

Key online copyright issues

The rapid evolution of the internet exemplified by the Web 2.0 phenomenon brings new challenges, in particular for rights owners struggling to police the vastness of the web and cope with the exponential replication of content

By **Simon Corke** and **Catriona Smith**,
Rouse Legal, London

It is hard to remember – or for younger generations, to imagine – the world without the internet. As its popularity increases, so too do the challenges it poses. The internet knows few borders, opening up a sea of information in just a few keystrokes. Many believe that it is this very openness which gives it its strength. Yet this easy accessibility leads to unprecedented legal issues and difficult conflicts between the rights of the user and those of the content provider.

The latest phase in the development of the internet has been dubbed Web 2.0. In Web 2.0 the creation of material or information online is as much a part of a user's experience as the finding or viewing of data was before. Previously, the internet was a one-way medium made up of isolated information, static websites and search engines in which the user surfed from one site to the next. Web 2.0 is more dynamic and interactive, combining sources of content with increased functionality. Many Web 2.0 platforms allow for mass publication. Open communication, the decentralisation of authority and the freedom to share and re-use web content are pervading features of Web 2.0 platforms. By their very nature, these features lead to a variety of conflicts with copyright owners.

To understand the copyright issues more easily, it is important to understand how the modern internet works and how users interact with each other today.

Web 2.0

End users now use digital media technologies such as digital video and blogging. The content they create is known as user-generated content (UGC). UGC forms an intrinsic component of the Web 2.0 environment.

In 2006, the value of UGC websites was confirmed by Google's US\$1.6 billion purchase of YouTube, one such site. The majority of UGC sites allow users to upload content onto the site where it is made generally accessible to other users. Websites that host or enable the creation and distribution of UGC include:

- Blogs (short for web logs) – online journals with entries in reverse chronological order. The entries might consist of commentary in written, video or graphical form. Examples include blogger.com and livejournal.com.
- Wikis – the most famous example is Wikipedia, the online encyclopaedia. Users can amend and contribute collectively to the content.
- Social networking sites – users have their own pages where they can add contacts to their network; post material and blogs; send individual messages or post bulletins to all their friends; and join groups of users with common interests. Perhaps the best-known social networking sites are MySpace and Facebook.
- Aggregation/social bookmarking sites – these sites seek to gather, link to and index content on the web by themes based upon user recommendations, coupled with a social network to share

content. Examples include Digg and Stumbleupon. MySpace also arguably straddles this category.

- Virtual worlds/MMORPGs (massively multiplayer online roleplaying games) – users download software to enter and engage in virtual worlds or games. Second Life and World of Warcraft are, respectively, perhaps the most popular virtual world and MMORPG.
- File sharing sites – these provide and receive digital files over a network, usually following the peer-to-peer (P2P) model, where the files are stored on and served by the users' personal computers. Examples are Napster, Kazaa and YouTube.

Infringement of copyright in UGC

UK and other copyright laws prevent parties from dealing with protected works without the copyright owner's permission. Protected works include literary works (eg, written works such as news stories and tables of information), films, musical works (eg, pop songs) and artistic works (eg, photograph and paintings).

UGC will often be protected by copyright in its own right. However, UGC can also include copyright works of third parties. If the user has not obtained consent to include the works in UGC, the user may be liable for copyright infringement.

Despite the law, copyright owners face an uphill battle in protecting their copyright works from unlawful reproductions. Users often neither know nor care that the work they are uploading is protected by copyright. And the spread of content on the internet is so rapid that trying to track down and stop every individual example of copyright infringement is a hopeless task.

In the context of UGC, the principal ways in which copyright can be infringed are where, without permission:

1. A user creates content that reproduces all, or a substantial part of, a third party's copyright work.
2. A user uploads and/or distributes content comprising all, or a substantial part of, a third party's copyright work.
3. A third party (eg, a UGC site owner) authorises a user to create, upload or distribute all or a substantial part of a third party's copyright work.

Creation of infringing content

Some virtual worlds, such as Second Life, enable users to create digital versions of a huge range of items from clothing to

architecture. The rate of creation of such UGC content can be startling. For example, residents in Second Life are reportedly creating over 7 million lines of computer code a week. Reproductions of copyright material are frequent, often without permission. These sites present new challenges, and opportunities, for copyright owners.

