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Brussels, 18<sup>th</sup> July 2008

## CMBA reflection paper: UGC (User Generated Content)<sup>1</sup>

The 'Creative and Media Business Alliance' represents media companies and associations as well as cultural industry. CMBA was launched in November 2004 and speaks in the name of all those sectors. More information on the CMBA can be found on the website [www.cmba-alliance.eu](http://www.cmba-alliance.eu).

In view of recent discussions concerning the development of Web 2.0, UGC and whether our current IPR systems have kept pace or not with the world of social-networking sites, wikis and mash-ups, etc., we believe it would be useful to reflect on some of these aspects of crucial interest to copyright-based industries.

Firstly it is important to clarify some basic ideas about what UGC is not. The taking of whole copyright-protected works – such as films, music, books, articles or photographs – and uploading/publishing them in another guise or under another's name is not UGC - that is piracy. Another type of activity which is clearly not UGC is that carried out by search engines such as linking, making cache copies or making thumbnails of existing pictures. There is emerging case law dealing with search engines carrying out these activities and whether they fall under the scope of exclusive rights of right holders or not. In any case, these should not lead to confusion since it is obvious that no new content is created by these types of actions and therefore these activities do not qualify as UGC.

Therefore, creativity must be the principal factor in determining what UGC is. This principally falls into two broad categories: original works and derivative works or compilations, including what are sometimes known as mash-ups. Some of this content will itself be protected by copyright if it passes the tests of originality (etc.). Where the UGC comprises copyright-protected content owned by others, whether whole works or just parts of them, the user needs the consent of the owner(s) or a relevant exception must apply before that content can be uploaded onto a UGC site. As a result, this type of content either needs to be licensed (e.g., by agreement with the right holder or by means of automated permissions) or to fall within the scope of an exception. There is a well-settled regime of exceptions to copyright, which, subject to the Berne three-step test, allows the user to copy and in certain cases communicate those copies to the public without explicit consent.

<sup>1</sup> In this paper we use the term "User Generated Content (UGC)" which we understand as a broad term covering all sorts of content that a user uploads onto internet sites. Other terms such as User Created Content (UCC) are often seen used, and UCC could be considered a sub-category of UGC. We will not, however, enter into further detail on how to distinguish these different notions.



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One of the recommendations of the Gowers Review<sup>2</sup> to the UK Government suggested introducing at EU level a new copyright exception for creative, transformative or derivative works along the lines of the “fair use” defence for transformative uses in the US. The UK Government’s recent follow-up questionnaire did not in fact seek comments on this original Recommendation but the Gowers Review team argued in their original report that “fair use” for transformative uses is a more flexible system than the European system of exceptions and better suited to foster the use of UGC.

We would caution against the importation of the US Fair Use doctrine into the EC legal system. The Fair Use doctrine provides a statutory defence to what would otherwise be infringement of exclusive copyright rights. The test is based on decades of jurisprudence (in effect it is court-made law that was subsequently codified in the US Copyright Act and since then has been subject to further jurisprudence). As such it is not readily adaptable to the legal framework in Europe. Moreover, it is a misconception to assert that in the US all transformative uses would qualify as “fair use” - the fact that a use is transformative is simply one factor among others to be weighed by the court. Thus, even if the EU were to adopt an exception for UGC, it would not mean that all or most UGC would fall within its scope. It is also worth noting that there are several ongoing cases in the US regarding the copyright issues related to UGC services.

The long-standing system of exceptions and exclusive rights in Europe, which have been sufficiently harmonized, already provide for the necessary conditions to foster UGC, and there is no evidence to suggest the contrary. Over the last years, many Internet websites have become more interactive giving users both space and tools to express their creativity within the current legal framework. Europe has also witnessed the growth of one of the most important UGC sites in the world: DailyMotion (which is a signatory to the “UGC Principles” referred to below). Consequently there is no need to introduce a new exception whether based on the US “fair use” defence or other formulations of transformative use. In fact, the European system results in much more legal certainty than the “fair use” defence in the US, which as noted above is of a general application to all exclusive rights but its application is very much carried out on a case-by-case basis, each case being examined on its merits thereby making a priori analysis hard to predict<sup>3</sup>. Transplanting of the US system, which developed through decades of jurisprudence, would be highly problematic and run contrary to the author’s rights tradition in most EU member states.

<sup>2</sup> [http://www.hm-treasury.gov.uk/independent\\_reviews/gowers\\_review\\_intellectual\\_property/gowersreview\\_index.cfm](http://www.hm-treasury.gov.uk/independent_reviews/gowers_review_intellectual_property/gowersreview_index.cfm)

<sup>3</sup> There are four statutory factors which are weighed to determine whether the use is fair or not: applies: (1) the purpose and character of the use, including whether it is commercial or for non-profit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used and (4) the effect of the use on the potential market for or value of the copyrighted work.



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It is also misleading to assume/suggest that UGC or compilations/mash-ups present some fundamental new issues that the EC copyright *acquis* cannot adequately cope with. In Europe, a well-established framework of the three-step test, now enshrined in the 2001/29 Directive and most national laws along with detailed exceptions, provide the necessary flexibility for national legislators and the courts. European copyright systems already provide the necessary clarity as to where the boundaries of copyright protection are.

Some examples<sup>4</sup> of national provisions, which illustrate various flexible approaches, are the “free use” in Germany<sup>5</sup> or the “parody, pastiche and caricature” provision in France<sup>6</sup>. The German example provides that an *independent* work created by free use of the work of another person may be published and exploited without the consent of the author of the work used. The French provision reads that once a work has been disclosed the author may not prohibit parody, pastiche and caricature. In order for this exception to apply the works must be similar but the public must be able to see the difference between them. These examples clearly show that the necessary flexibility is already built into the existing framework.

Furthermore, and increasingly importantly in the online world, the deployment of licensing and automated permissions play a vital role in the making available of copyright works. New forms of licensing, including Creative Commons and embedded permissions through the ACAP (Automated Content Access Protocol)<sup>7</sup>, system provide simple solutions to expressing permissions.

In conclusion, EC Copyright legislation is well-equipped to foster innovation on the Internet. For the time being there is no justifiable reason why a new exception(s) for transformative uses should be introduced in the EU Copyright legislation. There are, however, initiatives that aim to facilitate licensing of digital works and will improve the re-use of creative content. Other measures taken to enable the growth of UGC online and respect for intellectual property include the UGC Principles<sup>8</sup>, which are a set of guidelines agreed to in October 2007 by a group of media and internet companies that have as their objectives: (1) the elimination of infringing content on UGC Services, (2) the encouragement of uploads of wholly original and authorized user-generated audio and video content, (3) the accommodation of fair use of copyrighted content on UGC Services, and (4) the protection of legitimate interests of user privacy<sup>9</sup>.

<sup>4</sup> These examples illustrate that there are provisions already in place that provide flexibility and there is no need for further harmonisation of exceptions or for further exceptions at EU level.

<sup>5</sup> Article 24 German Copyright Act

<sup>6</sup> Article L 122-5 French Copyright Law

<sup>7</sup> <http://www.the-acap.org/>

<sup>8</sup> <http://www.ugcprinciples.com/>

<sup>9</sup> The objectives recognised in these principles reflect the way forward so that creators, creative industries and UGC platforms continue to develop. They may serve as inspiration for a framework on the Internet which would continue to support the achievement of the full potential of the online, user-generated environment.