

## FAIR USE ON INSTAGRAM

### Transformative Self-expressions or Copyright Infringing Reproductions?

The phenomenon of the rise of social media in providing immediate and easy dissemination of digitalised content online has bred a group of innocent private social media “infringers”, especially in Singapore, whose copyright law was not created with such content in mind. This article explores users’ behaviours on Instagram, how their actions onsite could infringe on another’s copyright, and their inability to rely on the fair dealing defence in Singapore. In the spirit of stimulating creativity with creative works, the fifth factor should be removed to facilitate greater access to creative works, and eventually build a robustly cultured public domain.

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#### I. Introduction

1 Courts around the world have noted the phenomenon of the rise of social media in providing immediate, easy access, and widespread dissemination of digitalised content online.<sup>1</sup> Against this backdrop is a group of innocent private social media “infringers” who are generally

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1 Admittedly, though, these observations were *not* made specifically in the context of disseminating copyright infringing material: see the Court of Justice of the European Union in *Google Spain SL v Agencia Española de Protección de Datos (AEPD)* [2014] 3 WLR 659 at [27]; the Federal Court of Australia in *Kazal v Thunder Studios Inc (California)* [2017] FCAFC 111 at [171]; the Third Circuit Court of Appeals in *United States v Fumo* 655 F 3d 288 at 305 (3rd Cir, 2011); the Supreme Court of Canada in *R v St-Cloud* [2015] 2 SCR 328 at [82]; and the Singapore District Court in *Public Prosecutor v Sze Kai Xuan* [2016] SGDC 316 at [22].

unaware that their acts of sharing and spreading digitalised content online could amount to copyright infringement, particularly in Singapore, if they were not the copyright owners of these digitalised content.<sup>2</sup> What is problematic is that copyright law was not created with these kinds of content in mind, so these behaviours by masses of ordinary users are out of line with the letter and expectations of the law.

2 Part II<sup>3</sup> of this article explores users' behaviours on popular social media site Instagram<sup>4</sup> and how their actions onsite could easily and dangerously be labelled as "copyright infringement". Part III<sup>5</sup> discusses the current law on fair dealing<sup>6</sup> under s 35(2) of the Singapore Copyright Act,<sup>7</sup> following which Part IV<sup>8</sup> illustrates how the defence does not adequately protect the private users on Instagram. Part V<sup>9</sup> considers the possibility of introducing a user-generated content ("UGC") statutory exception, but Part VI<sup>10</sup> concludes that a better solution is to remove the fifth factor from the fair use test to afford adequate protection to UGC generated by private individuals and keep the protection limited to a case-by-case basis for celebrities and business users seeking to commercially exploit original copyrighted works on Instagram.

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2 A survey has revealed that 41% of adult Internet users take image content found online and repost them on sites designed for sharing images: Iain Freeman & Michael Douglas, "Guarding against Unauthorised Use of Images on Social Media" (2013) 16(5) *Internet Bulletin Law* 120 at 102.

3 See paras 3–31 below.

4 Instagram has an estimated of 800 million active monthly users in September 2017: Lauren Johnson, "Instagram Hits 800 Million Monthly Users, Adding 100 Million in Just 5 Months" *Adweek* (25 September 2017).

5 See paras 32–60 below.

6 For the purposes of this article, s 35(2) of the Copyright Act (Cap 63, 2006 Rev Ed) will be referred to as "*fair use*" while "fair dealing" refers strictly to the categorical approach taken in jurisdictions such as Australia, Canada and the UK. In fact, in the recent public consultation by the Intellectual Property Office of Singapore and Singapore Ministry of Law, the "fair dealing" exception in s 35(2) of the Copyright Act was conveniently referred to as "fair use": Intellectual Property Office of Singapore & Ministry of Law, *Public Consultation on Proposed Changes to Singapore's Copyright Regime* (23 August 2016) at paras 2.6, 3.47, 3.49, 3.51, 3.53 and 3.68.

7 Cap 63, 2006 Rev Ed.

8 See paras 61–80 below.

9 See paras 81–119 below.

10 See paras 120–157 below.

## **II. Social media phenomenon**

### **A. Rise of social media**

3 Internet has transformed the way we communicate – the prompt, accurate and inexpensive distribution of digital information means that anyone can receive or disseminate digitalised content at the touch of a button. While it took traditional media – such as radio and television – more than a decade to reach 50 million users, it took Instagram just six years to reach 500 million users.<sup>11</sup>

4 There are currently about 1.9 million Instagram users (“Instagrammers”) in Singapore.<sup>12</sup>

### **B. Instagram**

5 Instagram has been selected for analysis in this article because of its distinctiveness from other social media sites, in that each post must include an image or a short video – Instagram was created to allow social networking through the sharing and viewing of photographs.<sup>13</sup> Surveys have shown that Instagram’s popularity is due mainly to the greater ease and efficiency in browsing friends’ photos compared to reading their posts on other sites such as Facebook.<sup>14</sup> As an application on the smartphone, Instagram’s increasing popularity is also due to the increasing ownership of smartphones,<sup>15</sup> especially when the smartphone’s features complement usage of Instagram – the camera, the touch screen and the web connection are used to capture, manipulate and upload images by pointing, tapping, cropping, filtering and swiping.<sup>16</sup> With the increased ownership of smartphones and ease of uploading images, Instagram is one social networking site with a substantial amount of copyright-infringing UGC.

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11 Jacob Kastrenakes, “Instagram Added 200 Million Daily Users a Year after Launching Stories” *The Verge* (25 September 2017).

12 Kasia Kowalczyk, “Instagram User Demographics in Singapore – April 2017” *NapoleonCat* (17 April 2017).

13 Linnea Laestadius, “Instagram” in *The SAGE Handbook of Social Media Research Methods* (Luke Sloan & Anabel Quan-Haase eds) (UK: SAGE Publishing, 2017) at p 574.

14 “Profiting from Instagram Influencers” *TRENDS eMagazine* (April 2017).

15 “Smartphone Penetration in Singapore the Highest Globally: Survey” *Today* (11 February 2015).

16 Zulkifli Abd Latiff & Nur Ayuni Safira Safiee, “New Business Set Up for Branding Strategies on Social Media” (2015) 72 *Procedia Computer Science* 13 at 21; Nicholas Carah & Michelle Shaul, “Brands and Instagram: Point, Tap, Swipe, Glance” (2016) 4(1) *Mobile Media and Communications* 69 at 71.

6 As Corinne Tan puts it, there are several features of Instagram which “nudge” Instagrammers to engage in activities generating more UGC.<sup>17</sup> The three UGC-generative activities are, *broadly*, creation, modification and dissemination of UGC. Instagrammers can easily create a new post by either uploading a picture (or video) that has already been stored in their smartphones, or by taking a new photo using the application itself. After choosing the photo they wish to upload, they will be prompted to modify the photo by choosing any filter and/or effect available on Instagram to be applied to the chosen photo. Once the modification selections are made, Instagrammers will disseminate the pictures by uploading them onto their accounts. The account could be set to “public” (instead of “private”) to reach a wider audience group, and hashtags could also be utilised to make the post visible on the corresponding hashtag page.<sup>18</sup>

7 For easy reference, the author will use “UGC” in this article to refer to Instagram posts building upon or reproducing existing copyrighted works. The extent to which UGC must be original to attract copyright protection is a topic for discussion on another day.

### C. *Types of social media users on Instagram*

8 Instagram consists of three broad categories of users. On the one hand are the private individuals who use Instagram for personal, private purposes and, on the other, the business users seeking to establish an online presence for brand building. Celebrities are arguably a hybrid of the two, using Instagram both for private purposes and to build their fan base.

#### (1) *Private users*

9 Private individuals usually use Instagram to document their lives and to gain knowledge about others. Much like the traditional way of capturing memories by taking photographs and then sharing these prints with family and friends, Instagram is the 21st-century tool employed to continue this innate social interaction since it primarily focuses on images.<sup>19</sup> The pictures uploaded then allow others (friends,

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17 Corinne H Y Tan, “Technological ‘Nudges’ and Copyright on Social Media Sites” (2015) 1 IPQ 62 at 62–63; Corinne Tan, *Regulating Content on Social Media* (London: University College London Press, 2018) at p 159.

18 Instagram Help Centre, “Using Instagram” <https://help.instagram.com>.

19 Pavica Sheldon & Katherine Bryant, “Instagram: Motives for Its Use and Relationship to Narcissism and Contextual Age” (2016) 58 *Computers in Human Behaviour* 89 at 93–95.

family and even strangers) who are “following” the user to keep up with or gain knowledge about what the Instagrammer is doing.

10 As a visually based social networking site, Instagram also presents plenty of opportunities for users to demonstrate their creativity: from applying filters to make pictures appear “artsy”, to posting creative captions and hashtags, these features allow users to develop their creativity. The filters are easy to operate and enable users to produce images that seem to have been given a professional touch.<sup>20</sup>

11 By posting images, with captions and hashtags<sup>21</sup> used as needed for context, private users use images as means of self-presentation and expression.<sup>22</sup> This includes the conveying of emotions, sharing of individual aspirations (such as posting bridal images to express romance desired in the relationships of couples), and even posting images of branded cars to reflect fantasies of consumption.<sup>23</sup> These posts then construct one’s “virtual identity” – the identity constructed through the virtual space of social media<sup>24</sup> – on Instagram.

12 Assuming that the original work is protected by copyright, private users are often unaware that by posting unauthorised photographs of copyrighted works, they are essentially disseminating and reproducing protected expressions without licence – a paradigm act of infringement.<sup>25</sup>

13 While Instagram is unlike Facebook where users can easily “share” another user’s post containing copyright-infringing material,

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20 Pavica Sheldon & Katherine Bryant, “Instagram: Motives for Its Use and Relationship to Narcissism and Contextual Age” (2016) 58 *Computers in Human Behaviour* 89 at 95; Zulkifli Abd Latiff & Nur Ayuni Safira Safiee, “New Business Set Up for Branding Strategies on Social Media” (2015) 72 *Procedia Computer Science* 13 at 17.

21 Hashtags are symbolised by the pound sign followed by one or more words; they make public content searchable under a common, user-selected hashtag: Della V Mosley *et al*, “Hashtags and Hip-Hop: Exploring the Online Performances of Hip-Hop Identified Youth Using Instagram” (2017) 17(2) *Feminist Media Studies* 135 at 139.

22 Linnea Laestadius, “Instagram” in *The SAGE Handbook of Social Media Research Methods* (Luke Sloan & Anabel Quan-Haase eds) (UK: SAGE Publishing, 2017) at p 576.

23 Daniel Miller *et al*, *How the World Changed Social Media* (UK: University College London Press, 2016) at pp 158 and 160.

24 Gina Masullo Chen & Paromita Pain, “@TeaParty.org’s Performance of Its Virtual Identity on Twitter” in *Social Media and Politics: A New Way to Participate in the Political Process* (Glenn W Richardson Jr ed) (California: Praeger, 2017) at p 150.

25 Copyright Act (Cap 63, 2006 Rev Ed) s 31(1); *Global Yellow Pages Ltd v Promedia Directories Pte Ltd* [2016] 2 SLR 165 at [364], *per* George Wei J; and *PropertyGuru Pte Ltd v 99 Pte Ltd* [2018] SGHC 52 at [94(c)], *per* Hoo Sheau Peng J.

the same can be achieved when Instagrammers “screenshot” the Instagram post, crop the copyright-infringing picture and post it on their account – as was done in *Gattoni v Tibi, LLC*,<sup>26</sup> a case which will be discussed later.<sup>27</sup> Like defamation, where each re-publication of the offensive post is actionable,<sup>28</sup> each republication of the infringing post renders each user personally liable for copyright infringement.

(2) *Business users*

14 “Business users” is defined loosely to denote businesses which use Instagram to foster relationships with customers. This includes large corporations like Nike (whose account is managed under “@nike”) and Louis Vuitton (whose account is managed under “@louisvuitton”), or even smaller-scale sole proprietorships which rely on Instagram to establish online presence.

15 By uploading posts on Instagram, brand fans can interact with these brand posts by liking or commenting on them; businesses are then able to cultivate and develop brand loyalty when customers’ impressions of the brand are positivised through such interactions.<sup>29</sup>

16 Business users could utilise aesthetically appealing copyrighted works without permission to make advertisements for their products, thus capturing Instagrammers’ attention and positivising their attitude towards the brand.<sup>30</sup> Alternatively, businesses could post unauthorised copyrighted (brand-unrelated) images to show more authentically human involvement, demystifying the brand image to enhance users’ perceptions of brand personality and ultimately motivating Instagrammers to consume their products.<sup>31</sup>

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26 2017 WL 2313882.

27 See paras 61–80 below.

28 *ATU v ATY* [2015] 4 SLR 1159 at [38], *per* Lee Seiu Kin J.

29 Tahir M Nisar & Caroline Whitehead, “Brand Interactions and Social Media: Enhancing User Loyalty through Social Networking Sites” (2016) 62 *Computers in Human Behaviour* 743 at 746.

30 British Airways has allegedly used street art in its advertisement boards in the US (Jim Armitage, “Corporate Vandalism? Anger As Brands ‘Steal’ Street Art for Ads” *Evening Standard* (3 May 2017). There is nothing, however, stopping these companies from using the same street art, or any other copyrighted work, to advertise their products and services on Instagram.

