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CHALLENGES IN PROTECTION OF USER-GENERATED CONTENT

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Açar sözlər: *istifadəçi tərəfindən yaradılan kontent, istifadəçi tərəfindən yaradılan kontentin tipləri, müəlliflik hüququ ilə qorunan kontent*

Anahtar kelimələr: *kullanıcı tarafından oluşturulan içerik, kullanıcı tarafından oluşturulan içerik türleri, telif hakkıyla korunan içerik*

Introduction

Copyright is struggling with UGC for many reasons. It is essential to note that UGC in every stage of it may create challenges for copyright because of its nature. This chapter first will analyze the problems of uncopyrightable UGC in connection with copyright in order to differ the challenges of copyrightable UGC from uncopyrightable content in regarding of copyright infringements. Therefore, these difficulties will analyze under two sections: A) Challenges arising from uncopyrightable UGC, B) Challenges arising from copyrightable UGC.

The structure of UGC platforms indicate what the various actions are that users can make: downloading, altering, mixing, uploading, and/or making available audio, video, and text content on personal web pages, social sites, or using peer-to-peer technology to allow others to access content on their computer. At first sight, they may seem as a great opportunity for people who want to express themselves on these platforms. There is truth that UGC is considered as a tool for an expression of the user, for example user shares video with background music in order to describe her feelings. Actually, all of us use platforms so as express themselves in different ways. But by creating UGC and uploading it to the Internet someone may potentially violate a number of exclusive rights: the reproduction right, the adaptation right, and the communication to the public right and so on. At the same time, the existence of limitations and exceptions on copyright may provide the scope for the lawful use. In this point, the main issue is that what actions on copyrighted content are allowed by copyright law for users, and which limitations and exceptions may offer solace to the user. It is so difficult to define line between lawful actions and unlawful actions on copyrighted content by others because of the wide variety of UGC and unclear character of some limitations and exceptions. At this moment, it should be stressed that, in general, in order to maintain an appropriate balance between the interests of right holders and public's interest, copyright laws allow certain limitations on economic rights, that is, cases in which protected works may be used without the authorization of the right holder and with or without payment of compensation. As it can be seen these exemptions and limitations related to just economic rights, therefore there are no any exemptions, limitations and other form of restriction on moral rights of authors. This is a general approach that these limitations and exceptions aim at create the balance between author and public, in regard of this approach every state defines the scope of copyright limitations and exceptions on their legislation.

How work these limitations and exceptions for UGC? User-generated content may be sheltered from the expansive exclusive rights by three exceptions and limitations: the quotation exception, the exception allowing incidental inclusion, and the exception for use for purpose of parody, caricature or pastiche (InfoSoc Directive 2001: art. 5(3)d) . By giving a common understanding of these exceptions this may possible to understand “safe place” for creating by users on internet.

The Berne Convention provides in article 10(1) that “[i]t shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose [...]”. The conditions for allowed quotations may be different in every country. Actually, the law only allows short quotations, for example, you can use up to 400 words in a single extract or you can quote up to 300 words at a time provided that you do not use more than 800 in total and other conditions. The requirement that the quotations be short is often understood to mean that musical works and works of graphical art cannot be quoted (Gaubiac, Y (1997) pp. 2-77). It is important to note that for making quotations from a work there must be a purpose of criticism or review. Therefore, if quotation is making in order to reach the aims which are required for legality of such use, then music quotation may deem possible under this condition that quotation

must be no more than is required to achieve purpose. For instance, the reproduction of an entire painting in an auction catalogue could not be regarded to be a permitted (short) quotation (Cour de cassation (1re Chambre Civile), *Fabris v. Loudmer*, 22 January 1991, 23 I.I.C. 294 (1992). In other cases, the showing during 49 seconds of murals by the artist Edouard Vuillard during a news broadcast was not allowed (*Société nationale de programmes Antenne 2 v Société SPADEM*, 4 July 1995) nor was the showing of paintings in a reportage about an art exhibition (Cour de cassation (1re Chambre Civile), *Utrillo*, 13 November 2003, 35 I.I.C. 716 (2004).

Generally, quotation exceptions have many sides and boundaries of it are formed by every state and of course, it may change case by case. As a result, from this brief understanding of quotation is clear that if user apply to quotation under the certain required conditions and they have compliance with the legislation, then her use is considered as lawful action.

