

User production and law reform: A socio-legal critique of user creativity

This paper offers a cultural and legal critique of an emergent actor in today's digital economy: the user. Existing research has identified the rising importance of the user, arguing that changing user practices radically challenges serial modes of production, which typified the nineteenth and twentieth century (see Benkler 2006; Bruns 2008a, 2008b; Jenkins 2006; Leadbeater and Miller 2004). This work provides useful analyses of the potential political impacts of user production (Benkler 2006) and presents detailed accounts of user practices in operation (Bruns 2008a, 2008b). However, "user" is not just a descriptive term. It is also a political term and implicated in specific legal and cultural histories. I argue that the term "user" itself can no longer be simply presented as a neutral actor in the contemporary digital moment. Instead, the use of the term user must be examined within specific legal and cultural contexts, allowing us to explore *how* particular individuals or groups get to be called users and the wider implications of these cultural and legal delineations.

In the following article, I begin this process by conducting a critique of existing literature around the user, following a body of work (see Hamilton 2014; van Dijck 2009) that examines a tendency towards technological determinism evident in accounts of contemporary user production. I then offer a new perspective on the user by exploring how the Canadian jurisdiction has interpreted the user through copyright law. Instead of looking at the user purely in terms of its practices (see Bruns 2008a, 2008b), I assess how the user has been considered and shaped legally in a specific jurisdiction. Finally, I offer a detailed analysis of the user-generated content provision, recently introduced in Canada, which attempted to address the emergence of user production. Through a careful analysis of this reform I complicate current scholarly accounts of user production and outline alternative ways to approach the user with respect to law. This process resolves some of the conceptual and legal challenges posed by contemporary attempts to locate creative agency in the subject of the user.

Understanding the user: Current scholarly interpretations

The contemporary concept of the user has been tied to the emergence, and subsequent mainstream use, of web 2.0 platforms. For a number of scholars these platforms represent a radical change in media production and consumption and

challenge traditional institutional understandings of users and their role in creative production (Benkler 2006; Bruns 2008a, 2008b; Jenkins 2006; Lessig 2008; Shirky 2008). Yochai Benkler (2006, p. 276) outlines the fundamental premise of this stance, arguing that the current digital environment has allowed people to take a more active role in culture, with the “radically declining costs of manipulating video and still images, audio, and text ... qualitatively [changing] the role individuals can play in cultural production”. Clay Shirky (2008) echoes this approach, suggesting that the greater agency provided to everyday people challenges institutionally sanctioned forms of creation and information such as journalism. For the above scholars, “[t]oday’s users of information” are no longer simply “readers and consumers”, but are also positioned as “today’s producers and tomorrow’s innovators” (Benkler 2006: 38).

These identified cultural trends have led to a significant amount of theoretical work as scholars explore the apparent introduction of creative agency into the passive role of the user. Subsequently, the term “user” has been assaulted with neologisms as various parties attempt to come to grips with the changing cultural landscape. Some of the more prominent attempts to describe these practices include consumer co-creation (Potts et al. 2008), user generated content (UGC), produsage (Bruns 2008a; 2008b) and “pro-ams” (Leadbeater and Miller 2004). Each term differs in their approach to the user. For example, Charles Leadbeater and Paul Miller (2004: 20) describe the “pro-am” as someone who “pursues an activity as an amateur, mainly for the love of it, but sets a professional standard”, whereas UGC is regularly “imagined as a disruptive, creative force, something spontaneously emerging from the creativity of individual users” and largely defined in opposition to “professionally produced content that is supported and sustained by commercial media businesses or public organizations” (Lobato, Thomas and Hunter 2011: 900). In spite of these minor definitional variables, all of these categories attempt to speak to the uncertain interactions between creativity and the user, and have gained purchase within both academic and policymaking circles (see Wunsch-Vincent and Vickery 2007).

There is much to like about this body of research about the growing importance of the user. It clearly identifies new forms of media engagement and takes the first step towards considering its potential implications. Axel Bruns’ (2008a) explanation of his term ‘produsage’ for example, usefully outlines a series of notable features of

online creativity. He identifies the emergence of community-based production models online, actors taking on fluid roles within these collaborative online communities as well as corporate companies engaging with ‘user-led’ (Bruns 2008b: 6) content creation. Benkler (2006: 27) offers a similar foundational intervention, suggesting that ‘peer production’ will “allows us to renegotiate the terms of freedom, justice, and productivity in the information society”. However, these projects are broad in both their scope and aims and therefore must be considered accordingly. Further research is needed in order to provide specificity to these accounts of the user in order to fully understand its role and function in a contemporary networked environment.