31 Qin Gao & Feng Chenyue, “Branding with Social Media: User Gratifications, Usage Patterns, and Brand Message Content Strategies” (2016) 63 *Computers in Human Behaviour* 868 at 878 and 888.

(3) *Celebrities*

17 This category consists of both traditional and “non-traditional”/“Instafamous” celebrities; the former includes our typical actors, and the latter, individuals who become famous through online media usage and are known by more people than merely their friends (sometimes known as social media influencers).<sup>32</sup> Studies have shown that “Instafamous” celebrities are perceived as knowledgeable and credible and have the capability to significantly shift the public conversation about products and services that are promoted through traditional channels.<sup>33</sup>

18 Like business users seeking to build online presence, celebrities (especially ordinary individuals trying to become “Instafamous”) could try to populate their pages by sharing unauthorised copyrighted works on their Instagram accounts. As the number of their Instagram followers increases, these celebrities are then approached to use their Instagram accounts to add value to brand names by endorsing and advertising products or service offerings. This becomes a vicious cycle for the Instafamous celebrities, who continue to try means and ways, including *possibly* posting more unauthorised copyrighted work, to gain more followers for bigger and better sponsorships.<sup>34</sup>

19 These endorsements and advertisements (which could also be “camouflaged” as positive reviews) of brand products then become “electronic word-of-mouth commutation”, allowing businesses to ride on the popularity of celebrities on Instagram to persuade and influence users to consume their products.

20 “Celebrities” belong to a hybrid category – like private individuals, they may genuinely be engaging in self-expressive conduct on Instagram when they post copyrighted work. This article, however, argues that as soon as individuals (regardless of their well-knownness) utilise their accounts to promote products and/or services, they have

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32 Hadley Bree, *Theatre, Social Media, and Meaning Making* (Cham: Springer International Publishing, 2017) at p 28.

33 Elmira Djafarova & Chloe Rushworth, “Exploring the Credibility of Online Celebrities’ Instagram Profiles in Influencing the Purchase Decisions of Young Female Users” (2017) 68 *Computers in Human Behaviour* 1 at 2 and 4; Bruce E Drushel, “Social Media versus the Madmen: Notes from the Frontlines of a Digital Insurgency” in *Social Media and Politics: A New Way to Participate in the Political Process* (Glenn W Richardson Jr ed) (California: Praeger, 2017) at p 211.

34 Daryl Chin, “The Fake Biz of Influencer Marketing” *The Straits Times* (13 August 2017); Calvin Yang, “Young Teens with Big Following on Social Media” *The Straits Times* (10 September 2017). An article has reported that celebrities with millions of followers could collect as high as \$10,000 per post: “Profiting from Instagram Influencers” *TRENDS eMagazine* (April 2017).

crossed the Rubicon: any attempt at “self-expression” using copyrighted work will inevitably be tainted with a commercial flavour. Like business users, the commerciality of these posts ought to be weighed alongside other factors to determine if the use is fair.

**D. Threats to copyright owners**

21 The Court of Appeal has succinctly summarised a copyright owner’s rights *broadly* into two categories: negative right to prevent unauthorised persons in dealing with the copyrighted work; and positive right in enabling the owner and authorising others to do certain exclusive acts.<sup>35</sup> The advent of the Internet, and of social media, is likely to result in encroachment of positive rights of copyright owners, making these rights more easily and frequently infringed than in the past.<sup>36</sup>

22 First, copyright owners no longer have control over how, when and where their copyrighted works are reproduced and communicated to the public.

23 Secondly, copyright owners are also deprived of benefits (commercial or otherwise) accruing from both markets of original and derivative works. In the context of Instagram, commercial benefits are often diverted away to the celebrities and business users.

24 Thirdly, matters are at times complicated by private international law issues when the infringement is done outside of the jurisdiction in which the copyright owner created the original work.<sup>37</sup>

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35 *Lee Wei Ling v Attorney-General* [2017] 2 SLR 786 at [61], *per* Sundaresh Menon CJ. See also s 26(1) of the Copyright Act (Cap 63, 2006 Rev Ed).

36 Corinne H Y Tan, “Technological ‘Nudges’ and Copyright on Social Media Sites” (2015) 1 IPQ 62 at 75; Corinne Tan, *Regulating Content on Social Media* (London: University College London Press, 2018) at p 5. In fact, Twitter users-cum-infringers can be particularly innovative. In 2014, an account using the twitter handle @555uhz began to tweet the film *Top Gun* using a captioned frame every 30 minutes, aiming to show the entire film over a number of months: Gary Assim & Jo Joyce, “Copyright in Conflict with Social Media” *Intellectual Property Magazine* (27 February 2015).

37 See Joost Blom, “Private International Law Aspects of User-generated Content” (2014) 26(2) IPJ 205 and Paul L C Torremans, “Private Internal Law Issues on the Internet” in *New Developments in EU and International Copyright Law* (Irina A Stamatoudi ed) (US: Kluwer Law International BV, 2016). This issue is, however, beyond the scope of this article.



**E. Justifications for UGC**

25 If it is accepted that promoting creativity is for the common good,<sup>38</sup> then UGC produced by Instagrammers must be protected in Singapore as they enable individuals to express their creative instincts.<sup>39</sup> Two distinctions must be made here: transformativeness and the commercial exploitation of the UGC.

(1) *Transformativeness of the UGC*

26 Whether a work is transformative is a question of *degree*, with its main consideration on whether the work is one which supersedes the objects of the original creation, by supplanting the original or adding it with a new purpose or character.<sup>40</sup> The goal of copyright, which is to promote science and the arts, is generally furthered by the creation of transformative works.<sup>41</sup>

27 On one end of the spectrum of transformativeness are parodies and satire which are usually deemed to be highly transformative. As they are humorous forms of criticism, the courts view them as providing social benefit, and by shedding new light on an earlier work, they create a new one in the process.<sup>42</sup> On the other end of the spectrum are works which copy the original in its entirety with no visual nor contextual modification; thus, there is no supplanting or adding of new purpose and/or character to speak of.

28 While Lobato has viewed UGC as a disruptive force spontaneously emerging from the creativity of individual users newly enabled as expressive agents by digital technologies,<sup>43</sup> the usefulness of

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38 *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd* [2011] 1 SLR 830 at [2], per V K Rajah JA. See also *Authors Guild v Google, Inc* 804 F3d 202 at 212 (2nd Cir, 2015), per Leval J; and *Global Yellow Pages Ltd v Promedia Directories Pte Ltd* [2017] 2 SLR 185 at [74], per Sundaresh Menon CJ.

39 Yashomati Ghosh, “Jurisprudential Analysis of the Rights of the Users in Copyrighted Works” in *Copyright Law in the Digital World: Challenges and Opportunities* (Manoj Kumar Sinha & Vandana Mahalwar eds) (Singapore: Springer Singapore, 2017) at p 69.

40 *Global Yellow Pages Ltd v Promedia Directories Pte Ltd* [2017] 2 SLR 185 at [79], per Sundaresh Menon CJ.

41 *Campbell v Acuff-Rose Music, Inc* 510 US 569 at 579 (1994), per Souter J.

42 *Campbell v Acuff-Rose Music, Inc* 510 US 569 at 579 (1994) (“*Campbell*”), per Souter J. *Campbell*’s decision was cited without disapproval in *Global Yellow Pages Ltd v Promedia Directories Pte Ltd* [2017] 2 SLR 185 at [81], per Sundaresh Menon CJ.

43 Ramon Lobato, Julian Thomas & Dan Hunter, “Histories of User-generated Content: Between Formal and Informal Media Economies” in *Amateur Media: Social, Cultural and Legal Perspectives* (Dan Hunter et al eds) (US: Routledge, 2013) at p 3.

this valuable social undertaking cannot be denied. Highly transformative UGC furthers the goal of copyright, while less (or non-) transformative UGC preserves the unimpeded exchange of information and ideas to create an environment conducive to the development of creative works.<sup>44</sup> One's creativity is also developed by encouraging the use of creative works.<sup>45</sup>

29 While these are not the aims of copyright law, as positive by-products, allowing access to creative works further helps the individuals to develop their intellect and increase their emotional and happiness quotient.<sup>46</sup> UGC also helps people to make and maintain social connections.<sup>47</sup> The use of image-based social media platforms like Instagram has been found to increase one's happiness and satisfaction with life.<sup>48</sup>

(2) *Commercial exploitation of the UGC*

30 Since celebrities and business users may exploit copyrighted works to promote products and/or build their fan base, these indirect benefits should be deemed "commercial".

31 This does not, however, deny the possibility that celebrities and business users may contribute to the creative and nuanced cultural engagement by producing transformative UGC, outweighing other factors against fair use and availing themselves to the defence.

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44 *Parliamentary Debates, Official Report* (16 November 2004) vol 78 at col 1070 (S Jayakumar, Minister for Law).

45 Niva Elkin-Koren, "Copyright in a Digital Ecosystem: A User Rights Approach" in *Copyright Law in an Age of Limitations and Exceptions* (Ruth L Okediji ed) (New York: Cambridge University Press, 2017) at pp 144–145.

46 Yashomati Ghosh, "Jurisprudential Analysis of the Rights of the Users in Copyrighted Works" in *Copyright Law in the Digital World: Challenges and Opportunities* (Manoj Kumar Sinha & Vandana Mahalwar eds) (Singapore: Springer Singapore, 2017) at p 69; Rebecca Katz, "Fan Fiction and Canadian Copyright Law: Defending Fan Narratives in the Wake of Canada's Copyright Reforms" (2014) 12(1) *Canadian Journal of Law and Technology* 73 at 77.

47 Amber Westcott-Baker, Rebekah Pure & Christopher Seaman, "Copyright Law and the Implications for User-generated Content" (2012) 3(1/2) *U Balt J Media L & Ethics* 171 at 191.

48 Matthew Pittman & Brandon Reich, "Social Media and Loneliness: Why an Instagram Picture May Be Worth More than a Thousand Twitter Words" (2016) 62 *Computers in Human Behaviour* 155 at 164.

### III. Current fair use provision in Singapore

32 In a generation where sharing is easy, fair use comes to the forefront of protection for the social media users. Our current law is, however, inadequate to protect the production of UGC on social media.

#### A. *The law on fair use*

33 Our fair use test<sup>49</sup> considers a list of five non-exhaustive<sup>50</sup> factors<sup>51</sup> to determine if the secondary use is fair. Singapore's fair use exception is indigenous as it incorporates influences from both the categorical fair dealing and the open-ended fair use approach: Section 35(2) of the Copyright Act mirrors the US's fair use provision by governing dealings for any purpose *other than* that in ss 36 and 37 (which mirror Canada's categorical fair dealing).<sup>52</sup> Cases from these jurisdictions, therefore, will be useful in the discussion on Singapore's position on fair use.<sup>53</sup>

34 This distinction is important as fair dealing is viewed as more of a "rule-like exception" which "gives judges less discretion to craft the response of the law to given facts", while fair use is viewed as more of a "standard-like exception", permitting "greater context-dependent decision-making".<sup>54</sup>

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49 Section 35(2) of the Copyright Act (Cap 63, 2006 Rev Ed) came into force on 1 January 2005. It was introduced by the Copyright (Amendment) Act 2004 (Act 52 of 2004). For a summary of the legislative history of the fair use provision, see *Global Yellow Pages Ltd v Promedia Directories Ltd* [2016] 2 SLR 165 at [389]–[395], per George Wei J; Ng-Loy Wee Loon, *Law of Intellectual Property of Singapore* (Singapore: Sweet & Maxwell, 2nd Ed, 2014) at paras 11.3.3–11.3.18; and George Wei, "A Look Back at Public Policy, the Legislature, the Courts and the Development of Copyright Law in Singapore: Twenty-five Years On" (2012) 24 SAclJ 867 at 878–885, paras 17–27.

50 *Global Yellow Pages Ltd v Promedia Directories Pte Ltd* [2016] 2 SLR 165 at [405], per George Wei J.

51 See paras 39–60 below.

52 *Parliamentary Debates, Official Report* (16 November 2004) vol 78 at col 1042 (S Jayakumar, Minister for Law). Jurisdictions which employ the categorical fair dealing approach, that were considered by the Legislature, include Canada, Australia, and the UK.

53 In particular, the Singapore Court of Appeal has also recently acknowledged the value of American and Anglo-Australian jurisprudence in developing our law on fair use: *Global Yellow Pages Ltd v Promedia Directories Pte Ltd* [2017] 2 SLR 185 at [76], per Sundaresh Menon CJ.

54 Emily Hudson, "Implementing Fair Use in Copyright Law: Lessons from Australia" (2013) 25 IPJ 201 at 212–213.

## B. *Rationale of fair use*

35 At the second reading of the Copyright (Amendment) Bill,<sup>55</sup> the Minister for Law clarified that the fair use amendments are intended to foster greater creativity in Singapore by preserving unimpeded exchange of information and ideas.<sup>56</sup>

36 The rationale is still applicable today. The Court of Appeal recently clarified that while copyright law is meant to promote creativity and innovation by granting exclusive rights to copyright holders, equally important is the public interest in not allowing copyright law to hinder creativity.<sup>57</sup> Fair use therefore embodies the Legislature's concern to safeguard the interests of the public at large within a framework of strong effective protection for copyright subject matter.<sup>58</sup>

## C. *Conceptualising fair use*

37 While fair use is often pleaded as a defence, "fair users" are not infringers *per se* – fair use is a user's right.<sup>59</sup> This label is important as it could influence the direction any reform might take.