Uploading and distribution of infringing content

Many Web 2.0 sites, such as social networking sites, post unauthorised copyright material, mainly music videos and photographs. Because so many people interact on these sites, one unauthorised reproduction may be copied by thousands of individual users as they each copy the work to their own networks, spiralling rapidly beyond control.

This process is not necessarily limited to UGC content alone. Use and distribution of potentially infringing Web 2.0 applications can spread equally swiftly. For example, Scrabulous, an online game with similar features to Scrabble invented by a pair of Indian brothers, appeared on Facebook. Facebook blocked users from accessing Scrabulous after suits were brought in the US, and more recently in India, by the Scrabble copyright owners. Scrabulous was reportedly one of Facebook's most popular applications, with around 500,000 players.

Authorising the creation, uploading or distribution of infringing content

UGC site operators could also be authorising the infringements of their users by providing them with the means to upload infringing content and to stream or download that content (resulting in further copies being made). Additionally, there is some US authority that knowingly linking to infringing copyright material can constitute copyright infringement. As it is far easier for copyright owners to identify and enforce their rights against operators rather than the end users of UGC sites, this has led to a number of tensions.

There are several high-profile examples of suits brought on the basis of authorisation of users' copyright infringements by UGC site owners and ISPs. Universal Music has sued MySpace in the US for music videos posted on its site by users without permission, claiming that MySpace "encourages, facilitates, and participates in" the unauthorised reproduction of copyright works.

Meanwhile, Viacom and the English FA



Simon Corke
Assistant manager
Rouse Legal, London
scorke@iprights.com
+44 20 7536 4100

Simon Corke is a solicitor with Rouse Legal working on a range of IP disputes, with an emphasis on soft IP infringements on the internet, including domain name dispute resolution. He is also extensively involved in international IP enforcement programmes for a number of leading brand owners.



Catriona Smith
 Consultant
 Rouse Legal, London
 csmith@iprights.com
 +44 20 7536 4100

Catriona Smith was a partner in the IP group at Allen & Overy for over 15 years, specialising in IP/IT disputes, before joining Rouse in 2008. She has a number of legal firsts on her CV – including gaining the first European-wide Community trademark injunction in the UK, in a case concerning Viagra (*Pfizer Ltd v Eurofood Link (UK) Ltd*) and handling the first UK case on unregistered Community design rights (*Mattel v Simba*). Her experience spans a wide range of dispute resolution disciplines, across all areas of IP.

Ms Smith is based in Rouse's London office, using her experience to foster and develop the legal skills of the Rouse team.

Premier League are both suing Google in the US in respect of unauthorised copyright material uploaded by YouTube users. The FA Premier League accuses Google of not implementing available filtering technologies. In these and similar cases, ISPs and UGC website operators are likely to try to rely on the safe harbour provisions available in the US under the Digital Millennium Copyright Act and in Europe under the 2000 E-commerce Directive. Broadly speaking, the operators seek to claim that they are mere hosts and are not actively endorsing the infringements. However, this is not always possible, leaving the operators vulnerable to claims and increasing the tension with the copyright owners which would find it impossible to track down and sue every end user.

Hosting protection

The EU's E-commerce Directive grants hosting immunity against criminal liability and damages (but not against injunctive relief) to website operators provided they:

- Do not control the user.
- Are not directly involved in the user's activities.
- Do not have actual knowledge of unlawful activity or information.
- Are not aware of facts or circumstances from which unlawful activity or information is apparent.
- Remove or disable access to infringing content expeditiously once becoming aware of its presence.

The problem for UGC site owners is that these exemptions were intended to apply to activity that "is of a mere technical, automatic and passive nature, which implies that the ... service provider has neither knowledge of nor control over the information which is transmitted or stored" (Recital 42). Thus, the presence of interactive functions automatically generated by a site, the authority to take down content or the use of monitoring and filtering systems may make the defence unavailable.

In practice, the approach of European courts has varied. For example, in recent French cases Google benefited from the exemption where it had removed content expeditiously. By contrast, in Germany, Microsoft was not entitled to hosting protection because it had embedded the UGC into related content on its MSN discussion forum board. In the absence of clear ECJ authority, such divergence of approaches is likely to continue along with the associated uncertainty.

Mere conduit defence

The E-commerce Directive protects a service provider which transmits information provided by a recipient and gives access to a communications network, provided that the service provider does not initiate the transmission, select its receiver or modify the transmission. There is a similar exception in UK copyright law for the making of temporary copies. These exemptions could be harnessed by file-sharing service providers, such as BitTorrent, that retain no control and are careful not to encourage infringement. In these circumstances, unless a rights holder can show that such sites are specifically inducing infringement, it will be difficult to take action.