As an initial point of departure, it is worth noting the tendency in the literature cited above, to approach the question of the user in “bipolar” “hybrid” terms such as “produser” or “co-creator” (van Dijck 2009: 42). van Dijck (2009: 42) notes that these terms fail to capture the complexity of user agency and calls for scholarly work, which can account for a “media environment where the boundaries between commerce, content and information are currently being redrawn”. Despite the historical grounding offered in some of the aforementioned accounts (see Bruns 2008b), van Dijck (2009) identifies a strain of technological determinism in the majority of the literature, where the passive audience of the industrial age is compared to the active users of the present and future. In contrast, she notes that “[u]ser agency ... encompasses a range of different uses and agents” and in light of the current media environment, questions the presumption that “amateurs or volunteers will gain more control over the monetization (or moderation) of their immaterial labour” (van Dijck 2009: 54).

This call for a more nuanced account of the user is also taken up by James Hamilton (2014) who outlines a longer history of user production, moving beyond the work of the oft-cited Alvin Toffler (1970), to instead consider contests, the crowdsourced research of Francis Bacon and activist media amongst other examples. He suggests that a more complete history of user production would present a significant challenge to some of the political claims made about the role of user production today. Bridget Griffin-Foley (2004: 545) offers a similar historical account of user engagement arguing that “media producers have been blurring the notion of the passive media consumer for more than a century”. Her research also suggests that a

more nuanced approach towards user production is in order, one that can position these recent contemporary changes within a longer historical trajectory, rather than simply claiming “a break with the past” (Darnton 2001: 1).

Collectively, these claims underline the fact that there is much more to be learnt about the user and its role and function today. Existing work on the user has been influential in media studies and law, offering an important foundational analysis of a range of new media practices. But it is clear that we must consider the user with greater nuance. This article contributes to this further examination of the user by critical analysing these various cultural discourses around the user and considering them in relation to copyright law. In so doing, I suggest that any deeper examination of the user requires a serious engagement with legal frameworks that may implicate the user or otherwise contribute to its wider cultural framing. While copyright law is discussed generally in the existing literature (see Jenkins 2006; Bruns 2008a, 2008b; Benkler 2006) there is scope for a more nuanced examination of how cultural and legal discourses help to define and shape the user.

Existing legal scholarship has examined these emergent digital media practices extensively and a valuable scholarly discourse around remix culture is prevalent in the literature. This research (see Fitzgerald and O’Brien 2005, 2006; McLeod 2005; McLeod and DiCola 2012; Lessig 2008) makes a strong case that current legal frameworks are unable to deal with these new creative practices and the Internet’s distinctive networked infrastructure. These scholars argue that strict interpretations of copyright law set out a strictly dichotomous relationship between author and user, which is increasingly weighted in favour of authors (see Litman 2001). They suggest that this approach to creativity is increasingly becoming untenable in an era of recognised user production. But in a sense, this literature misses a step. Before we can legislate for the user, we need to know who the user *is* and there has been a distinct under-theorisation of the user in copyright law scholarship. Although the term “user” is deployed regularly in the literature (see Benkler 2000, 2006; Cohen 2005; Gibson 2006) to describe “those who, access, purchase and use...copyrighted works” (Liu 2003, p. 400) current concepts of the user deployed in scholarly studies of copyright law (see Benkler 2006; Boyle 1996; Lessig 1999, 2002) have been criticised as conceptually weak and underdeveloped (Cohen 2005). Furthermore,

within law, the user as a concept is yet to be fully developed or articulated (see Cohen 2005; also Gibson 2006; Liu 2003).

This article is committed to offering a situated account of the user in law. It does so by exploring how a particular politics of creativity emerges around the user through a careful analysis of how these emergent cultural discourses have engaged with existing notions of the user already present in copyright law. In so doing, this analysis critiques existing accounts of user production and suggests that this discourse can actually entrench problematic tendencies within the common law doctrine of copyright. Amateurism is prized throughout these narratives but too often terms like “user generated content”, suggest a preference for seeing particular types of creation as “non-authorial”, reinforcing existing creative and corporate power structures within law. This argument will be developed in the following analysis of how the user is conceptualised in Canadian law and my subsequent examination of the user-generated content provisions introduced in the recent Canadian Copyright Modernization Act.