38 Apart from the competing tensions of public interest in securing both new and established works freely and as early as possible, and, on the other hand, private interest in ensuring that authors receive a just return for their creative efforts and are thereby encouraged to keep on creating,<sup>60</sup> courts now have to *consciously* consider a third player's interest in the game: the fair user's *right* in using the copyrighted works. Recognising fair use as a user's right which copyright owners have to

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55 Bill 48 of 2004.

56 *Parliamentary Debates, Official Report* (16 November 2004) vol 78 at col 1070 (S Jayakumar, Minister for Law).

57 *Global Yellow Pages Ltd v Promedia Directories Pte Ltd* [2017] 2 SLR 185 at [74], per Sundaresh Menon CJ. See also *Asia Pacific Publishing Pte Ltd v Pioneers & Leaders (Publishers) Pte Ltd* [2011] 4 SLR 381 at [41], per V K Rajah JA.

58 *Global Yellow Pages Ltd v Promedia Directories Pte Ltd* [2017] 2 SLR 185 at [74], per Sundaresh Menon CJ. The US Second Circuit Court of Appeals has similarly stated that the ultimate primary intended beneficiary of copyright is the public, whose access to knowledge copyright seeks to advance by providing rewards for authorship: *Authors Guild v Google, Inc* 804 F 3d 202 at 212 (2nd Cir, 2015), per Leval J.

59 *Alberta (Minister of Education) v Canadian Copyright Licensing Agency* [2012] SCC 37 at [22], per Abella J; *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339 at [48], per McLachlin CJ. For the US position, see *Lenz v Universal Music Corp* 851 F 3d 1145 at 1152 (9th Cir, 2015).

60 *Asia Pacific Publishing Pte Ltd v Pioneers & Leaders (Publishers) Pte Ltd* [2011] 4 SLR 381 at [27], per V K Rajah JA; *Global Yellow Pages Ltd v Promedia Directories Pte Ltd* [2017] 2 SLR 185 at [74], per Sundaresh Menon CJ. See also *Cariou v Prince* 714 F 3d 694 at 705 (2nd Cir, 2013), per Barrington D Parker J.

respect in relation to their copyrighted work may therefore widen its scope to permit the unauthorised use of a copyrighted work. The law must cater to not only incentivising authors *ex post* but also allowing them *ex ante* to access and use pre-existing material in the production of creative works.<sup>61</sup>

**D. The five factors under s 35(2)**

39 In analysing whether a defendant is to be afforded the fair use defence, five factors are to be explored, and the results weighed, together, in light of the purposes of copyright.<sup>62</sup>

(1) *Purpose and character of the secondary work*

40 The *first factor*<sup>63</sup> requires the court to assess whether the use was fair by comparing the purpose and character of the secondary and original work.<sup>64</sup>

41 The fact that the original and secondary works share the same purpose will tend to weigh against a finding of fair use.<sup>65</sup> The Court of Appeal has recognised that the US transformative use doctrine is similar to the enquiry under this factor: whether the secondary work merely supersedes the objects of the original creation, supplanting the original, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning or message.<sup>66</sup>

42 Since the decision in *Campbell v Acuff-Rose Music, Inc.*,<sup>67</sup> which was delivered more than 20 years ago, some of the Circuit Courts have further expanded on the transformative use doctrine: transformativeness could be found when the original work is employed “in the creation of new information, new aesthetics, new insights and

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61 Niva Elkin-Koren, “Copyright in a Digital Ecosystem: A User Rights Approach” in *Copyright Law in an Age of Limitations and Exceptions* (Ruth L Okediji ed) (New York: Cambridge University Press, 2017) at pp 147–148.

62 *Global Yellow Pages Ltd v Promedia Directories Pte Ltd* [2017] 2 SLR 185 at [86], per Sundaresh Menon CJ; *Campbell v Acuff-Rose Music, Inc* 510 US 569 at 578 (1994), per Souter J.

63 Copyright Act (Cap 63, 2006 Rev Ed) s 35(2)(a).

64 *Global Yellow Pages Ltd v Promedia Directories Pte Ltd* [2017] 2 SLR 185 at [77], per Sundaresh Menon CJ.

65 *Global Yellow Pages Ltd v Promedia Directories Pte Ltd* [2017] 2 SLR 185 at [78], per Sundaresh Menon CJ.

66 *Global Yellow Pages Ltd v Promedia Directories Pte Ltd* [2017] 2 SLR 185 at [79], per Sundaresh Menon CJ; *Campbell v Acuff-Rose Music, Inc* 510 US 569 at 579 (1994), per Souter J.

67 510 US 569 (1994).

understandings”.<sup>68</sup> The allegedly infringing work need not comment on the original work to qualify as transformative.<sup>69</sup> Verbatim copying may even be transformative so long as it serves a function different from the original work.<sup>70</sup>

43 In assessing transformativeness, the Circuit Courts have given weight to both the author’s own explanation of their creative rationale<sup>71</sup> and how the secondary work appears to the reasonable observer.<sup>72</sup>

44 Importantly, transformativeness of a work is not subject to a dichotomous choice: courts have recognised degrees of transformativeness.<sup>73</sup>

45 The Court of Appeal notably did not adopt the *implicit attitude* of many US courts in “worshipping” the transformative use factor – while the US courts have not demonstrated an overriding desire to find transformativeness in the cases before them, studies have shown that if a use was found to be transformative, the defendant’s chance of winning the fair use defence would be 94.9%.<sup>74</sup>

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68 The Second Circuit Court of Appeals in *Cariou v Prince* 714 F 3d 694 at 706 (2nd Cir, 2013).

69 The Second Circuit Court of Appeals in *Cariou v Prince* 714 F 3d 694 at 707 (2nd Cir, 2013) and the Ninth Circuit Court of Appeals in *Seltzer v Green Day, Inc* 725 F 3d 1170 at 1177 (9th Cir, 2013).

70 The Ninth Circuit Court of Appeals in *Perfect 10, Inc v Amazon.com, Inc* 508 F 3d 1146 at 1165 (9th Cir, 2007); the Eleventh Circuit Court of Appeals in *Cambridge University Press v Patton* 769 F 3d 1232 at 1262 (11th Cir, 2014); and the Federal Circuit Court of Appeals in *Oracle America, Inc v Google Inc* 750 F 3d 1339 at 1374 (Fed Cir, 2014).

71 The Second Circuit Court of Appeals in *Blanch v Koons* 467 F 3d 244 at 255 (2nd Cir, 2006). Although this is not always conclusive, as seen in *Cariou v Prince* 714 F 3d 694 at 707 (2nd Cir, 2013) where the Second Circuit Court of Appeals stated categorically that the defendant’s work could be transformative even without the author’s stated intention to do so. Note, though, that the same Circuit Court in a later decision acknowledged (but did not address head-on, preferring for the discussion to take place another day) the criticism against the approach taken in *Cariou v Prince* for threatening to override the copyright owner’s exclusive right to prepare derivative works: *TCA Television Corp v McCollum* 839 F 3d 168 at 181 (2nd Cir, 2016).

72 The Second Circuit Court of Appeals in *Cariou v Prince* 714 F 3d 694 at 707 (2nd Cir, 2013); and the Ninth Circuit Court of Appeals in *Seltzer v Green Day, Inc* 725 F 3d 1170 at 1181 (9th Cir, 2013).

73 David Tan, “Semiotics and the Spectacle of Transformation in Copyright Law” (2017) *International Journal for the Semiotics of Law* 1 at 8.

74 Barton Beebe, “An Empirical Study of US Copyright Fair Use Opinions, 1978–2005” (2008) 156 U Penn L Rev 549 at 605.

46 Additionally, many US courts have consistently stated that transformative use<sup>75</sup> serves copyright's overall objective of contributing to public knowledge,<sup>76</sup> a judicial finding of transformative use will thus almost certainly result in a finding of fair use.<sup>77</sup> Notably, however, the Seventh Circuit Court of Appeals (rightly) expressed reservations about asking exclusively whether something is “transformative” in considering a fair use defence, as it would appear to replace the statutory list of factors for fair use.<sup>78</sup> Regardless of the correctness of the approach taken by the US courts, the Court of Appeal emphasised that the enquiry is necessarily fact-sensitive and the exception must be considered having regard to *all* the circumstances.<sup>79</sup>

47 Pertinently, one problem must be acknowledged. The US transformative test is influenced by their First Amendment jurisprudence in adopting a marketplace of ideas where unfettered interchange of ideas is encouraged.<sup>80</sup> Singapore, however, has categorically rejected the “marketplace of ideas” rationale – though, admittedly, this statement was made by the dissenting in *Attorney General v Ting Choon Meng*,<sup>81</sup> albeit persuasively by the Chief Justice.<sup>82</sup> The transformative use doctrine is therefore likely to be narrower in scope in Singapore than in the US, in that not every initiation of discussion on *any* topic would qualify as “transformative”.

48 The author therefore disagrees with Hudson that US cases on fair use can be followed by Australian courts – this cannot be done

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75 For a summary of the different types of uses that have been found by the US courts to be transformative, see David Tan, “The Lost Language of the First Amendment in Copyright Fair Use: A Semiotic Perspective of the ‘Transformative Use’ Doctrine Twenty-five Years On” (2016) 26 *Fordham Intell Prop Media & Ent LJ* 311 at 332 and Corinne Tan, *Regulating Content on Social Media* (London: University College London Press, 2018) at p 54.

76 The Federal Circuit Court of Appeals in *Oracle America, Inc v Google Inc* 750 F 3d 1339 at 1375 (Fed Cir, 2014); the Second Circuit Court of Appeals in *Authors Guild v Google, Inc* 804 F 3d 202 at 214 (2nd Cir, 2015), *per* Leval J; the Fourth Circuit Court of Appeals in *Bouchat v Baltimore Ravens Ltd Partnership* 737 F 3d 932 at 939 (4th Cir, 2013); the Sixth Circuit Court of Appeals in *Balsley v LFP, Inc* 691 F 3d 747 at 578 (6th Cir, 2012); and the Eleventh Circuit Court of Appeals in *Cambridge University Press v Patton* 769 F 3d 1232 at 1262 (11th Cir, 2014).

77 David Tan, “Semiotics and the Spectacle of Transformation in Copyright Law” (2017) *International Journal for the Semiotics of Law* 1 at 4.

78 *Kienitz v Sconnie Nation LLC* 776 F 3d 756 at 758 (7th Cir, 2014), *per* Easterbrook J.

79 *Global Yellow Pages Ltd v Promedia Directories Pte Ltd* [2017] 2 SLR 185 at [86], *per* Sundaresh Menon CJ.

80 *New York Times Co v Sullivan* 376 US 254 at 269 (1964).

81 [2017] 1 SLR 373.

82 *Attorney General v Ting Choon Meng* [2017] 1 SLR 373 at [109] and [114], *per* Sundaresh Menon CJ.

(*blindly*) without appreciation for the differences in law on free speech.<sup>83</sup> While Hudson is not incorrect to note that US fair use cases do not seem to suggest that “freedom of speech concerns are ventilated by reference to some free-standing constitutional argument”, that is because US copyright law “contain[s] built-in First Amendment accommodations”, including under the fair use doctrine.<sup>84</sup> Therefore, the types of expression allowed under the US fair use doctrine, because of First Amendment’s influence, will invariably be *greater* than that in a speech-restrictive country like Singapore – where the right can be restricted in the wider interests of, *inter alia*, broader societal concerns such as public peace and order<sup>85</sup> – given that transformativeness could more easily be found through allowable new meaning and/or messages.

49 The fact that the secondary work is driven by commercial exploitation *could* weigh against a finding of fair use – this does not, however, mean that the commercial nature or purpose of a dealing is *presumptively* unfair.<sup>86</sup> The commerciality factor queries not whether the sole motive of the use is monetary gain but whether the user stands to profit from the exploitation of the copyrighted material without paying the customary price.<sup>87</sup> Other considerations include “whether the secondary work is a substitute of the original” and whether the author of the secondary work is merely copying the original expression for that precise form of expression to advance his commercial interests.<sup>88</sup>

50 Pertinently, the more transformative the secondary work, the less the significance of commerciality and other factors that may weigh against a finding of fair use will be.<sup>89</sup>

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83 Emily Hudson, “Implementing Fair Use in Copyright Law: Lessons from Australia” (2013) 25 IPJ 201 at 217.

84 *Eldred v Ashcroft* 537 US 186 at 219 (2003), *per* Ginsburg J.

85 *Attorney General v Ting Choon Meng* [2017] 1 SLR 373 at [109], *per* Sundaresh Menon CJ.

86 *Global Yellow Pages Ltd v Promedia Directories Pte Ltd* [2017] 2 SLR 185 at [80] and [81], *per* Sundaresh Menon CJ.

87 *Harper & Row Publishers, Inc v Nation Enterprises* 471 US 539 at 562 (1985), *per* O’Connor J.

88 *Authors Guild v Google, Inc* 804 F 3d 202 at 219 (2nd Cir, 2015), *per* Leval J; *TCA Television Corp v McCollum* 839 F 3d 168 at 184 (2nd Cir, 2016), *per* Reena Raggi J.

