Tarantino, Giuseppino, PhD Student, Osgoode Hall Law School, "*Calvinball: Users' Rights, Public Choice Theory and Rules Mutable Games*

The 2012 *Copyright Modernization Act* contained provisions which seemed, at first glance, to represent unequivocal "wins" for copyright "users": a dramatically expanded fair dealing provision, private-use provisions and an innovative "user-generated content" provision. But those apparent gains were accompanied by provisions relating to technological protection measures, prompting Myra Tawfik to observe that the purported gains for users' rights "may well be nothing but smoke and mirrors".

In 2015, the Canadian government amended the *Copyright Act* – with no public consultation and outside of the *Act*'s five-year legislative review process – to extend the term of protection for published sound recordings from fifty to seventy years. In justifying the change, the government explicitly mentioned the fact that some of the most popular recordings of the 1960s were imminently due to become public domain. Michael Geist described the change as "strictly the product of behind-the-scenes industry lobbying with no broader consultation or discussion".

So even when users may at first glance appear to succeed (as in 2012), such victories are provisional and subject to important caveats. Public choice theory assists in explaining these setbacks for users' rights in Canada: if public choice theory is, in the words of James M. Buchanan, "politics without romance", it appears well-suited to account for results which see the well-positioned make their positions even better. Of particular salience is the diffuseness and precariousness of the identity of the "user" – yes, users are legion, but they may be *too* legion, unable to marshal the resources and organizational heft needed to lobby for re-orientation copyright's rules in their favour. But can we supplement the story told by public choice theory? Is there an account of copyright reform which is at least equally consonant with the facts on the ground, but which provides a more engaging and illuminating metaphor – ideally, one which also enables us to make normative assessments of the results of the copyright reform process?

This article proposes the "rules mutable game" (introduced by Peter Drahos in his *A Philosophy of Intellectual Property*) as a metaphor for understanding the operation of copyright reform. Using the game of Calvinball (created by artist Bill Watterson in his long-running comic strip *Calvin & Hobbes*) as an illustrative device, the article explores how the notion of a game in which players can modify the rules of the game *while it is being played* accounts for how users are often disadvantaged in copyright reform processes. The game metaphor also introduces a normative metric of *fairness* into the heart of the analysis: games are expected to be fair, but when one player has a systemic advantage, we can query the ethical validity of the entire enterprise. Public choice theory helps tell us why users never seem to win the copyright game; the rules mutable game concept tells us why they occasionally *should*.

Using the rules mutable game as a framing device calls attention to the fact that players in the copyright game are concerned not just with the options they have available to them under the existing set of rules, but have the capacity to "change the rules of the game" to their advantage through the copyright reform process. The concept of the rules mutable game also complicates conventional notions about the copyright regime providing a fixed set of incentives and pay-offs at the time of creation, and obligates us to consider strategic maneuvering by copyright players to

alter the rules so as to increase their positional advantage throughout the term of copyright protection. The concept of the game thus highlights our need to think about copyright reform as an ongoing *process* which is demonstrably subject to rules-mutability: changes to the rules may not only alter incentives for creative expression, but function to extract rents for works which have *already been created*.

All legal regimes are subject to the power of political lobbying by interested parties – a notion adequately reflected in public choice theory. But the notion of a rules mutable game tells us something important about the kinds of stories we should be telling about copyright and copyright reform. The narrative power of the "fair play" norm embedded in the concept of the game can facilitate rhetoric which does not just doom users to dwell on their political losses, but empowers them to strategize for future victories.

Part II of this article considers the status of the "user" in copyright debates, identifying the concept as a placeholder for a multifarious set of stakeholders. Part III explores the insights of public choice theory as they have been applied to legislative copyright reform processes in the United States. In Part IV, short reviews are offered of two recent engagements in Canada's copyright reform process, namely the introduction of a bevy of user-focused provisions in the 2012 *Copyright Modernization Act* and the 2015 sound recording term extension. Part V introduces the notion of the rules mutable game and explores the benefits of the metaphor as a supplement to the conventional public choice model.