Approaching the user in Canadian law

As this article is focussing on the Canadian jurisdiction, I will begin by detailing how Canadian law has understood the user. However, for comparison’s sake I will also outline the U.S. fair use principles, which are viewed internationally “as a more robust vehicle for users” and envied by many “common law copyright reformers” (D’Agostino 2008: 314). By analysing these provisions, I will outline how law conceptualises the subject of the user. I suggest that that statutory law recognises a user; it just happens to be a particularly specific concept of the user formulated through the lens of copyright owner interests. This leads to a fundamental disjuncture between the conversations and conceptualisations of the user occurring at a cultural level, and the reality of how the user is actually understood within law. The tensions that emerge as current scholarly conversations around user production are translated into law, underline some of the problems in the current discourse around the user.

The user in Canadian law: Moving beyond fair dealing

In Canada, users are granted specific rights in relation to the use and reproduction of copyrighted works under ss 29 and 29.1 of the *Canadian Copyright Act*, through a

series of fair dealing exceptions. Under these exceptions, Canadians are able to use or reproduce copyrighted works without permission for the purposes of research, private study, education, parody, satire, criticism, review or news reporting (Katz 2013). The above exceptions to copyright law are exhaustive, which means that in order to avoid potential prosecution for copyright infringement, users are required to make sure their use falls in to one of the exceptions listed above. There are two stages to assessing whether a use is fair: “first, whether the intended use qualifies for one of the permitted purposes, and second, whether the use itself meets the fairness criteria” (Geist 2013: 158). There are benefits and limitations to this legal framing of the user. The benefit is that users have a clear set of provisions outlined and are able to assess whether or not they can “use” copyrighted content. However, the corollary of this approach is that unless copyright law has anticipated a use, it is considered infringement. This means that the legal framework is relatively inflexible and unable to respond quickly to technological advances and changing user practices.

In addition to the fair dealing exceptions, a range of further exceptions and statutory provisions help to frame the concept of a user in Canadian law (see Geist 2013). A prospective user is able to use ideas, which are unable to be copyrighted, use a less than substantial part of a copyrighted text, use work which has fallen out of copyright or use material for purposes covered by statutory licenses, pursuant to a fee paid to the copyright holder. There are a number of provisions that allow institutions such as libraries or universities to reproduce works for archival or educational purposes suggesting that law views public institutions like libraries as a representative space for ordinary users, where the public can access information easily and at limited cost. Canadian users can also copy for private purposes, time-shift content and engage in temporary copying. Finally, there is an exception for user-generated content, which will be discussed in more detail later in this article.

It is worth noting that legal reforms and a series of recent judicial decisions have significantly reshaped the Canadian user. Many of the agencies granted to the user outlined above, have only been recently introduced into Canadian law such the addition of parody, education and satire defences to the fair dealing exceptions and the exceptions relating to user-generated content, copying for private purposes, time-shifting and temporary copying (Katz 2013: 94). These changes have offered greater flexibility to the user in copyright law, echoing reform trends found in Australia, the

United Kingdom and Israel. In addition, in 2004 a landmark case - *CCH Canadian Ltd. v Law Society of Upper Canada* - saw the Supreme Court of Canada judicially affirm exceptions to copyright law as “user rights”, which needed to be actively protected by giving fair dealing exceptions “a large and liberal interpretation” (Reynolds 2013: 25). This decision was supported by a group of Supreme Court decisions on 12 July 2012, which confirmed a broad user-friendly interpretation of fair dealing would be in operating in Canadian jurisprudence.¹

These legislative reforms pursued by the Canadian Government as well as the nuanced interpretations of copyright law undertaken by the Supreme Court, have presented a legal landscape for users that has been radically reshaped. Indeed, for many scholarly commentators, Canadian law has taken a radical step beyond current other Commonwealth countries in respect to user rights. While it is still assumed that the use of copyrighted content must carry a clear public benefit, there are now a range of broadly constituted available defences for Canadian users, in contrast to other common law countries. Ariel Katz (2013: 94) has gone so far as to name this trend “Fair Dealing 1.9” suggesting that the “the colonial copyright past that Canada inherited is not quite as burdensome as it is commonly perceived to be”. Michael Geist (2013: 176) goes further and suggests that “Canada now has a fair use provision in everything but name only”. However, as a brief discussion of fair use in the United States outlines, a functioning fair use doctrine does not necessarily mean that a wide set of agencies is automatically granted to the user.