89 *Campbell v Acuff-Rose Music, Inc* 510 US 569 at 579 (1994), *per* Souter J; *Perfect 10, Inc v Amazon.com, Inc* 508 F 3d 1146 at 1166 (9th Cir, 2007), *per* Ikuta J; *TCA Television Corp v McCollum* 839 F 3d 168 at 183 (2nd Cir, 2016), *per* Reena Raggi J.



(2) *Nature of the original work*

51 The *second factor*<sup>90</sup> considers the following: (a) the nature of the infringed-original work; (b) whether the original work was unpublished; and (c) justification offered by the infringer.

52 A finding of fair use is less likely in cases involving works that are highly creative in nature such as fiction-based (as opposed to fact-based) copyright works, because copyright protection is not as “thin”.<sup>91</sup> This is a recognition that creative expression created for public dissemination is at the core of copyright’s protective purposes.<sup>92</sup> While the secondary user of non-creative information can more readily claim fair use based on the law’s recognition of a greater need to disseminate factual works than works of fiction or fantasy, the secondary user of a creative work must justify his use, usually by explaining the functional or creative rationale behind its quotation.<sup>93</sup>

53 Fair use is also less likely to be found in cases involving unpublished works because of the need to respect an author’s right to confidentiality and to release the work into the public domain.<sup>94</sup> This greater protection given to unpublished works recognises the author’s right to first publication – which encompasses not only the choice of whether to publish at all, but also the choices of when, where and in what form to first publish a work.<sup>95</sup>

54 The court also considers the justification proffered by the secondary user and determines how powerful or persuasive the justification for copying is.<sup>96</sup>

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90 Copyright Act (Cap 63, 2006 Rev Ed) s 35(2)(b).

91 *Global Yellow Pages Ltd v Promedia Directories Pte Ltd* [2017] 2 SLR 185 at [82], per Sundaresh Menon CJ. Viewing the “thin protection” from the lens of a copyright owner, it is said that while copyright can subsist in very simple line drawings (technical or otherwise), the simpler the work, the more exact the copy must be, for it to be regarded as infringing: *Nanofilm Technologies International Pte Ltd v Semivac International Pte Ltd* [2018] 5 SLR 956 at [124], per George Wei J.

92 *TCA Television Corp v McCollum* 839 F 3d 168 at 184 (2nd Cir, 2016), per Reena Raggi J.

93 *TCA Television Corp v McCollum* 839 F 3d 168 at 184 (2nd Cir, 2016), per Reena Raggi J.

94 *Global Yellow Pages Ltd v Promedia Directories Pte Ltd* [2017] 2 SLR 185 at [82], per Sundaresh Menon CJ.

95 *Harper & Row Publishers, Inc v Nation Enterprises* 471 US 539 at 564 (1985), per O’Connor J.

96 *Authors Guild v Google, Inc* 804 F 3d 202 at 220 (2nd Cir, 2015), per Leval J; *TCA Television Corp v McCollum* 839 F 3d 168 at 184 (2nd Cir, 2016), per Reena Raggi J.

(3) *Amount and substantiality of the part copied*

55 On the *third factor*,<sup>97</sup> the court considers the quantity, quality and importance of the original expressions used.<sup>98</sup> When a substantial portion of the original expression is copied verbatim, it poses a greater likelihood of market harm to the original work.<sup>99</sup> The larger the amount, or the more important the part, of the original that is copied, the greater the likelihood that the secondary work might serve as an effectively competing substitute for the original and might therefore diminish the original rights holder's sales and profits.<sup>100</sup>

56 The extent of permissible copying varies with the purpose and character of the use. The quantity, quality and importance of the original expressions taken will therefore be analysed alongside the justification for copying: whether the original expressions copied are reasonable in relation to the purpose of the copying.<sup>101</sup> In other words, a court must ask whether the defendant has helped herself overmuch to the copyrighted work in light of the purpose and character of the use.<sup>102</sup>

(4) *Effect of secondary use*

57 The *fourth factor*<sup>103</sup> considers not only the extent of market harm caused by the secondary work, but also whether the defendant's conduct, if unrestricted and widespread, would result in a substantially adverse impact on the potential market for the original work, taking into account harm to the market of both the original and derivative works.<sup>104</sup>

58 This factor is also sometimes described as requiring a balancing of the benefit the public will derive if the use is permitted and the personal gain the copyright owner will receive if the use is denied.<sup>105</sup> The rationale is that the ultimate value of the copyright work includes the revenue that the copyright owner can get from granting licences to

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97 Copyright Act (Cap 63, 2006 Rev Ed) s 35(2)(c).

98 *Global Yellow Pages Ltd v Promedia Directories Pte Ltd* [2017] 2 SLR 185 at [83], per Sundaresh Menon CJ; *Campbell v Acuff-Rose Music, Inc* 510 US 569 at 587 (1994), per Souter J.

99 *Campbell v Acuff-Rose Music, Inc* 510 US 569 at 587–588 (1994), per Souter J.

100 *Authors Guild v Google, Inc* 804 F 3d 202 at 221 (2nd Cir, 2015), per Leval J.

101 *Global Yellow Pages Ltd v Promedia Directories Pte Ltd* [2017] 2 SLR 185 at [83], per Sundaresh Menon CJ.

102 *Katz v Google Inc* 802 F 3d 1178 at 1183 (11th Cir, 2015), per curiam.

103 Copyright Act (Cap 63, 2006 Rev Ed) s 35(2)(d).

104 *Global Yellow Pages Ltd v Promedia Directories Pte Ltd* [2017] 2 SLR 185 at [84], per Sundaresh Menon CJ.

105 *Swatch Group Management Services Ltd v Bloomberg LP* 756 F 3d 73 at 90 (2nd Cir, 2014), per Katzmann J.

others to create derivative works based on the copyright work – this interest must not be overlooked.<sup>106</sup>

(5) *Reasonable possibility of obtaining the work*

59 The *fifth factor*<sup>107</sup> entails two enquiries:

(a) whether the defendant made reasonable investigations into the possibility of obtaining the original work on reasonable terms; and

(b) if (a) was possible, whether the defendant attempted to so obtain the original work.<sup>108</sup>

This requirement will necessarily “count against fair use in all cases, except when the work is not being commercialised in any way” (for example, an orphan work) as the evaluation focuses on “whether the work may be available at a reasonable commercial price”.<sup>109</sup> Both the fourth and fifth factors are premised on the notion that the market for the original work should not be usurped by others without compensation.<sup>110</sup>

60 The author acknowledges that there have been debates and public consultation on the utility of the fifth factor.<sup>111</sup> As a discussion covering all arguments for and against the repeal of the fifth factor would be beyond the scope of this article, the discussion below will be confined to the fifth factor’s effects on Instagrammers *only*. The author would, however, like to highlight that even proponents *against* the repeal of the fifth factor have proposed that the factor be “adapted to

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106 Ng-Loy Wee Loon, *Law of Intellectual Property of Singapore* (Singapore: Sweet & Maxwell, 2nd Ed, 2014) at para 11.3.32.

107 Copyright Act (Cap 63, 2006 Rev Ed) s 35(2)(e).

108 *Global Yellow Pages Ltd v Promedia Directories Pte Ltd* [2017] 2 SLR 185 at [85], per Sundaresh Menon CJ, noting *without* disapproval David Tan & Benjamin Foo, “The Unbearable Lightness of Fair Dealing” (2016) 28 SAclJ 124 at 156–159, paras 44–47.

109 Peter Jaszi *et al*, American University Washington College of Law, Program on Information Justice and Intellectual Property, “Re: Public Consultation on Proposed Changes to Singapore’s Copyright Regime” (7 November 2016) at pp 2–3.

110 *Global Yellow Pages Ltd v Promedia Directories Pte Ltd* [2017] 2 SLR 185 at [85], per Sundaresh Menon CJ.

111 Intellectual Property Office of Singapore & Singapore Ministry of Law, *Public Consultation on Proposed Changes to Singapore’s Copyright Regime* (23 August 2016) at paras 3.49–3.51. See also Peter Jaszi *et al*, American University Washington College of Law, Program on Information Justice and Intellectual Property, “Public Consultation on Proposed Changes to Singapore’s Copyright Regime” (7 November 2016) at pp 2–4; and David Tan, “Copyright Fair Use: Are We ‘Future-ready’?” *The Straits Times* (14 September 2016).

indicate its inapplicability in certain defined circumstances which do not interfere with normal commercial exploitation of copyright works”.<sup>112</sup> This proposal supports the author’s position that private uses that do not seek to commercially exploit the copyrighted work online should be allowed to “exist”.

#### IV. (Un)fair Instagrammers

61 It will be demonstrated how Singapore’s fair use operates against Instagrammers by applying the law to a recent litigation in the US – *Gattoni v Tibi, LLC*.

62 Gattoni, a professional photojournalist, sued Tibi, LLC (“Tibi”) for, amongst other things, copyright infringement. Tibi is a clothing corporation which maintains an Instagram page @Tibi: a typical “business user”. Tibi copied and cropped a photograph (Figure 1 below) taken from Gattoni’s Instagram page and shared the image on their Instagram page (Figure 2 below). Tibi’s post was accompanied by the caption “Palette” and a hyperlinked reference to Gattoni’s Instagram page. Gattoni’s copyright infringement claim was dismissed *only* because she has not yet alleged a valid copyright registration.<sup>113</sup>

63 What Tibi has done is not unfamiliar to many Instagrammers, who often freely post unauthorised photographs (unaltered or not) on their Instagram accounts for various reasons.<sup>114</sup> However, these Instagrammers cannot claim “fair use” to escape infringement liabilities in Singapore.

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112 International Association of Scientific Technical and Medical Publishers, *Public Consultation on Proposed Changes to Singapore’s Copyright Regime – Submission by the International Association of Scientific Technical and Medical Publishers (STM)* (3 November 2016) at p 5. For other arguments against removal of the fifth factor, see Justin Hughes, “Fair Use and Its Politics – At Home and Abroad” in *Copyright Law in an Age of Limitations and Exceptions* (Ruth L Okediji ed) (New York: Cambridge University Press, 2017) at p 258; and Australian Copyright Council, “Submissions in Response to Public Consultation on Proposed Changes to Singapore’s Copyright Regime” (October 2016) at pp 4–5.

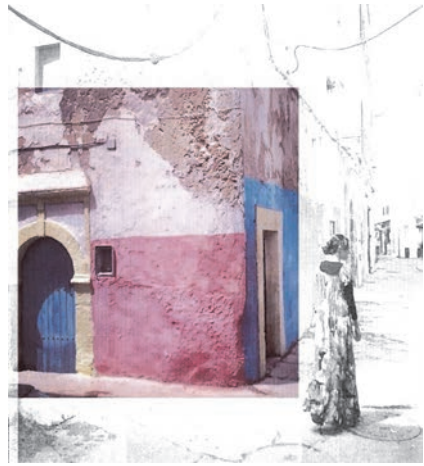
113 *Gattoni v Tibi, LLC* 2017 WL 2313882 at 4, *per* District Judge Sweet.

114 The reasons have been explored at paras 9–11 above.

## Fair Use on Instagram: Transformative Self-expressions or Copyright Infringing Reproductions?



**Figure 1: Essaouira photo**<sup>115</sup>



**Figure 2: Cropped photo by Tibi**<sup>116</sup>

### (1) *Business users*

64 On the *first factor*, Tibi alleged that the purpose of its use was to comment upon and draw attention to the colour and texture of the building's façade, and that the use was non-commercial since the Essaouira photo was not used to promote its sales.<sup>117</sup>

65 Tibi did not “add anything new”, visually, to the original creation as it had merely cropped out Gattoni's username from the border and decolourised certain parts of the original photo. Gattoni's photo was largely unedited and there was little visual transformation. Tibi's argument that the photo had been clothed with a different purpose by inciting discussion with the comment “Palette” could qualify as a “transformative purpose”, if it can be appreciated that the

115 Taken from Gattoni's Instagram account (username: @matildegattoni) <https://www.instagram.com/p/Bjkyhzh51S/?hl=en> (accessed November 2018).

116 “Memorandum of Law in Support of Motion to Dismiss the Complaint Pursuant to Fed R Civ Pro 12(b)(6)” filed by Gordon ER Troy on behalf of Tibi, LLC (27 October 2016) at p 2. Tibi, LLC's post was only online for approximately 8 hours on 20 September 2016, from 1.00am until about 8.00am New York time: see p 1.

117 “Memorandum of Law in Support of Motion to Dismiss the Complaint Pursuant to Fed R Civ Pro 12(b)(6)” filed by Gordon ER Troy on behalf of Tibi, LLC (27 October 2016) at pp 13–14.

decolourising of the rest of the picture to emphasise the building's colours provided new insight and understanding for the reasonable observer. Tibi's "creative rationale", to incite discussion, is also arguably a purpose different from Gattoni's, who, as a photojournalist, presumably shared the photograph for viewership and recognition of her photography skills.

66 The allegedly non-commercial use by Tibi is, however, misconstrued. Tibi's use of Gattoni's photo to attract more attention to its Instagram page, thereby establishing greater online presence, is no different from using well-known copyrighted lines to attract attention to an advertisement.<sup>118</sup> Such posts are atypical social-oriented content provided to elicit social interactions with users or among users. They help demystify the brand image by showing authentic human involvement and encouraging social interactions with consumers to enhance users' perceptions of brand personality, eliciting a more favourable evolution of the brand.<sup>119</sup>

67 One could further argue that as a clothing corporation, Tibi's post is an attempt at exhibiting the brand's artistic talent and appreciation, portraying a positive image of the brand.