As before mentioned incidental inclusion may consider as exception on copyright, it is important to add that this kind of exception is not acceptable in all legislations. But according to article 5(3)(i) of the InfoSoc Directive provides that member states may provide an exception or limitation for “incidental inclusion” of a work or other subject-matter in other material”. As can be seen from wording of incidental inclusion, there is no direct intent to use copyrighted content, it means that the use of such content is incidental. Take into consider that the examples of subjects which are protected by copyright exist in many sides of our everyday lives, so sometimes it is impossible to avoid incidental kind of use of copyrighted content. In order to better understanding of this notion, it would be useful applying to some certain cases both in daily life of us and in court. For example, when user takes a photo, a snippet of any program on a television screen may include the background of this photo, or where there is some background music playing where user is filming and so on. The key point is that all these have not been deliberately added in the edit of user-generated content.

Accordingly, in cases which are issued in court the same approach is taken as a basis. For example, within the case of *Football Affiliation Chief Association v Panini UK Ltd* Panini distributed for sale collectible stickers depicting well known football players. The images of players showed their premier league forms, club badges and premier emblems. In this case, the Football Association Premier League ("FAPL") as the first claimant had license to Topps Europe Limited ("Topps") in order to product an official sticker and album collection and Toops paid a substantial sum for this license. Thus, Panini actions caused that FAPL, Topps and fourteen premier clubs applied to court for copyright infringement. At that moment, Panini tried to gain the benefit “incidental inclusion”, therefore it argued that the inclusion of the claimant’s logos or badges in the photographic images of the stickers and in the album were merely “incidental”, not directly. Court did not accept this defense of Panini, therefore court held that the word “incidental” had “casual, inessential, subordinate or merely background” meaning according to Oxford English Dictionary, thus that inclusion was an integral part of the artistic work, without the badges Panini would not have had the complete picture that it wished to produce. Thus, such use of Panini was deemed as copyright infringement.

Panini appealed against this decision, submitting the judge was wrong to reach his decision for the following reasons: (i) there was no dichotomy between “integral” and “incidental” - the emblem and badges could be “an integral part of the artistic work”, as the judge held, and yet be incidental to that work; (ii) that the test whether the inclusion of the emblems and badges is incidental must be answered in the light of the circumstances when the “photograph in issue is made” - the judge should not have taken into account the characteristics of a notional customer of Panini’s product; (iii) that the “incidental” of the inclusion must be judged with regard to artistic considerations - again, the judge should not have taken into account the characteristics of a notional customer; and (iv) that the judge should have informed himself of the legislative policy to which s.31 of the Act was intended to give effect as revealed by a consideration of the debate in Parliament. But Court stated that the inclusion of the individual badge and the FAPL emblem is not “incidental” in this case, because the inclusion of the individual badge and the FAPL emblem has great role in the object for which the image of the player as it appears on the sticker or in the album. Thus, according to court decision the main role of this emblem cause the lack of accidental inclusion from here. At the same time, there are other thoughts which do not agree with court decision, especially in FAPL emblem. According to this approach, the FAPL emblem within the work has little or no impact upon the overall impression of the photograph in the mind of the notional customer and inessentiality of it covers “not essential” and merely “background” meaning of incidental inclusion. Therefore, from this point it falls into the scope of incidental inclusion.

Thus, it should be stressed that because of incidental and background character of incidental inclusion, the value of it for UGC may not make a sense. This is why actually when users create content, then they may tend to use copyrighted content in order to add significant value to their content. At this moment their

intention brings the essentiality and main focus to the place of copyrighted work on these content, and this inclusion loses its incidental character.

As it can be seen from above examples every exception has special features and they may change case by case and when court makes a decision in these cases, these features and “fair use” are considered by court. This is why, users who accused of copyright infringement try to enjoy such exceptions and fair use umbrella in order to avoiding copyright infringement. For example, one of the more discussible category of UGC are mashups and remix arise copyright issues because of its “borrowing” character. The legality of use for mashup or remix, it is required a permission from the copyright holders, but actually, users use another work on their content without permission and they face copyright infringement claim against them and therefore, in order to stay out of these cases, they apply to fair use umbrella. Copyright law encourages authorship at least as much for the benefit of the people who will read, view, listen to, and experience the works that authors create, as for the advantage of those authors and their distributors (Jessica Litman (2007): p. 45). It should be stressed that the fair use doctrine can determine whether and when public, commercial uses could be deemed “legitimate”, “lawful” and as can be seen from wording of it “fair”. The examples of fair use are uses for news reporting, scholarship, research, or educational purposes. In order to gain the benefit from fair use, user actions must be appropriate to some certain factors. Actually these factors cover:

1. The purpose and character of the use;
2. The nature of the copyrighted work;
3. The amount of use;
4. The effect of such use on the market for the copyright holder work.