The United States User: Fair Use

The United States takes a different approach from the specific rights granted to an Canadian user and instead has a fair use exception, which allows use and reproduction “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research” (Copyright Act 1976 (U.S.) §107). Unlike Canada’s clearly delineated exceptions, these examples are illustrative rather than exhaustive. Legislation sets out four factors, which will be used to decide whether the use is deemed fair if challenged:

¹ Due to my focus on UGC and its relationship to existing cultural discourses, a substantial legal analysis of these decisions is not within the scope of this article. I recommend X for a detailed account of the set of these decisions.

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

This doctrine, which was codified in the Copyright Act 1976, favours transformative works (Cohen 2005) and arguably gives users in the United States a slightly broader scope to use copyrighted material in comparison to Canada.

Despite the apparent breadth of US fair use, a number of substantial problems are associated with the operation of the exception. There are “gaps, overlaps, ambiguities, and inconsistencies in the statutory text” (Madison, 2005: 391), which create a range of problems in implementation and these have been addressed by a substantial body of literature (Fisher III 1988; Gordon 1982; 1992; Hilderbrand 2009; Tushnet 2004). I will attend to a handful of the most obvious issues. The first important issue to note is that the derivative work right - factor four - allows rights holders to potentially hinder “interesting, creative, and culturally significant reuses of their works” (Tushnet 2004: 545) if it is judged that these reuses have a negative effect on the rights holders market. Copyright holders have regularly relied on a broad interpretation of this fourth factor to challenge content, which has drawn directly on copyrighted works. Rebecca Tushnet (2004: 544) explains:

An influential court decision held that sampling, defined as quotation from sound recordings in new songs, was “stealing” even though the resulting work contained a large amount of original material. Another court found that a book of Seinfeld trivia questions, containing material largely created by the authors and not by the producers of Seinfeld, was an infringing derivative work. The same thing happened to *The Cat NOT in the Hat! A Parody by Dr. Juice*, a commentary on the O.J. Simpson murder trial written and illustrated in the style of Dr. Seuss.

The broad scope of fair use at first glance obscures the difficulty of defending use, and articulating why your use should be considered “transformative” and not “derivative”. The general trend of U.S. case law, particularly in major decisions, is to support the rights of existing copyright holders instead of taking a more generous interpretation of the exceptions as Tushnet (2004) notes above.

Michael J. Madison (2005: 393 - 394) outlines a complementary series of “problems” around fair use that shed further light on the underlying issues surrounding these exceptions. Madison argues that in an ideal situation under fair use all “productive” use - for example, documentary makers using copyrighted audio and video excerpts - would be seen as legitimate use. Similarly, any personal use (such as time-shifting content), and creative personal use - for example editing objectionable content from a text for personal use - would also be allowed (see Madison 2005). However, Madison notes that in all three situations, the doctrine of fair use is unclear and often unhelpful in formulating viable defenses for these actions. Exactly what constitutes “productive” use, how personal use should be construed and when creative personal use becomes derivative is entirely unclear and law lacks both clear criteria and vocabulary to contribute to solving these problems. As Madison (2005: 401; also see Hilderbrand 2009) explains the “[c]ourts have failed to build a common law of fair use, one that consists not merely of many cases applying a common rule, but instead a cluster of cases in which judges are listening to, echoing, and responding to one another in articulating their senses of the law.” This leaves the United States as a country with a long history of fair use and an abundance of fair use theory but no coherent body of fair use law, perhaps explaining the problematic trend towards refusing to acknowledge transformative works outlined above.

The final point to make is that a defense of fair use can also be expensive. U.S. Copyright Law provides theoretical support of fair use but in practice, users cannot effectively rely on fair use as a legal defence (see Lessig 2004). There are significant financial costs involved with any attempt to defend use as “fair”, especially as any re-used content of significant or potential value can draw legal action from well-resourced corporations. As Lawrence Lessig (2004: 107) explains, this leaves the user with two options:

You either pay a lawyer to defend your fair use rights or pay a lawyer to track down permissions so you don't have to rely upon fair use rights. Either way, the creative process is a process of paying lawyers—again a privilege, or perhaps a curse, reserved for the few.

As fair use is a reactive defence to copyright infringement, it can leave the user in a financially perilous position if they lose their case.