68 Coupled with the new insight derived from and repurposing of the original work, the first factor is at best neutral in finding fair use.

69 On the *second factor*, Gattoni's highly creative work lies at the core of intended copyright protection – it is an original photograph taken by Gattoni and not slavishly copied from another, thereby attracting "thick" protection under copyright laws. While Tibi's use of the photograph does support its alleged justification, this factor is arguably against fair use given the "thick" protection afforded to Gattoni's highly creative work.

70 On the *third factor*, it is not unreasonable for Tibi to have copied the entire photograph for its alleged justification – this factor is arguably not against a finding of fair use.

71 On the *fourth factor*, with Tibi's edits (cropping and decolourising of the original photo), Figure 2 is arguably not a substitute for Gattoni's photograph. It does, however, harm the derivative market for Gattoni's work, which could involve the alteration of other parts of

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118 *TCA Television Corp v McCollum* 839 F 3d 168 at 184 (2nd Cir, 2016), *per* Reena Raggi J.

119 Qin Gao & Feng Chenyue, "Branding with Social Media: User Gratifications, Usage Patterns, and Brand Message Content Strategies" (2016) 63 *Computers in Human Behaviour* 868 at 878 and 888.

the photograph (including decolourising and fading effects) to place emphasis on the unedited parts – this is against a finding of fair use.

72 The *final factor* also disfavours a finding of a fair use as Tibi appeared to have made no attempts to obtain the photograph from Gattoni at all.

73 In summary, while Tibi’s use is arguably transformative (from a reasonable observer’s perspective), it is unlikely to succeed in raising fair use, especially if litigated in Singapore. The original work deserving of “thick” protection has been commercially exploited by Tibi, with no attempts made to obtain the photograph from Gattoni. Tibi’s use also harms the market of derivative works for Gattoni’s photograph.

(2) *Private individuals*

74 On the first factor, an individual’s usage of Gattoni’s image could be for the purposes of self-presentation and expression, which *arguably* qualifies as a transformative use as it is a new purpose different from its original creation. Further, the fact that the individual does not stand to profit commercially (unlike business users) from the use of the image should lean towards a finding of fair use. Despite this, the private individual is likely to be deprived of the defence as the fifth factor requires him to have obtained Gattoni’s image on reasonable terms (or attempted to do so).

75 There is an estimate of about 95 million photos and videos shared on Instagram *per day*.<sup>120</sup> To expect private users, who are merely sharing images for social networking, to expend time and resources to investigate licensing possibilities before sharing the image is not only near impossible, but also runs directly against conventional Instagrammers’ behaviour accepted as a new online social norm. This is especially so when Instagram is meant to be a real-time sharing platform, providing an ephemeral and instantaneous televisual glance through its live flow of images.<sup>121</sup>

76 The discussion on the other factors in relation to the business users applies equally to private individuals.

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120 Mary Lister, “33 Mind-boggling Instagram Stats and Facts for 2017” (21 August 2017) <http://www.wordstream.com/blog/ws/2017/04/20/instagram-statistics> (accessed November 2018).

121 Jennifer Golbeck, *Introduction to Social Media Investigations: A Hands-on Approach* (US: Syngress, 2015) at pp 159–161; Nicholas Carah & Michelle Shaul, “Brands and Instagram: Point, Tap, Swipe, Glance” (2016) 4(1) *Mobile Media and Communications* 69 at 72.

(3) *Celebrities*

77 Assuming that Tibi's Instagram account belongs to a celebrity (traditional or Instafamous), the commerciality of the use, as with business users, is easily found as Gattoni's image has *arguably* been used to garner attention and populate the celebrity's page for more followers, clinching bigger and better sponsorships.

78 While celebrities, like private individuals, could argue that they are either solely or concurrently using Gattoni's image for self-expression in building their virtual identities, more transformation of the original work is required to outweigh the accruing commercial benefits before the first factor can be titled in their favour. Celebrities will also be expected to obtain Gattoni's image on reasonable terms.

79 The recent litigation in the US between Splash News and Jessica Simpson aptly illustrates the above-mentioned problems associated with celebrity Instagrammers.<sup>122</sup> Simpson was sued for using a paparazzi photo of her on her Instagram and Twitter accounts. Splash News' counsel rightly argued that Simpson's use of the copyrighted photo (*albeit* a paparazzi shot of herself) was to promote her persona.<sup>123</sup> Even if it was a genuine attempt at self-expression, the accruing commercial benefits cannot be denied – a copyrighted photo has been used to enhance Simpson's Instagram followers' perception of her personality, and the followers are ultimately motivated to consume products Simpson advertises on her Instagram account.

80 This exercise demonstrates that Singapore's fair use does not distinguish between "genuine" private Instagrammers who share copyrighted works as expressive conduct from celebrities and business users seeking to commercially exploit copyrighted work on Instagram.

## V. Approaches taken in foreign jurisdictions

81 Since the worldwide phenomenon of the advent of social media, there have been public consultations and reforms proposed on copyright

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122 *Splash News and Picture Agency, LLC v Jessica Simpson* Case No 2:17-cv-591 (CD Cal) (23 January 2018).

123 "Complaint for Copyright Infringement", filed by attorneys for Splash News and Picture Agency, LLC (23 January 2018) at [26] in *Splash News and Picture Agency, LLC v Jessica Simpson* Case No 2:17-cv-591 (C D Cal) (23 January 2018).



law in many countries in the last decade.<sup>124</sup> In the context of UGC, this article will focus on the approach taken in the US (from which Singapore has borrowed the open-ended fair use doctrine) and Canada (the first country to formulate a UGC exception).

**A. US fair use**

82 Leading local intellectual property scholar George Wei's praises of the fair use doctrine were accurate and apt: the fair use exception is "flexible and responsive enough to deal with a huge variety of uses."<sup>125</sup> It therefore comes as no surprise that the US Department of Commerce found the fair use doctrine to be effective in dealing with problems associated with UGC.<sup>126</sup>

83 Some problems remain, however, mainly due to the *interpretation* of fair use factors by US courts, which ought *not* to be followed in Singapore.

(1) *Fair use exception*

84 US's fair use, contained in § 107 of the US Copyright Act,<sup>127</sup> details the same first four factors in Singapore's Copyright Act; the discussion is therefore largely similar to Part III,<sup>128</sup> save for three important differences.

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124 Commission of the European Communities, *Green Paper: Copyright in the Knowledge Economy*, Brussels, COM (2008) 466/3 (16 July 2008); Canada Library of Parliament, *Legislative Summary of Bill C-32: An Act to Amend the Copyright Act* (Publication No 40-3-C32-E, 20 July 2010); United States, Department of Commerce Internet Policy Task Force, *Copyright Policy, Creativity, and Innovation in the Digital Economy* (July 2013); Australian Law Reform Commission, *Copyright and the Digital Economy: Final Report* (ALRC Report 122, November 2013); Hong Kong Legislative Council Panel on Commerce and Industry, *Public Consultation on Treatment of Parody under the Copyright Regime* (LC Paper No CB(1)516/13-14(03), December 2013); Ireland Copyright Review Committee, *Modernising Copyright: A Report Prepared by the Copyright Review Committee for the Department of Jobs, Enterprise and Innovation* (2013).

125 George Wei, "A Look Back at Public Policy, the Legislature, the Courts and the Development of Copyright Law in Singapore: Twenty-five Years On" (2012) 24 SAclJ 867 at 886–887, para 29.

126 United States, Department of Commerce, Internet Policy Task Force, *White Paper on Remixes, First Sale, and Statutory Damages: Copyright Policy, Creativity, and Innovation in the Digital Economy* (January 2016) at p 25.

127 Copyrights 17 USC (US); Copyright Act of 1976. The list of factors is also non-exhaustive: see *Rogers v Koons* 960 F2d 301 at 308 (2nd Cir, 1992), per Cardamone J.

128 See paras 39–59 above.

85 First, a finding of fair use is often necessitated by a finding of transformativeness.<sup>129</sup> Two problems peculiar to UGC arise: (a) the subjective nature of transformative assessment; and (b) the predominantly visually non-transformative nature of UGC.

86 Transformative assessment has been criticised as being heavily subjective – the outcome may vary depending on the adjudicator(s). It glosses over added value that may not be obvious to the casual viewer. Even though judges pretend to view the secondary work from a reasonable observer's perspective, it is essentially the judges' subjective findings about transformative value of the work, if any.<sup>130</sup>

87 On Pinterest alone, academics have predicted both successful and unsuccessful reliance of fair use defence, with a third position candidly admitting that the outcome is by no means certain.<sup>131</sup> By way of background, Pinterest, like Instagram and Facebook, allows users to “pin” or “re-pin” images found on the Internet or on another user's Pinterest boards. A pin can be an image or a video either from another website or uploaded by the user.

88 Curtis argues that users share images on social media sites particularly because of their aesthetic appeal, constituting use for its original purpose. There is therefore no *new* purpose to speak of.<sup>132</sup> Carpenter, however, argues that users appropriate these pictures to remember them and/or to inform friends about their interests, which adds a new purpose different from the copyrighted work.<sup>133</sup>

89 Instagram posts similarly consist of a significant amount of UGC with little or no alterations to the original work and were shared because of their aesthetic appeal. Regardless of the subjectivity in the interpretation of transformativeness and the visually non-transformative nature of UGC, private Instagrammers' posts are arguably highly transformative as they have been “repurposed” into means of

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129 David Tan, “Semiotics and the Spectacle of Transformation in Copyright Law” (2017) *International Journal for the Semiotics of Law* 1 at 4.

130 Nicole Nguyen, “No Copyright Intended” in *Cultures of Copyright* (Danielle Nicole DeVoss & Martine Courant Rife eds) (New York: Peter Lang, 2015) at pp 134–135; Amber Westcott-Baker, Rebekah Pure & Christopher Seaman, “Copyright Law and the Implications for User-generated Content” (2012) 3(1/2) *U Bal J of Media L & Ethics* 171 at 185.

131 Jessica Gutierrez Alm, “Sharing’ Copyrights: The Copyright Implications of User Content in Social Media” (2014) 35(2) *Hamline J Pub L & Pol’y* 104 at 127.

132 Brittany Curtis, “Copyright vs Social Media: Who Will Win?” (2016) 20 *Intellectual Property Law Bulletin* 81 at 90 and 91.

133 Craig C Carpenter, “Copyright Infringement and the Second Generation of Social Media: Why Pinterest Users Should Be Protected from Copyright Infringement by Fair Use Defense” (2013) 16(7) *Journal of Internet Law* 1 at 14.

self-presentation and expression, allowing users to socialise and stay connected on Instagram through photos.<sup>134</sup>

90 Bearing in mind that the ultimate, primary intended beneficiary of copyright is the public,<sup>135</sup> the (unspoken) insistence on transformativeness is problematic. It overlooks the fact that non-transformative uses may also further copyright goals in developing creativity by encouraging use of creative works.<sup>136</sup> In particular, the creation of new original works could not be possible without the.<sup>137</sup>

... opportunity of engaging in non-transformative uses of copyrighted works, which serve as an indispensable source of inspiration and information for contemporary authors and end-users wishing to become new creators.

The same has also been acknowledged in Singapore:<sup>138</sup>

... easier access to, and use of, creative works also benefit existing creators, in allowing them to work off and be inspired by the works of others, as well as help to cultivate the next generation of new creators and producers.

91 Secondly, US courts would more readily find “transformative uses” of an original work when it is used to create “new information, insights, understandings or aesthetics” as guided by “the spirit of the First Amendment in the rise of the transformative use doctrine”.<sup>139</sup> This is why even verbatim copying may be transformative so long as it serves a function different from the original work.<sup>140</sup>

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134 Linnea Laestadius, “Instagram” in *The SAGE Handbook of Social Media Research Methods* (Luke Sloan & Anabel Quan-Haase eds) (UK: SAGE Publishing, 2017) at p 574.

135 *Authors Guild v Google, Inc* 804 F 3d 202 at 212, (2nd Cir, 2015), per Leval J. See also *Global Yellow Pages Ltd v Promedia Directories Pte Ltd* [2017] 2 SLR 185 at [74], per Sundaresh Menon CJ: “there is a public interest in not allowing copyright law to hinder creativity and innovation”.

136 Niva Elkin-Koren, “Copyright in a Digital Ecosystem: A User Rights Approach” in *Copyright Law in an Age of Limitations and Exceptions* (Ruth L Okediji ed) (New York: Cambridge University Press, 2017) at pp 144–145.

137 Mazziotti Giuseppe, *EU Digital Copyright Law and the End-user* (Berlin: Springer, 2008) at p 8; Fred von Lohmann, “Fair Use As Innovation Policy” (2008) 23 Berkeley Tech LJ 829 at 862.

138 Intellectual Property Office of Singapore & Singapore Ministry of Law, *Public Consultation on Proposed Changes to Singapore’s Copyright Regime* (23 August 2016) at para 2.09.