Every factors have special place for determining whether the use of a copyrighted work is a fair use. The complexity of pinning down how fair use actually functions, or should function, and how the four factors should be utilized, is a subject that has been written about extensively (Paul Goldstein 2008: p. 433). According to Professor Paul Goldstein over-reliance on the four factors as a strict guide to determining fair use decisions can be problematic because the factors: are an abstracted, antiseptic version of the real world; they do not mirror, or even refract, the features a world in which authors create works and publishers market them in which copyright users must decide whether to take a license or risk going without; and in which judges must decide whether the user guessed right or wrong (Paul Goldstein 2008: 438).

It is clear that determining exceptions and limitations for UGC on the basis on these factors and some requirements such as incidental use, private use and so on is not easy. In there the best way to apply these exceptions and limitations in order to avoiding copyright infringement is focusing diverse contexts because of cases which address “new technologies for the distribution of copyrighted content [such as] photocopying, cable retransmission, and home videotaping.” (Paul Goldstein 2008: 438).

Finally, if we analyze all these exceptions and limitations in the light of UGC, then we see that the special features of UGC brings the additional challenges to defining the legal and i-llegal actions. First of all, UGC is on platforms which are open to many people, and these platforms make easy the sharing process and it can lead to facing more copyright infringement issues owing to virtual world. The other problematic issue is that actually users are unaware that they may be violating copyright law. When they create content apply to copyrighted content and they may not know that this process which they make can cause infringement and when they upload it to internet possibility of copyright infringement increases.

Conclusion

UGC can be clarified as copyrightable content and uncopyrightable content. Copyrightable content as a content that meets all certain copyright protection requierements. Uncopyrightable content is that could not protect as subject of copyright law, but it does not mean that this content is always an unlawful content. It can be lawful content or pure content which are not accepted as a subject matter of copyright law. In turns out that, expected ingringements depend on essential feature of UGC. Therefore, if UGC is copyrightible content, then challanges about it differ from uncopyrightable content.

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İstifadəçi tərəfindən yaradılan kontentin hüquqi mühafizəsinin çətinliyi **Xülasə**

Müasir texnologiyanın bizə yaratdığı şərait sayəsində artıq özümüzü ifadə etmək daha asanlaşıb. Hamımızın ən azı bir sosial media hesabımız var, bu hesabdən istifadə edərək fərqli şeylər paylaşırıq, bəzilərimiz bu paylaşımın çox az vaxt sərf edərkən, digərlərimiz isə həqiqətən, kifayət qədər profesional kontent yarada bilir. Lakin yaradılan kontent bəzən müəllif hüquqlarını poza bilər, əlbəttə bu zaman internetin azad təbiəti də məsələyə təsirsiz ötürmür. Belə olduqda istifadəçi tərəfindən yaradılan kontentin müəllif hüquqları ilə toqquşmamaması üçün mövcud olan istisnaların analizi vacib əhəmiyyət daşıyır.

Kullanıcı tarafından oluşturulan içeriğin korunmasının zorlukları **Özet**

Modern teknolojinin yarattığı koşullar sayesinde kendimizi ifade etmek daha kolay hale geldi. Hepimizin en az bir sosyal medya hesabı var, bu hesabı farklı şeyler paylaşmak için kullanıyoruz, bazılarımız bu paylaşım için çok az zaman harcarken, diğerleri gerçekten profesyonel içerik oluşturabilir. Bu durumda ortaya çıkan sorulardan biri, oluşturdukları içeriğin telif hakkı ile korunması meselesidir. Ancak, oluşturulan içerik bazen telif hakkını ihlal edebilir ve elbette İnternet'in özgür doğası da bu konuyu yakından etkiliyor. Bu durumda, kullanıcı tarafından oluşturulan içeriğin telif hakkı ile çelişmemesi için istisnaları analiz etmek önemlidir.

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