Constituting the user under fair use and fair dealing

Subsequently, we can say that Canadian copyright law and the statutory law of the United States presents us with a visible but still under-theorised user. Both legal frameworks suggest a subject that at times needs to operate outside the economic structures of copyright law. This subject of the user - as well as engaging in the economic contract that largely underlines copyright law - needs to be able to engage in particular forms of non-economic use for the general good of society, or the public interest. However, it is clear that both models limit the agency of the prospective user through their practical operation. Canadian copyright law positions the user in statutory law quite specifically and has only started to offer a broader conceptual framing of this subject. Alternatively, the fair use exception offers a wider concept of the user in theory but the practical operation of this exception sees the user similarly constrained.

A generous interpretation would suggest that the fair use exception presents wider access to the subject of the user, an approach that Canada is moving towards. Indeed, the lack of specificity in the fair use doctrine can be seen as a positive, because according to law, everyone is a potential user. However, a closer assessment of the four fair use factors suggest that non-profit, personal or transformative use that draws on a minimal part of the original work will be looked on more favourably than use that could impact on the commercial performance of the original work (see Madison 2005). Drawing from these precepts and keeping in mind the history of judicial decisions outlined by Tushnet (2004) earlier, fair use situates the user - and the act of use - largely within the non-commercial sphere. The reactive nature of the US fair use defence, as Lessig (2004) notes, also suggests the user is someone who can afford a lawyer.

Furthermore, Canada has not yet embraced fair use as a formal part of their statutory law, so while in practice the Canadian user may start to approach the framing of the fair use user presented above, there are some qualifications to be made. As Ariel Katz (2013: 140) notes “some uses, present or future are still categorically excluded”. Therefore unlike the author, the user does not stand as a comparatively viable and separate subject in copyright law. Instead it is roughly mapped out and defined by exceptions to the authorial remit. This legislative approach would suggest that Canadian copyright law views the user as carrying a potential negative impact for creators rather than standing as a potential creator in its own right. Interestingly, the

user-generated content exception – despite first appearances – echoes this framing, structurally separating the user from legally recognised acts of creation. As the following section will outline, the attempt to grant the user some creative agency in Canadian law, is directly influenced by this long-standing under-theorisation of the user.

The *Copyright Modernisation Act* and the user-generated content exception

The recent enactment of Canada’s *Copyright Modernization Act* has caused “the most significant changes to Canadian copyright law in decades” (Geist 2012a), involving a raft of alterations to the statutory law. As noted above, the act contained a number of important reforms that favoured user rights including the legalising of time shifting and format shifting, a cap on statutory damages for non-commercial infringement and a broad series of exceptions facilitating greater ease of use for educational purposes (see Geist 2012b). Many of these exceptions were already in place in other commonwealth countries and these reforms largely echoed an international trend, which saw jurisdictions affording the user a broader set of rights. However, Canada also introduced a relatively dramatic exception, which went significantly further than many other jurisdictions in regards to user rights: the user-generated content exception, also known as the “YouTube” exception (Geist 2012c). The provision would “establish a legal safe harbour for creators of non-commercial user generated content such as remixed music, mash up videos, or home movies with commercial music in the background” (Geist 2012c).

The provision itself (*Copyright Act 1985* s29.21) allows a person to use “an existing work or other subject-matter or copy of one ... in the creation of a new work or other subject-matter”, subject to the following restrictions:

- (a) the use of, or the authorization to disseminate, the new work or other subject-matter is done solely for non-commercial purposes;
- (b) the source – and, if given in the source, the name of the author, performer, maker or broadcaster – of the existing work or other subject-matter or copy of it are mentioned, if it is reasonable in the circumstances to do so;
- (c) the individual had reasonable grounds to believe that the existing work or other subject-matter or copy of it, as the case may be, was not infringing copyright; and

(d) the use of, or the authorization to disseminate, the new work or other subject-matter does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work or other subject-matter — or copy of it — or on an existing or potential market for it, including that the new work or other subject-matter is not a substitute for the existing one.

These limits strictly place the creative activities of the user within a non-commercial sphere, but at first glance appear to provide valuable legal recognition to user creativity. With the exception formally recognising the preponderance of creativity, which draws on existing works, this reform seems to address the demands of scholars for a legal framework that realised the benefits of vernacular and folk cultures, in offline and online contexts (see Jenkins 2006; Bruns 2008).

