive, copyright enforcement is likely to become a prior censorship tool. Furthermore, it could be argued that it violates international human rights standards on freedom of expression in relation to the principle of legality; that is, that the limitation on the right is provided by law with sufficient clarity to enable individuals to regulate their conduct.

The usual ways in which content moderation mechanisms are implemented to enforce copyright leave users in the dark, not knowing or understanding why they are being notified or why the content has been removed. Users do not receive enough information to understand that their content has been flagged as copyright infringement because the uploaded material matched with a copyrighted work in a database. The lack of transparency about how content moderation mechanisms are implemented to enforce copyright and the high incentives that platforms have to respond to the powerful copyright industry leaves users defenceless, affecting their fundamental rights to express and inform themselves, to share their opinions and ideas, and even to engage in democratic life.

**Conclusion**

UGC is a creative form of digital expression that has exploded thanks to technological developments and the expansion of the Internet. The reasons for creating and sharing UGC are endless. It is undeniable that UGC plays an important role in the cultural and political participation of societies. UGC contributes to the generation of knowledge and information, offers an opportunity to tell stories from a non-hegemonic point of view, and connects people with common interests. UGC is a powerful communication tool.

Never before have there been so many possibilities for exercising freedom of expression. Advances in digital technologies, telecommunication, and the growth of the use of mobile devices have led to diverse and creative ways of expressing oneself and sharing ideas and opinions with others. Unhappily, there are nega-
tive aspects arising from the capacity for users to generate misinformation and disinformation. Copyright regimes have become barriers, sometimes significant ones, to the dissemination of a cultural, informational, and even political asset of contemporary history.

While the flagging or removal of content because of copyright infringement is a valid mechanism, this chapter has evidenced ways in which rightsholders can appeal to copyright enforcement mechanisms to serve ill-intended purposes and to stifle public expression. Some valid mechanisms for addressing copyright infringement today may have the potential to inform future policies for dealing with unlawful behaviour and content online. However, policies and practices in relation to online content creation must be developed holistically to carefully address the needs of all stakeholders including civil society, governments, Internet intermediaries, copyright regimes, users, creators, and original authors.

Copyright and its enforcement through various content moderation mechanisms on online platforms represent a threat to the exercise of freedom of expression. “Since 1999, the UN Special Rapporteur, together with [others] ..., has issued annually a Joint Declaration on Freedom of Expression, reaffirming its central role for human rights and fundamental freedoms” (UN Human Rights n.d.). The Joint Declarations by the Special Rapporteurs for Freedom of Expression of the international and regional human rights systems have since 2011 consistently expressed the view that content moderation mechanisms applied to online platforms represent a significant threat to the enjoyment of freedom of expression on the Internet.

To meet the challenges posed by technological developments to copyright protection, it is essential to balance the legitimate interests of authors and rightsholders with the general interests of individuals and the community in enjoying their rights to freedom of expression. Governments must not forget their obligations under international human rights law and should refrain from promoting disproportionate measures that are responsive to the lobbying of powerful economic forces in the copyright industry. The socio-economic development of a country, often the argument for creating more protectionist copyright regimes, depends on many factors external to the creative industry, including the existence of conditions for the enjoyment of freedom of expression, for collective intelligence and collaboration to find space to flourish.

Online platform owners must also recognise the threat to freedom of expression inherent in content moderation mechanisms and mitigate it. Certainly, the platforms must be more transparent and accountable about the technical mechanisms they develop to meet their legal obligations, how they implement them, and the impact they have on users’ rights to freedom of expression. It is increasingly critical that future copyright regimes be developed which respect human
rights. Authors and rightsholders have legitimate interests in protecting their works and investment, but these interests should never outweigh societal significance in protecting human rights.

References