139 *Cariou v Prince* 714 F 3d 694 at 706 (2nd Cir, 2013), per Parker J; David Tan, “The Lost Language of the First Amendment in Copyright Fair Use: A Semiotic Perspective of the ‘Transformative Use’ Doctrine Twenty-five Years On” (2016) 26 Fordham Intell Prop Media & Ent LJ 311 at 357.

140 *Cambridge University Press v Patton* 769 F 3d 1232 at 1262 (11th Cir, 2014); *Oracle America, Inc v Google Inc* 750 F 3d 1339 at 1374 (Fed Cir, 2014).

92 The author therefore disagrees with Bunker that the transformative use doctrine chills expressions of creativity.<sup>141</sup> The assertion is premised on the allegedly unpredictable nature of the doctrine, concluding that vague laws force people to steer clear of the unlawful zone.<sup>142</sup> Contrary to Bunker's views, an equally valid argument is that it is the court's willingness in advancing "the marketplace of ideas" through the creation of "new information, insights, understandings or aesthetics" in the transformative use doctrine that has afforded (and continues to afford) more protection to different expressions, promoting (rather than chilling) creative expressions.

93 US courts have recognised that fair use could promote free speech by allowing copyrighted works to be used in communicating one's views.<sup>143</sup> Additionally, the US also subscribes to the theory of the marketplace of ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market.<sup>144</sup> Coupled with this theory, the transformative use doctrine is logically wider in scope in the US than in Singapore, and more UGC could avail itself to the protection of "fair use" by donning the cloak of "freedom of expression".

94 Finally, even though the US Supreme Court has declined viewing commercial use as presumptively unfair under the fair use analysis,<sup>145</sup> old habits die hard, and the lower US courts have, not infrequently, applied this *abandoned* presumption. There have been *at least* 12 reported judgments where a lower US court has expressly applied this presumption.<sup>146</sup> On a related note, it would therefore *not* be

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141 Matthew D Bunker & Clay Calvert, "The Jurisprudence of Transformation: Intellectual Incoherence and Doctrinal Murkiness Twenty Years after *Campbell v Acuff-Rose Music*" (2014) 12 Duke L & Tech Rev 92 at 126.

142 Matthew D Bunker & Clay Calvert, "The Jurisprudence of Transformation: Intellectual Incoherence and Doctrinal Murkiness Twenty Years after *Campbell v Acuff-Rose Music*" (2014) 12 Duke L & Tech Rev 92 at 126; Corinne Tan, *Regulating Content on Social Media* (London: University College London Press, 2018) at pp 54–55.

143 *Golan v Holder* 565 US 302 at 329 (2012), *per* Ginsburg J.

144 *Abrams v United States* 250 US 616 at 630 (1919), *per* Clarke J.

145 *Campbell v Acuff-Rose Music, Inc* 510 US 569 at 584 (1994), *per* Souter J.

146 Ninth Circuit Court of Appeals in *Los Angeles News Service v Reuters Television Intern, Ltd* 149 F 3d 987 at 994 (9th Cir, 1998), *per* Schwarzer J; Ninth Circuit Court of Appeals in *Micro Star v Formgen Inc* 154 F 3d 1107 at 1112 (9th Cir, 1998), *per* Kozinski J; Nevada District Court in *Tiffany Design, Inc v Reno-Tahoe Specialty, Inc* 55 F Supp 2d 1113 at 1123 (D Nev, 1999), *per* Pro J; Ninth Circuit Court of Appeals in *Worldwide Church of God v Philadelphia Church of God, Inc* 227 F 3d 1110 at 1117 (9th Cir, 2000), *per* Schwarzer J; Arizona District Court in *Designer Skin, LLC v S & L Vitamins, Inc* 560 F Supp 2d 811 at 823 (D Ariz, 2008), *per* James J; Ninth Circuit Court of Appeals in *Leadsinger, Inc v BMG Music Pub* 512 F 3d 522 at 530 (9th Cir, 2008), *per* Miland J; Ninth Circuit Court of Appeals  
(*cont'd on the next page*)

surprising if the US District Court for the Central District of California (being a lower court of the Ninth Circuit Court of Appeals) finds that Simpson cannot avail herself to the fair use defence due to the commerciality of her use of Splash News' copyrighted photograph.

95 The “bipolar” attitude towards “commerciality” confuses interested parties, including the Singapore Court of Appeal, which believed that the US fair use doctrine regards the commercial nature or purpose of the dealing as presumptively unfair.<sup>147</sup>

96 If US courts continue to (sub)consciously regard commercial use as presumptively unfair, celebrities and business Instagram users will be unfairly deprived of the defence. Such a position could presumptively foreclose the existence of highly transformative (but commercially tainted) UGC which furthers copyright goals.

(2) *Benefits*

97 The creativity developed and economic benefits reaped in the US have been credited to fair use's flexibility in responding to rapid technological changes.<sup>148</sup> This flexibility is also able to keep up with changing behaviour and contemporary attitudes, resulting in up-to-date copyright laws that are more likely deemed reasonable and commanding more compliance by the public.<sup>149</sup>

(3) *Associated problems*

(a) *Ex post* nature chills innovation

98 Permitting transformative uses *ex post* rather than *ex ante* – that is, the disputed use is held permissible by the court, rather than permitted from the outset by the Legislature – deters users in creating

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in *Monge v Maya Magazines, Inc* 688 F3d 1164 at 1176 (9th Cir, 2012), *per* McKeown J; Sixth Circuit Court of Appeals in *Balsley v LFP, Inc* 691 F3d 747 at 769 (6th Cir, 2012), *per* Clay J; California District Court in *Erickson Productions, Inc v Kast* Case No 5:13-cv-05472 HRL (N D Cal, 2014), *per* Howard J; Michigan District Court in *Calibrated Success, Inc v Charters* 72 F Supp 3d 763 at 771 (E D Mich, 2014), *per* Victoria J; California District Court in *Disney Enterprises, Inc v VidAngel, Inc* 224 F Supp 3d 957 at 970 (C D Cal, 2016), *per* Andre J; and Arizona District Court in *Keith Bell v The Moawad Group, LLC* 326 F Supp 3d 918 at [12] (D Ariz, 2018), *per* Campbell J.

147 *Global Yellow Pages Ltd v Promedia Directories Pte Ltd* [2017] 2 SLR 185 at [81], *per* Sundaresh Menon CJ.

148 Bob Wright, “Fair Use Will Give the Digital Economy a Fair Go” (2014) 24 AIPJ 218 at 227 and 228.

149 Bob Wright, “Fair Use Will Give the Digital Economy a Fair Go” (2014) 24 AIPJ 218 at 229.

UGC out of fear of having to undergo litigation to determine if the use is fair.<sup>150</sup>

(b) Uncertain outcomes

99 Given its standard-like nature, fair use is thought to be “vague and indeterminate”; creating a high risk of liability.<sup>151</sup> This uncertainty as to permissible uses may deter uses which are otherwise legitimate, or lead to high transaction and legal costs for users to determine fairness in a novel situation.<sup>152</sup> Some have even labelled fair use as “the right to hire a lawyer”, disparaging fair use for its inability to protect amateur creators from large media companies.<sup>153</sup>

(c) Judges usurping Legislature’s role

100 Critics have been uncomfortable with judges crafting new exceptions and limitations on a case-by-case basis, asserting that this is an abandonment of democratic ideals.<sup>154</sup>

(4) *Interim conclusion*

101 While US’s fair use has been criticised for shifting from an “open-ended possibility of the negation of copyright” to the “possibility of the open-ended negation of copyright” because of its *ex post* and

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150 Niva Elkin-Koren, “Copyright in a Digital Ecosystem: A User Rights Approach” in *Copyright Law in an Age of Limitations and Exceptions* (Ruth L Okediji ed) (New York: Cambridge University Press, 2017) at p 160.

151 Corinne Tan, *Regulating Content on Social Media* (London: University College London Press, 2018) at pp 54–55; Niva Elkin-Koren, “Copyright in a Digital Ecosystem: A User Rights Approach” in *Copyright Law in an Age of Limitations and Exceptions* (Ruth L Okediji ed) (New York: Cambridge University Press, 2017) at p 150.

152 Barry Sookman, “Copyright Reform for Canada: What Should We Do?” (2009) 22 IPJ 1 at 25; Niva Elkin-Koren, “Copyright in a Digital Ecosystem: A User Rights Approach” in *Copyright Law in an Age of Limitations and Exceptions* (Ruth L Okediji ed) (New York: Cambridge University Press, 2017) at p 150; Kevin F Steinmetz & Alexandra Pimentel, “DeLiberating the Information Commons: A Critical Analysis of Intellectual Property and Piracy” in *Digital Priacy* (Steven Caldwell Brown & Thomas J Holt eds) (US: Routledge, 2018) at p 194.

153 Peter Decherney, “Hollywood’s Guerrilla War: Fair Use and Home Video” in *Hollywood’s Copyright Wars: From Edison to the Internet* (New York: Columbia University Press, 2012) at p 199.

154 Justin Hughes, “Fair Use and Its Politics – At Home and Abroad” in *Copyright Law in an Age of Limitations and Exceptions* (Ruth L Okediji ed) (New York: Cambridge University Press, 2017) at p 256.

standard-like nature,<sup>155</sup> the adaptability and flexibility of the fair use doctrine have undeniably allowed US copyright laws, through judges, to respond equally swiftly to rapid technological changes.

**B. Canada's UGC exception**

102 Canada adopts a categorical approach in providing exceptions to copyright infringement: there are specific allowable purposes in its fair dealing defence alongside a codified UGC exception.<sup>156</sup>

103 The codified exception was part of a move to modernise its copyright law for the digital age and to promote innovation in Canada.<sup>157</sup> Following the Canada Supreme Court's favourable attitude towards dissemination of artistic works<sup>158</sup> – being central to developing a robustly cultured and intellectual public domain – supporters view the UGC exception as allowing engagement in the creative process without fear of lawsuits.<sup>159</sup>

(1) *The UGC exception*

104 The exception is premised on promoting the creation of works by allowing the use of a pre-existing work. The following requirements must be fulfilled for the exception to apply:

- (a) The user-creator must be an “individual”.
- (b) The original work must have been made available to the public.
- (c) The secondary work must be one in which copyright subsists.
- (d) The secondary work must be *solely* for non-commercial purposes.
- (e) The information of the author of the primary work must be mentioned, if available.

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155 The criticism was noted, but disagreed with, by Justin Hughes, “Fair Use and its Politics – At Home and Abroad” in *Copyright Law in an Age of Limitations and Exceptions* (Ruth L Okediji ed) (New York: Cambridge University Press, 2017) at p 273.

156 Copyright Act (RSC 1985, c C-42) (Can) ss 29 and 29.21.

157 *Canada House of Commons Debates, Official Report (Hansard)* (2 November 2010) Part A at p 5644 (Hon Tony Clement, Minister of Industry, CPC).

158 *Re Public Performance of Musical Works* [2012] SCC 36 at [10], *per* Abella J.

159 Canada, Legislative Committee on Bill C-32, *Evidence* (1 December 2010) at p 7 (Michael Geist).

(f) The primary work must, to the user's belief, not be an infringing copy.

(g) The secondary work must not have a substantial adverse effect, financial or otherwise, on the market for the original work.<sup>160</sup>

If the conditions are satisfied, the user has a right to authorise other household members to use, or for an intermediary to disseminate, the secondary work.

(2) *Benefits*

105 The UGC exception, which provides protection *ex ante* rather than *ex post*, **allegedly** increases certainty and creativity as its application is more straightforward.<sup>161</sup> For reasons elaborated below, this (illusory) "certainty" is likely to be overshadowed by many "uncertainties" generated from the undefined prerequisites.

(3) *Associated problems*

(a) Originality of UGC

106 Despite the support it receives, this requirement hinders rather than furthers the development of a robustly cultured public domain.

107 First, it must be recognised that the role of users in the creative process is *not* limited to *only* transformative use of pre-existing materials; it also includes their non-transformative use, which promotes creativity by generating "a shared cultural language".<sup>162</sup> The use of creative works, *albeit* non-transformative, could promote copyright goals in developing creativity.

108 While Canada requires merely "an exercise of skill and judgment" in the expression of an idea to qualify as original work,<sup>163</sup> this

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160 Copyright Act (RSC 1985, c C-42) s 29.21(1). See also Pascale Chapdelaine, "The Ambiguous Nature of Copyright Users' Rights" (2013) 26(1) IPJ 1 at 12.

161 Corinne Tan, *Regulating Content on Social Media* (London: University College London Press, 2018) at p 56; Niva Elkin-Koren, "Copyright in a Digital Ecosystem: A User Rights Approach" in *Copyright Law in an Age of Limitations and Exceptions* (Ruth L Okediji ed) (New York: Cambridge University Press, 2017) at pp 160 and 161.

162 Niva Elkin-Koren, "Copyright in a Digital Ecosystem: A User Rights Approach" in *Copyright Law in an Age of Limitations and Exceptions* (Ruth L Okediji ed) (New York: Cambridge University Press, 2017) at p 146.

163 *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339 at [24], *per* McLachlin CJ.



does not deny the fact that non-transformative uses which help develop a creative society are not protected by the UGC exception.