As an initial step, the exception provides a useful response to online cultures of user production. The growth of social media usage has seen a vast majority of online social interaction supported by the use and re-use of copyrighted materials and an emergent cultural discourse around the creative user (Burgess 2012). However, the concept of user creativity is not so easily understood in relation to the existing doctrine of copyright law. As the debates about the fair use exceptions in the United States suggest, identifying exactly what qualifies as use, what qualifies as infringement and what qualifies as authorship is a profoundly difficult process. Under copyright law one person's use can be seen to be sufficiently transformative to be considered an original work in its own right. Alternatively, that same use can also be considered derivative and therefore a form of use unsanctioned by copyright law and a direct infringement. Therefore, it is unlikely that the issue of user creativity will be solved by the simple introduction of an exception into Canadian copyright law.

Indeed, I suggest that the recognition of “user creativity” simply reinforces a creative hierarchy already present in copyright law. By framing the reform through the concept of “non-commercial use”, the exception immediately discounts the transformative elements of actions like remix, mash-up or the deployment of professional content in amateur settings. If a work is sufficiently transformative and fixed in an original form, this work can and should be considered authorial. By sectioning off creative user practices into a non-commercial space, this work now begins to operate through the oxymoronic concept (in the case of copyright law) of non-authorial creativity. As Teresa Scassa (2013: 437) notes, the exception

“perpetuates the myth that the regular ‘creator’ does not borrow from or use the works of others [and] constructs UGC as a more parasitic activity than perhaps it deserves to be”. These subsequent effects underline the political implications of the term “user”, and its limitations when used as a descriptive term for forms of online creativity.

This attempt to restrict particular practices to non-commercial spheres underlines the inability of copyright law as it is currently constituted to directly address these complex issues around the notion of creativity. Unwilling to explore the tensions and blurriness that exist between the acts of “use” and “authorship”, law instead prefers to rest on separate and fixed subjects that can be easily categorised and organised in a hierarchy of creativity. As seen in this exception, this hierarchy is one where the author is able to draw on cultural objects to develop their creativity and still gain compensation for their work, and maintain a market monopoly. Conversely a user - despite their creative agency - can be denied the mantle of the author, and their work denied legal status as a copyrighted work. Furthermore, the exception also retains a strong commitment to an individualist vision of creativity that is not necessarily amenable with user production practices previously identified (Scassa 2013: 438; see also Benkler 2006; Bruns 2008; Burgess 2006).

This creative hierarchy is also reinforced through an additional exception, found in Paragraph 29.21(1)(d), which will only legitimise user creativity as long as the act does not have a “substantial adverse effect financial, or otherwise, on the exploitation or potential exploitation of the existing work...” (my emphasis). This means that user creativity is not just placed in a non-commercial ghetto but that the subsequent creation is also subject to the whims of the rights holder through an “open-ended” exception. Teresa Scassa (2013: 443) suggests that a generous interpretation of this exception could see rights holders arguing that a particular use “diminishes the cultural impact or significance of the work by trivializing it, or ... tarnishes the reputation of the work as, for example, where fan fiction strays into the pornographic”. Consequently, a potentially transformative work can still be placed under the critical eye of a rights holder who could hold significant legal sway over subsequent interpretations of a work.

Although this reform is ambitious and well intentioned, it places the user placed in a difficult position, with their creative agency recognised but not fully accounted for within the law. An amenable alternative would be to remove the notion of the user in addressing new forms of creative production and simply recognise transformative and creative acts as authorial. As noted by Kathy Bowrey (2012) in reference to a proposed Australian transformative use exception, recognising a transformative work ultimately means recognising its own status as an original work:

[T]rue transformative works are not substitute works for originals. They are not piracies because they serve a different cultural function to the original ... If there is a legitimate cultural justification for permitting transformative use, any such right should not be then diminished and curtailed to non-commercial uses.

Her comment underlines the problems surrounding the discursive identification of user creativity and the problems that an entrenched cultural hierarchy around creativity can bring in terms of developing relevant legal frameworks.