In the context of peer-to-peer file sharing, without evidence of inducement or authorisation, the music and software industries have resorted to taking action against end users involved in extensive infringement. By making examples of individual users, these industries hope to create a deterrent effect and raise public awareness. The downside of this tactic is the negative press that can follow. Nevertheless, a recent case brought by a software developer against a British woman who uploaded a computer game onto a file-sharing network resulted in an award of £6,000 for damages and £10,000 costs.

In a separate approach, copyright owners are trying to force ISPs to block access to offending sites, either voluntarily or through the courts. In Denmark recently, ISP Tele 2 was ordered to prevent access to Allofmp3.com, a Russian file-sharing site which was holding content belonging to members of IFPI, the recording industry representative. In Belgium, an order was granted against ISP Tiscali, giving it six months to block or filter infringing material belonging to members of Sabam, the authors' and composers' representative. Similarly, in a case in China involving this firm, an appeal court held Yahoo! China liable for not removing all links to music tracks which to its knowledge, were protected by copyright, wherever they were on the web, and whether or not IFPI was able to give it details of the relevant sites.

Against this background, UGC site owners are trying to legitimise their content – for example, by signing deals with the content providers and music collecting societies, and through the introduction of technical means to catch online infringements.

As a further example of this new collaborative approach, a group of media and

UGC companies – including CBS, Disney, Microsoft, MySpace and Viacom – recently released a set of principles for UGC content services aimed at reducing infringement on UGC sites. The companies aim to educate users, to cooperate to stop infringements occurring and to bring them down when they do through a combination of shared information, technical means and agreed takedown procedures. If a UGC site has adhered to the principles in good faith, the copyright owners have agreed that they will not bring a claim against it.

In the UK, the British Phonographic Industry (BPI) is lobbying ISPs and those who provide access to broadband services to do more to combat copyright infringement occurring through use of their networks, in particular through illegal file sharing. The BPI is currently working with ISPs such as Virgin Media on a postal warning campaign. Letters are sent to account holders who have engaged in illegal file sharing, threatening that their broadband access could be cut off. Whether these threats are carried through, however, remains to be seen. The ISPs are very aware of views expressed by, for example, human rights and consumer interest groups concerned to preserve users' freedom of access to information. Such groups also resist making it easier for ISPs to disclose personal details of broadband account users on grounds of protection of privacy. There is therefore a tension between the privacy rights of Web 2.0 users and the rights of copyright owners, as the ISPs may be the only people who can identify alleged infringers.

The movement to place more of the responsibility and costs of policing the internet on ISPs' shoulders is resisted by the ISP Association, which sees ISPs' as "mere conduits" and questions their technological capability to monitor and filter the massive volumes of data passing across their networks.

Notwithstanding this view, the UK government is considering legislating to force ISPs to monitor traffic and terminate the accounts of file sharers caught engaging in such activities unless ISPs propose a voluntary arrangement for self-regulation. The government will have to tread a cautious line between the rights of copyright owners and those of users, balancing the data protection and privacy rights of those who may be innocent against the need to prevent widespread copyright infringement. If they go too far, they may meet with protests from the ISPs, who will be fearful of losing their protection under the E-commerce Directive and, indeed, their

ability to run their businesses effectively. If they do too little, they will meet with protests from the copyright owners whose rights are being damaged – a true political nightmare.

Conclusion

While UGC website operators may not, in practice, be able to rely on safe harbour provisions (eg, the protection for hosts), many nevertheless observe takedown procedures and set out in their terms and conditions the procedures in place for notification of infringing content and takedown. Accordingly, the primary method of enforcement for copyright owners against infringing Web 2.0 content remains the issue of takedown notices to site operators and ISPs, with infringement actions reserved for large-scale and/or repeat infringers.

Mounting pressure from government and industry looks increasingly likely to draw ISPs into the fight against online infringements in a proactive policing capacity. Exactly how this can be reconciled with the safe harbour provisions of the existing European legislative framework remains to be seen.

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Rouse Legal

11th Floor, Exchange Tower
1 Harbour Exchange Square
London, E14 9GE, UK
Tel: +44 20 7536 4100
Fax: +44 20 7536 4200
www.iprights.com