(b) Non-commerciality

109 It is unclear if the following satisfy this undefined requirement:

(a) directing profits irrevocably to a charity, or to the disseminator instead of the secondary user; and

(b) receiving only enough money to cover production costs.<sup>164</sup>

Concerns have been raised regarding intermediaries (such as Instagram) who might be able to exploit and generate substantial profits from seemingly non-commercially created UGC posted on their commercial platforms.<sup>165</sup> The fact that *someone* is commercially exploiting one's creative works without provision of any obligatory remuneration strikes a nerve,<sup>166</sup> and this remains unaddressed by the exception.

110 The fame or notoriety from the dissemination of UGC leading to commercial benefits may be entirely unanticipated<sup>167</sup> – is the secondary user to reject these benefits, then, if he wishes to continue relying on the exception?

(c) Substantial adverse effect

111 It is generally unclear where the courts will draw the line in recognising detrimental effects to the primary work.

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164 Marian Hebb, "UGC and Fan Fiction: Rethinking Section 29.21" (2014) 26(2) IPJ 237 at 240. See also Margot Patterson, "The Copyright Modernization Act and UGC" *Mondaq Business Briefing* (25 June 2012).

165 Hong Kong Legislative Council Panel on Commerce and Industry, *Public Consultation on Treatment of Parody under the Copyright Regime* (LC Paper No CB(1)516/13-14(03), 17 December 2013) Annex II at p 33.

166 Teresa Scassa, "Acknowledging Copyright's Illegitimate Offspring: User-Generated Content and Canadian Copyright Law" in *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Michael Geist ed) (Ottawa: University of Ottawa Press, 2013) at p 441.

167 Teresa Scassa, "Acknowledging Copyright's Illegitimate Offspring: User-generated Content and Canadian Copyright Law" in *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Michael Geist ed) (Ottawa: University of Ottawa Press, 2013) at p 441.

112 While it is understandable that substantial adverse financial effects ought to be avoided, it is less clear why other effects, such as reputational, are also prohibited.<sup>168</sup>

113 This provision also appears to contradict the fair dealing exception for parody and satire.<sup>169</sup> A parody is *generally* known as a “work that imitates the characteristic style of an author or a work for comic effect or ridicule”, and satire is *generally* defined as a work “in which prevalent follies or vices are assailed with ridicule”.<sup>170</sup> Parodies and satirical works are thus in their nature likely to lessen the attractiveness of the primary work – such potential to have both adverse financial and non-financial effect has been recognised by the US Supreme Court.<sup>171</sup>

114 The requirement is also, in practice, insufficient to protect the primary author’s interest: once the UGC is available on the Internet, it will be extremely difficult to remove it from circulation; market harm for the original work would have already occurred. It is not difficult to imagine a situation where the UGC goes viral on the Internet, causing the original author to lose a book deal or opportunity to license the original work.<sup>172</sup>

115 Given the inherent uncertainties, the author agrees that either more litigation over the exception will be instituted, or the creation of creative works will be chilled, to avoid incurring liability.<sup>173</sup>

(d) False pretences

116 If the conditions are not met, UGC may be forced to *pretend* to be something else which it is not – to fit within one of the purposes

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168 Cameron Hutchison, *Digital Copyright Law* (Canada: Irwin Law Incorporation, 2016) at p 160.

169 Copyright Act (RSC 1985, c C-42) (Can) s 29.21.

170 *Campbell v Acuff-Rose Music, Inc* 510 US 569 at 580 and 581 (1994), *per* Souter J.

171 *Campbell v Acuff-Rose Music, Inc* 510 US 569 at 592 (1994), *per* Souter J.

172 Marian Hebb, “UGC and Fan Fiction: Rethinking Section 29.21” (2014) 26(2) IPJ 237 at 243 and 240–241.

173 Teresa Scassa, “Acknowledging Copyright’s Illegitimate Offspring: User-generated Content and Canadian Copyright Law” in *The Copyright Pentology: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Michael Geist ed) (Ottawa: University of Ottawa Press, 2013) at p 442.

allowed.<sup>174</sup> Depending on the purpose(s) relied upon, different considerations apply to consider whether the dealing is fair. This is, in fact, a problem faced in Australia, where no such UGC exception is provided. Instead, to be afforded protection for “fair dealing”, UGC must attempt to fit into one of the allowable purposes or be denied existence from the outset, resulting in the loss of some socially useful and transformative works which may arguably further the interest of copyright in developing a creative society.<sup>175</sup>

(4) *Interim conclusion*

117 Any “certainty” arising from the UGC exception’s *ex ante* nature has been overridden by the inherent uncertainties arising from the same exception. These uncertainties in fact mirror some considerations discussed under the fair use doctrine.

118 Patterson has argued for the UGC exception to be incorporated into Canada’s fair dealing test, for which there are already established standards and framework to determine the fairness of such use.<sup>176</sup> However, the author agrees with the Australian Law Reform Commission that the social use of copyrighted material is best considered on a case-by-case basis, applying the fair use exception; attempting to prescribe types of social use that should not infringe copyright is unlikely to be beneficial.<sup>177</sup>

119 The UGC exception also suffers from both over-inclusivity (protecting UGC which may adversely affect the market for the original work, such effects manifesting only at a later time), and under-inclusivity (excluding non-transformative UGC which helps develop creativity).

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174 The eight purposes allowed are namely research, private study, education, parody, satire, criticism, review and news reporting: Graham Reynolds, “Of Reasonableness, Fairness and the Public Interest: Judicial Review of Copyright Board Decisions in Canada’s Copyright Pentology” in *The Copyright Pentology: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Michael Geist ed) (Ottawa: University of Ottawa Press, 2013) at p 10.

175 Bob Wright, “Fair Use Will Give the Digital Economy a Fair Go” (2014) 24 AIPJ 218 at 223.

176 Margot Patterson, “The Copyright Modernization Act and UGC” *Mondaq Business Briefing* (25 June 2012).

177 Australian Law Reform Commission, *Copyright and the Digital Economy: Final Report* (ALRC Report 122, November 2013) at para 10.109.

## VI. Proposed solution for Singapore

120 Take-down notices and end-user contracts are rapidly becoming the preferred method of “risk management” for copyright owners, despite the fact that in some cases they could override users’ ability to take legitimate advantage of the exceptions in the copyright system.<sup>178</sup> If Singapore does not act, the public domain could potentially be dominated by copyright owners with deep pockets engaging lawyers and sending cease-and-desist letters to social media users, eventually resulting in a decrease in creative works, both online and offline.

### A. *Exempting UGC’s liabilities under the fair use rubric*

121 The comparison of the US’s and Canada’s approaches reveals that the *ex post* fair use approach is more suited to balance interests of all stakeholders for UGC created on social media, on a case-by-case basis.

#### (1) *Adaptability*

122 An exception that is flexible in responding to technological and cultural change can avoid the risk of becoming practically irrelevant and widely ignored. Copyright laws that rigidly limit protection to contemporary forms of expression “would most assuredly stifle creativity”.<sup>179</sup>

123 An open-ended flexible approach like fair use will allow the doctrine to evolve over time, in the advent of technological change, “eliminating the need for a series of specific amendments ... whenever the march of technology begins to drag upon the current copyright machinery”.<sup>180</sup>

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178 Sophia Christou & Abi Paramaguru, “User-generated Content, Copyright and Fair Dealing” (2009) 12(4) *Internet Law Bulletin* 57 at 59.

179 Sophia Christou & Abi Paramaguru, “User-generated Content, Copyright and Fair Dealing” (2009) 12(4) *Internet Law Bulletin* 57 at 58; William Patry, “The Moral Panic over Fair Use” in *How to Fix Copyright* (New York: Oxford University Press, 2011) at p 227.

180 Sophia Christou & Alana Maurushat, “‘Waltzing Matilda’ or ‘Advance Australia Fair’? User-generated Content and Fair Dealing in Australian Copyright Law” (2009) 14 *MALR* 46 at 77. See also Australian Law Reform Commission, *Copyright and the Digital Economy: Final Report* (ALRC Report 122, November 2013) at para 4.3:

Law that incorporates principles or standards is generally more flexible and adaptive than prescriptive rules. Fair use can therefore be applied to new technologies and new uses, without having to wait for consideration by the legislature.

124 Canada's categorical approach, on the other hand, requires one to read the exempt purposes down to literal or highly prescriptive definitions to ensure that all possible UGC has been adequately considered. This will do no favour to creative and nuanced cultural engagement. By providing a "sweeping nod of approval" to all permitted UGC, Canada's UGC exception leaves no room for reconsideration of new facts and unique circumstances.<sup>181</sup>

125 While Canada's current suite of fair dealing exceptions parallels some established examples of fair use in US case law, they require legislative intervention for each new exception to be introduced.<sup>182</sup> Reactive legislative responses are intrinsically ill-suited to the pace of change.

126 Canada's approach also does not recognise that some transformative UGC, *albeit* commercially exploiting an original work, could further the goals of copyright. Instead, it forces commercially tainted UGC to fit within one of the permitted categories to be afforded protection from infringement liabilities.

(2) *Inherent uncertainty*

127 Admittedly, critics of fair use have consistently argued that its inherently uncertain nature could have a chilling effect on creativity, particularly on those who cannot afford legal advice or the risk of litigation. The end result is that these people will simply avoid using material that could have otherwise been, in fact, fair.<sup>183</sup>

128 It was further argued that permitting uses *ex ante* like Canada's UGC exception provides more certainty than exempting them *ex post*. This has, however, been shown above to be untrue: the requirements of "non-commercial use" and "adverse effect", in particular, made the exception even more uncertain as no absolute definition can ever be given.<sup>184</sup> The *potential* non-financial adverse effect on the market for the original work can also be quite easily alleged.

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181 Sophia Christou & Alana Maurushat, "'Waltzing Matilda' or 'Advance Australia Fair'? User-generated Content and Fair Dealing in Australian Copyright Law" (2009) 14 MALR 46 at 75 and 77.

182 Steve Collins & Sherman Young, "Fair Enough? How Technology and the Law Shape Creative Mashups" (2017) 30(3) *Australian Intellectual Property Law Bulletin* 46 at 48; Bob Wright, "Fair Use Will Give the Digital Economy a Fair Go" (2014) 24 AIPJ 218 at 228.

183 Australian Law Reform Commission, *Copyright and the Digital Economy: Final Report* (ALRC Report 122, November 2013) at para 4.118.

184 See paras 109–115 above.

129 Since uncertainty is inevitable in either codified UGC exception or the fair use doctrine, this argument should hold little sway against an open-ended fair use approach to address the problem of UGC.

130 As noted by the Australian Law Reform Commission, rules (like the UGC exception) are more specific and prescribed, while standards (like the fair use doctrine) are more flexible and allow decisions to be made at the time of application with respect to a set of facts. “Rules and standards are, however, points on a spectrum – rules are not infinitely precise, and standards are not infinitely vague.”<sup>185</sup> In fact, the Australian Law Reform Commission has taken (quite rightly) a different view: it considers the fair use doctrine to be “clear and principled”, and sufficiently certain in scope.<sup>186</sup>

131 Additionally, and mainly due to the evolving technological changes and changing users’ behaviours online, the law cannot accurately pre-empt, *ex ante*, what uses are fair – pre-emptive, highly prescriptive and clear definitions are simply not possible. In leaving the discretion to the courts to decide when a use is “fair” instead of prescribing, in advance, the permissible uses, the law is able to maintain some degree of flexibility in deciding the permissibility on a case-by-case basis, through the Judiciary.<sup>187</sup>

132 Further, litigation should not be viewed as entirely harmful. By clarifying the boundaries of copyright through litigation, the boundaries of the law are more clearly drawn for all interested stakeholders. Risk-averse practices may, in fact, in the long run, be detrimental to the copyright debate.<sup>188</sup>

### (3) *Coherence within copyright law*

133 Canada could have inadvertently landed itself in an awkward position. On the one hand, parodies and satire are allowed under their “fair dealing” provision even though they often aim at garrotting the original, destroying it commercially as well as artistically, thereby

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185 Australian Law Reform Commission, *Copyright and the Digital Economy: Final Report* (ALRC Report 122, November 2013) at paras 4.54–4.55. See also Emily Hudson, “Implementing Fair Use in Copyright Law: Lessons from Australia” (2013) 25 IPJ 201 at 211–213.

186 Australian Law Reform Commission, *Copyright and the Digital Economy: Final Report* (ALRC Report 122, November 2013) at para 4.6.

187 Maria Lilla Montagnani, “A New Interface Between Copyright Law and Technology: How User-generated Content Will Shape the Future of Online Distribution” (2009) 26 Cardozo Arts & Ent LJ 719 at 770.

188 Sophia Christou & Abi Paramaguru, “User-generated Content, Copyright and Fair Dealing” (2009) 12(4) *Internet Law Bulletin* 57 at 58.

causing an adverse non-financial effect on the market for the original work. On the other hand, such uses, even if non-commercial, may be disallowed under the UGC exception. This *awkward* contradiction is avoided in the fair use approach.

(4) *Adherence to international obligations*

134 Another hotly debated issue over Canada's UGC is whether it coheres with the Agreement on Trade-Related Aspects of Intellectual Property Rights<sup>189</sup> ("TRIPS Agreement").