Conclusion: The politics and limitations of user creativity

The structural limitations of copyright law are more of a long-term problem for copyright law itself, rather than scholars interested in user production. However, law does not exist in a vacuum. It is a cultural text that is attuned to cultural discourses and media practices (see Sarat and Simon 2003). Therefore scholars of user production cannot avoid considering the political impact of the user and how its cultural position relates to a legal framework interested in the regulation of creative practice. While the tracking of emergent creative practices is important, the discursive shaping of the user also has an impact on the rights granted to a person in law and the wider regulatory arena of creative production. Once the user is read through the situated example of the Canadian Copyright Act, it no longer appears as a subject or term that is easily grasped and understood. Instead, it is embroiled in a broader set of creative politics where being defined as a user or an author can have commercial implications.

The tensions evident in the Canadian example of legal reform underline the inherent problems with copyright law's structural isolation of the user. Copyright law has a need to firmly locate acts within the purview of particular subjects. Original and transformative creativity must reside in the subject of the author. Alternative

transformative and creative contributions of other subjects must either be reshaped as “authorial” or be diminished and subsequently reframed as “non-commercial” or “infringing”. This need for structural integrity and relatively inflexible subjects means that legal doctrine is willing to accept pragmatic solutions rather than undertake a conceptual investigation of the position of an act like creativity within law. However, this means it is easy for a well-meaning exception like the Canadian UGC exception, to still deny legal creative and authorial agency to a creator who has been discursively positioned as a user.

Therefore, it is possible to both welcome and critique scholarly discourses around user production, when considered in light of the Canadian example. They offer a welcome step forward in terms of conceptualising creativity and begin to acknowledge the complex relationships that exist through creative production. However, there is an optimistic tendency in this literature that tends to avoid a consideration of how these new terms and emergent practices will relate to existing regulatory structures. There is a common recognition that the current structure of copyright law is flawed and that a radical restructuring of current creative hierarchies is required. Indeed, Bruns (2008a) suggests the need for “fundamentally different form of intellectual property legislation able to cope with collaboratively produced, always unfinished, evolving and palimpsestic content”. However, with this radical restructure of copyright law as we know it unlikely, it is incumbent on scholars to be attentive to how these approaches to user production will engage with copyright law as it currently operates.

I take the first step in this article by outlining one key impact of current scholarly discourses around the user: that they fail to translate effectively into the language of copyright law. Terms like “user generated content” and “produsage” suggest a preference for seeing particular types of creation as “non-authorial”. In some cases, forms of user production may be minimal and not be considered authorship in its own right. But in other cases there are clear examples of user production generating intellectual property through transformative use (Jenkins 2006) or collaborative production (Bruns 2008a). I suggest that by not discursively identifying these creators as authors, these neologisms can therefore reinscribe cultural hierarchies around who can create and under what conditions. This underlines the ways in which this language can end up re-enforcing existing power relations it seeks supposed to

dismantle. If there is a wish to draw attention to the creativity inherent in user-generated content, it may be useful to critically assess the use of the term user, which has a conflicted relationship within the copyright doctrine.

In calling for a deeper consideration around how narratives of user production interact with copyright law as it currently stands, I do not mean to reinforce the extensively criticised narrative of authorial individualism (see Rose 1993; Woodmansee 1984) into these debates by demanding that more users simply be called authors. Instead I seek to draw attention to the different discursive boundaries of subjectification, which are established and maintained through scholarship, everyday practice and law and explore the wider implications of these boundaries. The UGC exception in Canada stands as a paradigmatic example of what happens when a long-standing legal doctrine attempts to engage with an emergent cultural conversation around user creativity. While these discourses of user production seek to move beyond copyright law, it is still operating at a time where these laws have force. Therefore, who is called a user, in what context and in relation to what activity, matters substantially. As the ambitious but ultimately underwhelming attempted response to this cultural conversation through the UGC exception highlights, how the user resonates in legal discourse needs to be accounted for.

I recognise the difficulties of defining and deploying accurate terminologies. As Jean Burgess notes in an interview with Henry Jenkins (2007), when voicing her displeasure about the term user-generated content, “Users isn’t great either, but it’s hard to think of a better term for the relationship it describes”. Following Burgess, I do not think that there is one magic term that will accurately account for these online creative practices. But I do suggest that if we are stuck with the term user, we need to be more considerate of the politics of this term, evident in this article’s consideration of copyright law. As the conversation around the user continues, a compromise approach would see greater specificity and qualification emerge around this subject. The existing literature has provided an account of emergent practices (Bruns 2008a; 2008b) and possible macro-political implications (Benkler 2006). It is time to get specific, and consider the user with an appreciation for its extant cultural and legal contexts.

Acknowledgments

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