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Faculty of Law, University of Toronto, “On the Partial (In)Alienability of Users’ Rights”**

Copyright law is often presented as a “carefully balanced scheme”<sup>1</sup> which allocates rights between copyright owners and users to maintain “a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator”.<sup>2</sup>

So far so good. But copyright owners routinely accompany the provision of digital forms of their work with End User License Agreements, Terms of Use, and Technological Protection Measures (TPM) that often purport to restrict users from doing things that fall within the scope of users’ right: they may restrict the ways in which a work or product may be used or prohibit its resale; they may dictate that a product may be used in conjunctions with only some works or products but not others; they may prohibit the copying of facts or other non-copyrightable subject matter, or prohibit reverse engineering.

The validity of such restrictions of users’ rights has not been fully determined yet. For some, such private reordering of the respective rights of owners and users constitute an encroachment onto rights deliberately allocated to users and its proliferation a sign of a systematic failure of the statutory scheme. For others, such private re-ordering proves that the market framework contemplated by the Copyright Act, in which entitlements are exchanged for the transacting parties’ mutual benefit, is functioning exactly as indented. Essentially, the question is whether and to what extent users’ rights are alienable. Some say they are not; others say “of course they are”.

A third approach, treating users’ rights as partially (in)alienable, lies at the centre of this project. It begins by explaining why treating user rights as either inalienable or fully alienable is unsatisfactory, and argues that a more productive question should be under what conditions users’ rights may be alienable. The paper will then proceed to develop a framework for determining the conditions of partial (in)alienability. The framework will answer three main questions: one, under what conditions private reordering of owners and user rights should be permitted and when it should not be. Second, when reordering is permitted, how such restraints can be enforced and against whom (e.g., merely as contractual obligations, or as copyright infringement). And third, when reordering is not permitted, are the restraints merely non-enforceable, or will the attempt to impose or enforce them bear some negative consequences for the copyright owner.

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<sup>1</sup> Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168, 2012 SCC 68 (CanLII), [2012] 3 SCR 489, <http://canlii.ca/t/fv76k>.

<sup>2</sup> *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34 (CanLII), [2002] 2 SCR 336, <http://canlii.ca/t/51tn>, paras 30-31.