135 The Berne Convention for the Protection of Literary and Artistic Works, the TRIPS Agreement and the World Intellectual Property Organization Internet treaties require member states to fulfil the "three-step" test: limitations or exceptions on copyright holders' exclusive rights shall be confined to (a) special cases; (b) which do not conflict with a normal exploitation of the work; and (d) which do not unreasonably prejudice the legitimate interests of copyright holders.<sup>190</sup>

136 In the US, the fair use doctrine is said to have complied with the "three-step" test. It seems unlikely that several countries which have adopted fair use or expanded fair dealing exceptions in recent years would have done so if fair use was incompatible with the "three-step" test.<sup>191</sup> The concern over the coherence with the TRIPS Agreement can therefore be avoided if the fair use approach is retained in Singapore.

(5) *Corporations' UGC could also be allowed*

137 Canada's UGC exception allows only *individuals* to be exempted for their UGC creations. This effectively bars corporations from participating in the creative process. While corporate users will *almost* always benefit commercially from their use of copyrighted work through brand building and establishing an online presence, it is not unimaginable that there may be uses which could be transformative

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189 Marrakesh Agreement Establishing the World Trade Organisation (15 April 1994) Annex 1C. Hong Kong, Legislative Council Panel on Commerce and Industry, *Public Consultation on Treatment of Parody under the Copyright Regime* (LC Paper No CB(1)516/13-14(03, December 2013) Appendix III; Peter K Yu, "Can the Canadian UGC Exception Be Transplanted Abroad?" (2014) 26 IPJ 177 at 192; Jojo Y C Mo, "The Copyright (Amendment) Bill 2014 in Hong Kong: A Blessing or a Curse?" (2017) 38(2) Stat LR 211 at 218.

190 Pascale Chapdelaine, "The Nature and Function of Exceptions to Copyright Infringement" in *Copyright User Rights: Contracts and the Erosion of Property* (Oxford: Oxford University Press, 2017) at pp 37-38.

191 Pamela Samuelson, "Possible Futures of Fair Use" (2015) 90 Wash L Rev 815 at 852; Niva Elkin-Koren & Orit Fischman-Afori, "Rulifying Fair Use" (2017) 59 Ariz L Rev 161 at 186.

enough (and thereby promote the goal of copyright to benefit the public by disseminating creative works) to qualify for protection. This problem can be adequately dealt with under the fair use approach by delicately weighing different and competing considerations on a case-by-case basis to assess if a UGC is worthy of protection.

**B. *Identical twin with a different personality***

138 Canada's UGC exception is inadequate to afford adequate protection as UGC often involves commercial benefits accruing to the user: to increase one's popularity online and for brand building. *Potential* adverse impact to the market for the original work is also something that may be difficult to identify with precision at the outset. The eventual outcome is little protection for UGC, as these works scramble to don the cloak of any of the allowed purposes under Canada's Copyright Act.

139 On the other hand, US's fair use doctrine seemed promising a solution until the lower courts started applying the abandoned presumption of commercial unfairness – giving commercial usage a free pass to trump fair use. The insistence with transformativeness in finding fair use also neglects non-transformative uses that help build a robustly cultured and intellectual public domain.<sup>192</sup>

140 It is at this juncture that one appreciates the position Singapore is in: without *implicitly* “worshipping” transformativeness and presumptively according commerciality an unfair advantage, Singapore's *ex ante* fair use approach affords the most protection to a fair amount of creative UGC. However, a little more tweaking is necessary before the provision is good to go.

**(1) *Removal of the fifth factor***

141 The public authorities in Singapore are correct in recommending the removal of the fifth factor. The removal of the fifth factor ensures that the “evaluation of market harm is not merely restricted to asking whether the work may be available at a reasonable commercial price”.<sup>193</sup> Instead, it balances market harm against the

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192 Niva Elkin-Koren, “Copyright in a Digital Ecosystem: A User Rights Approach” in *Copyright Law in an Age of Limitations and Exceptions* (Ruth L Okediji ed) (New York: Cambridge University Press, 2017) at p 146.

193 Peter Jaszi *et al*, American University Washington College of Law, Program on Information Justice and Intellectual Property, *Public Consultation on Proposed Changes to Singapore's Copyright Regime* (7 November 2016) at pp 2–3.



accompanying benefit(s) the secondary work achieves in furthering the goals of copyright.

142 Importantly, it accords with realistic users' behaviours and expectations on social media: that the sharing of copyrighted works happens at a fast pace.<sup>194</sup> Demanding that reasonable enquiries be made before sharing each image effectively runs against social norms and practices.

143 Such an approach is also faithful to the view of recognising fair use as a user's right. The Canadian Supreme Court, in a single decision in *CCH Canadian Ltd v Law Society of Upper Canada*,<sup>195</sup> elevated fair dealing from a limited exception that was viewed as largely ineffectual to a users' right that must not be interpreted restrictively and cannot be unduly constrained.<sup>196</sup> The necessary implication is that online users, who are also authors in the creative process, should not be unduly inhibited by strictly insisting that they enquire and pay for licences whenever they seek to access and use existing copyrighted work.<sup>197</sup>

(2) *Presumptively "fair" for private users*

144 The law should recognise that individuals in using copyrighted work as means of self-presentation and expression are sufficiently transformative to be afforded the protection of fair use. The original work has been repurposed – it is now used as a tool of self-expression. Courts should not insist on visual modifications to find a transformative use of the original work.

145 Private use that does not seek to commercially exploit the copyrighted work should be allowed if it is accepted that the user's right to fairly use the work is *on par* with the author's right to be rewarded.<sup>198</sup>

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194 Nicholas Carah & Michelle Shaul, "Brands and Instagram: Point, Tap, Swipe, Glance" (2016) 4(1) *Mobile Media and Communications* 69 at 72; Jennifer Golbeck, *Introduction to Social Media Investigations: A Hands-on Approach* (US: Syngress, 2015) at pp 159–161.

195 [2004] 1 SCR 339.

196 *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339 at [48], *per* McLachlin CJ; Michael Geist, "The Canadian Copyright Story: How Canada Improbably Became the World Leader on Users' Rights in Copyright Law" in *Copyright Law in an Age of Limitations and Exceptions* (Ruth L Okediji ed) (New York: Cambridge University Press, 2017) at p 182.

197 Niva Elkin-Koren, "Copyright in a Digital Ecosystem: A User Rights Approach" in *Copyright Law in an Age of Limitations and Exceptions* (Ruth L Okediji ed) (New York: Cambridge University Press, 2017) at pp 147–148.

198 Niva Elkin-Koren, "Copyright in a Digital Ecosystem: A User Rights Approach" in *Copyright Law in an Age of Limitations and Exceptions* (Ruth L Okediji ed) (New York: Cambridge University Press, 2017) at p 143.

(3) *Commercial use is not presumptively unfair*

146 First, a distinction has to be made between the “use value gained by the user and lost exchange value by the right holder”.<sup>199</sup> The former is free-riding and the latter, parasitic.

147 Christou argues that the focus is whether the reuse in particular cases harms the existing market for the copyright material (that is, whether it is a parasitic use), as this is, after all, at the heart of copyright’s protection of economic interests of the copyright owner.<sup>200</sup> Following her argument, UGC should not be denied existence *merely* because the user stands to gain commercially from the use if the original author would not have otherwise benefited from it. Christou’s argument is convincing if it is accepted that the more transformative the new work, the less the significance of other factors against fair use, like commerciality, will be. This acknowledges that the benefits of some highly transformative works, like those in *Authors Guild v Google, Inc.*,<sup>201</sup> could outweigh other factors, ultimately furthering the goals of copyright.

148 Therefore, even if commerciality is found, each case must involve a careful balancing of each fair use factor, having regard to all the circumstances and keeping in mind the goal of copyright in promoting creativity. As astutely pointed out, the commercial nature of the dealing is just one of many factors to be taken into account; the importance and significance of the commercial nature of the dealing will vary from case to case.<sup>202</sup>

(4) *No strict insistence on transformativeness*

149 If it is accepted that engagement in creative works could foster creativity in Singapore and promote a “robustly cultured and intellectual public domain”, then the lack of transformativeness should not prevent the finding of fair use, so long as the private users do not stand to gain any commercial benefits (direct or otherwise) from the use of the copyrighted work.

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199 Daniel Gervais, “The Tangled Web of UGC: Making Copyright Sense of User-generated Content” (2009) 11 Vand J Ent & Tech L 841 at 867.

200 Sophia Christou & Abi Paramaguru, “User-generated Content, Copyright and Fair Dealing” (2009) 12(4) *Internet Law Bulletin* 57 at 59.

201 804 F 3d 202 (2nd Cir, 2015).

202 *Global Yellow Pages Ltd v Promedia Directories Pte Ltd* [2016] 2 SLR 165 at [399], per George Wei J.

**C. Application to Instagram**

150 Applying the proposed four-factor fair use test to the three categories of Instagrammers, with the above argued presumptions and stripped of the US's idiosyncrasies, the result is as follows.

(1) *Private users*

151 Uses by private individuals are, more likely than not, transformative, as they are repurposed into means of expression and self-presentation for individuals, and for the building of virtual identities, even when there is verbatim copying of the copyrighted work.

152 Even non-transformative uses ought to be allowed, as they can further the goal of copyright by developing one's creativity. Such postings on Instagram are also unlikely to function as substitutes for the original work, given their lowered image quality when uploaded onto Instagram.<sup>203</sup>

153 Importantly, private users will not be required to expend time and resources on enquiring into reasonable licensing arrangements for the original work, and the analysis is not unfairly skewed towards economic considerations for the original creator.<sup>204</sup>

(2) *Business users*

154 Businesses seeking to increase their popularity and credibility to promote their brands and/or products must be viewed to have benefitted commercially, *albeit* indirectly, under the first factor.

155 Importantly, the existence of creative works by business users is not *presumptively* foreclosed because of the commercial exploitation of the copyrighted work. The success of raising a fair use defence will depend on a careful balancing of all the factors under s 35(2) of Singapore's Copyright Act. A stronger case of fair use could be made out, despite verbatim copying, if the original work is used to create highly transformative works, such as parodies or satire.

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203 Michael Zhang, "Instagram Resolution Increases: Here's How It affects Image Quality and File Size" *PetaPixel* (8 July 2015).

204 Peter Jaszi *et al*, American University Washington College of Law, Program on Information Justice and Intellectual Property, *Public Consultation on Proposed Changes to Singapore's Copyright Regime* (7 November 2016) at p 2.

(3) *Celebrities*

156 Celebrities should be careful of engaging in self-expressive conduct with copyrighted works, as such conduct will inevitably accrue some indirect commercial benefits to them, in the form of increased popularity or even mere well-knownness.

157 Like business users, their posts will not be regarded as presumptively unfair simply because of the commercial benefits involved, but such benefits will be considered alongside other fair use factors, in light of the purposes of copyright.

**V. Conclusion**

158 Copyright must evolve to recognise contemporary notions of authorship, creative possibilities and a 21st-century reality of online social networking that is fast becoming the new norm. With the dramatically increased scale and distributive scope of works in this digital era, the author agrees that copyright should encourage a potential golden age of cultural creativity rather than constrain those possibilities.<sup>205</sup>

159 To the extent that the Court of Appeal recently endorsed the “creative spark” doctrine, stating that there must be an authorial creation that is causally connected with the engagement of the human intellect for copyright to subsist,<sup>206</sup> this indicates an inclination towards building a “robustly cultured and intellectual public domain”, in line with the position this article advocates: stimulating creativity with creative works. In the event a private user is hauled to court for infringing a copyrighted work, before any legislative intervention for UGC, it is likely that any non-transformative use will *not* be considered fair; even if the user does not derive any commercial benefits, due to the need to make reasonable enquiries and attempt to obtain the work on reasonable terms.

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205 Steve Collins & Sherman Young, “Fair Enough? How Technology and the Law Shape Creative Mashups” (2017) 30(3) *Australian Intellectual Property Law Bulletin* 46 at 49; Debora J Halbert, *The State of Copyright: The Complex Relationship of Cultural Creation in a Globalised World* (Oxford: Routledge, 2014) at p 197.

206 *Global Yellow Pages Ltd v Promedia Directories Pte Ltd* [2017] 2 SLR 185 at [24], per Sundaresh Menon CJ; *Feist Publications, Inc v Rural Telephone Services Co, Inc* 499 US 340 at 345 (1991), per O’Connor J.

160 Regarding the third parties' (social media sites) profiting from the dissemination of the UGC,<sup>207</sup> this is an issue to be debated another day. The author will only go so far as to say that social media has become an inevitable part of the cultural landscape. Providing users with tools to engage with creative works on more than a merely consumptive level encourages creativity. Any attempts to legislate or prosecute this behaviour out of existence will only serve to create an adversarial relationship between the users, authors and the disseminators.<sup>208</sup>

161 Regrettably, in the latest copyright reform public consultation in Singapore, the potential effects of UGC were not considered. The author hopes that this article will spark debate in Singapore in deciding the level of protection to be afforded to UGC, if at all.

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207 See Sophia Christou & Abi Paramaguru, "User-generated Content, Copyright and Fair Dealing" (2009) 12(4) *Internet Law Bulletin* 57 at 59 and Debora J Halbert, *The State of Copyright: The Complex Relationship of Cultural Creation in a Globalised World* (Oxford: Routledge, 2014) at p 197.

208 Amber Westcott-Baker, Rebekah Pure & Christopher Seaman, "Copyright Law and the Implications for User-generated Content" (2012) 3(1/2) *U Balt J Media L & Ethics* 171 at 192.